Appendix: Introduction

Identity of Immigration Judge Single Best Predictor of Outcome

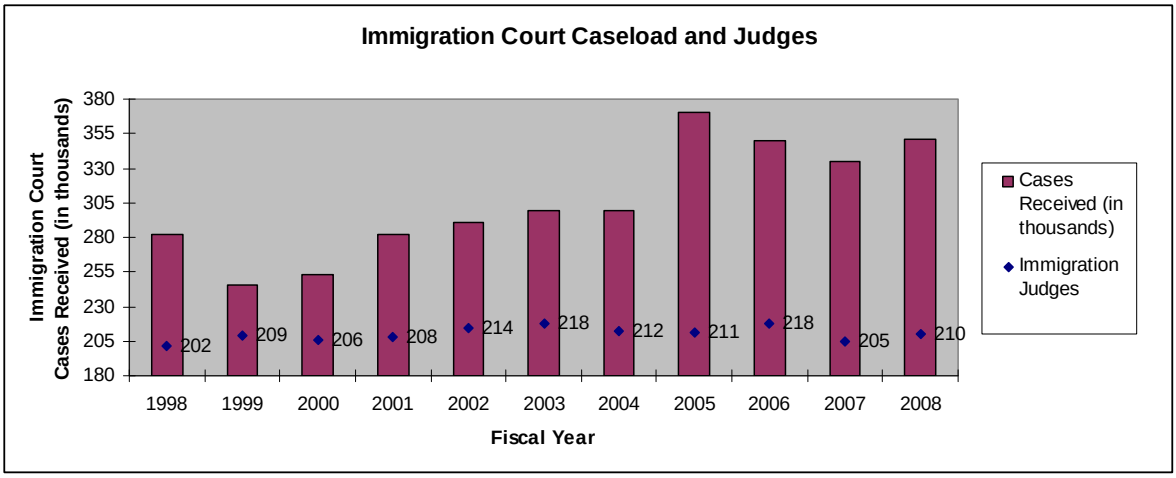
See generally Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007). In *Refugee Roulette*, the authors undertake a statistical analysis of asylum decisions from various Immigration Courts and find that "[i]n many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular . . . immigration judge." *Refugee Roulette* at 296. *See also* Syndenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 Geo. Immigr. L.J. 1 (2006).

The Transactional Records Access Clearinghouse ("TRAC") echoes this sentiment, noting that "the identity of the judge who handles a particular matter often is more important than the underlying facts." TRAC Immigration, *Asylum Disparities Persist, Regardless of Court Location and Nationality*, http://trac.syr.edu/immigration/reports/183/. TRAC is a massive database of immigration-related data at Syracuse University, and is available online at http://trac.syr.edu/immigration/. Its purpose is "a unique new multi-year effort to systematically go after very detailed information from the government, check it for accuracy and completeness and then make it available in an understandable way to the American people, Congress, immigration groups and others." The TRAC Immigration website has a wealth of data and analysis regarding immigration adjudication.

Sharp Increase in Number of Immigration Court Cases

Since 1992, the number of cases in Immigration Courts has more than doubled–from 112,832 in that year to a high of 321,319 in 2005. TRAC Immigration, *Individuals Charged in Immigration Court by Charge Category FY 1992 - 2006*, *available at* http://trac.syr.edu/immigration/reports/178/include/timeseries.html.

This increase in cases has not been accompanied by a commensurate increase in staff to handle those cases. For example, the number of Immigration Judges who have active dockets, *i.e.*, excluding those judges whose duties are primarily supervisory or administrative, has remained nearly steady since 1998, despite an increase in caseload upward of 35%.



Source: TRAC Immigration Reports, *available at* http://trac.syr.edu/immigration/reports/189/include/payroll.html and http://trac.syr.edu/immigration/reports/189/include/minutes.html

Over 100 Interviews Conducted

We conducted over 100 interviews in locations nationwide with stakeholders from a broad range of constituent groups in the immigration law community. Our count of interviews includes conversations with

- 19 pro bono attorneys;
- 29 attorneys from public interest groups and immigrant advocacy organizations;
- 33 private practitioners;
- 12 academic & clinical professors; and
- 9 governmental officials.

First-Round Interview Questionnaire

In early 2008, Chicago Appleseed and the law firm of Latham & Watkins LLP assembled a group of respected individual practitioners and representatives of Chicago-area organizations involved in immigration work. Those assembled discussed complaints that had been leveled against the immigration adjudication system by lawyers, judges and members of the public. They discussed possible approaches to bring needed change to this system and the need to reach out to the larger legal community for additional views and suggestions.

This planning group met again and developed a plan to review the policies and procedures of the Chicago Immigration Court and to determine how identified problems and possible solutions could be explored. The group's overall goal was to ensure that the Immigration Court has the policies, procedures and resources to in sure that the process is accurate, legitimate and efficient. It was decided that Chicago Appleseed and Latham & Watkins LLP would conduct the project jointly.

We decided that the best way to ascertain the real problems of the Immigration Court system and to develop the best solutions was to interview the people who are working in those courts every day and ask them to identify the strengths and weaknesses of the immigration courts and to solicit their ideas for reform. To enhance the reliability and robustness of our survey results, the investigation was expanded to key Immigration Courts located in Virginia, Baltimore, New York, Los Angeles, and, most recently, Texas. Chicago Appleseed and Latham & Watkins coordinated with national Appleseed, New York Appleseed and Texas Appleseed, and partnered with the law firm of Akin Gump Strauss Hauer & Feld LLP.

To conduct the project, we utilized Appleseed staff and the pro bono services of more than 100 attorneys and professional staff, each of whom received training from an immigration law expert and a social scientist with expertise in interviewing techniques. We began the project with an initial review of the literature pertaining to the function of Immigration Courts and conducted interviews with key stakeholders. We then proceeded with more than 70 exploratory interviews with stakeholders in the Immigration Court system, including private attorneys, pro bono organizations, academics and Immigration Judges. These exploratory interviews were conducted through the use of a questionnaire that contained open-ended questions designed to solicit from these experts the most pressing issues needing reform in the Immigration Court system and their proposed recommendations for addressing these issues.

Following the completion of the exploratory interviews and the initial court watching sessions, a work team composed of representatives from Latham& Watkins, Chicago Appleseed and national Appleseed evaluated the identified issues and corresponding recommendations to develop a list of documented proposals. This list served as the basis for 35 additional interviews with leading stakeholders in our five original sites plus Texas, which was identified as a key area presenting Immigration Court issues. The stakeholders included private attorneys, pro bono organizations, academics and Immigration Judges. These interviews were conducted with trained pro bono lawyers from Latham & Watkins and Akin Gump.

Each of these interviews was designed to solicit the opinions of these stakeholders about our identified issues and the efficacy of the potential recommendations. We then re-

evaluated each recommendation and developed a refined list of recommendations, accompanied by a discussion of the reasoning behind each.

In December 2008, we utilized our research outcomes in developing a draft report that we submitted to President Obama's Transition Team. Subsequent to an in-person meeting with representatives of the Transition Team, we conducted targeted interviews designed to elicit additional information on particular issues and proposed recommendations. The work team then incorporated the additional information into the report and began a process of analysis, debate, and editing that led to the final report.

Court-Watching Findings

While we were conducting the exploratory interviews, teams of trained court watchers in Chicago, Los Angeles and New York observed over one hundred hours of master calendar hearings, merits hearings, and asylum cases in the Immigration Courts in those cities. Each court watcher completed summaries for each hearing, using a standardized data collection form. Court watchers, within their summaries, reported and commented on any problems that they identified. The observers also noted any other issues related to hearing procedures and the outcome of the hearing. The court watchers also observed master calendar proceedings, merits hearings, asylum proceedings, and hearings done through videoconferencing.

In each category, observers examined the following issues:

- General Description of the Proceedings
- Demeanor of the IJ
- Demeanor of the attorneys
    - DHS Attorney
    - Respondent's Attorney
- Facilities
- Interpreters
- Treatment of Pro Se Respondents
- Understanding of the Proceeding
- Quality and Problems with Technology

The problems noted during these court-watching sessions largely reflected many of the same issues raised during our exploratory interviews. The following are some of the key observations filed by our court watchers.

- Court watchers often described the atmosphere of the Immigration Court proceedings as chaotic – too many cases and two few lawyers and Immigration Judges. They also documented many instances where continuances had been sought after it was discovered that important paperwork was missing.

- Our court watchers observed that the demeanor of Immigration Judges varied greatly from judge to judge. Some were well prepared, while others seemed to lack the necessary knowledge to make an informed ruling. Some were concerned about insuring that respondents understood the proceedings, while others "seemed to be following a standard script."

- The demeanor of the government attorneys also varied greatly. Observers' descriptions of these attorneys included "professional," "stern and serious," "aggressive" and "passive."

- Court watchers often commented on problems involving interpreters. Court proceedings sometimes had to be stopped while the court personnel sought an interpreter. Our observers noted that immigrants sometimes appeared to be confused even when an interpreter was present.

The Cost of Detention

In the aggregate, detention costs for fiscal year 2009 are estimated at more than $1.7 billion. Immigration and Customs Enforcement, 2009 Budget Fact Sheet (Oct. 23, 2008), *available at* http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.doc. Indeed, this is the single largest line item in ICE's budget. Individually, current daily costs for housing an immigrant detainee hover near the $100 mark. *See* Doris Meissner & Donald Kerwin, Migration Policy Inst., *DHS and Immigration: Taking Stock and Correcting Course* (February 2009) at 54, *available at* http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf (estimating the daily cost of detention at $95 per detainee); Vera Institute, Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II (May 2008) at 51 (n. 60) (basing its estimated daily cost of $97 per detainee on the congressional testimony of then-Director of ICE Julie L. Meyers).

