



Federal Bar Association

April 16, 2018

The Honorable John Cornyn
Chairman
Subcommittee on Border Security
and Immigration
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Richard Durbin
Ranking Member
Subcommittee on Border Security
and Immigration
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: April 18, 2018 Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System”

Dear Chairman Cornyn and Ranking Member Durbin:

We write in connection with the April 18, 2018 hearing of the Subcommittee on Border Security and Immigration on “Strengthening and Reforming America’s Immigration Court System” and respectfully request that these comments be included in the hearing record.

As you know, the Federal Bar Association (FBA) is the foremost professional association for attorneys engaged in the practice of law before the federal courts and federal administrative agencies. Over 19,000 members of the legal profession belong to the FBA through affiliation with nearly 100 local chapters around the country. The Immigration Law Section is one of our 24 sections that focus on substantive areas of practice.

Since 2013, the FBA has advocated the establishment of an Article I “United States Immigration Court” to replace the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) as the principal adjudicative forum under title II of the Immigration and Nationality Act (INA). More recently, with the aid of our Immigration Law Section, the FBA has drafted and shared with the members of the Judiciary Committee model legislation to create an Article I immigration court and provide for more timely and effective adjudication of immigration matters.

EOIR: A Bureaucracy, Not an Immigration Court

Our country deserves an immigration adjudication system that works. Court experts, stakeholders, and the Government Accountability Office (GAO) all have pointed to faster and more efficient adjudication of immigration matters as possible through an Article I court structure. The costliness and inefficient structure of today’s EOIR – with its existing

immigration courts and Board of Immigration Appeals – is certain and documented. EOIR’s costly bureaucracy and inefficiency have contributed to a backlog of over 600,000 cases, according to the most recent estimates, with some cases not scheduled for hearings until 2022. There is broad consensus that the current system for adjudicating immigration claims is irretrievably broken and requires systemic overhaul.

Hiring additional immigration judges and imposing judicial performance metrics represent bureaucratic band-aids for the treatment of fundamental, longstanding management and operational deficiencies. Even though additional resources are a necessary means to reduce backlogs and handle future caseloads, they are not a solution absent a management structure that ensures resources are effectively utilized. Indeed, increasing bureaucratic scrutiny and political pressure to improve productivity will only further erode the integrity of the immigration adjudication system.

EOIR today represents a pale reflection of the kind of professionally administered adjudicative system that Congress and the American people expect. A key example is EOIR’s failure to make effective use of technology to aid its work. Since 2001, the agency has failed to fulfil its pledge to establish an electronic case filing system. It continues to rely on paper files that contribute to storage and retrieval costs, greater space needs, lost filings, and added delay. Its less-than-functional implementation of courtroom technology, including video-conferencing of immigration proceedings, has led to difficulties in maintaining connectivity, adequately hearing the participants, exchanging paper documents, conducting accurate foreign language interpretation, and assessing the demeanor and credibility of respondents and witnesses.

The June 2017 GAO report on EOIR lays bare this reliance on outdated technologies, as well as other problems that include case backlogs of epic size, costly and ineffective case management, and significantly inadequate, inefficient hiring practices. *See* GAO-17-438, IMMIGRATION COURTS: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017). This is “justice delayed,” contrary to congressional and public expectations for timely and efficient judicial administration.

Constraints on Immigration Judicial Authority

Current Board of Immigration Appeals members and immigration judges are considered only “attorneys representing the United States in litigation” – not independent, fully empowered judicial officers. They are responsible for carrying out formal adjudications yet, due to bureaucratic resistance within DOJ and the U.S. Department of Homeland Security (DHS), are deprived of the judicial authority – expressly conferred by Congress – to impose contempt sanctions upon noncompliant parties when necessary. They also lack independence to freely decide the matters before them and, indeed, are subject to discipline if the Attorney General disagrees with their decisions. The potential for political influence puts due process and rule of law at risk. As law professor Stephen Legomsky noted,

The benefits of decisional independence in an adjudicative context are compelling. . . . People who decide cases should base their decisions on their honest assessments of the evidence and their honest interpretations of the relevant law, not on the basis of which outcomes are most likely to please the officials who have the power to fire them. In addition, decisional independence serves to avoid defensive judging (playing it safe); to protect unpopular individuals, minorities, and viewpoints; to operationalize separation of powers; to nourish public confidence in the integrity of the justice system; to prevent “reverse social Darwinism,” in which the most honest and most courageous adjudicators are the ones first culled from the herd; to make the positions attractive enough to recruit the most talented candidates; and to sustain a continuity of interpretation from one administration to the next.

Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1691 (2010).

In addition, due to the number of immigration judges and members of the Board of Immigration Appeals who are former DOJ or DHS attorneys, as well as the co-location of some immigration courts with Immigration and Customs Enforcement offices, a broad perception exists that immigration judges and DHS attorneys are working together, or that the immigration courts act merely as “rubber stamps” to approve and uphold DHS actions. These perceptions degrade the respect of aliens appearing before the immigration courts and contribute to increased court absences, prompted by fear and belief that the system is rigged. Without their active participation, the rule of law falls short and justice suffers. Access to the truth is compromised when merit hearings are delayed for years.

Benefits of an Article I Immigration Court

In 2010, the FBA (through its Immigration Law Section) began to assess the alternatives to restructuring the immigration adjudication framework. Ultimately it concluded that success in that venture relied upon transforming EOIR from a bureaucracy into a true specialty court, the hallmark of Article I status. The transfer by statute of EOIR’s adjudicative components (trial and appellate judges and support) to a specialized tribunal would bring with it distinct benefits: fairness in the administration of the immigration laws; adjudication independent of political decision-making; and fixed terms of office for immigration judges, facilitating judicial decisions without fear or favor. Managed by the judges themselves rather than bureaucrats, an Article I immigration court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect.

An independent Article I immigration court would properly take its place beside other Article I courts established by Congress. In fact, creation of an Article I court in this context would comport with past congressional practice in the establishment of Article I courts for other specialty areas of federal law – including tax administration, veterans

benefits, and military justice – that involve executive branch policy-making, priority-setting and impartial adjudication. The origins of the existing Article I courts are similar to that of the immigration courts today. Much like the current immigration courts, the United States Tax Court, United States Court of Appeals for Veterans Claims, and United States Court of Appeals for the Armed Forces started out as internal components of civilian or military bureaucracies, with little or no separation from those responsible for executive leadership. In each instance, initial attempts at reform sought to separate the executive and adjudicative responsibilities, yet retain both within the same agency structure, reporting to the same higher-level management. Ultimately, concerns over fairness and impartiality led Congress to extract the adjudicative responsibilities and reposition them in an independent Article I court. This history demonstrates repeated recognition by Congress that independent review by “real” judges is the *sine qua non* of faithfully adjudicating rights and responsibilities in matters governed by public law.

A similar evolution is already under way in the immigration context, one that began over a century ago. Our nation’s system for the adjudication of immigration matters originated in 1893, when Congress replaced state and local inspection practices with federal “Boards of Special Inquiry” (each comprised of three immigration inspectors) that reviewed and decided whether to exclude or deport foreign persons seeking to enter or remain in the United States. In 1921, after Congress instituted a quota system limiting the number of immigrants, the Secretary of Labor created a “Board of Review” to handle administrative appeals and, in 1933, established the Immigration and Naturalization Service (INS) to handle all immigration matters, including Board of Review proceedings.

The INS was moved to the Department of Justice in 1940, and the Attorney General thereafter renamed the Board of Review as the “Board of Immigration Appeals.” In 1952, Congress replaced the Boards of Special Inquiry with individual “special inquiry officers” to review and decide deportation cases. In 1973, those officers were authorized by regulation to use the title “Immigration Judge,” a change affirmed by legislation in 1996, and to wear judicial robes. In 1983, the Attorney General created EOIR, separating the adjudicative responsibilities performed by the immigration judges and the Board of Immigration Appeals from the prosecutorial and investigative responsibilities, as well as first-line, informal adjudications, which continued to be handled by INS. And in 2002, when INS was dissolved and reconstituted as three components within the newly established DHS, Congress continued to respect the need for separation of adjudicative responsibilities by keeping EOIR within DOJ. Today we stand at another potential hinge moment, in which Congress could take the next logical step – establishing an Article I immigration court – just as it did in the creation of the Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces.

