EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

OF THE

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HOUSE OF REPRESENTATIVES

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EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

TUESDAY, SEPTEMBER 23, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:17 a.m., in room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (Chairwoman of the Subcommittee) presiding.

Present: Representatives Conyers, Lofgren, Sánchez, Smith, and King.

Staff Present: Traci Hong, Majority Counsel; George Fishman; Minority Counsel; and Andrés Jimenez, Majority Professional Staff Member

Ms. LOFGREN. The Ranking Member having arrived, the hearing of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law is now able to come to order.

On July 28, 2008, the Department of Justice's Office of Professional Responsibility and the Office of the Inspector General (I.G.) issued a report showing that three high-level Department of Justice officials—Kyle Sampson, Jan Williams, and Monica Goodling—violated Department of Justice policy and Federal law by considering political or ideological affiliations in soliciting and evaluating candidates for immigration judges (I.J.), which are Schedule A career positions, not political appointments.

"Further"—and this is a quote of the I.G.—"the evidence demonstrates that their violations were not isolated instances but were systematic in nature."

Based on this report, it appears Republicans credentials, rather than knowledge of and experience in immigration law, became the main criteria for hiring immigration judges and members of the Board of Immigration Appeals (BIA). All three named officials only considered candidates referred to them by the White House, Republican Members of Congress, Republican political appointees, the Federalist Society, the Republican National Lawyers Association, and individuals with Republican Party affiliations, while ignoring candidates sent to them by the Executive Office for Immigration Review.

This politicization of EOIR occurred at a time when immigration courts and the Board of Immigration Appeals were also suffering from systemic problems created by former Attorney General Ash-

croft's streamlining plan. By 2002, then-Attorney General John Ashcroft promulgated a rule that established—and this is a quote—"the primacy of the streamlining system for the majority of the cases." The 2002 streamlining regulation made single-member decisions and affirmance without opinions the norm, rather than the exception.

At the same time, Attorney General Ashcroft also reduced the size of the BIA from 23 members to 11. Several analyses of the eliminated BIA members found that the selections had been ideological, and those with voting records most favorable to applicants or appellants were the ones chosen for reassignment.

The result of the Ashcroft streamlining plan was a significant increase in the number of BIA decisions appealed to the Federal courts of appeal. The courts of appeal not only reversed the BIA at a higher rate, but also added uncharacteristically scathing comments about the poor quality of I.J. and BIA decisions.

Moreover, even as the Administration and Congress dedicated more resources to the arrest and detention of deportable noncitizens, they failed to commit a similar level of resources to the immigration courts, which are responsible for determining whether certain noncitizens are, in fact, deportable.

The failure to devote adequate resources to the immigration courts has led to increased caseloads at all levels of the removal process: at the immigration courts, the BIA, and, of course, the Federal courts. EOIR has been too long ignored, and the result has been politicization of the immigration courts, so-called streamlining, and inadequate resources.

Now, I look forward to hearing from our witnesses today so we may begin to address these very serious problems in the administrative removal process, which is really at the heart of our immigration enforcement system.

I would note that we have received informal input from the Federal circuits who are alarmed at the increased volume of appeals that is gridlocking the Federal courts and having an adverse impact on civil litigation generally. And they really believe it is a product of dysfunction in the immigration courts and the BIA.

So wherever one lies on the immigration debate, I think it is certainly not in the national interest to gridlock the Federal appellate courts with matters that should be appropriately decided at a lower level and are not being properly decided.

I will finally add that when then-Attorney General Ashcroft made his decisions, many of us, including myself, on the Judiciary Committee warned that it would be a disastrous result. Our comments were ignored. And once again, I am mindful of how unsatisfactory are the words, "I told you so."

So, at this point, I would recognize our distinguished Ranking minority Member, Steve King, for any opening statement he may have.

Mr. KING. Thank you, Madam Chair.

And I welcome the witnesses today.

Politics in the hiring process at an executive agency is nothing new. However, it should not be done in violation of the law. The inspector general has already issued its report, which found some improper hiring practices at the Department of Justice.

Instead of focusing on the conduct of a few former Department of Justice officials, I hope this hearing proves to be truly useful by shedding light on what we, in Congress, can do to ensure a credible and efficient immigration litigation system.

In 2007, the roughly 220 U.S. immigration judges heard 328,425 cases, and the Board of Immigration Appeals completed 35,393 cases. They should be provided with the resources needed to perform their jobs effectively now that our immigration laws are being enforced more vigorously—not as vigorously as I would like, however. Anything less leaves EOIR open to criticism.

In the same vein, Congress should work to implement immigration policy that reduces the workload of immigration courts instead of policy that increases their workload. It does no good to vilify an entire group of immigration judges and Board of Immigration Appeals members simply because a few were hired after their political affiliation was determined.

Unfortunately, hiring scandals have occurred in the past. In 1995, during the Clinton administration, White males were blatantly discriminated against in the hiring process for immigration judges. In fact, plaintiffs were certified as a class of "White, male applicants for employment not selected as immigration judges during 1994 and 1995." And they won their case against DOJ.

It makes no more sense to impugn immigration judges hired during the Bush administration than to impugn those hired during the Clinton administration.

In an effort to ensure quality decisions in the immigration litigation system, the Executive Office for Immigration Review is implementing 22 directives announced by the Department of Justice in 2006.

In recent years, the Board of Immigration Appeals has come under fire from some Federal courts for its use of affirmances without opinion, AWOs, which are one-sentence decisions affirming the immigration judge's ruling. Use of AWOs became popular in an effort to streamline the overwhelming number of immigration cases, but critics think that the AWOs show a lack of diligence and willingness to examine all of the facts on the part of the immigration judges. Others disagree.

In 2006, the Second Circuit held that, "The BIA's members and the dedicated corps of immigration judges under the board's supervision should be applauded for their continuing diligence, their integrity and, as is shown in the records of nearly all immigration cases in this court, their earnest desire to reach and equitable results under an almost overwhelmingly complex legal regime."

And I will submit that the fear of being seen as too harsh toward alien litigants by the Federal courts, Members of Congress and nongovernmental agencies, that fear may have caused some immigration judges and BIA members to bend the law in favor of illegal immigrants and criminal aliens.

We have witnessed this before. It is why Congress took action in 1996 to reduce the amount of discretion held by immigration judges. Maybe we would have a fairer process for the American people if ICE could appeal EOIR decisions made in favor of illegal immigrants and criminal aliens.

The reversal rates show that most of the criticism is unfair. So far this year, 87 percent of BIA decisions that have been appealed were affirmed by Federal courts. The affirmance rates are even higher in the circuits with large numbers of cases. For instance, this year, the Ninth Circuit, large numbers of cases, has affirmed 81 percent of the BIA appeals.

I look forward to the testimony of the witnesses here today to give this Congress guidance on changes that may be warranted to ensure fair and equitable disposition of immigration cases.

I think we need to, though, advocate for a balance here and not overreact to a sample. Because the sample of what we have seen before in this hearing and some of the decisions and the advocacy that comes from the other side I think doesn't reflect the whole. So I urge our restraint in overreacting to something here.

I am looking forward to the testimony of the witnesses.

And I yield back the balance of my time.

Ms. LOFGREN. The Chairman of the House Judiciary Committee, Congressman Conyers, is recognized if he wishes to give an opening statement.

Mr. CONYERS. Thank you, Madam Chairwoman.

I welcome the witnesses. And I want to report to you that this is the first oversight hearing on what you gentlemen have been supposed to have been doing for a long time. So a lot of the problem is that we in Congress haven't been doing our job. When the cat is away, the mice will play.

So I want to just read you what the inspector general's report said, the part that really criticizes you. "The evidence detailed above in the report demonstrates that Kyle Sampson, Jan Williams, Monica Goodling each violated Department of Justice policy and Federal law by considering political or ideological affiliations in soliciting and evaluating candidates for immigration judges, which are Schedule A career positions, not political appointments."

Now, I will insert my comments in here. There were political appointments made en masse. I am not talking about a couple political appointments; I am talking about a lot of them. And we found out about that now. And we regret it very much, because you have some explaining to do here today about that.

And then the inspector general goes on to say, "Further, the evidence demonstrates that their violations were not isolated instances, but were systemic in nature."

"The evidence demonstrates further"—and I am quoting—"that Goodling violated department policy and Federal law by considering political or ideological affiliations in selecting candidates even for the Board of Immigration Appeals."

So we hope you will find time, in your opening statements and other opportunities, to help us understand the depth of what went wrong and how that happened.

Now, I know one of the excuses coming forward is that we need more money in the budget to hire more judges. And, of course, that is a function of the executive branch, as well as the Congress, not owning up to what the reality of this thing is. How can 215 immigration judges be expected to handle a caseload of 300,000 cases a year?

And then, of course, to make insult to injury, the reduction of the Board of Immigration Appeals from 23 members to 11 members. What do you think that did? A crushing workload, an appellate mess, that has spilled over into the circuit courts as well.

So if you notice some unhappiness in my presentation about what you have been doing, you are absolutely right. This is awful. And of course we plan to get to the bottom of it.

And I hope that you feel free to comment on anything I have said here at the hearing or subsequently in writing afterward.

Thank you, Madam Chairwoman.

Ms. LOFGREN. Thank you, Mr. Chairman.

I would now invite the Ranking Member of the full Committee, Congressman Smith, to deliver any opening statement.

Mr. SMITH. Is that an open invitation?

Ms. LOFGREN. If you have an opening statement, now would be the time.

Mr. SMITH. Thank you, Madam Chair.

I, too, was disappointed with the finding of the July 2008 inspector general's report that senior Justice Department officials violated civil service laws in the hiring of several career employees, detailees and immigration judges.

The Justice Department is responsible for enforcing the law, so it is regrettable when its officials abuse their positions of authority and violate the laws that they had promised to uphold.

While the findings in the report are troubling, we must be sure not to let the actions of a few undermine the good work of the many. On the whole, immigration judges and members of the Board of Immigration Appeals carry out their duties in a highly professional manner. In fact, less than 10 percent of cases decided by immigration judges are appealed to the Board of Immigration Appeals. Understanding that immigration judges hear over 300,000 cases per year, such a low rate of appeals is impressive.

I am pleased that, in response to the inspector general's report, the attorney general has already taken steps to guard against future abuses. And the mechanisms in place since April 2007 help to ensure a lack of political influence in the hiring process.

There is no government agency that is not deserving of at least legitimate criticism. The important thing is whether the criticism leads to constructive changes being implemented to address these concerns.

In August 2006, then-Attorney General Gonzales announced 22 new directives for the Executive Office of Immigration Review, and EOIR has made significant positive strides in implementing those directives.

For example, newly appointed immigration judges and Board of Immigration Appeals members must pass a test on immigration law. In addition, the judges and board members are trained periodically on immigration subjects such as asylum adjudication and international religious freedom.

Mechanisms have been put into place to notify EOIR management about any inappropriate conduct by immigration judges. And the Department of Justice has proposed a new regulation to increase the ability of judges to discipline attorneys who file frivolous

lawsuits and to provide sanctions for gross misconduct on the part of counsel or litigants.

EOIR continues to make progress on the implementation of those 22 directives, which will ensure a more streamlined and effective immigration litigation system.

The number of immigration court cases in the United States is on the rise, due, in part, to a long-overdue increase in enforcement of our immigration laws. And Congress needs to respond with additional funding to hire judges and support staff to relieve the overwhelmed court system. This is just as important as hiring additional Border Patrol agents.

However, more money is not the only answer. The number of immigration cases will eventually decrease with a consistent emphasis on immigration enforcement. If the laws against illegal hiring and employment, there will be fewer jobs available for illegal immigrants. There will be an increase in the number of illegal immigrants returning to their home countries on their own. There will be less of an incentive to come here in the first place. Finally, of course, there will be a decrease in the number of matters that come before the immigration courts.

I thank you, Madam Chair, and I will yield back.

Ms. LOFGREN. The gentleman yields back.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record within 5 legislative days. And, without objection, all opening statements will be placed in the record.

And, without objection, the Chair is authorized to declare a recess of the hearing at any time.

Today we will hear from two panels of witnesses to help us consider the important issues before us.

It is my pleasure to introduce Lee Lofthus. Mr. Lofthus was appointed as assistant attorney general for administration in December of 2006. His responsibilities include department-wide financial reporting, budget formulation and execution, accounting operations, asset forfeiture, fund operations, support, procurement, and debt management support. He also oversees department-wide facilities management, human resources, business services and planning.

He has served in several financial management positions during 20-plus years with the Department of Justice. He joined the department in 1982, and since that time has held senior management positions overseeing financial operations, financial policy, reportings and systems. He received his MBA in 1982 from the American University in Washington, D.C.

I would also like to introduce Kevin Ohlson. Mr. Ohlson has served as director of the Executive Office for Immigration Review, known as EOIR in the immigration world, since September 2007. Before being appointed director, Mr. Ohlson also served as the deputy director of EOIR and as a member of the Board of Immigration Appeals.

Mr. Ohlson is a graduate of Washington and Jefferson College and the University of Virginia School of Law. Mr. Ohlson is a member of the bar in both Virginia and the District of Columbia.

Upon his graduation from law schools, he was commissioned as an officer in the U.S. Army, where he served as both a judge advo-

cate and as a paratrooper. In 1989, he was appointed as a Federal prosecutor, but in 1990 he was recalled to active duty and was awarded the Bronze Star for his actions overseas during the Persian Gulf war.

As you may know, your written statements will be made part of the record of this hearing in their entirety. We ask during the testimony that you summarize your written testimony in 5 minutes or less.