Appendix: Basic Structure of the Immigration Court System

Use of the Term "Immigrant"

Under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, (the "INA") "the term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). (Moreover, the same section of the INA defines 'immigrant' as any person not a citizen of the United States except for accredited diplomats (and their family members) from foreign countries, those whose presence in the United States is transitory, and those who are in the United States solely for work with an intent to return to their homelands, *e.g.*, foreign press, students, or crewmen aboard a seagoing vessel. *See* 8 U.S.C § 1101(a)(15).) Once in an Immigration Court, an immigrant or alien is called a "respondent." 8 C.F.R. § 1001.1(r). In order to avoid confusion and the appearance of false precision, we use the term "immigrant" throughout this report in the same way a layman would use it.

The Homeland Security Act

The Homeland Security Act of 2002, 6 U.S.C. § 101 *et seq.*, transferred to and consolidated in the newly-created Department of Homeland Security the functions of INS. Enforcement of, and grant of benefits under, immigration laws was divided among three different agencies within the new department: Immigration and Customs Enforcement, Customs and Border Protection and Citizenship and Immigration Services. All three of these agencies may refer immigrants to Immigration Courts for removal. *See* 8 C.F.R § 239.1.

Detaining Immigrants

ICE's Detention and Removal Operations is responsible for detaining broad classes of immigrants. "Under current law, ICE *can* detain all noncitizens in removal proceedings. However, it *must* detain virtually all noncitizens who are removable on criminal or national security grounds, asylum-seekers in the expedited removal process until they can demonstrate a credible fear of persecution, arriving aliens who appear inadmissible for other than document-related reasons, and persons ordered removed for at least 90 days following their removal orders." Doris Meissner & Donald Kerwin, Migration Policy Inst., *DHS and Immigration: Taking Stock and Correcting Course* (February 2009) at 51, *available at* http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf (emphasis in original). Statutory authority for these detention policies is found in the Immigration and Nationality Act, codified at 8 U.S.C. § 1226.

Removal, Deportation and Exclusion

The terms removal, deportation and exclusion are used interchangeably throughout this report. We show a preference for "deport" and its variants, a term that is still very much the common one used by the public. The current term of art for the act of ordering an immigrant with no right to remain is "removal," after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546, "merged the exclusion and deportation proceedings into a single removal proceeding . . ." 1-1 Immigration Law and Procedure § 1.03.

Appendix 1: Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

John Adams Urged Judicial Independence and Impartiality

This quote comes from Article XXIX of the Declaration of Rights in the Commonwealth of Massachusetts constitution. A report by Alfred P. Carlton, Jr., the president of the American Bar Association from 2002-2003, attributes this passage to John Adams. The report was written as a commentary on the 2003 Recommendations of the American Bar Association Commission on the 21st Century Judiciary in order to stress the importance of independence to the integrity of the justice system. See Alfred P. Carlton Jr., *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, July, 2003, at 6, 8 *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf.

2008 Report by the DOJ Inspector General and Office of Professional Responsibility

This report details numerous cases where political appointees in the Office of the Attorney General inappropriately considered political ideology when selecting career DOJ employees, including Immigration Judges and members of the Board of Immigration Appeals. See U.S. Department of Justice Office of Professional Responsibility and Office of the Inspector General, *Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 28, 2008, *available at* http://www.usdoj.gov/oig/special/s0807/final.pdf.

Immigration Judges Appointed Between 2004 and 2006

A *New York Times* analysis found that, as a group, the Immigration Judges appointed "using a conservative political litmus test" ruled against asylum-seekers "significantly more often than colleagues who were appointed…under politically neutral rules." The analysis focused on 16 illegally appointed Immigration Judges who had ruled on at least 100 cases each. See Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, THE NEW YORK TIMES, Aug. 24, 2008, *available at* http://www.nytimes.com/2008/08/24/washington/24judges.html.

Refugee Roulette

Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295 (2007), *available at* http://lawreview.stanford.edu/content/vol60/issue2/RefugeeRoulette.pdf. An expanded version of this study will be published as a book in summer 2009.

Transactional Records Access Clearinghouse Database

The Transaction Records Access Clearinghouse, known as TRAC, is a not-for-profit database compiling reports and statistics on current immigration issues in America. The website contains biographical information on all immigration judges who decided more than 100 asylum cases between the years 2002 and 2007, a total of 236 judges. Transactional Records Access Clearinghouse, *Immigration Judge Reports—Asylum*, *at* http://trac.syr.edu/immigration/reports/judgereports/.

Biographies of the BIA Members

The biography of each of the 14 current members of the BIA is available on the EOIR website. See Executive Office for Immigration Review, *Fact Sheet: Board of Immigration Appeals*, Jan. 2009 (Revised), *at* http://www.usdoj.gov/eoir/fs/biabios.htm.

The Success Rate of Asylum Seekers at the BIA Plunged 70 Percent

See *Refugee Roulette: Disparities in Asylum Adjudication* at 358, 377-78. The authors state that the success rate of asylum seeks at the BIA plunged by 70% between 2001 and 2005. They argue that the decrease is due to the 2002 streamlining reforms where Attorney General Ashcroft reduced the size of the BIA from 23 to 11 members, which allowed him to remove five appointees of President Clinton and encourage others to leave. The authors note that they have no way of knowing whether the pre-2002 approval rate or post-2002 rates are a "more accurate reflection of justice. But we are troubled by the facts that the rate drop was sudden and persistent, that it was associated temporally with a purge of certain members appointed by a prior administration and with increased fear of foreign nationals after the 9/11 attacks, and that it also coincided with the institution of new procedures that provided less scrutiny of immigration judges' decisions. These factors cause us to suspect that in many asylum cases, the BIA has ceased to function as an effective appellate body."

Testimony of the Director of EOIR

On September 23, 2008, Kevin A. Ohlson, the Director of EOIR, testified before Congress regarding the politicized-hiring scandal at the Department of Justice in which several Immigration Judges were hired by Monica Goodling and other DOJ political appointees based on their demonstrated loyalty to Republican party. During his testimony, Mr. Ohlson stated that the new Immigration Judge hiring process

> has returned primary responsibility for reviewing Immigration Judge applications to career officials in EOIR. These new procedures include public announcement for vacancies, a rigorous, multi-level review of applications, and a multi-panel interview and selection process involving career officials in EOIR and senior career and non-career officials in the Department.

Statement of Kevin A. Olhson before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, September 23, 2008, *available at* http://judiciary.house.gov/hearings/pdf/JointDOJ080923.pdf.

Monica Goodling

Although several Justice Department political appointees were found to have illegally considered political and ideological affiliations when hiring employees for career positions at DOJ, Monica Goodling became the public face of the scandal. Goodling was the Justice Department's White House Liaison and Senior Counsel to the Attorney General from April 2006 until her resignation in April 2007. In testimony before the United States House of Representatives Committee on the Judiciary, Goodling admitted that she took political considerations into account in assessing candidates for career positions in the Justice Department, including Immigration Judges and members of the Board of Immigration Appeals. See David Johnston and Erin Lipton, *Ex-Justice Aid Admits Politics Affected Hiring*, THE NEW YORK TIMES, May 24, 2007, *available at* http://www.nytimes.com/2007/05/24/washington/24monica.html?hp; see also, U. S. Department of Justice Office of Professional Responsibility and Office of the Inspector General, *Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 28, 2008, at 1, 121, *available at* http://www.usdoj.gov/oig/special/s0807/final.pdf; *Remarks of Monica M. Goodling Before the Committee on the Judiciary, United States House of Representatives, Pursuant to the Committee's Subpoena and the District Court's Order of Immunity*, May 23, 2007, *available at* http://judiciary.house.gov/hearings/May2007/GoodlingII070523.pdf.

The Farm Team of Immigration Judges

One potential explanation for why so many Immigration Judges have come from the ranks of the government immigration enforcers is that these are the people known to the Director of EOIR and the Chief Immigration Judge, who, except during 2004-2006, have done most of the screening and selection of Immigration Judges.

Expanding the Candidate Pool of Immigration Judges and BIA Members

One way EOIR could expand the candidate pool of Immigration Judges and BIA members is to advertise vacancies widely. Specifically, EOIR should advertise vacancies in Interpreter Releases, on the immigration law professors' listserv and in other media beyond the Department of Justice website and USAJobs.gov.

2002 "Streamlining Reforms"

The so-called "streamlining reforms" are discussed in the section entitled "Getting it Right on Appeal." The 2002 streamlining is detailed in a final rule published by the Department of Justice, Executive Office for Immigration Appeal, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 FR 54878, Aug. 26, 2002. See also Press Release, U.S. Department of Justice, *Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures*, Aug. 23, 2002, *available at* http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf. Many commentators point to the 2002 streamlining as having damaged the BIA's credibility as an appellate body. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295 (2007) at 377-78, *available at* http://lawreview.stanford.edu/content/vol60/issue2/RefugeeRoulette.pdf.

Appendix 2: Giving Immigration Judges the Tools to Achieve Justice

Number of Sitting Immigration Judges

As of March, 2009, there were 223 immigration judges. See U.S. Department of Justice, Executive Office for Immigration Review, *Immigration Courts Nationwide*, Mar. 2009, *at* http://www.usdoj.gov/eoir/sibpages/ICadr.htm. The number of Immigration Judges is in near-constant flux, and EOIR regularly updates this webpage as a result. The *FY 2009 Department of Justice Congressional Budget Justification* indicates that EOIR has authority for 244 Immigration Judge positions. See *FY 2009 Department of Justice Congressional Budget Justification*, Administrative Review and Appeals (Exhibit K, Summary of Requirements by Grade), *available at* http://www.usdoj.gov/jmd/2009justification/pdf/fy09-ara.pdf.

