

Proposed Article I Immigration Court



Immigration Update

by Christine Lockhart Poarch

The FBA's Proposal for the Creation of a Federal Immigration Court

Recently, the FBA Immigration Law Section

proposed that Congress establish a new, specialized court under Article I of the Constitution. This new court would be created by transferring the adjudicatory responsibilities currently performed by the Executive Office of Immigration Review (EOIR) in the Department of Justice (DOJ) to the U.S. judiciary. The FBA adopted the Immigration Law Section's proposal during the FBA Board of Directors' recent determination of the 2013–2014 Issues Agenda. Through that agenda, the Federal Bar Association has now called upon Congress to create a specialized federal court for the adjudication of immigration claims under the Immigration and Naturalization Act.

Background: The Immigration Law Section's Proposal

The legal community has been aware, since at least the 1980s, of the defects of the current immigration adjudication system, which time has only made more pronounced. The Hon. Dana Leigh Marks, president of the National Association of Immigration Judges, published an article discussing the need for this reform in the March 2012 edition of *The Federal Lawyer* (available on the FBA website). A number of other legal groups have also endorsed the creation of an independent immigration court. Those developments prompted H. Raymond Fasano, chair of the Immigration Law Section, to appoint a committee to draft a proposal for the creation of an Article I Immigration Court. Following lively debate within the committee, the section's board adopted a revised proposal that has been endorsed by the FBA's National Board of Directors and included in the FBA's Issues Agenda.

In a Nutshell: The Problems and Potential Solutions

Although Congress directed that immigration judges should be considered administrative judges, raised their compensation to the approximate level of administrative law judges, and even granted contempt authority¹; the DOJ still considers immigration judges to be department attorneys. The due process protections of the Administrative Procedures Act (APA) do not apply in immigration proceedings. DOJ also retains ultimate control over immigration judge decisions and employment. They are thus placed in an

ethical dilemma, as the public (and the courts of appeals) perceive them as independent, when they are actually subject to substantial agency supervision.

Further, EOIR, which is the home for immigration judges as well as the Board of Immigration Appeals, has an agency rather than a court structure, with many layers of supervision and administration. This reform would result in cost-savings through greater efficiency. EOIR would be reorganized as a court system, with per-judge funding either equal to that of district judges, or roughly equal to that of other Article I judges (such as bankruptcy and magistrate judges). These substantial improvements in resources and efficiency could be realized without additional expenditures by Congress.

There is another system of trial courts within EOIR—the Office of the Chief Administrative Hearing Officer (OCAHO), designed to hear employer sanctions cases.² Because such actions involve U.S. citizens, Congress provided for their adjudication by administrative law judges, rather than immigration judges, and so these proceedings are subject to the protections of the APA. However, the employer sanctions regime never realized its anticipated volume, and OCAHO lapsed into relative inactivity even though it is still staffed as a separate division of EOIR. Merging the functions of these two trial divisions would result in greater savings and efficiency.

Finally, revenue to fund the court would be created not only by realized savings, but also by the generation of court filing fees. EOIR generally does not collect fees for the adjudications that it conducts, as they are collected and retained by the Department of Homeland Security. Those fees that EOIR does collect, such as for appeals and motions to reopen, have not been increased in two decades and are clearly inadequate.

The Proposal

First, the proposal would abolish the present Executive Office for Immigration Review in the Department of Justice and transfer its functions to a newly created U.S. Immigration Court. The U.S. Immigration Court would be administered by the Administrative Office of the U.S. Courts, as is the Bankruptcy Court. A chief immi-

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gration appeals judge, nominated by the President with Senate confirmation, would direct the U.S. Immigration Court and serve for a five-year term.

The court would consist of two levels:

- An appellate level of 15 immigration appeals judges, analogous to the present Board of Immigration Appeals (BIA). The President would appoint these members to 15-year terms with Senate confirmation. The initial panel would be divided into three

clerical duties. Rather than being an administrative bureaucracy as it is now, the immigration court staff will be responsive to its judges and to the public.

- Cost Savings: According to the Administrative Office of the U.S. Courts, the cost of operations for one U.S. district judge (including staff, office, and courtroom) is \$1.1 million. Although EOIR is far less transparent, a best estimate of the similar cost for an immigration judge is \$1.0 million. Considering the vast superiority in resources possessed by the district court as opposed to

“[An Article I immigration court] will foster greater judicial independence, cost-savings, and speed in deciding immigration claims.”

—Karen Silberman, Federal Bar Association Executive Director

groups, with staggered appointments for 5, 10, and 15 years. Decisions will be made by three-judge panels; and

- A trial level of immigration judges, appointed for 15-year terms by the relevant judicial circuit, in a manner similar to that of bankruptcy judges.

To ensure that the work of the present immigration judges and BIA continue without disruption, all current immigration judges and BIA board members would be appointed to initial terms.