And to help you know about those time limits, we have a little machine there on the desk. When you have 1 minute remaining, the green light will turn yellow. And when your time is up, a red light will begin. And we don't ask you to stop mid-sentence, but we would ask you to sum up at that point.

Now, it is my understanding that there has been a request that Mr. Ohlson testify first. Is that correct? And I am happy to accommodate that request. So, Mr. Ohlson, if you would begin.

TESTIMONY OF KEVIN A. OHLSON, DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE

Mr. OHLSON. Madam Chairwoman, Congressman King, other Members of the Subcommittee, it is my pleasure to be here today. It provides me with an excellent opportunity to testify about the steps we are taking as we transform the immigration court system. It also gives me the opportunity to answer any questions you may have about that process.

A discussion of the transformation of the immigration courts really needs to begin with the topic of hiring. We now have a process in place that gives career officials at the Executive Office for Immigration Review much of the authority to screen, interview and recommend immigration judge candidates.

Using that process, during the past year, we have been able to hire 18 top-notch immigration judges to augment the many truly outstanding judges we already have on the bench. What is more, there are an additional 16 immigration judge candidates in the pipeline, many of whom are simply waiting for their background investigations to be completed.

But hiring is only the start. When these new immigration judges come onboard, we now provide them with 5 weeks of training, rather than just 1 or 2 weeks of training, as in the past. In addition, they now are required to take and pass a new immigration law exam before they can begin adjudicating cases.

When the new judges come onboard, they are now subject to a formalized review process as part of their probationary period. This probationary period typically lasts 2 years. New immigration judges who are not capable of serving professionally and well will now be removed from the bench.

But it is important to note that we also now are taking many other steps to ensure that all of our immigration judges, whether they are newly hired or long-term veterans, will succeed in their mission. For instance, a year ago we had a week-long training conference for all the immigration judges. Provided we have adequate resources, we plan to resume holding such training conferences on an annual basis in the future.

So far this year, we have conducted a 2-day training program for all the judges in their home courts regarding asylum adjudications. We have launched a new Immigration Judge Benchbook that is full of reference materials. We have developed a comprehensive practice manual that incorporates best practices nationwide. We have begun distributing a monthly newsletter on regulatory, judicial and legislative developments. And we have expanded our online Virtual Law Library.

In addition to these new hiring and training steps, we recently have launched a number of other important initiatives. For instance, we have placed supervisors with immigration judges in six field sites located around the country. We have implemented new, rigorous procedures for reporting and investigating allegations of judicial misconduct. We are working hard to reduce disparities in asylum grant rates among our immigration judges. We are completing a massive revision of our ethics manual.

We have published new regulations that will improve the judicial process. We have launched digital audio recording to replace the antiquated analog recording system we currently have. We have started a new program to help ferret out fraud and abuse in the immigration court system. We have implemented performance work plans with regard to members of the Board of Immigration Appeals, and we have worked diligently to do the same with the immigration judges. And we have significantly enhanced our pro-bono program.

As can be seen then, Madam Chairwoman, we have been very, very busy and very, very productive. And we have made these great strides largely due to the professionalism, dedication and hard work of our immigration judges, who, as has been noted, are on target to handle approximately 300,000 matters this year. That number is staggering, and our immigration judges deserve a tremendous amount of credit.

And they also deserve to have all of the resources requested in the President's 2009 budget. If congressional appropriators match that number, it would be extremely helpful to us as we continue our vitally important mission of transforming the immigration court system.

Thank you.

[The prepared statement of Mr. Ohlson follows:]

PREPARED STATEMENT OF KEVIN A. OHLSON

Statement of Kevin A. Ohlson
Director, Executive Office for Immigration Review

before the
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

House Committee on the Judiciary

Hearing entitled

"Oversight of the Department of Justice's Executive Office for Immigration Review"

September 23, 2008

Chairwoman Lofgren, Ranking Member King, and members of the Subcommittee, it is a pleasure to be here today and to testify before you. It provides me with an opportunity to fully answer any questions you may have about the Immigration Courts and the Board of Immigration Appeals (BIA or the Board). Further, it gives me the chance to brief you on how we are transforming their operations.

The Executive Office for Immigration Review (EOIR) is an agency within the Department of Justice (the Department). Under delegated authority from the Attorney General, Immigration Judges and Board Members interpret and adjudicate immigration cases according to United States immigration laws. EOIR has more than 220 Immigration Judges who conduct administrative court proceedings in more than 50 Immigration Courts located throughout the nation. These Immigration Judges determine whether foreign-born individuals—who are charged by the Department of Homeland Security (DHS) with violating immigration law—should be ordered removed from the United States or should be granted relief from removal and be permitted to remain in this country. The Board primarily reviews appeals of decisions by these Immigration Judges. EOIR's Office of the Chief Administrative Hearing Officer adjudicates immigration-related employment cases. EOIR is committed to ensuring fairness in all of the cases it adjudicates.

As has been noted in the report prepared by the Office of the Inspector General and the Office of Professional Responsibility, the process that was previously used to hire Immigration Judges was problematic. I want to assure you, madam chairwoman, that we now have in place a recruitment, screening, interviewing, recommendation, and selection process that, although time-consuming, is a premiere system for identifying and appointing the very best candidates to serve as Immigration Judges. This new process was implemented in April 2007, and it has returned primary responsibility for reviewing Immigration Judge applications to career officials in EOIR. These new procedures include public announcements 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. It is important to note that even those Immigration Judge candidates who applied prior to the institution of this new hiring process were recently evaluated using the current procedures and were given full consideration.

Regardless of whether an Immigration Judge was hired pursuant to the old system or the new one, our agency now closely monitors them. Newly-hired Immigration Judges typically serve a two-year trial period during which they can be terminated if they fail to consistently demonstrate the necessary abilities, professionalism, and temperament on the bench. As part of this monitoring process, EOIR consults with court staff, peers, and interested parties, and, five months before the end of the Immigration Judge's probationary period, files a report with the Office of the Deputy Attorney General.

With respect to veteran EOIR adjudicators, we recently implemented annual performance evaluations for the Board of Immigration Appeals and are currently in union negotiations concerning the implementation of annual performance evaluations for Immigration Judges. In addition, Assistant Chief Immigration Judges have been assigned to six regional offices to supervise the Immigration Judges in their geographic regions. Further, we have created the new position of "Assistant Chief Immigration Judge for Conduct and Professionalism." This person reviews and monitors all complaints and allegations of misconduct involving Immigration Judges. As part of our new emphasis on professionalism, we also have created a link on EOIR's internet web page which allows members of the public to easily file complaints about Immigration Judges' conduct. We take all such complaints seriously. We investigate them, we refer the matters to the Office of Professional Responsibility and/or the Office of the Inspector General as appropriate, and we discipline Immigration Judges as circumstances warrant.

Our focus is not just on a few "problem" judges. We now are committed to providing assistance, training, and guidance to all our Immigration Judges, the vast, vast majority of whom perform in an exemplary manner on the bench. Specifically, to ensure that newly-appointed Immigration Judges are proficient in applying immigration law to specific cases, training for new Immigration Judges has been extended to five weeks. This new training program includes an extensive academic curriculum covering relevant legal and procedural topics, as well as on-the-job training where new Immigration Judges observe, and are observed by, mentor judges. Additionally, new Immigration Judges must pass a rigorous immigration law examination before being permitted to adjudicate cases.

Once on the bench, the learning continues for all of our Immigration Judges. Continuing education opportunities on important topics, such as asylum and country conditions, are offered to all adjudicators and legal staff on a regular basis. Participation in many training sessions is mandatory. To accommodate the fact that our Immigration Judges are spread out from Honolulu, Hawaii, to San Juan, Puerto Rico, we offer

computerized training sessions and home-court peer mentoring. In August 2008, all Immigration Judges nationwide participated in a two-day training program on asylum and other topics relevant to their duties. Due to the success and positive feedback from this training, we are currently planning a similar session on international religious freedom.

Further, to ensure that the Immigration Judges have legal research tools readily available, we launched a new *Immigration Judge Benchbook* that contains a growing library of reference materials on immigration law topics. We also expanded EOIR's online *Virtual Law Library*, which includes up-to-date case decisions, immigration law resources, and guidance. In addition, we now distribute on a monthly basis the *Immigration Law Advisor*, a newsletter on regulatory, judicial, and legislative developments in immigration law. We also recently published an online *Immigration Court Practice Manual* that provides uniform procedures, requirements, and recommendations for parties who present cases before the Immigration Courts. The manual was made publicly available in February 2008 and became effective nationwide in July 2008, giving the private bar and others ample time to review and provide comments before its implementation. Revisions based on public comments were made to the manual before its implementation, and our efforts have been applauded by the private bar. Further, we continue to encourage the public to identify errors or ambiguities in the text and to propose revisions for future editions. Equally importantly, EOIR's *Ethics Manual* is being revised to provide detailed ethics guidance to Immigration Judges and Board Members.

In terms of technology, we have begun implementing Digital Audio Recording (DAR) to replace the analog taping system that has been used in the past to record immigration proceedings. DAR is a new, state-of-the-art recording system designed to achieve better quality recordings of Immigration Court hearings. DAR has been implemented in 21 Immigration Courts, and, subject to the approval of the President's Budget for 2009, we intend to continue its implementation nationwide.

As Director of EIOR I can assure you that EOIR and the Department continue to seek the resources necessary to hire additional Immigration Judges and staff, to provide them with sufficient training and assistance, to fully implement DAR, and to continue pursuing other improvement measures that will benefit our agency and the parties who appear before us. During the last three budget cycles, the Department and the Office of Management and Budget (OMB) have supported EOIR's requests for increased resources without exception. For FY 2007, the Department and OMB approved our request for a program increase of 120 positions, which included 20 additional Immigration Judges. Congress ultimately approved that request.

At the time the FY 2007 budget was under review in Congress, the Department and OMB approved our request for an additional 120 positions to be included in the 2006 War Supplemental appropriation. Congress approved that request as well, providing

"start up" funding which expired at the end of FY 2007. Permanent funding for those positions was included in the President's Budget for 2008. However, while both the House and Senate bills approved the request, ultimately the final FY 2008 Omnibus appropriation did not include enough funding to support the positions.

Therefore, to date, Congress has provided funding for 120 of the 240 positions that EOIR requested funding for over the last three fiscal years, and EOIR is near the end of the process of filling those positions.

In regard to the FY 2009 budget, we urge the appropriators in Congress to meet the President's budget. The resources the President requests are essential to our ongoing efforts to recruit, train, and equip top-quality Immigration Judges and court staff. Further, it would greatly assist in the process of transforming our entire immigration court system.

Chairwoman Lofgren, we appreciate your interest in EOIR and the opportunity to share with you the accomplishments we have made in better fulfilling our mission. I would be pleased to answer your questions at this time. Thank you.

Ms. LOFGREN. Thank you, Mr. Ohlson.

Mr. Lofthus, were you going to provide testimony, or are you here as a resource person?

Mr. LOFTHUS. I do have an opening statement.

Ms. LOFGREN. Well, we would love to hear it then, if you would turn on the mic and pull it forward.

TESTIMONY OF LEE LOFTHUS, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE

Mr. LOFTHUS. Okay, thank you very much.

Chairwoman Lofgren, Ranking Member King, and Members of the Subcommittee, thank you for the invitation to testify about the Executive Office for Immigration Review, or what we call it at the department, by its acronym, EOIR, at the Department of Justice.

I have a brief statement about the department's support and funding for hiring of EOIR, and then I welcome any questions you may have.

Let me start by saying I am a career government employee, and I have worked for the Department of Justice for going on 27 years. My work has been dedicated to supporting the counterterrorism, law enforcement and litigation operations of the department through four different Administrations.

My role at DOJ as the assistant attorney general for administration and the head of the Justice Management Division includes being the department's chief financial officer, developing our budget, and overseeing the management of personnel, planning, technology and other management programs across the department.

I take very seriously the issues raised by the inspector general, as well as questions about the appropriate funding levels at EOIR. I want to ensure that EOIR has sufficient resources to accomplish its mission and that its hiring practices are consistent, fair and effective.

EOIR and the department have worked to address the findings of the inspector general, and we are working hard to implement all the changes recommended and needed. We have also integrated hiring rules and laws into the transition briefing materials we plan to use for the incoming Administration.

During fiscal year 2006, then-Attorney General Gonzales commissioned a review of EOIR. From that review, 22 steps for improving the office's operations were identified, two of which suggested that the department seek additional funding for new positions and information technology improvements. We have taken measures to address both those findings.

The fiscal year 2007 President's budget request was the department's first opportunity to formally request additional resources to support those findings. During the same budget cycle, the department also requested additional resources for the Civil Division's Office of Immigration Litigation, commonly called OIL.

EOIR has developed a budget request to increase the number of immigration judges and lawyers, and the department and OMB have supported those needs, and the Administration has requested them from Congress.

After positive funding results in the fiscal year 2006 emergency supplemental, a fiscal year 2007 appropriation, and the initial fis-

cal year 2008 marks, EOIR ultimately did not receive its requested funding when the 2008 omnibus was passed. But the department will continue to work with Congress to identify the resources needed to support EOIR's needs.

Thank you, and I welcome any questions the Committee may have.

Ms. LOFGREN. Thank you very much, Mr. Lofthus and Mr. Ohlson.

We will now begin questions by the panel, and I will begin.

Mr. Lofthus, it is my understanding that there was no request made for additional personnel in the 2009 budget request. Is that correct?

Mr. LOFTHUS. That is correct. There were——

Ms. LOFGREN. That is fine, because I have a whole list of questions. I just wanted to know if that was true.