Immigration Court Caseload in 2008

According to EOIR, Immigration Courts received 291,781 new cases in fiscal year 2008 and completed 281,041 cases. Of these 281,041 completed cases, 51,725 are listed as "Other Completions," which, for example, indicate the case was closed administratively or had a change of venue. Therefore, Immigration Judges rendered a final decision in 229,316 cases in fiscal year 2008. See U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis & Technology, *FY 2008 Statistical Year Book*, Mar. 2009, *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

Increase in the Number of Immigration Judges

Appleseed estimates that to reduce the caseload of each Immigration Judge by one case per day would require 76 new judges. This estimate was calculated using the following methodology and assumptions. To calculate the average number of cases per day decided by Immigration Judges in fiscal year 2008, we assumed (1) 250 workdays per year and (2) that each judge will take 10 vacation days per year, which leaves 240 days for Immigration Judges to handle cases. Applying the 229,316 decided cases in fiscal year 2008 (see "Immigration Court Caseload in 2008" immediately above) and assuming 220 sitting Immigration Judges, each judge handled 1,042 cases on average (229,316 cases ÷ 220 judges= 1,042 cases/judge). With 240 days to handle 1,042 cases, each judge handled 4.3 cases per day (1,042 cases/judge ÷ 240 days = 4.3 cases/day/judge).

To calculate the number of new Immigration Judges needed to reduce this caseload by one case per day, we further assumed that each judge would have five days of training per year, consistent with our training recommendation, which leaves a total of 235 days for Immigration Judges to handle cases. With the 229,316 decided cases in 2008 and 235 work days, 976 cases must be decided each day in the aggregate (229,316 cases ÷ 235 days = 976 cases/day). To reduce the daily caseload per judge from 4.3 per day to 3.3 per day, a total of 296 Immigration Judges would be needed (976 cases/day ÷ 3.3 cases/day/judge = 296 judges). With approximately 220 Immigration Judges in place, an additional 76 judges would be needed to reach a total of 296 Immigration Judges.

To calculate the number of new Immigration Judges needed to reduce this caseload by two cases per day, we used the same assumptions as in the previous explanation to find that 976 cases must be decided each day in the aggregate. To reduce the daily caseload per judge from 4.3 cases per day to 2.3 cases per day, a total of 424 Immigration Judges would be needed (976 cases/day ÷ 2.3 cases/day/judge = 424 judges). With approximately 220 Immigration Judges in place, an additional 204 judges would be needed to reach a total of 424 Immigration Judges.

These calculations are admittedly simplified, and do not account for all possible complexities, including, for example, the time Immigration Judges devote each week to Master Calendar hearings and reducing any case backlog. The calculations are nonetheless useful to indicate the general scale of the additional resources that are needed to make even modest improvements.

Shortage of Clerks to Assist Immigration Judges

A July 2008 report by the Transactional Records Access Clearinghouse states that EOIR has increased the number of clerks assisting Immigration Judges from 35 in 2006 to 50 in 2008. Despite the increase, as of July 2008, there were still over four Immigration Judges for every law clerk employed, with at least fourteen Immigration Courts having no clerks at all. See Transactional Records Access Clearinghouse, *Efforts to Hire More Immigration Judges Falls Short*, July 28, 2008, *at* http://trac.syr.edu/immigration/reports/189.

DOJ's Failure to Implement Regulations Giving Immigration Judges Contempt Authority

Section 240(b)1 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 gives Immigration Judges contempt authority over their courtrooms.

> The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.

The law requires the Attorney General to issue regulations in order to implement this authority. Although the Department of Justice has issued such regulations with respect to private attorneys appearing in Immigration Court, it has not issued regulations with respect to government attorneys. Originally, opposition to this contempt authority came from the INS, which argued that government attorneys should not be subject to discipline by other DOJ attorneys, even if those attorneys were Immigration Judges. Even after the Homeland Security Act of 2002 moved the functions of INS out of DOJ and into the newly created DHS, essentially eliminating the potential conflict of interest, the Attorney General has yet to issue regulations covering behavior by government attorneys. Therefore, the rules and procedures concerning professional conduct and the rules for representation and appearances before the Immigration Courts apply only to attorneys and representatives who do not represent the federal government. Immigration Judges do not have the power to hold in contempt or discipline DHS Trial Attorneys, who are subject to review only by DHS's Office of Inspector General and ICE's Office of Professional Responsibility.

See National Association of Immigration Judges, *An Independent Immigration Court: An Idea Whose Time Has Come*, Jan. 2002, *available at* http://www.woodrow.org/teachers/esi/2002/CivilLiberties/Projects/PositionPaperImmigrationJudges.pdf (position paper calling for contempt authority).
The rules and procedures concerning professional conduct before the Immigration Courts are codified in 8 C.F.R. part 1003, subpart G, which can be found at: http://law.justia.com/us/cfr/title08/8-1.0.2.4.2.7.html.
The rules for representation and appearances before the Immigration Courts are codified in 8 C.F.R. part 1292, which can be found at: http://law.justia.com/us/cfr/title08/8-1.0.2.5.29.html.

Additional Materials

Law Review Articles

- Nicole S. Thompson, *Due Process Problems Caused by Large Disparities in Grants of Asylum: Will the New Department of Justice Recommendations Solve the Problem?* 22 EMORY INT'L L. REV. 385 (2008).

Government-Produced Documents

- U.S. Department of Justice, *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals* (Aug. 9, 2006) *available at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.
- U.S. Department of Justice, *Measures to Improve the Immigration Courts and the Board of Immigration Appeals* (Aug. 9, 2006) *available at* http://trac.syr.edu/tracatwork/detail/P104.pdf.
- U.S. Department of Justice, Memo from Kevin D. Rooney (EOIR Director), (March, 2007) *available at* http://trac.syr.edu/immigration/reports/194/include/RooneyMemoMarch2007.pdf.

Other Sources

- Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, THE NEW YORK TIMES (Oct. 8, 2006), *available at* http://www.nytimes.com/2006/10/08/nyregion/08immigration.html?pagewanted=1's%20Immigration%20Courts%20Lurch%20Under%20a%20Growing%20Burden,%20&_r=1&sq=New%20York&st=nyt&scp=1.

Appendix 3: Cultivating a Culture of Professionalism in the Immigration Courts

Proposed Code of Conduct for Immigration Judges and Board Members

EOIR published for public comment a Code of Conduct for Immigration Judges and Board Members on June 28, 2007. See Codes of Conduct for the Immigration Judges and Board Members, 72 FR 35510, June 28, 2007. A number of commenters criticized the proposed code, including the New York City Bar Association and American Immigration Lawyers Association, which complained that the proposed canons are overly general and do not provide sufficient guidance. See, e.g. Letter from Am. Immigration Lawyers Ass'n to Kevin Chapman, Acting Gen. Counsel, Executive Office for Immigration Review (July 30, 2007), *available at* http://www.aila.org/content/default.aspx?docid=23005. Several academic commentaries also criticized the proposed code. See, e.g. Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOKLYN L. REV. 467, 505-8 (2008).

Ethics Manual, Executive Office for Immigration Review

On January 17, 2001, Attorney General Janet Reno approved EOIR's Ethics Manual. This manual summarizes the various laws and regulations that govern the conduct of DOJ employees (Immigration Judges, members of the Board of Immigration Appeals, and administrative law judges) as they apply to the specific activities of EOIR.. See U.S. Department of Justice, Executive Office for Immigration Review, *Ethics Manual*, *available at* http://www.usdoj.gov/eoir/statspub/handbook.pdf.

According to an EOIR Fact Sheet issued on September 8, 2008, the proposed Code of Conduct is "being revised and incorporated into the existing Ethics Manual. Revisions to the Ethics Manual are forthcoming." No date has been set for its completion completion. See U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet: EOIR's Improvement Measures—Progress Overview*, Sept. 8, 2008, *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf . See, also, Transactional Records Access Clearinghouse, *Supporting Details: Implementation of the 22 Improvement Measures*, *at* http://www.trac.syr.edu/immigration/reports/194/details.html#M10.

Process for Submitting Complaints about Immigration Judges

In 2003, the EOIR Director established a procedure, overseen jointly by EOIR and the Office of the Chief Immigration Judge ("OCIJ"), to monitor complaints against Immigration Judges. Under this procedure, complaints are received by the OCIJ either orally or in writing, primarily from the Assistant Chief Immigration Judge who supervises the affected Immigration Judge. OCIJ is required to immediately notify the EOIR Director when such a complaint is filed. If warranted, referrals may also be required to either the DOJ's Office of Professional Responsibility or Office of the Inspector General. Finally, OCIJ prepares monthly reports summarizing the number, nature and status of complaints against Immigration Judges for the EOIR Director. See U.S. Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement*, Aug. 2006, *available at* http://www.gao.gov/new.items/d06771.pdf.

DOJ has conducted a number of training sessions for Immigration Judges

According to an EOIR Fact Sheet, EOIR recently provided the following training:

- June 2007: training on emerging asylum and refugee issues for BIA members and staff;
- August 2007: joint week-long of training on immigration law for BIA members and Immigration Judges; and
- August 2008: two-day training program on asylum adjudications.

See U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet: EOIR's Improvement Measures—Progress Overview*, Sept. 8, 2008, *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf

Researcher Susan Long noted in Congressional testimony that EOIR has had to cut or reduce training for Immigration Judges. In fact, annual training conferences for Immigration Judges were not held in 2005, 2006 and 2008 due to budget constraints. In 2008, EOIR sent Immigration Judges DVDs, which they were encouraged to watch and discuss in groups. Ms. Long believes such virtual training is less valuable than in-person conferences. See Susan B. Long, *Prepared Testimony and Statement for the Record: Promises Not Kept: Failures in Implementing Key Immigration Court Reforms*, Sept. 23, 2008, *available at* http://trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf.

DOJ expands training of new Immigration Judges

According to an EOIR Fact Sheet, EOIR has expanded initial training for new Immigration Judges from two weeks to five weeks The extended training includes a new on-the-job training component where new judges observe and are observed by a mentor judge. See U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet: EOIR's Improvement Measures—Progress Overview*, Sept. 8, 2008, *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf

Training for new asylum officers

According to the *Refugee Roulette* article, new asylum officers receive five weeks of intense classroom training followed by testing. Additionally, asylum officers constantly receive ongoing training—each regional asylum office conducts four hours a week of training on new legal issues, country conditions, procedures and other issues. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 381 (2007), *available at* http://lawreview.stanford.edu/content/vol60/issue2/RefugeeRoulette.pdf.