Broad consensus exists for the creation of an Article I court. The GAO, in its review of potential restructuring alternatives, reported that a majority of immigration court experts and stakeholders support the Article I alternative. Reestablishing EOIR as an Article I court would replace an overstuffed, bloated bureaucracy with a new structure, modeled on the federal courts, their case management expertise, and their demonstrated record for delivering prompt, effective justice.

The idea of an Article I immigration court is not new. The Select Commission on Immigration and Refugee Policy proposed the creation of an Article I immigration court in 1981 (see U.S. Immigration Policy and the National Interest (Mar. 1, 1981), *available at* <https://files.eric.ed.gov/fulltext/ED211612.pdf>). An Article I immigration court has been proposed numerous times in Congress over the past three decades, including a series of bills introduced in the House of Representatives between 1982 and 1999. Even then, experts saw the need for change because of “[l]ong delays [that] pervade the quasi-judicial hearing and appellate process” and the reality that “[immigration judges] are subject to inappropriate interference from law enforcement personnel, lack the necessary control over the administration of their own hearings, and lack the resources needed to carry out their essential functions.” See Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. Rev. 644, 645-46 (1981). Little has changed since then; the same problems remain today, only with greater size and seriousness. EOIR’s dysfunction, as highlighted in last year’s GAO report, continues to contribute to monumental immigration judge caseloads and significant backlogs. The time to reconstitute the immigration court system on an independent, Article I basis is now.

Bi-Level and Efficient Adjudication

The FBA proposal for the creation of an Article I immigration court would not duplicate or create new jobs or in any way expand the size of the federal government. It would reposition EOIR’s current quasi-judicial responsibilities in an independent, professionally managed Article I tribunal, staffed with merit-appointed judges at the trial level and only enough presidentially nominated, senatorially-confirmed appellate judges to replace the current Board of Immigration Appeals. These appointments would be consistent with the Appointments Clause of the Constitution and essentially follow the local merit-selection process successfully used for decades to appoint bankruptcy judges and magistrate judges in the federal court system. While the political branches of government would still participate in appointments to the appellate division, the court would be insulated from undue political influence and policy shifts by staggering the terms of office of the appellate judges and mandating among them the same partisan balance that is already required for the United States Court of International Trade and dozens of independent, multi-member federal boards and commissions (e.g., Securities and Exchange Commission). Also, judges in both the appellate and trial divisions would serve for renewable 15-year terms, enabling them to focus solely on their judicial responsibilities, free of daily concerns about continued employment.

Establishment of an independent Article I court would have the additional benefit of permitting DHS to seek review of the new court’s appellate decisions in the courts of appeals for the respective circuits. This would provide those courts with the authority to oversee the interpretation of the INA based on a broader view of the issues addressed at the trial level. Because that statute currently requires that the Attorney General be named as the respondent on any petition for circuit review, see 8 U.S.C. § 1252(b)(3)(A), the government is unable to appeal against its own decisions, and thus cannot raise legal interpretation

questions of interest to those responsible for administering the INA, even when DHS and DOJ differ in their views. With an Article I court independent of both departments, that barrier would disappear. This would represent a significant change. EOIR's FY 2016 Statistics Yearbook indicates that one-quarter of the cases initially decided by the Board of Immigration Appeals were favorable to the individual – and therefore never subject to Article III appellate review under the current system. By affording both sides to an immigration case the right to appeal to the regional circuits, guiding Article III precedents would be developed in a more balanced context.

The transition to the new, independent Article I court under the FBA legislative proposal would be relatively seamless. The current responsibilities of the Board of Immigration Appeals, the Office of the Chief Administrative Judge (i.e., the existing immigration courts), and the Office of the Chief Administrative Hearing Officer (OCAHO, i.e., the administrative law judge (ALJ) who hears complaints against employers) would simply be transferred at first, along with support personnel, from the Department of Justice to the new court. Although fresh judicial appointments would be required after a reasonable transition period, continuity would be maintained by retaining incumbent immigration judges and Board members on an interim basis to preserve institutional memory and avert disruption of pending proceedings. Once the new immigration court has made substantial reductions on the backlog, other formal adjudications, including those presently conducted in DHS's Administrative Appeals Office and the Labor Department's Board of Alien Labor Certification Appeals, would be studied to determine if those functions should similarly be transferred to the Article I court.