I would like to ask—Mr. Lofthus, I don't know if you can answer this, but if you can't, you can just tell me so. I have been looking—and we have been assisted by TRAC Statistics, as well as testimony we received in Ms. Sánchez's Subcommittee—that there has been a massive expansion of enforcing of garden-variety, low-level immigration violations that have tracked a decline, especially in the Southwest quadrant, of prosecutions of organized crime.

It is pretty obvious it has happened at the same time. We have also had feedback privately from U.S. attorneys that they have really been pulled off organized crime and drug smuggling and the like to do massive expansions of these prosecutions of, you know, bus boys and gardeners.

Has that been a policy decision that you have been involved in, in terms of resources? Or is that just something that you respond to as the MBA guy at the department in supporting a policy decision elsewhere?

Mr. LOFTHUS. What we do when we look at resources across the department is we look at influencing workload factors. In this case, we look at what is going on at the Department of Homeland Security. We look at what is going on across the prosecution realm. But we basically get that input from our program offices and from our policy officials who are running their programs and responding to those types of needs.

My goal is to make sure that our offices have the appropriate resources once those decisions are made.

Ms. LOFGREN. All right.

Mr. Ohlson, you mentioned in your remarks the benchbook that you have put together to try to get some additional professionalism—maybe that is not the right way to put it, but I think it is—to upgrade performance.

I am interested and, frankly, I think, from what I have heard, concerned about the development of that benchbook. The Office of Immigration Litigation, or OIL, had input into the development, but it is my understanding that outside lawyers did not.

And that is kind of like asking the prosecutor to write the rules for the judge; it is a little bit one-sided. And if it ends up being the prosecutor's view instead of a more general view of the law overall, it is going to end up with still more appeals and more process problems.

Do you have a plan to allow other outside immigration experts to review that and provide input to the department?

Mr. OHLSON. Madam Chairwoman, our Immigration Judge Benchbook is an outstanding resource material for our immigration judges when they are on the bench.

The primary individuals who worked on that Immigration Judge Benchbook were our most senior and the immigration judges who are recognized as being experts in this area, in terms of training, as well as——

Ms. LOFGREN. It was a simple question. Do you have a plan to allow others in the immigration world—AILA or law professors or the like—to provide input to the department?

Mr. OHLSON. With something such as the Immigration Judge Benchbook, we are always completely open. We have continued meeting with AILA. I personally attend those meetings that we have on a semi-annual basis. We are open to input——

Ms. LOFGREN. Okay, very good.

I am interested also in how one of the recent studies indicated that immigration judges were making diametrically opposed decisions on asylum on essentially the same fact situation. And the studies seem to indicate—and this is something we hear a lot, actually, anecdotally—that whether your asylum petition is granted really has more to do with who you land in front of than the actual facts of your case.

And it has often been of concern to me that the immigration judges have to make it up each time. There is no general resource that is updated constantly for the American view of what is going on in a foreign nation that we accept as true.

Is that part of your planning? I mean, you wouldn't want to put that in a published benchbook. It would have to be an electronic version of that that is constantly updated. Is that something you are looking at?

Mr. OHLSON. We certainly would be open to that. We get country reports from the Department of State, and we are certainly willing to look into that. In terms of——

Ms. LOFGREN. All right. Thank you very much.

I have a question on the inspector general's report. The inspector general really panned what was going on in the department. And we have got a new process now that you have talked about.

Has the inspector general reviewed the questions that are now part of the hiring process?

Mr. OHLSON. In terms of the questions that are posed to the individual?

Ms. LOFGREN. Yes.

Mr. OHLSON. Those questions were developed by our career officials in the Office of the Chief Immigration Judge. And the Office of the Inspector General I don't believe has ever seen them. But it is really now—that part of the process is strictly run by career people.

Ms. LOFGREN. But is it true that one of the questions for the IGs is whether the applicant would follow a direction or order from the attorney general even if it was contrary to law?

Mr. OHLSON. Not to the best of my knowledge, Chairwoman.

Ms. LOFGREN. Would you please look into that?

Mr. OHLSON. Certainly.

Ms. LOFGREN. Thank you.

I will now recognize the Ranking Member for 5 minutes for his questions.

Mr. KING. Thank you, Madam Chair.

First, Mr. Lofthus—and thank you both for your testimony—in your testimony I believe you said that you had been at Justice for 27 years?

Mr. LOFTHUS. Yes, just going on.

Mr. KING. And in that period of time, you have seen a lot of things move through and change. And I am not sure what your vantage point was throughout all those 27 years, but I presume it was a gradual moving up through the ranks.

Mr. LOFTHUS. Yes.

Mr. KING. And I am wondering what your title and your perspective was back in 1995. Do you recall?

Mr. LOFTHUS. In 1995, I was—during that year, I became chief of finance for the Federal Bureau of Prisons.

Mr. KING. Okay. I would ask you then, from that standpoint, I wouldn't know how much insight you would have had into the circumstances where, under the Clinton administration's appointments, where they essentially put a hiring freeze on White males. Being one, you might have noticed that a little more closely. Do you recall those times?

Mr. LOFTHUS. Only from a distance, because of my role at the time as the finance officer for the prisons I didn't have any direct exposure to that particular event.

Mr. KING. I would ask Mr. Ohlson, did you have—where were you in 1995?

Mr. OHLSON. Congressman King, I was a Federal prosecutor at that time.

Mr. KING. Then did you have a vantage point that might have given you a little more insight into those circumstances?

Mr. OHLSON. Since that time, I have served as the deputy director of the organization and as the director. And, as a result of settling that case, I have become aware of what was going on during that time, yes, sir.

Mr. KING. Do you recall how many plaintiffs were part of that class action suit?

Mr. OHLSON. I am afraid I don't remember that number off the top of my head, Mr. King. I would be happy to get that number for you.

Mr. KING. Does 150 ring a bell?

Mr. OHLSON. It was a very significant number, yes, sir.

Mr. KING. Do you know how many are the subject of this I.G.'s report, those that they said the evidence supported that they had violated policy and law?

Mr. OHLSON. Yes, Congressman King. In the Office of the Inspector General report, it was approximately 40 immigration judges.

Mr. KING. Cases? Forty whats, I am sorry?

Mr. OHLSON. Forty immigration judges who were hired during the process covered by the I.G.

Mr. KING. By three people taking action?

Mr. OHLSON. That is correct, sir.

Mr. KING. If three people hired 40, and in 1995 and 1996 there was a policy that brought at least—we will use this number—150 into the class action lawsuits.

I lay that out as a comparison of the magnitude of what we are dealing with here today compared to what was taking place in the mid-1990's under the previous Administration. And I thank you for that, lending that clarity.

Now, also, Mr. Ohlson, are you aware if any of the Federal circuits issue an automatic stay of removal if an alien appeals the case?

Mr. OHLSON. I believe that may occur in the Ninth Circuit.

Mr. KING. Any other circuits that you are aware of?

Mr. OHLSON. I am not aware. It may occur also in the Second Circuit.

Mr. KING. The Second and the Ninth. And then could you explain to this panel what the result of that is?

Mr. OHLSON. Well, approximately 70 percent of the cases that are appealed up from the Board go to those two circuits. We are very happy to note that, over the last year, we have had about a 23 percent drop in the number of cases that are going from the Board of Immigration Appeals up to the circuit courts.

There certainly has been the view on the part of some that it is because of those delays that people are appealing at a higher rate within the Second and the Ninth Circuits, sir.

Mr. KING. Do you have an idea about how much higher their rate might be if—have you analyzed this proportionally, from circuit to circuit, to see if that incentive that is there to appeal, what that has done to overburden the circuits in the Ninth, as you testified, and the Second, as I allege?

Mr. OHLSON. There is a significantly increased percentage of cases that are appealed to the Second and Ninth Circuits where there are longer delays before they are adjudicated.

Mr. KING. And "significant" would mean?

Mr. OHLSON. I would have to get you those numbers precisely to be accurate.

Mr. KING. I would ask you if you could produce those numbers, the percentage comparisons between the circuits.

Mr. OHLSON. I would be happy to, Mr. King.

Mr. KING. I think that is essential data for us to look at to evaluate that practice.

And then I would ask you also, of the 40 or so IJs that have been hired under the practice that has been brought into question and criticized by the I.G.—and I am going to say appropriately, given the testimony that I have seen here—of those 40, is there any evidence of any partisan bias in the decisions that they have made?

Mr. OHLSON. I am familiar with the work of the 40 individuals who have been hired. A couple of those individuals have not completed their probationary period. But I can tell you that my experience is the vast, vast majority are extremely dedicated and very successful on the bench.

Mr. KING. I thank you, Mr. Ohlson. And I thank you also, Mr. Lofthus. And I appreciate you all's testimony.

And I yield back the balance of my time.

Ms. LOFGREN. The gentleman yields back.

I would now invite the Chairman of the Judiciary Committee, Chairman Conyers, for any questions he may have.

Mr. CONYERS. Well, thank you, gentlemen.

My opening statement contained about 20 or so questions. I would like you both to try to respond to them, send in your responses as soon as you can.

Mr. OHLSON. I would be happy to, Mr. Chairman.

Mr. LOFTHUS. Yes.

Mr. CONYERS. Have you ever been before a Judiciary Committee for oversight in this position before?

Mr. OHLSON. I have not, sir. I am a career person in the Department of Justice. I have been with the department for approximately 20 years——

Mr. CONYERS. Okay. You haven't.

Have you?

Mr. LOFTHUS. Not Judiciary. Other Committees, but not Judiciary.

Mr. CONYERS. But on this subject?

Mr. LOFTHUS. Not on this subject.

Mr. CONYERS. Do you happen to know—I am impressed that everything is moving forward, that everything is going pretty smoothly, now that the I.G. and lots of hearings, including in this Committee, have revealed the politicization of the Department of Justice and Immigration. And I am pleased with it.

What about during the year of, say, 2000? How many immigration judges were appointed?

Mr. OHLSON. In terms of having the number who were hired during that time, Mr. Chairman, I would have to——

Mr. CONYERS. Okay. All right. Let's take 2004, 2005, 2006, 2007. Because that is the period of time the inspector general was critical about. As a matter of fact, he gave you, Mr. Ohlson, a pretty good—he didn't find you in violation of anything he was inspecting. As a matter of fact, you got promoted.

Now we are going to be watching carefully—and I am not threatening you. But we have got to clean this mess up and keep it cleaned up. It is our fault that we didn't oversight you. You can't call up and say, "Judiciary hasn't oversighted us in 8 years, and now they wonder why we are wandering all over the lot, with Monica doing all this political stuff."

But we are not going back into those years just to harass you. We are trying to make sure it never happens again.

Now, what is the deal on the budget. Everybody knows we need a lot more judges and a lot more appeal board members. What is the situation here? Tell me.

2009, Department of Justice did not request any positions for judges or appeal board members.

Mr. LOFTHUS. Mr. Conyers, let me address that question, because I think it is an excellent one.

To really get the context of what is going on with the budget at EOIR, if you go back to the report with the 22 recommendations, two of the recommendations said go forth and help this organization; it needs money for additional hiring, and it needs money for infrastructure, support for the judges and the activities of the court, information technology improvements.

So, for three straight budgets, we worked and successfully worked with OMB to present budgets to the Hill that——

Mr. CONYERS. But there were no requests in 2009. Where is 2009?

Mr. LOFTHUS. Here is what happened. In 2007, we sought positions in our budget, meaning increases of 120 positions, including 22 judge positions. in 2008, we came back for another tranche of those positions, another 120, including 20 judges. We were successful back in 2007——

Mr. CONYERS. What about 2009?

Mr. LOFTHUS. In 2009, what we did, because we knew we had gotten the money in 2007 and had a request for 2008, in 2009 we went after technology money.

Mr. CONYERS. You did not make any requests for judges.

Mr. LOFTHUS. That is right, because we had an existing 2008 request here and because we had been successful in 2007. So we had 2 straight years of requests for judges, and then we felt we needed to turn our attention to the infrastructure to support the judges, which was the DARS, digital audio recording system, and another I.T. system.

So after 2 years of supporting the personnel increases, we wanted to turn our attention to the I.T.

Mr. CONYERS. So then you are the one that allowed 300,000 cases to be handled by 215 immigration judges, because you didn't make any requests. You didn't expect us to come out of the clear, blue sky and give you some judges when there is no request made for them, did you?

Mr. LOFTHUS. We had two——

Mr. CONYERS. Yes or no?

Mr. LOFTHUS. We made two——

Mr. CONYERS. Yes or no?

Mr. LOFTHUS [continuing]. Requests.

Mr. CONYERS. The 2009—hey, you must know something about the budget process. You don't go back and look at the years before to find out what happened and 2 years before to find out what happened. We are taking the current annual budget for 2009.

Mr. LOFTHUS. Sure.

Mr. CONYERS. So you can't say, "Well, this is what happened in 2008, this is what happened in 2007, and although we need hundreds of judges, I am not going to ask for any." And then we come here today and give me this lame alibi, that you had made the request before and you wanted to turn it to something else. I find that almost unbelievable.

Mr. LOFTHUS. Well, I think 2009 was requested in light of what we had done in 2007 and 2008. And unfortunately 2008 had not been completed or enacted when we made the 2009 request to the Hill. And when the 2008 omnibus was finished in the wee hours, when that finally was completed, there was not the money for our personnel increase. We would have liked that.

I have to say, I share your concern——

Mr. CONYERS. Oh, thank you.

Now, let me ask you something else. Are you making the ones for next year?