Additional Materials

Law Review Articles

- Stacy Caplow, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS 85 (2007-2008) (recommending that Immigration Judges be given more time for training).
- Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011 (2007) (recommending frequent mandatory cultural sensitivity training for Immigration Judges).

Appendix 4: Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently

DHS Trial Attorneys – Organizational Background

Trial Attorneys from the Department of Homeland Security's Immigration and Customs Enforcement (ICE) represent the U.S. government in the Immigration Courts. Trial Attorneys are centrally managed by ICE's Principal Legal Advisor and are organizationally housed within the Office of the Principal Legal Advisor (OPLA). Trial Attorneys are locally supervised by Chief Counsel and operate out of OPLA field offices called Chief Counsel Offices.

OPLA has the exclusive authority to prosecute all removal proceedings. *See* 6 U.S.C. § 252(c); *Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 1 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf.

For a description of the role of ICE attorneys, *see* U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2007 Annual Report: Protecting National Security and Upholding Public Safety*, at 33–34 (2007), *available at* http://www.ice.gov/doclib/about/ice07ar_final.pdf.

For a description of the functions of personnel within OPLA, *see* U.S. Department of Homeland Security, *Fiscal Year 2009 Budget*, at S&E - 7–12 (2008), *available at* http://www.dhs.gov/xlibrary/assets/budget_fy2009.pdf.

Notices to Appear & Dropping Weak Cases

Trial Attorneys do not have the power to issue or cancel Notices to Appear ("NTA"). *Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 5 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf; 8 C.F.R. § 239.1. Rather, that power is vested in forty different categories of DHS employees, ranging from port directors to district file officers to supervisory asylum officers. 8 C.F.R. § 239.1. Trial Attorneys may dismiss the proceedings *without prejudice*. *See Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 5 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf; 8 C.F.R. § 239.2. Trial Attorneys also lack the power to make use of

other deferral mechanisms such as deferred action status, stays of removal and parole. *Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 5 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf.

DHS Trial Attorneys – Overburdened

In 2005, the Principal Legal Advisor stated that about 600 Trial Attorneys handle over 300,000 cases per year, having only 20 minutes to prepare for each case on average. *See Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor* at 1 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf. As of 2007, the number of Trial Attorneys was increased to 750, who were responsible for more than 365,000 cases. U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2007 Annual Report: Protecting National Security and Upholding Public Safety*, at 33 (2007), *available at* http://www.ice.gov/doclib/about/ice07ar_final.pdf. In light of the above, the Department of Homeland Security should consider increasing the number of Trial Attorneys on staff.

Policy Directive to Seek Justice – ICE's Mission Statement

ICE's mission statement can be found online at *About U.S. Immigration and Customs Enforcement (ICE)* , http://www.ice.gov/about/index.htm.

Policy Directive to Seek Justice – Statistics on Cases Involving Terrorism and Crime

For the TRAC report, *see* TRAC Immigration, *Immigration Enforcement: The Rhetoric, The Reality*, *available at* http://trac.syr.edu/immigration/reports/178 (May 27, 2008).

Enforcing DHS' Policy Encouraging Prosecutorial Discretion – Challenging Appeals

Some Trial Attorneys do waive appeal in appropriate cases. Additionally, some Immigration Judges ask Trial Attorneys, at the end of a hearing, whether the government will seek or waive appeal. If appeal is not waived at that point in the judicial process, a successful respondent must wait 30 days before being eligible to receive a new I-94, which documents the immigrant's permission to remain in the country, and an unrestricted social security card. To promote efficiency, Immigration Judges should ask this question to all Trial Attorneys after granting relief to an immigrant.

Prosecutorial Discretion – Legal Basis

The Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see also Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 1 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf. Congress and the Supreme Court have accordingly affirmed that judicial review of decisions to commence proceedings, adjudicate cases and execute removal orders is not available. *See* 8 U.S.C. § 1252(g); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999).

Guidance memoranda from ICE and its predecessor, the Immigration and Naturalization Service (INS), encourage DHS Trial Attorneys to exercise their prosecutorial discretion in certain circumstances. In 2005, the ICE principal legal advisor asked that DHS Trial Attorneys:

- "discourage issuance of Notices to Appear where there are other options available. . . or where the desired result is other than a removal order . . ."
- "appropriately resolve a case prior to expending court resources when a Notice to Appear has been issued but not yet filed with the immigration court [where other options are available, where the desired result is other than a removal order or] where the reasonable and rational decision is not to prosecute the case . . ."
- "move the court to terminate the case and to thereafter cancel the Notice to Appear as improvidently issued or due to a change in circumstances such that continuation

> is no longer in the government interest . . . [and] resolve a case in the immigration court . . . where such action should . . . be considered for purposes of judicial economy, efficiency of process or to promote justice . . ."

- "[use prosecutorial discretion in post-hearing actions to promote] judicial economy and fairness . . ."
- "[use prosecutorial discretion when] the proper and just course of action [would be to grant a stay of removal or] move to reopen the proceeding for purposes of terminating the Notice to Appear."

Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor (Oct. 24, 2005), at 3- 8, *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf.

Similarly, in 2000 the INS Commissioner noted that

> "[Trial Attorneys] are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process . . . subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. [Prosecutorial discretion] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order."

Memorandum on Exercising Prosecutorial Discretion to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel from Doris Meissner, Commissioner of the Immigration and Naturalization Service, at 1-2 (Nov. 17, 2000), *available at* http://www.miracoalition.org/uploads/V_/hg/V_hgJbpG0Xs-0mZLNg7CDQ/Prosecutorial-Discretion1.pdf.

In evaluating whether to exercise prosecutorial discretion, the Commissioner lists factors that Trial Attorneys may and may not consider, and notes that the goals of Trial Attorneys should be "protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law." Trial Attorneys "may decline to prosecute a legally sufficient immigration case if the federal immigration enforcement interest that would be served by prosecution is not substantial." *Memorandum on Exercising Prosecutorial Discretion to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel from Doris Meissner, Commissioner of the Immigration and Naturalization Service*, at 4-9 (Nov. 17, 2000), *available at* http://www.miracoalition.org/uploads/V_/hg/V_hgJbpG0Xs-0mZLNg7CDQ/Prosecutorial-Discretion1.pdf.

A U.S. Government Accountability Office report indicated, however, that the guidance memoranda did not comprehensively address situations in which Trial Attorneys should exercise prosecutorial discretion due to humanitarian concerns. *See* U.S. Government Accountability Office, *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making*, GAO-08-67, at 7 (Oct. 2007), *available at* http://www.gao.gov/new.items/d0867.pdf.

Prosecutorial & Enforcement Priorities

DHS already has both policy-based and statutorily-mandated priority schemes for enforcement and prosecution. DHS's stated policy is that "national security violators, human rights abusers, spies, traffickers in both narcotics and people, sexual predators and other criminals" should be removed posthaste. *Memorandum on Prosecutorial Discretion for all OPLA Chief Counsel from William J. Howard, Principal Legal Advisor*, at 8 (Oct. 24, 2005), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf. There is some doubt whether these stated priorities have actually been followed. *See generally* Doris Meissner & Donald Kerwin, Migration Policy Inst., *DHS and Immigration: Taking Stock and Correcting Course* (Feb. 2009), *available at* http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf. Recently, DHS Secretary Janet Napolitano has urged that department resources be focused on the removal of criminals, an emphasis that is in keeping with the stated DHS policies mentioned above. *See* Spencer Hsu, *Immigration Priorities Questions*, Washington Post, February 5, 2009, at A2.

An ordinal priority scheme, which would permit Trial Attorneys to asses and triage their cases, could be based on an existing DHS framework---DHS's fugitive-apprehension priorities. Those priorities are, in descending order of importance: (a) noncitizens who are a threat to the nation; (b) noncitizens who are a threat to the community; (c) noncitizens with a violent criminal history; (d) noncitizens with criminal convictions; and (e) noncitizens with no criminal convictions. Doris Meissner & Donald Kerwin, Migration Policy Inst., *DHS and Immigration: Taking Stock and Correcting Course* (Feb. 2009), at 45, *available at* http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

DHS's Secure Communities initiative, as outlined in DOJ's FY 2010 budget proposal to Congress, is a concrete proposal that will attempt to focus resources in the manner emphasized by Secretary Napolitano. Secure Communities is "a new and comprehensive initiative" with collaboration among EOIR, DHS enforcement agencies, Trial Attorneys and state and local officials " developed to identify, prioritize, process, detain and remove all criminal aliens held in U.S. prisons and jails." U.S. Department of Justice, *FY 2010 Congressional Budget Submission: Administrative Review and Appeals – Justification*, at 18, *available at* http://www.usdoj.gov/jmd/2010justification/pdf/fy10-ara.pdf. The goals of this initiative include identifying and processing all criminals subject to removal while still in custody, ensuring that no removable alien is released into the community due to a lack of bedspace, and implementing strategies that shorten the time aliens are in detention. U.S. Department of Justice, *FY 2010 Congressional Budget Submission: Administrative Review and Appeals – Justification*, at 21, *available at* http://www.usdoj.gov/jmd/2010justification/pdf/fy10-ara.pdf.

Assigning Trial Attorneys to Cases – Scheduling Conflicts

Scheduling difficulties seem to have impaired a recent experiment by one OPLA field office in the assigning of Trial Attorneys to cases. In the fall of 2008, the San Francisco Chief Counsel Office implemented an 18-month pilot program in vertical prosecution. Under this program, DHS assigns a specific Trial Attorney to each case for the life of the case. It was DHS's and EOIR's expectation that vertical prosecution would improve communications, provide more opportunity for the parties to narrow issues and reduce the instances in which multiple cases are "double booked" for the same time. Immigration Judges we interviewed said they hoped it would increase Trial Attorney preparedness as well.