Compensation would be essentially the same as it is now, except that all judges will be paid at the same rate, regardless of their years of service. This would, in effect, raise the pay of more junior judges; although, as the highest rate is reached in only four or five years, most judges currently receive the highest rate. The proposal would also make the Judicial Retirement System available to judges of the immigration court, just as it is for magistrate and bankruptcy judges. To cover these additional expenses, the court would collect fees for the matters it adjudicates, at the rates presently charged by the Department of Homeland Security. Fees for appeals and motions would be increased to reasonable levels.

The employer-sanctions functions of the administrative law judges of the Office of the Chief Administrative Hearing Officer would be merged with the traditional immigration judge function. This would permit greater flexibility, in that any U.S. immigration judge would have jurisdiction over cases under the sanctions regime. This would eliminate the expense and inefficiency of having a separate organization to hear sanctions cases.

Finally, retired judges could be used as senior judges to augment the capabilities of the immigration court as needed, and discipline and removal of judges would be handled in a judicial manner.

Advantages Over the Present System.

- Independence: The immigration court would be fully independent of the executive branch. No longer will judges be intimidated or disciplined for their good-faith decisions.
- Best Use of Judicial Resources and Traditional Judicial Authority: Judges will have greater control over their cases. Now, judges lack authority to supervise law clerks and support personnel. Judges will be able to devote their time to deciding cases rather than finding files, making copies, and performing

the immigration court, it is clear that funds are not being utilized in an optimum manner under the present system. Freeing up these resources will enormously enhance the mission of the U.S. Immigration Court and permit more efficient justice. Collecting fees for adjudication of applications and appeals should more than compensate for the increases in compensation and expenses of an Article I court. Moreover, efficient combination of the function of immigration judges with that of the administrative law judges in employer sanctions cases will create additional cost savings, including travel costs.

- Increased Professionalism: Finally, it will elevate the percep-

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tion of the practice of immigration law to the true federal specialty that it is. The difficulties faced by EOIR in appropriately sanctioning unauthorized practitioners will be managed by the existing licensure requirements of the U.S. court system, which require appropriate bar membership. This will protect the public and ensure greater accountability by immigration practitioners in general.

Future Possibilities

In addition to using existing resources more efficiently and flexibly, establishing the U.S. Immigration Court under Article I could have benefits in the more distant future. The draft bill provides for a study of the feasibility of consolidating all immigration-related adjudications in the immigration court. Currently, the Departments of Homeland Security, State, and Labor maintain review units that interpret various aspects of the Immigration and Nationality Act. Some of those units comprise administrative law judges while others are staffed by non-attorney officers. Having a single body making these decisions would promote consistency, efficiency, and fidelity to the law.

Once the U.S. Immigration Court is well established, Congress might even consider transferring criminal jurisdiction over misdemeanor immigration violations to the immigration court. This would take considerable pressure from district courts, especially

those located in border states that are currently inundated with prosecutions for illegal entry and other minor violations.

Conclusion

The Immigration Law Section of the Federal Bar Association is grateful that the Federal Bar Association has included this reform in its current Issues Agenda. Congressional establishment of an Article I Immigration Court would bring about judicial independence, cost savings, and speed in deciding immigration claims. In addition, the administration of justice under the immigration laws would be improved. This would bring to immigration law the same level of professionalism and quality of justice that the bankruptcy and debtor-creditor law experienced through the creation of the Article I Bankruptcy Courts. It is, we believe, high time. ☉

Endnotes

¹Illegal Immigration Reform and Immigrant Responsibility Act of 1996, division C of Pub. L. No. 104-208, sections 304, 371 [the latter amended by section 1125(c)(4) of National Defense Authorization Act for FY 2004].

²Immigration Reform and Control Act of 1986, Pub. L. No. 99-603.

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Immigration Court Backlog Shows No Sign of Shrinking

Written by [Tory Johnson](#) April 22, 2016

American Immigration Council

<http://immigrationimpact.com/2016/04/22/immigration-court-backlog-shows-no-sign-shrinking/>

The latest figures show that the number of cases pending in immigration court continue to grow. According to the Transactional Records Access Clearinghouse ([TRAC](#)), there were 486,206 cases in the backlog as of the end of March. This is almost 30,000 more pending cases than Executive Office of Immigration Review (EOIR) Director Juan Osuna [reported](#) to Congress at the end of Fiscal Year (FY) 2015.

The data show that in the first half of FY 2016 (October 2015 through March 2016), a total of [99,452](#) cases were completed in immigration court. In FY 2015, TRAC [estimated](#) that 198,105 cases total were completed—meaning this year cases are moving through immigration court at about the same rate. A case could be classified as completed if someone was ordered or volunteered to be removed, the court terminated the case because there were no grounds for removal, someone was granted relief to stay in the country, or the case was closed on administrative grounds.