Mr. LOFTHUS. Excuse me, sir?

Mr. CONYERS. Are you the person that makes the request for the coming budget?

Mr. LOFTHUS. Absolutely. We will work with the department's officials, and we are going to work with the incoming transition group and the incoming Administration to put together a 2010 budget.

Mr. CONYERS. So we can expect the same kind of work that you have given us in the past, right? Even though you need hundreds of judges, after you work with everybody and it is late at night and everything is going crazy, you make no request. That could happen, right?

Mr. LOFTHUS [continuing]. We made 2 years' requests. And I have to say, I am very concerned, as you are, that when that other——

Mr. CONYERS. Well, we never heard about you being concerned before this morning.

Mr. LOFTHUS. When that second request was made and did not get fulfilled through the omnibus, that presents a problem for me and for Mr. Ohlson. We know that that didn't come through, and I need help in the 2009——

Mr. CONYERS. I will be watching to help you, and I will be watching to see how you perform.

Thank you, Madam Chair.

Ms. LOFGREN. Thank you, Mr. Chairman.

I now recognize Chairwoman Linda Sánchez for 5 minutes for her questions.

Ms. SÁNCHEZ. Thank you, Ms. Lofgren, for your leadership on this issue and the fact that we are actually having an oversight hearing. Because I am appalled at some of the information that is coming out and some that isn't coming out, quite frankly.

Mr. Lofthus, a fact sheet that is entitled "EOIR's Improvement Measures: Progress Overview" and dated September 8, 2008, states that EOIR has hired 22 immigration judges and one new assistant chief immigration judge. Is that correct?

Mr. LOFTHUS. I defer to Mr. Ohlson on——

Ms. SÁNCHEZ. Mr. Ohlson?

Mr. OHLSON. Over what time frame were we talking about, Ms. Sánchez?

Ms. SÁNCHEZ. I don't know. I am specifically referring to the "Progress Overview" that is dated September 8, 2008.

Mr. OHLSON. What we have done is, through the new hiring process that has been implemented since April of 2007, we have managed to bring onboard 18 new immigration judges, and we have 16 in the pipeline.

Ms. SÁNCHEZ. Okay. And yet, in something that is dated September 8 of this year, you are saying that EOIR has hired 22 immigration judges.

Mr. OHLSON. I would have to see the document, Ms. Sánchez.

Ms. SÁNCHEZ. Okay. Because I would be interested in knowing, of those 22, how many of them were hired through the revised process and how many were hired through the politicized process. If you could get me that information, that would——

Mr. OHLSON. I would certainly be happy to. With the 18 to which I am referring, all of them have been hired through the new process.

Ms. SÁNCHEZ. Okay. So there is a potential that in the progress report about improvement, they may be adding in judges that were hired under the old process, in which it was politicized.

Mr. OHLSON. I would have to look at the document, ma'am.

Ms. SÁNCHEZ. But wouldn't that stand to make sense? If 18 were hired under the new process and the progress report says 22 new judges have been hired, then, by simple arithmetic, the ones that were not hired in the new process were hired under the old process? Do you want to take a look at it?

Mr. OHLSON. I don't believe so, because the last people we had come onboard through the old process was December 2006.

Ms. SÁNCHEZ. Okay. I have actually got the document here.

Ms. LOFGREN. Maybe we can ask the clerk to bring it down to the witness, and he can take a look at it.

Ms. SÁNCHEZ. You know, I am really concerned, after hearing the testimony, that, you know, there is this sort of rose-colored glass vision that, you know, since the revised, you know, hiring has come into effect, you know, there isn't any problem with the immigration judges that are currently deciding cases.

I am interested in knowing, of the new judges that have been hired, how many of them have an ICE, an INS or a law enforcement background. Do you know that?

Mr. OHLSON. In terms of specific numbers, I don't. I do know that——

Ms. SÁNCHEZ. Could you please provide that for this Committee?

Mr. OHLSON. I would be happy to, Ms. Sánchez.

Ms. SÁNCHEZ. Great. And I would be interested in knowing, conversely, how many of them have private practice, teaching or other types of immigration law background.

Mr. OHLSON. We will be more than happy to get that information to you.

Ms. SÁNCHEZ. Okay. And I would be interested in knowing how many of them have no background in immigration at all.

Mr. OHLSON. Certainly.

Ms. SÁNCHEZ. I think that would definitely be helpful, to know who is deciding cases that has no background in immigration law at all.

Another question that I have: Is it true that Rex Ford, who was one of three immigration judges mentioned by name in the OIG report as having been involved in the "coordinated efforts" with two other immigration judges to identify candidates for the I.J. vacancies for Monica Goodling under the politicized hiring system, is also now participating in interviews for I.J. candidate positions in the new process? Is that correct?

Mr. OHLSON. No, I don't believe that is correct, ma'am.

Ms. SÁNCHEZ. Okay. Because you can see why that would be troubling.

Mr. OHLSON. Certainly.

Ms. SÁNCHEZ. Okay.

Mr. OHLSON. The three people who do that are our assistant chief immigration judges. And Rex Ford is not an assistant chief immigration judge.

Ms. SÁNCHEZ. Okay. I am particularly concerned—and Chairwoman Lofgren mentioned this—the background, in terms of who serves or who chooses who serves, is very troubling to me. And in looking at the lowest rates for approval of asylum cases, the lowest rates of approval tend to come from ICE, INS trial attorneys.

So it would stand to reason that if you worked for ICE or INS, that probably you come in with a certain perspective when you are adjudicating cases. Would you not agree?

Mr. OHLSON. What we are trying to do is we are trying to address the issue of asylum disparity very aggressively. Our goal is to ensure that whenever an alien comes before an immigration judge, he or she does not feel as if the case has been predetermined.

Ms. SÁNCHEZ. But if the lowest asylum-grantee rate comes from ICE or INS trial attorneys, wouldn't it stand to reason that perhaps you need to balance the number of judges who come from that kind of background versus pro-bono work or private practice or teaching?

Mr. OHLSON. We have a broad representation of backgrounds on the immigration judge bench, as it is now. And it is not always predictive of how they will decide asylum cases.

Ms. SÁNCHEZ. But wouldn't you agree that if there is a link between the lowest rates of granting asylum cases and the type of the background of the judge deciding them, that there might be some kind of inherent bias or preconceived perspective that those judges are bringing to the table? Or is that totally crazy and outside the realm of possibility in your world?

Mr. OHLSON. No, I don't think in anyone's world. But our goal is to have——

Ms. SÁNCHEZ. I know what your goal is, but I am——

Mr. OHLSON. And it is not only just a spoken goal. We are taking concrete steps to ensure that that is the case.

Ms. SÁNCHEZ. In terms of streamlining, which is something that was developed in 2002, there was—item 12 of the former attorney general's 22-point plan to improve EOIR called for a revision of the 2002 streamlining regulations. And in March 2007, then-EOIR director Kevin Rooney stated that the proposed rule would be issued in the spring of 2007. And the proposed rule was, in fact, issued in June of this year, of 2008.

When do you expect to finalize the revised streamlining rule?

Mr. OHLSON. I would expect the regulation to be out very soon, but we also have actually implemented the provisions without the regulation needing to be out there.

What the goal is, when it comes to affirmances without opinion, as part of the streamlining, we have decreased that number from 34 percent of all their decisions down to 9 percent.

We have also increased dramatically the number of precedential decisions. A few years ago it was 12; we are up to about 50 a year now.

Ms. SÁNCHEZ. Well, that is an improvement. But without the regulation, it is just sort of—you can choose to follow it or you cannot. I am interested in knowing when that will be finalized.

Mr. OHLSON. The regulatory process sometimes is rather opaque, but we expect to have that finalized very soon.

Ms. LOFGREN. The gentlelady's time has expired.

I have been a Member of the Judiciary Committee for almost 14 years, and this is the first time we have ever had any oversight of this activity. So I think that merits a second round of questions. And I would permit the Ranking Member to begin the second round.

Mr. KING. And not in preparation of the gentlelady's generous offer, I would——

Ms. LOFGREN. Oh, I will be happy to begin then.

I want to talk about, getting back to the inspector general's report, there were just a few people who were mentioned by name in that report. And Mr. Garry Malphrus was one of them mentioned as a politicized appointee. The inspector general also noted that he was involved in politicized appointments of others, on page 88, 89, 97, 98, and 108 to 111, if you want to reference the report. I was feeling surprised to see that he was recently named to the Board of Immigration Appeals.

Was the fact that Mr. Malphrus was originally hired through the politicized process and, according to the I.G., participated in this illegal scheme of appointment taken into consideration when he was appointed?

Mr. OHLSON. I am not privy to any discussions that occurred within the office of the deputy attorney general or the attorney general. It was a career process that was used in selecting Mr. Malphrus for the Board of Immigration——

Ms. LOFGREN. Well, on that point, I believe it is true that Board of Immigration Appeals members are required to have 7 years of experience in immigration law, as opposed to IJs that merely requires 7 years of legal experience.

Did, to your knowledge, Mr. Malphrus have at least 7 years of experience in immigration law?

Mr. OHLSON. I am not sure that it is required that they have 7 years of immigration law experience.

Ms. LOFGREN. Do you know what his experience is in immigration law?

Mr. OHLSON. He has served as an immigration——

Ms. LOFGREN. How long? Only through this politicized process?

Mr. OHLSON. He was appointed in 2004-2005.

Ms. LOFGREN. Okay.

I want to talk about the appointment process and how it might lead to a particular result.

How long does the new hiring process take?

Mr. OHLSON. It actually takes a significant period of time, particularly when you factor in——

Ms. LOFGREN. Approximately how long?

Mr. OHLSON. Going forward, if we don't count the background investigation——

Ms. LOFGREN. Count the whole process. I mean, is it a year? Is it 6 months?

Mr. OHLSON. If you include the background investigation, it will probably take at least a year.

Ms. LOFGREN. So I would just like to make this suggestion, that that really means that we are going to hire government lawyers for the most part. It is very difficult in the private sector to be on hold for a year if you are in a law firm. And I think that that is something that needs to be, obviously in the new Administration, reviewed. Because I think that skews it toward—it is going to be OIL or ICE, instead of anybody who knows a different angle on immigration law.

I am also interested in what efforts have been made to reach out to the broad spectrum of immigration expertise in this country for EOIR.

Mr. OHLSON. In terms of hiring?

Ms. LOFGREN. Yes.

Mr. OHLSON. We actually put out the ad in a number of publications, minority publications and so forth, around the country. We try to aggressively recruit individuals from a diverse background.

Ms. LOFGREN. When you say "try to aggressively recruit," what does that consist of, I mean, other than an ad?

Mr. OHLSON. We have, as I mentioned, I put on our DOJ Web site, we put on OPM's Web site, we——

Ms. LOFGREN. I see. I mean, in my experience, you know, looking at it, the prosecutors generally are the ones—the OIL people are taking a look, they know in advance when the openings are in. And, you know, they have a right to apply; I wouldn't say otherwise. But you end up with kind of a skewed process.

And unless there is a real effort to include a different perspective, you end up with, you know, a prosecutor as the prosecutor, a prosecutor as the judge, and an immigrant who doesn't have a lawyer, and it doesn't always lead to a result that is a just result or at least providing the appearance of a just result. And I am concerned that that is still going on.

Mr. OHLSON. We would certainly be receptive to any ideas you have along those lines, Madam Chairwoman.

Ms. LOFGREN. Now, the former chief judge of the U.S. Court of Appeals for the Second Circuit, the Honorable John Walker, testified before the Senate Judiciary Committee in 2006. I was glad that they had a look at this. In his opinion, at least 30 people should be on the BIA. And in his judgment, the number of immigration judges should be doubled to about 400, given the workload. And that was certainly before the surge that we have had in prosecutions and arrests.

Do you think those are the kinds of numbers that are, in fact, necessary to deal with the caseload that we have here?

Mr. OHLSON. If you look at the Board of Immigration Appeals, they are currently capable of adjudicating 35,000 cases a year, and they are receiving approximately 30,000. So they are——

Ms. LOFGREN. But some would argue they are not capable, given what the circuit courts are seeing and the scathing comments made by the real judges about the quality of these decisions.

Mr. OHLSON. Well, I would note that we have about an 87 percent affirmance rate within the circuit courts, which is extremely

high. And I think our members of the Board of Immigration Appeals are doing a truly outstanding job.

Ms. LOFGREN. I see that my time has expired. I will turn to Mr. King for any additional questions he may have.

Mr. KING. Thank you, Madam Chair.

Let's say first to Mr. Lofthus, you know, you were excoriated earlier for not coming to this Congress and pressing us for authorization and funding for more IJs. I don't exactly know how many. But I heard that and I would characterize that, and I would ask you if you agree with my characterization.

And I would point out for your benefit that the House hasn't passed a single appropriations bill for 2009, for fiscal year 2009. We have had one come to the floor of the House of Representatives, and that was the milcon, military construction, appropriations bill.

Now, we could discuss the reasons for that. But I will just submit that that is just dysfunctional. And Congress has never been this dysfunctional. There has never been a time that we have gone this far, in the history of this country, and not passed an appropriations bill.

There is a reason that this Congress is structured the way it is, that we have appropriations Subcommittees and Committees and that bills come to the floor, that we have authorization Committees and that bills come through the Subcommittee and the Committee to the floor.

The reason for that is so that every Member of Congress has an opportunity to weigh in and perfect legislation so that when it does arrive at the President's desk it is the voice of the people of the United States of America run through the filter of the United States House of Representatives and the United States Senate.