For a discussion of the San Francisco Office's implementation of the vertical prosecution pilot program, see EOIR's notes from an August 2008 meeting between the representatives from the private bar and representatives from EOIR. U.S. Department of Justice, *AILA*

NORCAL/EOIR Liaison Questions and Answers: August 28, 2008 Meeting, at 1, 4, *available at* http://www.usdoj.gov/eoir/sibpages/sfr/AILAQAAug2008.pdf.

Our interviews suggest that this program has not met expectations. Immigration Judges we interviewed called it a "disaster." They complained that the program had no appreciable benefit with respect to Trial Attorney preparedness and that the only effect it had was to reduce flexibility in scheduling. Similarly, several other interviewees viewed our recommendation to assign a Trial Attorney to each case as impracticable due to logistics of scheduling so many cases among a small set of Trial Attorneys in a relatively tiny number of courtrooms.

Other practitioners with whom we met, however, were more optimistic that the vertical prosecution program might eventually meet expectations. They expressed their belief that vertical prosecution could ultimately prove beneficial to both immigrants and Trial Attorneys, but will require time and the cooperation, flexibility and patience of all parties involved, including Immigration Judges. Indeed, given the large current backlog of cases, the benefits of vertical prosecution may not be apparent until months after the program's initiation.

Additionally, we submit that a policy of assigning a Trial Attorney to each case would be more likely to succeed if it is part of a package of reforms, including mandating pre-hearing conferences, clarifying Trial Attorneys' prosecutorial discretion, and directing Trial Attorneys to seek justice under the law in each case. Taken together, these recommendations would reduce the volume of cases and streamline those that remain in the Immigration Court system. These efficiency-enhancing benefits would outweigh or entirely negate the harm caused by any loss in flexibility of scheduling.

Pre-Hearing Conferences – Held at the Immigration Judge's Discretion

"Pre-hearing conferences are scheduled at the discretion of the immigration judge to narrow issues, obtain stipulations between parties, exchange information voluntarily, and otherwise simplify and organize the proceeding." 8 C.F.R. § 1003.21(a).

Pre-Hearing Conferences – Encouraged but Not Mandatory

EOIR publishes a number of instruction manuals, including the *Immigration Court Practice Manual* and the *Immigration Judge Benchbook Index*. These two publications touch on pre-hearing conferences:

"[Pre-hearing] conferences may be requested by a party (orally or by a written motion) or initiated by the immigration judge . . . . Even if a pre-hearing conference is not held, the parties are strongly encouraged to confer prior to a hearing to narrow issues for litigation." Executive Office for Immigration Review, *Immigration Court Practice Manual*, Chapter 4.18(a) (Apr. 2008).

"Prior to the telephonic hearing date the Immigration Judge should encourage parties to conduct a pre-trial conference to reach stipulations and narrow issues for consideration by the Court." Executive Office for Immigration Review, *Immigration Court Practice Manual*, IIA.2 (Oct. 2001).

Pre-Hearing Conferences – Neal Memorandum

In 2008, David L. Neal, the Chief Immigration Judge of EOIR, circulated a memorandum providing guidance to Immigration Judges on how to encourage pro bono representation in Immigration Courts. One way to encourage pro bono representation, Chief Judge Neal advised, was to encourage pre-hearing conferences when pro bono counsel is involved. Using logic that applies regardless of whether pro bono counsel is involved, Chief Judge Neal reasoned that the use of a pre-hearing conference helps to conserve the often limited time and resources available to pro bono counsel.

For the memorandum, *see* Hon. David L. Neal, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services* at 4 (Mar. 10, 2008), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf.

Appendix 5: Enhancing the Accuracy of Proceedings Through Effective Translation

Statistics Regarding Use of Interpreters in Immigration Courts

See Martin A. Roldan, Office of the Chief Immigration Judge, *Immigration Court Interpreters: Their Standing as Professionals* (May 2000), *available at* http://www.ncsconline.org/d_icm/programs/cedp/papers/abstracts/immigrationcourtinterpreters.html.

Courts – Due Process Requires Competent Translation

The United States Court of Appeals for the Ninth Circuit recognized the fundamental role of competent interpreter services in an Immigration Court proceeding in *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003).

Simultaneous Interpretation

Simultaneous interpretation as suggested in this recommendation means the interpreter renders the message as quickly as he or she can while others are continuously speaking, rather than waiting for the speaker to finish speaking before interpreting. Simultaneous interpretation in this sense can and should be distinguished from other meanings of simultaneous interpretation, such as in the United Nations meeting context, where interpreters are confined to glass-encased booths aided with earpieces and microphones.

Private Companies Providing Translation Services

The leading provider of contract interpreter services is Lionbridge Global Solutions. For an explanation of contract interpreter services, see Office of the Chief Immigration Judge, *Uniform Docketing System Manual,* at V-I (July 2008), *available at* http://www.usdoj.gov/eoir/efoia/ newudms/Docket Manual.pdf.

Recognition Among the Courts of Appeals Regarding Dialectical Differences

Several federal courts of appeals have examined the difficulties arising when an interpreter and applicant cannot communicate due to dialectical differences. See, *e.g.*, *Zhen Li Lao v. Gonzales*, 300 F.3d 530, 534 (7th Cir. 2005) (cautioning immigration judges to show sensitivity "to the possibility of misunderstandings caused by the use of translators of difficult languages, such as Chinese"); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (adverse effects noted where interpreter spoke Mandarin and applicant spoke Foo Ching); *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000) (noting that interpreter and applicant spoke different dialects of Fulani); *Ming Shi Xue v. Bd. Of Immigration Appeals*, 439 F.3d 111, 125, n. 17 (2nd Cir. 2006) (noting that interpreter and respondent spoke "related but distinct" dialects).

Interpreter Disqualification

In 2004, the Office of the Chief Immigration Judge issued a memorandum that effectively summarizes the mechanics of dismissing and disqualifying an interpreter. The memorandum also discusses the economic rationale for the EOIR's interpreter policies. *See* Office of the Chief Immigration Judge, *Operating Policies and Procedures Memorandum No. 05-08: Contract Interpreter Services*, at 12 (Oct. 20, 2004), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-08.pdf.

Existing Regulations Regarding Opining and Paraphrasing

Existing regulations already prohibit opining and paraphrasing by interpreters. For example, 8 C.F.R. 1003.22 provides that contract interpreters are to take an oath to interpret and translate accurately in court. Moreover, the Standards for Performance and Professional Responsibility for Contract Court Interpreters in Federal Courts provide that interpreters shall "render a complete and accurate interpretation or sight translation that preserves the level of language used without altering, omitting, or adding . . . ." U.S. Courts, *Standards for Performance and Professional Responsibility for Contract Court Interpreters,* at 1 (2006), *available at* http://www.uscourts.gov/interpretprog/Standards_for_Performance.pdf. Our interviews made clear, however, that these standards are not always met.

Appendix 6: Reducing the Unfairness of Videoconferencing

Expanding Installation of Videoconferencing Equipment

EOIR is calling for the expanded use of videoconference hearings. *See* National Public Radio, *Debate Over Video in Immigration Courts* (Feb. 10, 2009), *available at* http://www.npr.org/ templates/story/story.php?storyId= 100534850. As of September 21, 2004, videoconferencing units had been installed at the EOIR Headquarters in Falls Church, Virginia, and at forty (of fifty-three) Immigration Courts, as well as at seventy-seven other sites such as detention centers and correctional facilities where immigration hearings are conducted throughout the country. Eugenio Mollo, Jr., *The Expansion of Video Conferencing Technology in Immigration Proceedings and its Impact on Venue Provisions, Interpretation Rights, and the Mexican Immigrant Community,* Journal of Gender, Race & Justice (Mar. 22, 2006), *available at* http://www.accessmylibrary.com/coms2/ summary_0286-15656761_ITM.

Statistics Regarding Detainees

Detainees comprised 42 percent of all completed immigration court cases in fiscal year 2007. *See* Executive Office for Immigration Review, *FY 2008 Statistical Year Book,* at O1 (Mar. 2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf.

Problems Associated with Videoconferencing – Credibility Determinations

Rusu v. INS, 124 F.3d 205 (7th Cir. 1997), is not the only authority to consider the troubles caused by videoconferencing. Numerous sources document the problems associated with videoconferencing, particularly the distortions of an applicant's credibility. "The problem with the perceived distance between the judge and the applicant is that the applicant will seem less trustworthy and less credible. . . . The expressions, gaze, posture, and gestures that provide important insight into an applicant's credibility are skewed when viewed via [videoconferencing]." *See* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immig. L.J. 259 (2008); Cormac T. Connor, *Human Rights Violations in the Information Age*, 16 Geo. Immig. L.J. 207 (2001–2002). In addition, attorneys often cannot communicate with clients during a videoconference hearing, leaving the attorney "unable to recognize nuances of her client's body language, particularly any behaviors that are peculiar to the alien's cultural background, so that they can be explained in court." Cormac T. Connor, *Human Rights Violations in the Information Age*, 16 Geo. Immig. L.J. 207, 226 (2001-2002).

Credibility determinations are of particular concern in the immigration court context because they are often extremely important to the outcome of a case. The BIA will overturn a credibility determination only if it is "clearly erroneous," a very high standard that means in practice an adverse credibility determination can be fatal to an immigrant's case. *See* Board of Immigration Appeals, *Procedural Reforms to Improve Case Management,* 67 FR 54878 (Aug. 26, 2002).

Equipping Detention Centers with Courtrooms

Some detention centers are currently equipped with functioning courtrooms and can provide a model for expanding such courtrooms to other detention centers nationwide. However, the suggested scope of expansion is as yet unclear. Detention locations currently include DHS Service Processing Centers, DHS contract detention facilities, state and local government jails, and Bureau of Prisons institutions. *See* Executive Office for Immigration Review, *FY 2008 Statistical Year Book,* at O1 (Mar. 2009), *available at* http://www.usdoj.gov/eoir/statspub/ fy08syb.pdf. This report does not suggest equipping *all* types of detention locations with courtrooms, particularly those that are in far, remote locations, as this endeavor would indeed be costly and difficult. Rather, DHS could consider equipping major detention facilities in each state with courtrooms.