Savings through Professional Case Management

Professional, efficient case management is a hallmark of our federal court system. For example, in the mid-1990s, the judicial branch examined emerging technologies, identified ways in which the docketing, filing, and management of case documents could be handled more efficiently, and determined to move to an electronic case management and filing system. Implementation of the CM/ECF system for bankruptcy courts began nationally in early 2001, followed by systems for district courts and courts of appeals in 2002 and 2005, respectively. By 2012, all courts of appeals, district courts, and bankruptcy courts were accepting electronic filings via CM/ECF. Now, most of these courts have moved to an upgraded "NextGen" version of the system. Over 41 million cases and 500 million documents are on CM/ECF systems, and more than 700,000 attorneys across the country are filing documents electronically. Though the federal courts have significant experience with unrepresented parties, that constituency has not been a barrier to implementation.

By contrast, electronic filing at EOIR is only a pipe dream. Although EOIR first identified the need for an electronic filing system in 2001, as the GAO report points out, no e-filing capacity is in sight. Despite repeated promises in 2005, 2013, 2015, and 2017, no real progress has been made, the result of bureaucratic shuffling, reorganization, and different political priorities. Significant cost savings would be realized if an Article I

immigration court could finally implement a modern electronic case filing system equal to what the federal courts have had for several years.

Significant efficiencies and cost savings could be achieved through the hearing of alien removal and employer sanction cases by the same immigration judges, without the need to maintain a duplicate system as now exists in the separate OCAHO within EOIR. An independent court would continue to provide necessary due process protections for U.S. employers potentially subject to substantial fines, the single OCAHO ALJ would be included at the trial court level, and additional judges could be easily assigned to employer cases if needed. Eliminating for those cases the administrative expenses of a separate court with a separate oversight bureaucracy represents true savings.

In addition, moving the immigration judiciary out of DOJ would alleviate the perception that immigration judges are not independent, fair adjudicators, and that DHS and individual respondents are not parties of equal standing in immigration cases. This would also cure the perception that the immigration courts and the Board of Immigration Appeals have become so politicized that their decisions are based not on the established law but on the changing views of successive administrations.

Real Reform Is Possible

As an Article I court begins to operate, and individual cases start to receive fair, prompt, and accurate attention, respect for that court's authority and decisions should grow over time, lessening delays caused by both parties' dilatory actions as well as the volume of appeals and remands. The localized merit-selection process proposed for trial judge appointments would not take 742 days (over two years) – the average time required for EOIR to complete immigration judge hiring in the five-year period studied by GAO (*see* report, *supra*, at 40). It bears noting that in the federal district courts, the merit-based appointment of magistrate judges (used as a model in our proposal) often takes less than half of that time.

In an Article I court, trial judges would gain control over their dockets and no longer be subject to shifting decisions by political superiors to prioritize case A over case B (and vice-versa) or send judges off to border areas to handle a few cases while their regular dockets are further backlogged. The new court itself would establish and modify administrative and procedural rules as needed, free of EOIR's current byzantine requirements for consultation with numerous, disparate offices and agencies.

While we recognize that no structural alternative, including that of an Article I court, will single-handedly fix the current case backlog at the trial level, the restructuring of immigration adjudication as an Article I court is the quintessential "good government" measure. Members of Congress – and this Subcommittee – may have strong opinions about whether the substantive provisions of our nation's immigration laws need a complete overhaul or only a quick fix. But if we focus attention on the current adjudicative system, it is apparent that an Article I approach is far superior to the current situation.

Our immigration judiciary, as with all our institutions, represents this nation's traditional fidelity to the rule of law and its commitment to fundamental fairness for all who enter our courts. We encourage the Subcommittee to make our system of immigration adjudication the best it can be, and we look forward to working with you in that endeavor.

Sincerely yours,



Kip T. Bollin
National President



Elizabeth Stevens
Chair, Immigration Law Section

cc: Members of the Subcommittee on Border Security and Immigration