What we are seeing instead—we are here discussing how we run this country by omnibus spending bills, by stacks of 3,600 pages, by my memory, and $912 billion in one stack that comes out in the print at 11 o'clock at night and comes to the floor for debate and passage without amendment the following day.

That means that the effect is the American people will go to the polls again on November 4 and they will put up their votes, and whatever the party affiliation is of the members of House of Representatives, they will vote for speaker. Whether it be the Democrats or whether it be Republicans, those votes will be exactly down party lines.

And then whoever is elected the speaker will have the authority to suspend Committee process, effective Committee process, and bring bills to the floor with the assent of the Rules Committee, which is approved by the speaker.

And so we look back on how this happens—the energy bill would be a perfect example of that. No Committee action, a bill that might set the destiny of this country for a generation or more, no amendments, only 3 hours of debate on the floor, no way to perfect the legislation.

So, whatever Members of this Judiciary Committee hear, or Justice Approps over on the appropriations side, might have wanted to do to help you and provide you more judges to work with, we haven't had a process to do that. And you haven't had the opportunity to make the request that could be acted upon by anyone

other than the speaker of the House and those that she might authorize to do this.

This is not a representative form of government. And it troubled me that you have to sit there and listen to that when there was no avenue for anyone to help you, except the people who are wielding the gavel at the speaker's level.

So I am hopeful that one day soon we will get back to an open Congress, a functional Congress, one that takes advantage of the wisdom and the expertise of 435 members of the House, 100 members of the Senate, so that we can provide the filter to receive input, build those kind of coalitions and those consensus, and be able to move through to provide effective government. It is just simply not possible for a small group of people to make all the right decisions, no matter how smart they might be.

So then I would just take you to this. Mr. Ohlson, I have the information, it has arrived in front of me, that I had asked of you earlier, the rate of appeals for BIA decisions. So it won't be necessary for you to provide it unless the other Committee Members would be interested.

But I would just say this, that the I.J. appeals rate is 10 percent, the BIA appeals rate is 30 percent. And when you look at the two circuits that I mentioned in the previous questioning, the Ninth Circuit and the Second Circuit, those at the Ninth—and I think Mr. Lofthus has actually testified—that is an automatic stay if it is appealed from the BIA to the Ninth Circuit. They have the highest rate of appeals, at 42 percent.

And if I am correct on the Second Circuit having an automatic stay, they have the second highest rate of appeals; that is 36 percent. That is compared to the average of 30 percent. If you go to the more conservative circuits, for example, the 11th, you will see a 9 percent rate of appeals.

I mean, I would think that the reflective appeals out of I.J. on up through the BIA to the circuit at 10 percent, that would be something we might want to look at as being more the norm that we should like to see.

Ms. LOFGREN. Would the gentleman yield?

Mr. KING. I would yield.

Ms. LOFGREN. I think the premise is incorrect. There is no automatic stay in law in this appeals.

Mr. KING. The practice then—reclaiming my time. I will ask, then, Mr. Ohlson.

Are you aware of the practice in the Ninth Circuit? Do they grant stay for every appeal, or don't they?

Mr. OHLSON. Essentially, yes.

Mr. KING. Okay. Then let me just correct that to the practice in the Ninth Circuit and the practice that I allege exists in the Second Circuit has yielded the highest percentage of appeals. And so, that is the standard that we need to be looking at.

And I think—I will ask you this. Will you, then, put together for this Committee the data that will show us the percentage of appeals and how many stays are granted for each of the circuits and, in print, the statistical data and the text of the practice that you have testified exists in the Ninth, that I allege in the Second, and any exceptions that might exist in the other districts, so that we

have a real perspective on what is going on here? And I would ask you if you would do that.

And I would yield back the balance of my time.

Ms. LOFGREN. The gentleman's time has expired. And, as we have said before, we are all entitled to our own opinions but not entitled to our own facts. So we will find out and we will have in the record——

Mr. KING. Will the gentlewoman yield?

Ms. LOFGREN. Of course.

Mr. KING. I would submit that I have characterized this accurately, and the witness has testified that the result is that there is a stay of deportation——

Ms. LOFGREN. Recalling my time——

Mr. KING. That is the witness's testimony.

Ms. LOFGREN. And I think the witness is incorrect, but we will find out. As we look at it, we will actually get the facts. And we will not have a disagreement; we will have the facts.

With that, I would like to thank this panel for its testimony.

Without objection, Members of the Subcommittee will have 5 legislative days to submit questions to you, which we will forward and ask that you answer as promptly as you can so they can be made part of the record.

I would also like to just note that, in January of this year, Chairman Conyers and I wrote to the attorney general regarding a very wrong decision, the matter of "A.T.," a Board of Immigration Appeals decision that denied political asylum to a victim of female genital mutilation, a decision that was at odds with all the precedence and morally incorrect, from my point of view.

We want to publicly thank the attorney general for overturning the BIA decision and reaffirming the proud tradition of asylum for that egregious behavior. And I don't always agree with Attorney General Mukasey, but I do feel obliged to publicly acknowledge his very honorable decision today.

And we do thank you for appearing today. And we will ask you to relinquish your seats, as we ask up our second panel of distinguished witnesses.

And as we are doing this, I will introduce our witnesses.

I am pleased to welcome Professor Susan Long. Professor Long is co-director of the Transactional Records Access Clearinghouse at Syracuse University. Professor Long's specialties are in the fields of statistics, data and measurement. And she is currently a faculty member in the department of finance at the Martin J. Whitman School at Syracuse University.

Professor Long has served as an expert witness in litigation, on information technologies, and with respect to public disclosure, and on the use of statistical evidence in evaluating government policy. She has also published articles on data-warehousing and data-mining tools in the legal profession.

I am also pleased to introduce Dr. Stephen Legomsky. Dr. Legomsky is a professor at the Washington University School of Law in St. Louis. He is the author of "Immigration and Refugee Law and Policy," which has been adopted as the required text for immigration courses in 163 U.S. law schools.

Dr. Legomsky founded the Immigration Law Section of the Association of American Law Schools and chaired the Refugee Committee of the American branch of the International Law Association. He has been a consultant to President Clinton's transition team and to the first President Bush's Commission on Immigration, as well as to the U.N. high commissioner for refugees and to several foreign governments on migration, refugee and citizenship issues.

He is an elected member of the American Law Institute and has been a visiting fellow at Oxford University and a visiting fellow at Cambridge University. He has had teaching or research appointments in the United States, Mexico, New Zealand, Switzerland, Germany, Italy, Austria, Australia, Suriname and Singapore.

And we are very honored to have both of you as witnesses today.

Now, as mentioned before, your entire written statements will be made part of the record. And we will have 5 minutes of testimony, which we will follow by questions.

So all those bells and whistles are calling us to the floor to vote, but we have 13 minutes. So I think that is time to get both of your oral testimonies in, and then we will return for questions.

So, Professor Long, could you begin your 5 minutes of oral testimony? And your full statement will be made part of the record.

TESTIMONY OF SUSAN B. LONG, CO-DIRECTOR, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC)

Ms. LONG. Madam Chair and Members of this Subcommittee, my name is Susan Long, and I am co-director of the Transactional Records Access Clearinghouse at Syracuse University, commonly known as TRAC.

I wish to thank you for the invitation to come today to testify about the results of TRAC's research on the functioning of the immigration court system and its administration by the Executive Office for Immigration Review.

Since its founding in 1989, TRAC has sought to provide the American people with comprehensive information about the activities of Federal enforcement and regulatory agencies. To give you one small indicator of the scope of TRAC's activities, TRAC publishes around 100,000 reports each month on a large range of topics. These reports are based upon TRAC's ever-expanding data warehouse, with more than a terabyte of data, roughly equivalent to over 500 million printed pages of information.

TRAC's series of focus studies on the immigration courts began in 2005. The problems faced by our immigration court system are not new. TRAC's analyses of hundreds of thousands of immigration court records covering the last quarter-century, supplemented by extensive examination of budgets, staffing, workload and other agency documents, along with interviews with stakeholders, show that our immigration court system has been troubled for a very long time.

These conclusions are further reinforced by the criticisms from the Federal appellate courts and the reports of other analysts and immigration stakeholders.

Two years ago, the Bush administration made a commitment to end this sorry history. However, our careful examination since then shows that this promise has not been kept.

Our findings: One, the most recent covering the period through the end of fiscal year 2007, continue to show inexplicable asylum grant rate disparities among judges in the immigration courts.

Two, despite the fact immigration judge caseload has repeatedly been cited as a chief problem, there are still fewer immigration judges today than there were in 2006 when the attorney general announced his 22-point plan for reforms, as result only partially explained by the illegal hiring process used by the Justice Department in EOIR.

Further, a central reform promised was for DOJ to seek budget increases to increase the available number of immigration judge positions. Regrettably, there has been no actual increase in the number of immigration judge positions since the A.G.'s proposals were announced. And DOJ did not even seek funding for increasing immigration judge positions, as we heard earlier testimony on, in the fiscal year 2009 budget.

Three, despite the fact that judicial conduct and quality were the stated reasons for conducting the 2006 comprehensive review of the immigration court system, over 2 years later EOIR has failed to implement key improvement measures, as directed by the A.G., to enforce the oversight and training of judges.

Four, and despite the hope that the Gonzales reforms would usher in increased transparency and accountability into the immigration courts, the Justice Department and EOIR has repeatedly and needlessly sought to veil the implementation of improvements, including decisions that amount to substantial policy changes.

My prepared statement outlines each of these points at more length and provides full references to TRAC's research studies where these and other findings are laid out in detail.

I would be happy to answer any questions the Committee may have.

[The prepared statement of Ms. Long follows:]

PREPARED STATEMENT OF SUSAN B. LONG

PREPARED TESTIMONY
and
STATEMENT FOR THE RECORD

of
SUSAN B. LONG
Co-Director, Transactional Records Access Clearinghouse (TRAC)
Syracuse University
and
Associate Professor of Managerial Statistics
Martin J. Whitman School of Management
Syracuse University

on

"Promises Not Kept: Failures in Implementing Key Immigration Court Reforms"

before the

U.S. House of Representatives, Committee on the Judiciary

Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

September 23, 2008

Madam Chairman and members of this subcommittee, my name is Susan B. Long and I am Co-Director of the Transactional Records Access Clearinghouse at Syracuse University (TRAC). I wish to thank you for the invitation to come today to testify about the results of TRAC's research on the functioning of the immigration court system and its administration by the Executive Office for Immigration Review (EOIR).

The problems faced by our immigration court system are not new. TRAC's analyses of hundreds of thousands of immigration court records covering the last quarter century -- supplemented by an extensive examination of budget, staffing, workload, and other agency documents along with interviews with stakeholders -- show that our immigration court system has been troubled for a long time. These conclusions are further reinforced by the criticisms from the federal appellate courts and the reports of other analysts and immigration stakeholders.

Two years ago the Bush administration made a commitment to end this sorry history. However, our careful examination since then shows that this promise has not been kept.

- Our findings, the most recent covering the period through the end of FY 2007, continue to show inexplicable asylum grant-rate disparities among judges in the immigration courts.

- Despite the fact immigration judge caseload has repeatedly been cited as a chief problem, there are still fewer immigration judges today than there were in 2006 when the Attorney General announced his 22 point plan for reforms, a result only partially explained by the illegal political hiring process used by the Justice Department and EOIR.

- A central reform promise was for DOJ to seek budget increases to increase the available number of immigration judge positions. Regrettably there has been no actual increase in the number of immigration judge positions since the AGs proposals were announced, and DOJ did not even seek funding for increasing immigration judge positions in the FY 2009 budget.

- Despite the fact that judicial conduct and quality were the stated reasons for conducting the 2006 "comprehensive review" of the immigration court system, over two years later EOIR has failed to implement key improvement measures as directed by the AG to enhance the oversight and training of judges.

- And despite the hope that the Gonzales' reforms would usher in increased transparency and accountability into the immigration courts, the Justice Department and EOIR have repeatedly and needlessly sought to veil the implementation of improvements, including decisions that amount to substantial policy changes.

BACKGROUND ON TRAC

The Transactional Records Access Clearinghouse (TRAC) is a data gathering, data research and data distribution organization associated with the Martin J. Whitman School of Management and the S. I. Newhouse School of Public Communications at Syracuse University. TRAC has offices at Syracuse, in Washington, D.C. and on the west coast. I serve as the Center's co-director along with David Burnham, a research faculty member at the Newhouse School at Syracuse. My specialties are in statistics, data and measurement, and I am currently a faculty member in the Department of Finance at the Whitman School in Syracuse.

TRAC focuses its research efforts on federal enforcement and regulatory activities, including staffing and expenditures. Since its founding in 1989, TRAC has sought to provide the American people with comprehensive information about the activities of federal enforcement and regulatory agencies. TRAC's studies are based on masses of detailed data that it obtains from federal agencies through the systematic and informed use of the Freedom of Information Act. With the use of a variety of sophisticated statistical techniques, the raw information obtained from the agencies is checked and verified, and a variety of reports and other information products are prepared and made available on TRAC's public web site (http://trac.syr.edu) and through its data warehouse (http://tracfed.syr.edu). To give you one small indicator of the scope of TRAC's activities, TRAC publishes around 100,000 reports each month. These reports are based upon TRAC's ever expanding data warehouse with more than a terabyte of data – roughly equivalent to over five hundred million printed pages of information.