Barring Videoconferencing in Merits Hearings

The Social Security Administration ("SSA") may provide a useful model for the Immigration Courts in barring the use of videoconferencing in merits hearings. Applicable SAA regulations state that the desire for an in-person hearing is alone sufficient to reschedule a videoconference hearing for an in-person hearing. An SSA administrative law judge determines whether the applicant's hearing will take place in person or via videoconferencing, but an applicant may reschedule the hearing if he or she sets forth a "good reason" objection to the assigned hearing. If an applicant is scheduled to appear by videoconference, he or she may object to such an appearance and reschedule in order to make an in-person appearance. Such an objection is considered to be a "good reason" objection. *See* 20 C.F.R. §§ 404.936(c), (e) ("If you have been scheduled to appear by video teleconferencing at the place of your hearing and you notify the ALJ as provided in paragraph (d) of this section that you object to appearing in that way, the administrative law judge will find your wish not to appear by video teleconferencing to be a good reason for changing the time or place of your scheduled hearing and will reschedule your hearing

for a time and place at which you may make your appearance before the administrative law judge in person."). Immigration Courts could consider following a similar approach.

Confidential Attorney-Client Communications – Ability to Confer Privately with One's Attorney

Our research uncovered numerous sources that raised concern over the lack of confidential attorney-client communications in videoconference hearings. "The client is [] unable to communicate confidentially, if at all, with his attorney during the hearing. Such hindrances on the attorney-client relationship serve to minimize any positive effect a defense attorney may have, further diminishing the fairness of the removal proceeding." Cormac T. Connor, *Human Rights Violations in the Information Age*, 16 Geo. Immig. L.J. 207, 226 (2001-2002).

Training Video Operators

Note that this recommendation suggests training existing video operators rather than creating new staff positions which would be costly and inefficient.

Immigration Judge Benchbook

Excerpts of the Immigration Judge Benchbook are on file with the authors.

Appendix 7: Improving the Reliability and Availability of Court Records

Freedom of Information Act Document Request Process – Roadblocks

The U.S. Department of Justice and the U.S. Citizenship & Immigration Services provide annual reports on the Freedom of Information Act requests received. These reports evidence the number of requests, approvals, and processing times. *See* Department of Justice, *Annual Report of the Freedom of Information Act, Fiscal Years 2006–2008*, *available at* http://www.usdoj.gov/ oip/foia-ar.htm; U.S. Citizenship & Immigration Services, *Freedom of Information Act Annual Reports, Fiscal Years 2006–2008, available at* http://www.uscis.gov/portal/site/uscis/menuitem. 5af9bb95919f35e66f614176543f6d1a/?vgnextoid=774fd0676988d010VgnVCM10000048f3d6a1 RCRD&vgnextchannel=34139c7755cb9010VgnVCM10000045f3d6a1RCRD.

New Freedom of Information Act Guidelines – Memorandum from President Obama

President Obama recently issued a memorandum directing the Attorney General to issue new FOIA guidelines. *See* The White House, *Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act*, *available at* http://www.whitehouse.gov/the_press_office/ FreedomofInformationAct/.

Strategic Goals of the Executive Office of Immigration Review – eWorld

Many of the proposed action items for improving access to court records, such as implementation of an electronic filing system, have been identified by EOIR. EOIR has published several reports on its progress and improvement goals, some of which are contingent on the future budget. *See* Executive Office for Immigration Review, *EOIR Improvement Measures—Progress Overview* (Sept. 8, 2008), *available at* http://www.usdoj.gov/eoir/press/08/ EOIRs22ImprovementProgressOverview 090508v2.pdf; Executive Office for Immigration Review, *Fiscal Years 2008–2013 Strategic Plan* (Jan. 2008), *available at* http://www.usdoj.gov/ eoir/statspub/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf. Notably, EOIR requested $10,250,000 in its FY 2010 Congressional Budget Submission to enhance the eWorld Document Management System. According to EOIR, this request "will tie all EOIR eWorld projects together, providing a single system in which to store, distribute and archive all documents filed with or created by EOIR. This system will greatly enhance EOIR's capacity to maximize the efficiency of case processing in support of priority

enforcement and adjudication initiatives." *See* Executive Office for Immigration Review, *FY 2010 Congressional Budget Submission: Administrative Review and Appeals*, at 1-2, 21-23 (Apr. 28, 2009), *available at* http://www.usdoj.gov/jmd/2010justification/pdf/fy10-ara.pdf. .

Strategic Goals of the Executive Office of Immigration Review – Digital Recording Systems

EOIR has published several reports on its progress and improvement goals, including the installation of digital recording systems. *See* Executive Office for Immigration Review, *EOIR Improvement Measures—Progress Overview* (Sept. 8, 2008), *available at* http://www.usdoj.gov/eoir/ press/08/EOIRs22ImprovementProgressOverview090508v2.pdf; Executive Office for Immigration Review, *Fiscal Years 2008–2013 Strategic Plan* (Jan. 2008), *available at* http://www.usdoj.gov/eoir/statspub/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf.

Appendix 8: Helping the Unrepresented

Probability of Success: Represented vs. Unrepresented

Although it is true that represented immigrants overall have a success rate three times higher than those who are unrepresented, one cannot ascribe all of this difference to representation alone. We heard from many of our interviewees that referral organizations screen cases and designate the strongest cases for pro bono representation first.

Immigration Court Practice Manual

For the Immigration Court Practice Manual, *see* Office of the Chief Immigration Judge, *Immigration Court Practice Manual*, *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

Few Immigrants can Afford Lawyers

According to EOIR, between October 1, 2006 and September 30, 2007, approximately 84% of detained immigrants with completed immigration court proceedings lacked representation. Under the Immigration and Nationality Act, persons in removal proceedings have "the privilege of being represented," but "at no expense to the Government." INA § 292. Because of the cost involved, this report does not undertake to change the current scheme of private representation for immigrants. But for such a proposal, *see*, *e.g.*, Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute, April 2005, No. 4, *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services

Judge Neal's Guidelines take the form of an Operating Policies and Procedures Memorandum (OPPM), which EOIR periodically publishes to make policy directives for the Immigration Courts under its jurisdiction. For Judge Neal's Guidelines, *see* Executive Office for Immigration Review, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services* (March 10, 2008), *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm08/08-01.pdf. For EOIR's complete log of

OPPMs *see* Executive Office for Immigration Review, *OPPM LOG*, *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

Pro Bono Community Embraces Judge Neil's Guidelines

Several articles have been written in the immigration pro bono service community praising Judge Neal's Guidelines. For one such example, *see* Chris Nugent, *New EOIR Guidelines Offer More Pro Bono Incentives,* Immigration Law Today, May/June 2008.

Judge Neil's Guidelines/Legal Outreach and Pro bono Program

Judge Neil's Guidelines also include measures to strengthen the existing Legal Outreach and Pro Bono Program (LOPBP). The Vera Institute of Justice operates under a government contract to run the LOPBP. It is an educational initiative for detainees that focuses on detainee rights, immigration court and the detention process. The LOPBP also helps detained immigrants obtain pro bono counsel. It aims to allow immigrants to make more informed decisions and increase efficiency in the Immigration Courts. From 2003 through September 2007, the program reached more than 100,000 detainees. Notably, it has been successful both in decreasing the length of time that pro se immigrants remain detained, and in narrowing the gap in results reached by represented and pro se immigrants. For more information, see the Vera Institute's *Evaluation and Performance and Outcome Measurement Report, Phase II*.

Headquarters Immigration Court

EOIR established the Headquarters Immigration Court (HQIC), which is based in Falls Church, VA, in July of 2004. Although the HQIC was originally designed to assist other overburdened courts with overflow and not necessarily to match unrepresented parties with pro bono counsel, the basic framework of the HQIC could be used for this purpose. Expanding the existing HQIC in Falls Church or establishing other video conferencing-based courts in other cities with high concentrations of pro bono providers could bring much needed pro bono assistance to detained immigrants located in sparsely populated areas. For more information, *see* the Executive Office for Immigration Review, *Headquarters Immigration Fact Sheet* (July 21, 2004), *available at* http://www.usdoj.gov/eoir/press/04/HQICFactSheet.htm.

Ninth Circuit Experiment: Simplified Procedures and Workbook

A copy of the Ninth Circuit's pro se workbook and instructions packet is *available at* http://www.ca9.uscourts.gov/opencase/Open_a_Case_ProSe/prose.immigration.caseopening.12-08.pdf. The pro se packet has been available to Ninth Circuit pro se litigants since only December 2008 and therefore it is too early to evaluate its effectiveness with actual results. We believe, however, that a similar information packet for the Immigration Courts would streamline the process for pro se immigrants and lead to better outcomes, especially for those individuals unable to participate in the LOPBP, described above.

Private Organizations/the Florence Project

Several private organizations have provided important resources to pro se immigrants in Immigration Court. One of the most notable is the Florence Project. The Phoenix-based Florence Project has been serving detained and unrepresented immigrants for 20 years. The materials that it has prepared are field-tested and have proven useful to pro se immigrants. The Florence Project's step-by-step "How To" publications are written in multiple languages and at an appropriate level for pro se litigants. Their *Pro-Se Document Index*, *available at* http://www.firrp.org/proseindex.asp, provides straightforward guidance on navigating the Immigration Court system and could be used as a model in constructing the pro se practice manual.