While EOIR has [sworn in](#) 17 new immigration judges since January 2016, following a major hiring push in late 2015, it is clear the current backlog will take some time to bring to a manageable level. In the meantime, those seeking asylum and other forms of relief are caught in an inefficient and inconsistent system.

As of the end of March, relief had been granted in [8,165](#) cases since October 1. In FY 2015, relief was granted in [20,208](#) of the total completed cases. The projections for the current fiscal year show a significant drop, with just [16,330](#) cases completed as of March.

The TRAC [data](#) reveal that in cases where relief is granted, the time it takes to process a case varies significantly from state to state. In New York, for example, it took more than 1,000 days on average—or about three years—for a qualifying asylum seeker to obtain relief. Likewise, in five other states—Arizona, Illinois, Nevada, California and Ohio—the average was also more than 1,000 days. Puerto Rico had the fastest time with an average of 378 days. Overall, it took at least two years on average for a qualifying asylum seeker to be granted relief in 15 states, out of 28 states with immigration court data.

The lengthy processing times have hidden [consequences](#) for those seeking asylum. Many individuals navigating the immigration system have already experienced

trauma and violence, and are subjected to further suffering in the form of detention and ankle shackles while their case is processed. Many immigrants remain detained during their hearings, including families and children fleeing persecution, with serious negative health impacts. Some detainees with valid claims to stay in the United States simply give up.

For more than a decade, the immigration court system has struggled with its enormous backlog. After attempting to bring down processing times by implementing flawed prioritization policies that led certain cases to be processed with [alarming speed](#), EOIR finally received an influx in [funding from Congress](#) for new immigration judges in FY 2016. Halfway through FY 2016, the data shows that the issues in the immigration court system are deeply rooted and may take more time to be addressed. Hopefully, as more immigration judges are vetted and hired, we will see a greater impact on the backlog and wait times for asylum seekers.

Congress of the United States
Washington, DC 20515

January 12, 2015

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
41 G Street, NW
Washington, D.C. 20548

Re: Request for a GAO Study on the Costs and Cost-Effectiveness
of an Article I Immigration Court

Dear Mr. Dodaro:

We are writing to request that the Government Accountability Office (GAO) conduct a study into the costs and cost-effectiveness of converting the current immigration court system into an Article I court. Such a study would inform ongoing policy debates regarding the ability of the current immigration court system to adequately handle its growing caseload. The number of removal cases pending before the court has been steadily increasing for well over a decade with more than 400,000 Immigration Court cases now pending. Case adjudication backlogs have been growing and lawmakers and stakeholders are in search of a solution.

The nation's immigration court system is located within the Executive Office for Immigration Review (EOIR), a component of the U.S. Department of Justice (DOJ). In addition to raising concerns that the placement of EOIR within the DOJ may jeopardize the ability of the agency to get adequate funding, many organizations have expressed concerns about the judicial independence of a court operating pursuant to delegated authority of the Attorney General. A pending federal court lawsuit filed by an Immigration Judge of Iranian heritage who is challenging an order indefinitely recusing her from all cases involving Iranian nationals raises related questions about the appropriateness of disciplinary procedures for Immigration Judges.¹

In an effort to address these and other concerns, numerous organizations, such as the American Bar Association, the Federal Bar Association, the American Judicature Society, Appleseed and the National Association of Immigration Judges have endorsed the creation of an Immigration Court system independent from the DOJ. Such a proposal is not new. In 1981, the Select Commission on Immigration and Refugee Policy proposed the idea of an Article I Immigration Court. Several legislative proposals also have been introduced, though none have been enacted into law.

We therefore request that the GAO review and assess:

- 1) the existing operations and performance of immigration courts within EOIR;

¹ Associated Press, *Immigration Judge Sues over Recusal from Cases*, Aug. 13, 2014, available at <http://bigstory.ap.org/article/immigration-judge-recused-iranian-cases-sues>.

- 2) the extent to which DOJ and EOIR have examined the operations and performance of the courts, identified any challenges, and taken steps to respond to any identified challenges; and
- 3) options to improve immigration court operations and performance, including possible structural changes to transition to an Article I court with particular focus on whether the federal bankruptcy court model could serve as a useful model.

With respect to the costs and cost-effectiveness of transitioning to an Article I court, we request that GAO review and assess:

- 1) the start-up and transition-related costs of establishing an Article I immigration court system; and
- 2) the ongoing operational costs of operating an Article I Immigration Court as compared to the ongoing operational costs of the current structure.

Thank you for your attention to this matter. We look forward to working with you on this study.

Sincerely,



Trey Gowdy
Chairman
Subcommittee on Immigration and Border Security



Zoe Lofgren
Ranking Member
Subcommittee on Immigration and Border Security