TRAC'S STUDIES OF THE IMMIGRATION COURTS AND THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)

TRAC has been researching immigration enforcement for nearly twenty years as part of its overall mission to report to the public details about government enforcement and regulatory activities. In July 2006, we issued a report documenting an extraordinary disparity in the decision making process of immigration judges. (http://trac.syr.edu/immigration/reports/160/; see also subsequent reports on this topic at http://trac.syr.edu/immigration/reports/183/ and related reports at http://trac.syr.edu/immigration/reports/159/; http://trac.syr.edu/immigration/reports/161/; http://trac.syr.edu/immigration/reports/judgereports/. Our July 2006 report was published in the wake of a series of federal appellate court rulings that sharply criticized the immigration courts, specifically noting deficiencies in the overall administration of the immigration courts, poor work conditions of immigration judges, and in some cases, "patterns of misconduct" among immigration

judges.

In the month after publication of our July 2006 report former Attorney General Alberto Gonzales released his 22 "improvement measures," a plan to improve the performance of the nation's immigration courts, which Gonzales stated was based on a six month "comprehensive review" of the immigration courts and was initiated because of "reports of judges failing to display temperament and produce work that meets the Department's standards." Point number 8 of this plan referred to TRAC's disparity study and directed EOIR to examine the issue of judge decision disparity and implement reforms, if needed. In an accompanying press release, Gonzales said that the 22 points were "key reforms needed to improve the performance and quality of work of the nation's immigration court system."

This past year TRAC has been conducting a comprehensive, two-year review of the immigration court system, generously funded by the Carnegie Corporation, to chart these government efforts to increase the fairness and effectiveness of the immigration courts. This project builds on TRAC's 2006 report on asylum grant-rate disparities and other analyses of immigration prosecutions that were supported by Syracuse University, the Ford Foundation, the JEHT Foundation, and the Haas Fund.

This past summer TRAC published a series of reports from this review, including the publication of updated results on immigration judge asylum grant-rate disparities, a report on the staffing and hiring of immigration judges and judicial law clerks, and a report on the status of each of the implementation of Gonzales' 22 improvement measures. The full studies are available on TRAC's web site at: http://trac.syr.edu/immigration/reports/ (see particularly http://trac.syr.edu/immigration/reports/189/ and http://trac.syr.edu/immigration/reports/194/). I refer anyone interested in more details to these full reports.

In the brief time I have here, I can only highlight four issues uncovered by our research with regards to the operation of the immigration courts and the Justice Department and EOIR's efforts to implement the Gonzales improvement measures:

1. Inadequate Number of Immigration Judges to Meet Workload Demands.

The high workload of immigration judges has long raised concerns that judges do not have

the time to fairly adjudicate the cases that come before them. For example, in an August 10, 2007, speech to immigration judges, Federal Ninth Circuit Court of Appeals Judge Carlos T. Bea connected high immigration judge workload with appellate criticisms of the quality of immigration judge rulings, saying "Last year, [Immigration Judges] decided over 350,000 matters, or roughly 1,520 matters per judge ... Of course the opinions are not as detailed as we appellate court judge would like, how could they be? ... I think we would see fewer appeals if Immigration Judges were given the resources necessary to do a detailed, thorough, thoughtful job in the first place."

Former Attorney General Gonzales recognized this longstanding concern when he directed the Justice Department and EOIR "to seek budget increases, starting in FY 2008, for ... the hiring of more immigration judges and judicial law clerks," citing the need for the immigration courts to have "the resources needed to execute their duties appropriately" and increases in workload in recent years. While DOJ did seek funding in FY 2008 for additional judges (Congress did not grant the funds), the department failed to make any request for more judgeships for FY 2009.

Compounding the problem is that existing judge positions remain unfilled. EOIR's large number of unfilled positions is certainly due in part to the illegal political hiring of immigration judges that took place from the Spring of 2004 until December 2006. The Department of Justice's Office of the Inspector General and Office of Professional Responsibility confirmed that the DOJ used an illegal process to exclusively appoint immigration judges who had been screened for their political or ideological affiliations during that time in their report issued on July 28, 2008. "One of the results of this tightly controlled selection process [by DOJ political appointees] was that it left numerous IJ vacancies unfilled for long periods of time when they could not find enough candidates, even when EOIR pleaded for more judges and told the OAG repeatedly that EOIR's mission was being compromised by the shortage of IJs."

While the number of unfilled judge slots today is in part a result directly connected to the past illegal political hiring process used by the Justice Department and EOIR, we are not yet seeing much improvement in the pace of immigration judge hiring. In fact, in July 14, 2008, EOIR told TRAC that there were 27 current vacancies which "are in the process of being filled." Over two months later according to EOIR's current web site, this is exactly the same number of unfilled judge positions that EOIR has despite hiring 5 new immigration judges since the same number of judges have left during this period of time. Thus, it remains true that there are still fewer immigration judges today than there were in 2006 when the Attorney General announced his 22 point plan for reforms.

What does this mean in practical terms? Many of the proposed improvements to the immigration courts, such as improved judicial bench resources, or peer training programs, will have little meaning if judges don't have the time to use them. Furthermore, rather than seeing any improvement in the available time judges have to deal with each case, the practical reality is that immigration judges have substantially less time today than in 2006. In fact, the available judges relative to court workload has been on the decline for most of the past decade.

That is why it is so astonishing that today, after Justice Department specifically noted the staffing problem, the staffing shortage is worse, not better.

2. EOIR Has Failed To Implement Key Improvement Measures As Directed By Attorney General Gonzales To Enhance The Oversight And Training Of Judges.

According to former Attorney General Gonzales, the reason for his review of the immigration courts was "reports of judges failing to display temperament and produce work that meets the Department's standards." Yet two years after the Attorney General issued directives to improve the oversight and training of judges, key improvements have yet to be implemented.

For example, EOIR has not implemented a code of judicial conduct, and has apparently, and without explanation, abandoned its effort to institute a code of judicial conduct through a rule change as directed by Attorney General Gonzales. The agency published a proposed code of judicial conduct on June 28, 2007, but has not published a final rule. During the course of our investigation this summer, the agency initially stated that the final rule was still under review at Justice Department; shortly before we published our report, the agency reported that "upon further review," it had abandoned the rulemaking process and decided to implement changes to an existing ethics manual published in April 2001.

Although the agency made it sound as if the ethics manual revisions had been completed, no new ethics manual has been published as of today. Moreover, by abandoning the rule making process, the agency is no longer required to receive comment on its proposed changes, and as of the time that we published our report, had not informed the National Association of Immigration Judges, or any other stakeholders, that it had decided to abandon the rulemaking procedure, or informed anyone as to what the proposed changes to the ethics manual would be. No reason was provided as to why the agency had decided to abandon the rulemaking process.

Similarly, the agency has yet to implement an annual performance review of immigration judges, and was not able to give a date on when it expected negotiations with the judges union to be concluded on the issue.[1] The agency only implemented an annual performance review plan for the Board of Immigration Appeals members on July 1, 2008, nearly two years after the directive was issued, and has not yet conducted a review. BIA members are not unionized, so no negotiations were necessary to implement a review of BIA members.

Neither has the Justice Department finalized rules that would limit contentious "affirmances without opinion" at the appellate level or provide immigration judges or BIA members with money-sanction authority, as explicitly directly by the Attorney General.

In many cases, the agency has claimed to have implemented changes, but is unable, or unwilling, to show that the implementation is effective. For example, although the agency claims to have implemented the directive to standardize complaint procedures and ensure timely response to complaints, the agency could not say how many complaints had been lodged against judges last year, or how they were resolved. Similarly, although the agency has implemented an immigration law exam for new judges, the exam procedures, content and methodology are not public, and therefore it is impossible to know whether this exam actually tests substantial knowledge of immigration law or whether it is a rubber stamp that any appointee can pass.

3. EOIR Appears To Be Experiencing Budget Shortfalls Yet Funded Positions Are Unfilled.

According to reports from the National Association of Immigration Judges and others, EOIR has had to cut or reduce training for judges and limit other programs despite the fact that funding was appropriated for over two dozen unfilled immigration judge positions. For example, EOIR cancelled its planned annual training conference for immigration judges for this year and instead held a "virtual conference" where judges did not leave their home cities. According to the NAIJ, in-person conferences are an "invaluable" training opportunity to talk about adjudicative issues and challenges. Similarly, according to NAIJ, EOIR has decided not to order the newest version of leading immigration law reference, "Kurzban's Immigration Law Sourcebook," for immigration judges because of budget constraints, and does not plan to do so until the new fiscal year begins in

[1] It is worthwhile noting that according to NAIJ, a central point of disagreement between the union and the agency relates to judicial independence -- the NAIJ has objected to what it has categorized as an attorney-employee review model that it argues would allow the administration to improperly influence judicial decision making, and has proposed a review model that would incorporate a panel review including both EOIR supervisors as well as other immigration court stakeholders.

October. Finally, in some circumstances EOIR has moved from live-instructor training of new immigration judges and BIA members to playback of recordings of live-instructor sessions in previous years. Obviously, training through recordings does not provide judges with an equivalent learning experience.

The former attorney general, federal circuit judges, and other court observers made clear that equipping immigration judges with the proper resources and training was key to improving the immigration courts. It is a matter of concern, therefore, that EOIR seems to be encountering funding shortfalls in this fiscal year in areas that were supposed to be priorities for immigration court improvement.

4. The Justice Department And EOIR Have Taken Active Steps To Keep Information About The Implementation Of Reforms Opaque.

Finally, TRAC is concerned that in many instances, the Justice Department and EOIR have taken steps to provide as little information to the public as possible about the implementation of the improvements, and have at times attempted to misrepresent the manner of their implementation.

For example, the Attorney General directed EOIR to form a committee to oversee the expansion and improvement of EOIR's Pro Bono Program. The committee was to be composed "of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar." EOIR did in fact form a committee, but did not invite any members of the private immigration bar to sit on the committee, although it did solicit input of various immigration stakeholders. When asked why EOIR did not invite external parties to sit on the committee as directed by the Attorney General, EOIR responded that the decision was made because of "legal concerns raised by the Federal Advisory Committee Act (FACA) and the Sunshine Act, EOIR determined that it would not be appropriate to include non-governmental organizations and private individuals as members of the Committee, per se."

EOIR has never published, and declined to provide to TRAC, the full the report of the Pro-bono committee's recommendations. Nor did it provide this report to the American Immigration Lawyers Association and other external stakeholders whose views were solicited. Moreover, the committees meetings were not open to the public, as they would have been required to be had the committee included external members as directed by the Attorney General.

Why EOIR and the Justice Department have taken such steps to shroud the work of the Pro-Bono committee is a mystery. This is not a national security issue. It is a committee whose sole purpose is to consider how to increase pro-bono representation of immigrants, an issue which by its nature require cooperation between the agency, the private bar, and other stakeholders. Yet for some reason, the agency chose to make this secretive.

On a related matter, the Justice Department and EOIR have apparently made policy decisions to change the Attorney General's directives without any announcement or explanation. For example, EOIR has not issued any rule or proposed rule to provide direct sanction authority, including civil money-penalty sanction authority, to immigration judges and BIA members, an explicit directive of the Attorney General that would have implemented the power that Congress provided to immigration judges in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. According to NAIJ, such sanction authority would allow judges to meaningfully sanction attorneys for contemptuous behaviour, such as late filings or ignoring judicial orders, that slows down the court and makes just adjudications more difficult.

In its fact sheet responding to TRAC's findings, however, EOIR implied that another proposed rule it promulgated satisfied these directives. In fact, that proposed rule, titled "Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances" and issued on July 30, 2008, expands the grounds on which the agency, through its Office of General Counsel, may sanction immigration attorneys or non-attorney representatives. This proposed rule does not provide civil money-penalty sanction authority, or any direct sanction authority at all, to immigration judges or BIA members, as explicitly directed by the Attorney General.

This leads to a troubling conclusion. Either the Justice Department and EOIR have decided to abandon their stated goal to provide civil money-penalty sanction authority to judges without any notice or explanation to the public or to immigration judges, or the Justice Department and EOIR have attempted to pass off another action as an implementation of their directive.

CONCLUSION

I do not mean to present the picture that the Justice Department and EOIR have not implemented any changes to increase the equity of the immigration court system. As our full reports lay out, the agencies have taken positive steps, such as standardizing court practices through the

new court manual and appointing additional supervisory judges. The number of judicial law clerks – still shockingly few in number – has also modestly increased. Moreover, it must be acknowledged that altering the operation of complex agencies like the EOIR in a constructive way is by its very nature a genuine challenge. The challenge is compounded by the fact that the EOIR functions within a much larger and older institution --the Department of Justice --and seeks to serve the needs of agencies like Customs and Border Protection and Immigration and Customs Enforcement that operate under an entirely different unit, the Department of Homeland Security.

Nevertheless, nearly three years after the Attorney General acknowledged the substantial problems in the immigration courts by ordering a six-month comprehensive review, and over two years after the AG issued a 22-point directive to remedy these problems, our careful examination shows that the reform promise outlined in these directives has not been kept.

In light of our findings, Madam Chairman, I would like to request that this committee continue its important oversight by:

1. *Resources:* Fully scrutinizing the current hiring system and understanding why, many months after the end of the illegal political hiring, there are still so many unfilled immigration judge positions; and whether, in addition, judges have adequate resources -- including judicial law clerks -- to effectively carry out their work.

2. *Procedures.* Requesting documentation and explanation from the Justice Department and EOIR on the implementation of key improvements, such as the code of judicial conduct, the annual performance review, the immigration law exam, and others, to ensure that the changes are implemented in a way that actually improves the fairness, effectiveness and accountability of the immigration court system.

3. *Transparency.* Helping to ensure that procedural reform is conducted in a fully transparent manner.

This concludes my testimony Madam Chairman. Let me thank you again for the opportunity to testify before you today.