The EOIR Automated Telephone Number

There are two automated telephone numbers relating to immigration issues. The contact number for EOIR, referenced in the report, is +1.800.828.1120 and can be located on the Department of Justice's website for EOIR, *available at* http://www.usdoj.gov/eoir/contact.htm. As noted in the report, the EOIR contact number provides "Case Information," which allows an immigrant to check the status of a pending case, but does not provide information about the Immigration Court process or procedure. The other automated telephone number relating to Immigration issues is the U.S. Citizenship and Immigration Services (USCIS) National Customer Service Center toll-free telephone number, which is +1.800.375.5283. The National Customer Service Center provides information to people with questions about citizenship, lawful permanent

residency, family- or employment-related immigration, or other general immigration issues. Like the EOIR case information contact number, the National Customer Service Center telephone number does not provide information regarding the Immigration Court process or procedure. Because EOIR is the body overseeing the Immigration Courts, our recommendation is to upgrade the EOIR automated telephone number to provide immigrants with the information they need to effectively navigate the Immigration Court system.

We recommend that the automated telephone number be operated by competent staff members. It is important that the representatives providing information on the hotline are knowledgeable about the Immigration Court system so that they can provide accurate information to callers. For a 2004 *Los Angeles Times* article discussing problems arising from the use of National Customer Service Center telephone operators who were not sufficiently educated regarding the Immigration issues about which they provided assistance, *see* Ann M. Simmons, Los Angeles Times, *Lawyers Blast Immigration Phone Service* (Feb. 28, 2004).

Information that the Hotline Should Provide

In addition to the substantive information that should be provided by the Immigration Court hotline, for added efficiency the hotline could direct callers to the EOIR website before speaking with a representative . In order to be effective, however, the EOIR website should be significantly improved to make it as user-friendly as possible and provide much of the same information as offered on the hotline.

Detention Centers: Lack of Telephone Availability

Contrary to DHS policy, access to functioning telephones in most detention centers is currently very limited. For a full discussion of this problem, *see* United States Government Accountability Office, *ALIEN DETENTION STANDARDS: Telephone Access Problems were Pervasive at Detention Facilities; Other Deficiencies did not Show a Pattern of Noncompliance, available at* http://www.gao.gov/new.items/d07875.pdf.

The IRS Toll-free Telephone Number Accuracy Rate

The 91.2% accuracy rate on tax law questions can be found on page 10 of the Internal Revenue Service *Budget in Brief* for Fiscal Year 2009, *available at* http://www.irs.gov/pub/newsroom/ budget-in-brief-2009.pdf.

EOIR's Recognition of the Value of a Simple Description of Immigration Court Procedure

The value of creating a simple description of the Immigration Court process was discussed during an April, 2007 AILA-EOIR Liaison Meeting. For a written transcription of the meeting *see* Executive Office for Immigration Review, *AILA-EOIR Liaison Meeting Agenda Questions* (April 11, 2007) at 14 *available at* http://www.usdoj.gov/eoir/statspub/eoiraila041107.pdf.

Vera Institute

The Vera Institute of Justice's website is *available at* http://www.vera.org/cij/cij.html. The Institute works with both the government and nonprofit organizations to engage in "program oversight, pilot program development and implementation, technical assistance, evaluation, and empirical research." Notably, the Vera Institute collaborates with the government to run the Legal Orientation Program (LOP), which currently provides education services to detained immigrants in 25 detention facilities. The LOP is focused on educating detained immigrants about detainee rights, immigration court and the detention process.

Appendix 9: Getting it Right on Appeal

Judge Posner's Statement

This quote is from Seventh Circuit Court of Appeals Judge Richard Posner in the case *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). In his ruling, Judge Poser noted that in the year directly preceding the *Benslimane* case, the Seventh Circuit had reversed 40 percent of the decisions made by the BIA when those decisions were resolved on the merits. Judge Posner added that in those cases reversing the BIA, the Seventh Circuit's "criticisms of the Board and of the immigration judges have frequently been severe."

2002 Streamlining Reforms

In 2002, the EOIR implemented a number of procedural reforms intended to "reduce the delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those cases presenting significant issues for resolution by a three-member panel." Board of Immigration Appeals: Procedural Reforms to Improve Case Management; 67 Fed. Reg. 54878, 54878 (August 26, 2002). At the time these reforms were implemented, there was a backlog of approximately 55,000 cases pending before the BIA. Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management.* The "streamlining reforms" directly resulted in: (1) an increase in the issuance of affirmances without opinions, (2) a reduction in the use of three-member panels and (3) a reduction in the number of BIA members.

Motivation Behind the BIA Reduction

Several articles have discussed the political motivations behind the 2002 "streamlining reforms" and, more specifically, the removal of numerous pro-immigrant members. *See, e.g.,* Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557 (2007); Michael L. Sozan, *CAIR Coalition v. DOJ: A Victory for Standing and Reviewability; A Hurdle for the APA Challenge to BIA "Streamlining,"* 8 BENDER'S IMMIGR. BULL. 1198 (2003). The "streamlining reforms" reduced the authorized number of BIA members from 23 to 11; however, at the time the streamlining was implemented, there were only 19 members on the Board. After three members left on their own accord, Attorney General Ashcroft removed five additional members who were widely viewed as the most

"immigrant friendly." *See* Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1159 (2004); Benesch, *supra* at 560.

Even when first proposed, the rule reducing the number of BIA members drew criticism from several commentators who "stated that the reduction could be perceived as part of a design to eliminate Board members with whom the Attorney General disagrees." 67 Fed. Reg. at 54893. Our interviewees confirmed this widespread skepticism. For example, one practitioner noted: "I strongly believe when they reduced the number of BIA members, they pretty much got rid of all the BIA members who were seen as 'liberal' or 'immigrant-friendly.' I don't think that was a coincidence."

Percentage of Cases Reviewed By Three-Member Panels

While only seven to eight percent of BIA cases are decided by three-member panels, a larger percentage of decisions are reviewed by three members during the BIA's screening process, which is used to determine whether a decision is to be made by a single-member or three-member panel, and which Board members also use to solicit input from each other on the legal issues arising in cases. Thus, although some cases are ultimately decided by only a single member, they may actually receive input from several members during the screening and review process.

Affirmance Without Opinion

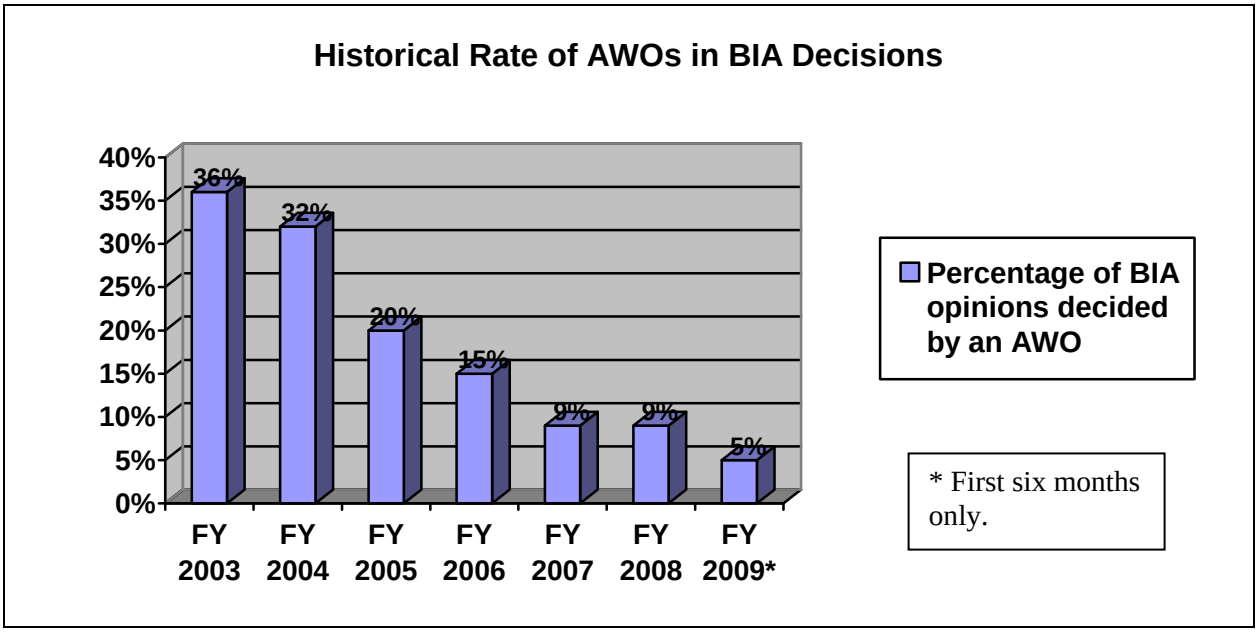
In 1999, then Attorney General Janet Reno issued rules that provided individual BIA members the authority, in their discretion, to issue affirmances without opinion in certain limited categories of cases as designated by the BIA Chairman. The new rules provided that affirmances without opinions were permitted when a "Board member determine[d] that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial and that (A) the issue on appeal [was] squarely controlled by existing Board or federal court precedent and [did] not involve the application of precedent to a novel factual situation; or (B) the factual and legal issues raised on appeal [were] so insubstantial that three-Member review [was] not warranted." *See* 8 C.F.R. § 3.1(a)(7)(i)–(ii) (2000).

In 2002, then Attorney General John Ashcroft issued more aggressive rules that transformed the use of affirmances without opinion from an option into a mandate when an appeal met

the conditions detailed above. *See* 8 C.F.R. 1003.1(e)(4). Moreover, in March 2002, the BIA Chairman authorized the use of AWOs in the previously ineligible categories of cases involving asylum, withholding of deportation and the Convention Against Torture. As a result of these changes, the BIA dramatically increased its use of AWOs.

Decline in the Number of Affirmances Without Opinion

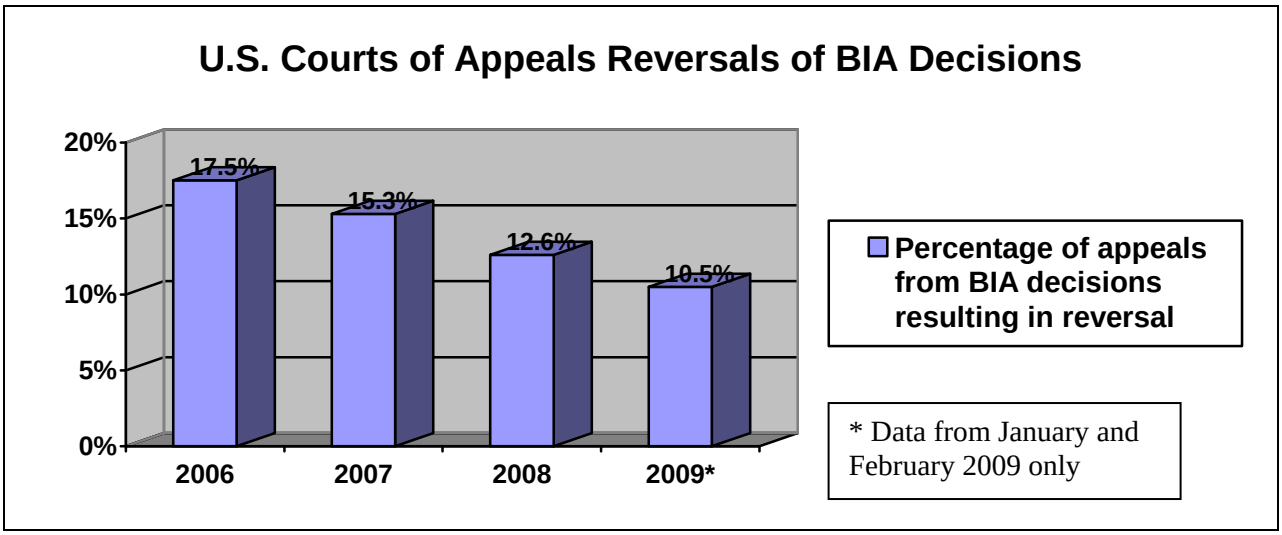
Since 2003 there has been a steady decline in the rate of AWOs in BIA decisions, as illustrated by the chart below.



Source: Email from BIA Chairman Osuna, on file with authors.

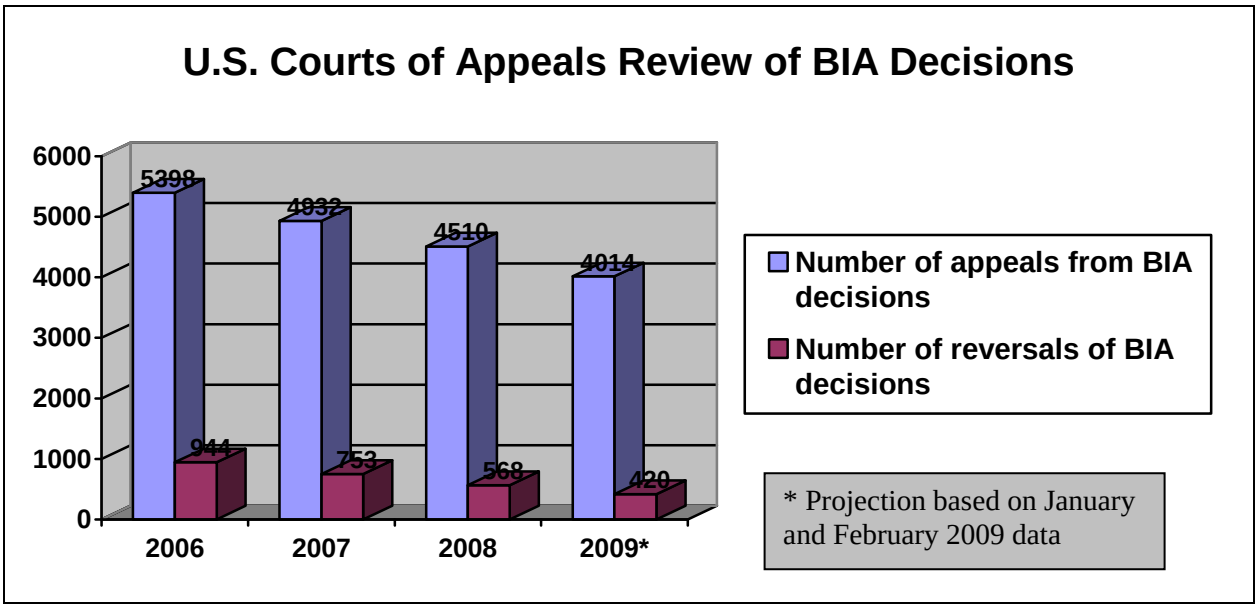
BIA's Reversal Rate in the Federal Courts of Appeals has Dropped Substantially

The percentage of appeals from BIA decisions resulting in reversal has decreased significantly in recent years, as illustrated by the chart below.



Source: Federal Court Activity, IMMIGRATION LAW ADVISOR (U.S. Dept. of Justice, EOIR), January 2008, January 2009, March 2009.

Not only has the reversal rate decreased, but so has the total number of appeals of BIA decisions to the U.S. Courts of Appeals, as illustrated by the chart below.



Source: Federal Court Activity, IMMIGRATION LAW ADVISOR (U.S. Dept. of Justice, EOIR), January 2008, January 2009, March 2009.

Proposed Rules

In June 2008, DOJ proposed rules regarding the BIA's administrative review procedures. Specifically, the proposed rules: (1) provide the BIA with greater discretion in its determination of whether to issue an AWO, (2) expand BIA members' authority to refer a case to a three-member panel and (3) modify the process for publication of BIA decisions. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents; 73 Fed. Reg. 34,654 (June 18, 2008).

Three-member panel decisions

Currently, three-member panels can be assigned if a case requires: (1) settling inconsistencies among the rulings of different Immigration Judges; (2) establishing a precedent construing the meaning of laws, regulations or procedures; (3) reviewing a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents; (4) resolving a case or controversy of major national import; (5) reviewing a clearly erroneous factual determination by an Immigration Judge; or (6) reversing the decision of an Immigration Judge or DHS, other than nondiscretionary dispositions. *See* 8 C.F.R. § 1003.1(e)(6).

Temporary Board Members

Current regulations permit temporary board members to act as members for a term lasting up to six months. Temporary board members have the authority to adjudicate cases, except that they do not have the authority to vote on cases decided en banc. *See* 8 C.F.R. § 1003.1 (a)(4).

Staff Attorney and BIA Member Ratio

Chairman Osuna estimated that if a universal return to review by three-member panels is implemented, the BIA would need at least 25 members and 250 staff attorneys to guard against large case backlogs developing. These numbers are based on a ratio of ten staff attorneys for each BIA member, a ratio that historically has proved to be effective and efficient. This ratio will need to be continually evaluated, however, in light of any other

changes that are made to the system and fluctuations in the BIA's caseload. For example, if regulatory deadlines are tightened or if there is a return to de novo review for more classes of cases than at present, the ten-to-one ratio may need to increase. At the same time, a return to three-member panel review in all cases may permit a decrease in the ratio because there would no longer be a need for an initial screening process, which required substantial staff support.

Appendix: A Call to Independence

Removing the Immigration Court System from the Department of Justice

Creating a new immigration court under Article I of the Constitution is neither a novel nor radical concept. It dates at least as far back as a 1980 law review article by Maurice A. Roberts, the former Chairman of the BIA. See Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1 (1980). Just a short while later, the Select Commission on Immigration and Refugee Policy, established by Public Law 95-412, recommended that Congress create an immigration court under Article I in its Final Report. See *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners* (Mar. 1, 1981), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2f/b7/7e.pdf.

In 1997, the U.S. Commission on Immigration Reform, established by the Immigration Act of 1990 (Public Law 101-649), also recommended that the Immigration Court system be removed from the Department of Justice, although it suggested the creation of a new independent agency rather than an Article I court. See U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy*, 1997 Report to Congress (Sept. 1997), *available at* http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf. In 2007, the deputy director of the U.S. Commission on Immigration Reform concluded that the Board of Immigration Appeals should be established as an Article I court and removed from the Department of Justice, although he continued to believe that it should become an independent federal agency. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 386 (2007), *available at* http://lawreview.stanford.edu/content/vol60/issue2/RefugeeRoulette.pdf. Mr. Schoenholtz served as the commission's deputy director.

Even the Immigration Judges themselves have been advocating for the creation of an Article I immigration court. See Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 1 (2008).

Appointment by Federal Courts of Appeals

Article II, Section 2, Clause 2 of the U.S. Constitution, known as the Appointments Clause, provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The U.S. Supreme Court's jurisprudence on this clause is murky at best, particularly with regard to the so-called Excepting Clause relating to the appointment of inferior officers. See, e.g., *Edmond v. United States*, 520 U.S. 651 (1997) and *Morrison v. Olson*, 487 U.S. 654 (1988). However, we note that Congress has already provided for the federal courts of appeals to appoint U.S. bankruptcy judges, another statutory judge established by Congress under Article I of the Constitution. See 28 U.S.C. §152(a)(1). We believe it is possible, if not likely, that Congress could structure the proposed U.S. Immigration Court so that the appointment of its appellate judges by the U.S. courts of appeals passes constitutional muster, including by clearly subjecting the new court to the supervision of the federal courts of appeals and the Supreme Court.

In the event that Congress is concerned about the constitutionality of this appointment method, however, an alternative procedure may provide similar benefits while staying on firmer constitutional ground. Namely, rather than providing for direct appointment of judges by the federal courts of appeals, Congress could provide that the appeals courts draw up short lists of candidates from which the President would nominate the judges, who would then be subject to Senate confirmation. This procedure is akin to the process used to appoint the U.S. Comptroller General. See U.S. Government Accountability Office, *How the Comptroller General Is Selected*, *at* http://www.gao.gov/cghome/cgprocess.html.

Academic Research on Judges Appointing Judges

See Judith Resnick, "*Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geo. L. J. 607, 668-71 (Mar. 2002).

Additional Materials

Law Review Articles

Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STANFORD L. REV. 475 (2007).