Ms. LOFGREN. Thank you, Professor Long.

Now we will turn to you, Professor Legomsky, for your 5 minutes of oral testimony.

TESTIMONY OF STEPHEN H. LEGOMSKY, THE JOHN S. LEHMANN UNIVERSITY PROFESSOR, WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. LEGOMSKY. Well, thank you very much, Madam Chair.

I have been asked to provide a historical perspective on EOIR, with specific attention to the 2002 reforms that you have already described and their impact. The written statement spells out the history in more detail, so I am going to jump right up to 2002 when those reforms were announced. And I think three of those reforms are most relevant to today's hearing.

First, instead of the BIA deciding the vast majority of its cases in three-member panels, single members now decide all cases that don't fit within a few specific exceptions.

Second, the BIA was forbidden to give any reasons for its decisions any time one board member believes that the immigration judge reached the right result and that the issues are either squarely controlled by precedent or, in the opinion of that member, not substantial enough to justify a written opinion.

And third, despite his expressed desire to boost productivity, Mr. Ashcroft simultaneously announced a reduction in the size of the BIA from 23 authorized member positions, some of which were vacant, to 11. To accomplish that, he reassigned the generally most liberal board members to either I.J. positions or non-adjudicative positions.

The BIA was created, I might add, in 1940, and this was the first time any attorney general had ever removed any BIA member for any reason.

Attorneys General Gonzales and Mukasey have since introduced some further changes, also described in the written statement. But one of those changes was to expressly authorize DOJ officials to talk with I.J.s and board members ex parte about pending cases.

Another recent change was to authorize OIL, which is the office that argues the government's side in the courts, to report any I.J. or BIA decisions that, in their opinion, were of "poor quality." Similar reports from the opposing party are not authorized.

The effect of all of these last few changes—reassigning liberal adjudicators, authorizing ex parte communications with DOJ, and allowing one side but not the other to file complaints about the decisions—does put real pressure on adjudicators to reach decisions in favor of the government.

Decisional independence is critical. Judges have to be able to base their decisions solely on the evidence and their honest interpretations of the law without fear that they will lose their jobs if they rule against their boss.

Immediately after the 2002 reforms, three things happened. First, immigrants began losing a much higher percentage of BIA cases. Second, after they lost, they began filing for judicial review of the BIA decision at spectacularly increased rates, which has caused huge problems for the courts. And third, the courts began issuing numerous opinions not only reversing the BIA, but, as you

have said, uncharacteristically scathing comments about the quality of the I.J. and BIA opinions, in many cases. This was unprecedented.

All these problems almost certainly resulted directly from a combination of the 2002 reforms and persistent under-resourcing of EOIR. There just is no other plausible explanation for the coincidence in timing. All of these problems emerged immediately after these reforms went into effect.

Moreover, there are all kinds of logical reasons to expect that all of these reforms, including under-resourcing, would have precisely the adverse effects that did occur. The details on causation are in my written statement, at pages 7 to 9.

I would respectfully urge Congress to consider four steps.

First, invest the resources EOIR needs. It has a huge caseload. Many of its cases are very complex. And, of course, the consequences of error, especially in asylum, can be potentially grave.

Second, minimize the case categories in which single board members are allowed to hand down decisions on behalf of the entire BIA. Three-member panels should once again be the norm.

Third, the BIA should rarely be allowed to decide removal cases without giving at least basic reasons and never, in my view, in asylum cases.

And fourth and finally, Congress should restore the independence of the IJs and the BIA. It should consider taking EOIR out of DOJ entirely. But short of that, I think there are some modest steps that would go a long way. Congress should specifically prohibit the reassignment of IJs or BIA members, other than for misconduct. Congress should end the attorney general's asymmetrical practice of allowing government attorneys to file complains about adjudicators when they don't like the results but not the other side's attorneys. And finally, Congress should prohibit ex parte communications by adjudicators with DOJ officials concerning pending cases.

These contradict the most elementary principles of procedural fairness. And they are not even necessary, because the A.G. already has the power to reverse himself or herself whenever the attorney general disagrees.

I guess that is it for now. Thank you once again for the privilege of testifying before you.

[The prepared statement of Mr. Legomsky follows:]

PREPARED STATEMENT OF STEPHEN H. LEGOMSKY

Madame Chairwoman and members of the subcommittee, thank you for the opportunity to appear before you today. My name is Stephen H. Legomsky. I am the John S. Lehmann University Professor at the Washington University School of Law. For more than thirty years I have devoted the majority of my professional life to the subject of immigration law and policy. I have taught U.S. immigration law to law students for approximately 25 years, am the author of the law school textbook "Immigration and Refugee Law and Policy" (now in its fourth edition), and have had the privilege of advising both Democratic and Republican administrations and several foreign governments on immigration policy.

I have been asked to provide a historical perspective on the Executive Office for Immigration Review (EOIR) and to comment specifically on the 2002 streamlining initiatives and their impact.

To understand the role and structure of the EOIR it is necessary to describe briefly the system that was in place before its creation in 1983. For most of the first half of the twentieth century, deportation cases were adjudicated by "immigration

inspectors." These individuals worked for the predecessors to the former Immigration and Naturalization Service (INS), and in addition to adjudication they performed various law enforcement functions. There was a rough system of appeals to a centralized office in Washington, DC.[1] In 1940, in order to improve the appellate part of the process, the Attorney General created the Board of Immigration Appeals (BIA). He delegated to the new Board the authority to hear appeals from the deportation decisions of the immigration inspectors, as well as a few other miscellaneous orders.[2] BIA decisions were accompanied by written opinions that set out the Board's reasons for affirming or reversing.

After passage of the Administrative Procedure Act (APA) in 1946, there was disagreement over whether the APA procedures were meant to apply to deportation proceedings. The issue was important, because the APA philosophy was to assure independence for those who adjudicate formal agency hearings, and the immigration inspectors who presided over deportation hearings freely co-mingled adjudicative and enforcement functions and reported to other enforcement officials. After a vigorous tug of war among Congress, the executive branch, and the Supreme Court, Congress finally settled the issue by enacting the Immigration and Nationality Act (INA) in 1952.[3] That statute, as amended many times, is still the main law governing immigration and nationality in the United States. Among other things, the Act assigned the task of presiding over deportation hearings to "special inquiry officers," later re-named "immigration judges."

The immigration judges clearly possessed greater independence than their "immigration inspector" predecessors, but in many quarters concern about their institutional independence lingered. They reported to the INS, which was, after all, one of the two opposing parties in the cases they heard. To alleviate that concern, the Attorney General in 1983 created EOIR.[4] The new agency initially housed both the Chief Immigration Judge (who in turn coordinates the work of the immigration judges) and the BIA. It now has a third component, the Office of the Chief Administrative Hearing Officer (OCAHO).[5]

Throughout its history, EOIR has experienced steadily increasing caseloads. Generally, the number of immigration judges expanded and the resources increased, though not necessarily as rapidly as the demands of their caseloads. The BIA was a different story. It remained at five members (minus vacancies at various times) until 1994. In that year, EOIR expanded to nine members, later to 12,[6] and eventually to 23 member positions.

As caseloads and membership increased, BIA procedures changed too. Until 1988, the five-member BIA decided all cases en banc; i.e., all five members participated in every decision. In 1985, the Administrative Conference of the United States (a former U.S. government agency charged with recommending administrative reforms), concerned about present and future caseload increases, recommended that the Board start deciding cases in three-member panels, reserving the en banc procedure for exceptionally important cases.[7] The Justice Department strenuously opposed the recommended change. Persuaded three years later by the demands of its increased caseload and the inefficiency of requiring all five members to hear every case, however, the Department ultimately adopted the ACUS recommendation and began deciding cases in three-member panels.[8]

From then until 1999, almost all cases were decided in three-member panels. In the meantime, however, the caseload continued to mount and backlogs began to grow. Apart from strictly workload concerns, the Department worried that long delays in the appeal process would give noncitizens in removal proceedings an incentive to file frivolous appeals to the BIA in order to buy additional time in the United States. In 1999, therefore, in order to boost productivity and thereby speed the process, Attorney General Janet Reno issued a regulation authorizing the Chair

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[1] This system of hearings and appeals, as it functioned before 1952, is thoughtfully described by former INS examiner Sidney B. Rawitz, in *From Wong Yang Sung to Black Robes,* 65 Interpreter Releases 453 (1988).

[2] 5 Fed. Reg. 3503 (Sept. 4, 1940).

[3] Pub. L. 82–414, 66 Stat. 163 (June 27, 1952).

[4] 48 Fed. Reg. 8039 (Feb. 25, 1983).

[5] OCAHO houses the ALJs who decide various cases arising under the Immigration Reform and Control Act of 1996 (IRCA), Pub. L. 99–603, 100 Stat. 3359 (Nov. 5, 1986). These hearings involve either employer sanctions or alleged violations of IRCA's anti-discrimination requirements.

[6] See 72 Interpreter Releases 772–73 (June 5, 1995).

[7] The reasons appear in the consultant's report, Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 Iowa L. Rev. 1297 (1986).

[8] 53 Fed. Reg. 15660 (May 3, 1988).

of the BIA to identify exceptional categories of cases that could be decided by single members.[9] Over the next two years, the Chair designated several such categories. Whatever the impact of that change on the quality of the resulting decisions, it was clear that the new procedure noticeably improved the Board's productivity.[10]

Despite that success, Attorney General Ashcroft in 2002 announced what turned out to be a highly controversial series of changes designed to further "streamline" the BIA.[11] The core of the new procedure was called the 'case management system." Among other things, the new system made single-member decisions the norm rather than the exception and simultaneously introduced the concept of the "affirmance without opinion" (AWO).

As to the former, the new regulation requires all BIA decisions to be rendered by single members rather than by three-member panels, unless the case falls within one of six specific categories. The case categories in which the regulation permits the Board to convene three-member panels are (1) inconsistent rulings among immigration judges; (2) a need for a precedential decision; (3) a decision "not in conformity with the law;" (4) a "major national impact;" (5) an immigration judge's finding of fact that was "clearly erroneous;" or (6) a desire to reverse the immigration judge's decision.[12]

The AWO, also designed to save the time of the BIA members and their staff, entails affirming the opinion of the immigration judge but without giving reasons for the decision. The Attorney General's regulation, in fact, expressly forbids the BIA from giving reasons for any of its decisions whenever a single Board member "determines" that the immigration judge reached the right result, that any errors by the immigration judge were harmless, and that the issues are either "squarely controlled" by precedent or not "substantial" enough to warrant a written opinion.[13] The combination of the two changes means that a large number of BIA decisions are both single-member and without opinion.

The 2002 regulation contained another highly controversial element. It provided that, within six months of the start of the new system, the authorized size of the Board would be reduced from 23 members to eleven.[14] This marked the first time in the then 62-year history of the BIA that any Attorney General had removed any member from the Board. Coming at the same time that the Attorney General was justifying the introduction of affirmances without opinion and the expanded use of single-member decisions as ways to increase productivity and thereby reduce the backlog, the decision to cut the number of BIA member positions in half was puzzling. Perhaps more important, neither the rule itself nor any other announcement specified concrete criteria for determining which BIA members would be removed from the Board.[15] When the Attorney General announced the names of the "reassigned" Board members, it was clear that the selections had been ideological; those with the voting records most favorable to noncitizens were the ones chosen for reassignment.[16] Moreover, during the months between the Attorney General's announcement that some members would be reassigned and the announcement of actual names, the percentage of cases in which particular members ruled in favor of the noncitizen dropped precipitously.[17] In 2006 Attorney General Alberto R. Gonzales then restored four positions to the BIA.[18] That move brought the Board membership to its current total of 15 and in effect enabled the Attorney General to replace four of the reassigned members with individuals of his own choosing.

Finally, partly in response to judicial criticisms described below, Attorney General Gonzales convened a team to review and evaluate the EOIR. At the same time he issued a public memorandum to the immigration judges and the BIA communicating

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[9] 64 Fed. Reg. 56135 (Oct. 18, 1999).

[10] That was the finding of an important ABA study. Dorsey & Whitney LLP, Study Conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono, Re Board of Immigration Appeals: Procedural Reforms to Improve Case Management (July 22, 2003), section III.

[11] 67 Fed. Reg. 54878 (Aug. 26, 2002).

[12] 8 C.F.R. section 1003.1(e)(6) (2008).

[13] 8 C.F.R. section 1003.1(e)(4) (2008).

[14] 67 Fed. Reg. at 54901 (Aug. 26, 2002).

[15] The regulation referred only to "traditional" factors such as the Attorney General's "discretion," and to such other factors as "integrity, . . . , professional competence, and adjudicatorial temperament." Seniority, the Attorney General made clear, would not be "a presumptive factor." 67 Fed. Reg. at 54878.

[16] This was the conclusion of an empirical study by former House Judiciary Committee staff counsel Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications,* 9 Bender's Immigration Bulletin 1154 (Oct. 1, 2004). Accord, ABA Study, note 10 above.

[17] Levinson, note 15 above.

[18] 71 Fed. Reg. 70855 (Dec. 7, 2006).

his expectations concerning the quality of decisions and professional demeanor.[19] He declined to release the findings of his review team, but he did announce a series of measures to enhance the professionalism of the adjudicators.[20] One of those steps was to issue Codes of Conduct for immigration judges and BIA members.[21] To those who had hoped the Attorney General would restore the independence of the immigration judges and the BIA, the departmental announcement and accompanying Codes proved disappointing. The Codes expressly authorize immigration judges and BIA members to engage in ex parte communications with Justice Department personnel concerning pending cases,[22] thus exacerbating the likelihood of departmental pressure on adjudicators to reach particular outcomes. In addition, item 7 of the Attorney General's 22-point plan to improve EOIR calls for the Justice Department's Office of Immigration Litigation (OIL), which is the office that argues the government's side in the courts of appeals, "to report adjudications that reflect immigration judge temperament problems or poor Immigration Court or Board quality."[23] There is no analogous provision for the noncitizen or his or her attorney to report "poor quality."[24] The same plan contemplates "performance evaluations" for immigration judges and BIA members.[25] Although the memorandum is not explicit, a large number of OIL complaints of "poor quality" decisions by a particular adjudicator would presumably be considered in the preparation of the performance evaluation. Since OIL is more likely to consider a decision to be of "poor quality" when the government loses than when it wins, and since there is no analogous mechanism for the noncitizen to file complaints of "poor quality," the system further encourages adjudicators to favor the government side.

In June 2008, Attorney General Michael B. Mukasey announced changes designed to cut back on the number of affirmances without opinion.[26]

The overall impact of the 2002 reforms is hard to gauge conclusively. By several identifiable measures, the performance of EOIR has badly deteriorated since the reforms were initiated. There are logical reasons to attribute the deterioration to those reforms, though cause and effect are of course difficult to prove scientifically. Harder still is linking particular adverse performance measures to particular components of the 2002 reforms. The following will describe some of the recent trends:

First, immediately after the 2002 reforms went into effect, the BIA, not surprisingly, decided a much higher percentage of its cases through single-member dispositions; that trend coincided with the BIA reversing a dramatically lower percentage of immigration judge opinions, both in asylum cases specifically and in all removal cases combined.[27] Since the vast majority of appeals to the BIA are by noncitizens challenging orders of removal, these changes in outcomes mean that immediately after the 2002 reforms the probability of a noncitizen prevailing on appeal to the BIA dropped markedly. Second, immediately after the reforms there was a spectacular increase in the number of petitions for review of BIA decisions filed in the courts of appeals—both in absolute terms and as a percentage of BIA removal orders. The massive impact of this increased caseload on the courts, the U.S. attorneys, and on DHS itself is now a familiar problem that has been thoroughly documented elsewhere.[28] Third, the courts of appeals have issued numerous opinions not only reversing the BIA, but adding uncharacteristically scathing comments about both the quality of the immigration judge and BIA opinions and the professional demeanors of a small number of immigration judges. Often the criticism is a combined one, chastising the immigration judge for an inexplicable result and the BIA for affirming it without opinion.[29]

There are many possible explanations for the emergence of these problems immediately following the 2002 reforms. The combination of far more single-member deci-

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[19] 83 Interpreter Releases 122 (Jan.17, 2006).

[20] 83 Interpreter Releases 1725 (Aug. 14, 2006).

[21] See 72 Fed. Reg. 35510 (June 28, 2007).

[22] *Id.* at 35511, 35512, Canon XV of each Code.

[23] U.S. Dept. of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006).

[24] Item 11, *id.,* authorizes a review of the process for filing complaints concerning "inappropriate conduct" but not complaints concerning "poor quality" decisions.

[25] Item 1, *id.*

[26] The proposed rule is in 73 Fed. Reg. 34654 (June 18, 2008), amending 8 C.F.R. § 1003.

[27] Jaya Ramji-Nogales et al, *Refugee Roulette: Disparities in Asylum Adjudication,* 60 Stan. L. Rev. 295, 353, 357–59 (2007).

[28] See especially the fine empirical study by John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis,* 51 New York L. School L. Rev. 13 (2006–07).

[29] E.g., Recinos de Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005). Some of the harshest language has come from the Seventh Circuit. See, e.g., Zhen Li Iao v. Gonzales, 400 F.3d 530, 533–35 (7th Cir. 2005).

sions, the widespread use of affirmances without opinion, and the threats or at least perceived threats to the job security of the immigration judges and the BIA members could well be responsible. The prevailing view among many immigration judges, BIA members, and immigration practitioners that EOIR is badly under-resourced very likely is also a large part of the explanation, as Judge Walker, of the Court of Appeals for the Second Circuit, has suggested.[30] The Justice Department has denied that the increased rate of appeals to the courts reflects a diminished quality of the BIA decision-making. The Department has speculated that by speeding up its decisions the BIA has reduced the amount of time that a noncitizen can buy with a frivolous BIA appeal and, therefore, has increased the incentive to delay removal by appealing to the courts.[31] This last theory seems highly unlikely, because since 1996 the filing of a petition for review no longer triggers an automatic stay of removal; special permission to remain pending review is required, and courts are loathe to grant such permission in cases they consider frivolous. Moreover, if anything, one would expect that, all else equal, someone who had spent a lengthy period in the United States already (as was true in the past when BIA appeals were taking longer) would have deeper roots and therefore a greater incentive, not a lesser one, to further prolong his or her future stay through a judicial appeal.

The most likely explanation is that the problems have stemmed from a combination of the 2002 reforms and persistent under-resourcing of the EOIR. For one thing, there is no other apparent explanation for the coincidence in timing; all of these problems emerged immediately after the reforms went into effect. For another, as the remainder of this Statement will explain, there are logical reasons to expect all of the reforms just described, as well as the continuing under-resourcing of EOIR, to have precisely the adverse effects just discussed.

The prohibition on the Board giving reasons for its decisions seems especially likely to have all these effects—a much lower chance of a noncitizen winning a BIA appeal, a much higher probability that a person who loses will seek judicial review, and a much higher number of poorly thought out BIA decisions. First, while affirmances require no giving of reasons unless they fall within one of the designated exceptions, reversals always require opinions. And opinions with defensible reasons take time to write. BIA members with staggering caseload demands and so little time per case therefore have a real incentive to affirm rather than reverse. The Attorney General's recent introduction of performance evaluations for both immigration judges and BIA members[32]—evaluations that will undoubtedly include judgments about productivity—enlarge that incentive further. Moreover, a reasoned opinion requires the Board member to consider the losing side's argument with some care; without it, affirmance without adequate attention becomes easier. In addition, the very process of writing an opinion forces the writer to think through whether his or her conclusion really is consistent with the evidence and the law. For all these reasons, a decision without explanation naturally makes it easier for the BIA to casually affirm an immigration judge's removal order and easier to reach a conclusion without adequate thought. Once such a decision is handed down, the appellant also has no way to know the reasons for the decision, less confidence that the decision was correct, and, therefore, a greater incentive to seek judicial review. In turn, the reviewing court, not having an opinion to review, has to spend time doing what the BIA should have done, has less confidence in the BIA decision, and has a greater inclination to reverse and remand to the BIA for further consideration or explanation. The cursory nature of the BIA review might matter less if one could be confident that the immigration judges were correct. But the immigration judges operate under similar time pressures and resource shortages that inevitably compromise their abilities to give their cases full consideration. Finally, reasoned BIA opinions provide guidance not only to the appellants whose cases they are deciding, but also (at least for precedential decisions) to immigration judges and to DHS officials. When precedential and other reasoned decisions are scarce, DHS officials and immigration judges frequently have to guess at whether a given decision will meet the BIA's approval.

For similar reasons the increased reliance on single-member decisions (not just decisions without reasons) can be expected to decrease the attention a case will receive, increase the error rate, and, therefore, increase the rate of further appeals to the courts. With three member-panels there is less chance of one person missing an immigration judge error. The chance that one individual with a strong ideology (in either direction) will reach an extreme result that the Board as a whole would

[30] See Ramji-Nogales et al, note 22 above, at 383 (quoting Judge Walker).
[31] EOIR Fact Sheet (Sept. 15, 2004).
[32] See Press Release, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006).

not have countenanced is reduced. The members are able to deliberate. There will be more confidence that the appeal was adequately considered. There is opportunity for a dissenting opinion that can help guide the future development of the law. Since many of the BIA cases are argued pro se (i.e., by unrepresented noncitizens), and therefore without legal briefs, there is a particular need for some exchange of ideas. And the enormity of the interests at stake—especially in cases of long-term lawful permanent residents with family and other roots in the community, or in asylum cases where an erroneous result can lead to death, torture, or other persecution—combined with the ever expanding categories of cases in which Congress has withheld judicial review, makes the fairness and thoroughness of the administrative appellate process critical.

Apart from single-member decisions and affirmances without opinions, the events of 2002 and the subsequent changes announced in 2006 also brought home to both immigration judges and the BIA how fragile their job security can become when they rule in favor of the noncitizen and against the government. The reassignments that followed the 2002 announcement are the clearest threat to job security. The combination of allowing OIL to file compaints about "poor quality" decisions, withholding the same right from noncitizens and their attorneys, and performance evaluations that likely reflect those complaints send additional signals to immigration judges and BIA members that ruling in favor of the government and against the noncitizen is the safest way to secure one's job. I have written elsewhere about the great dangers that this insecurity poses for the decisional independence of the immigration judges and the members of the BIA, and I respectfully refer the subcommittee to that writing for fuller treatment of the independence issue.[33] For present purposes, a summary will suffice.

The clearest benefit of judicial independence is procedural fairness. People who adjudicate cases need every incentive to reach their decisions honestly. They must base their findings of fact solely on the evidence before them and their legal conclusions solely on their honest interpretations of all the relevant sources of law. They must not be encouraged to base their decisions on which outcome they think is favored by the person who is in a position to fire them. No one would want his or her case to be decided by someone who knows in advance that a decision in their favor could be hazardous to the adjudicator's job. Decisional independence is also essential to protecting unpopular individuals, minorities, and points of view. It is necessary as well to fostering public confidence in the integrity and accuracy of the justice system.

To sum up: The main components of the 2002 EOIR reforms were making single-member BIA decisions the norm; introducing BIA affirmances without opinion; and eliminating the job security, and therefore eroding the decisional independence, of both immigration judges and the BIA. The last measure was reinforced by the asymmetrical complaint procedure, and the performance evaluation provisions, of the 2006 Justice Department announcement. Immediately following the 2002 reforms, several things happened: The BIA began to affirm immigration judge removal orders with greater frequency; a much higher percentage of those whom the BIA ordered removed filed petitions for review with the courts of appeals; and the courts began issuing a stream of opinions chastising immigration judges and the BIA for both poor quality work and, on several occasions, unprofessional conduct of selected immigration judges. There is no way to prove cause and effect conclusively, but both the absence of plausible alternative explanations and the presence of logical reasons to expect the reforms to produce these results make it highly likely that these serious problems are the product of the 2002 reforms and insufficient resourcing of EOIR.

These problems suggest several reforms. First, in my view, EOIR resources need to be substantially increased to reflect the realities of their large caseloads, the complexities of many of the cases, the often lengthy hearing transcripts and other record evidence that must be reviewed, and the grave consequences of error. Both the number of adjudicators themselves (immigration judges and BIA members) and their staff support needs to increase. Second, the categories of cases in which single Board members may hand down decisions on behalf of the entire BIA should be minimized; three-member panels should once again be the norm for the vast majority of the Board's cases. Third, the BIA should never be permitted to decide an asylum case, and should rarely be allowed to do so in other removal cases, without providing at least basic reasons for its decision. The reasons need not be elaborate, but they should provide enough clarity to show that the arguments of the losing side were seriously considered and to give the opposing parties, and the reviewing court,

[33] Stephen H. Legomsky, *Deportation and the War on Independence,* 91 Cornell L. Rev. 369 (2006).

enough information to understand the basis for the decision. For this purpose, it will often be enough to incorporate by reference the reasoning of the immigration judge, as long as the opinion leaves clear which parts of that reasoning formed the basis for the affirmance if there were multiple parts. Fourth, the decisional independence of the immigration judges and the BIA should be restored. This means not only prohibiting the "reassignment" of immigration judges or BIA members other than for misconduct, but also ensuring that any performance evaluation system that could affect an adjudicator's job security be based on data that are fair and symmetrical. In particular, either complaints of "poor quality" decisions should not be part of the record, or they should be invited from both sides rather than solely the government side. In addition, the provisions in the Codes of Conduct that authorize the adjudicators to confer ex parte with Justice Department officials concerning pending cases should be stricken. Such ex parte communications contradict the most basic principles of procedural fairness. Moreover, the Attorney General already possesses the power to reverse BIA decisions with which he or she disagrees;[34] in addition to being inappropriate, therefore, ex parte pressures by the Justice Department are not even necessary. Given the events of the past several years, it seems doubtful that even these reforms would provide adequate reassurance to the immigration judges and the BIA members if the reforms are announced by the Department of Justice itself. Adjudicators would be well aware that those policy reforms could be reversed at any time. The above mechanisms for restoring decisional independence should therefore be enacted into law by Congress.

Thank you once again for the privilege of testifying before you.

Ms. LOFGREN. I think we are going to see if we can get our questions in before we go to vote, since only about 50 of our colleagues have shown up yet. And I will begin.

Professor Long, in your testimony, you indicated several indices of poor judicial performance and even patterns of misconduct within the immigration court system. And one of the things you mentioned is a series of Federal appellate court rulings that sharply criticized the immigration courts.

Can you just briefly describe what some of these criticisms were and how prevalent these decisions were?

Ms. LONG. Well, basically, court of appeals judges were seeing several things. Number one is that the judges were not ruling and treating those who appeared before them with proper respect. Number two, that prejudices of the judges appeared to be getting in the way of the decisions, so that often there was not sufficient support in the record to support the decisions being made.

Ms. LOFGREN. I wonder if either one of you or both of you could provide a sample of some of the opinions to the Subcommittee subsequent to this hearing, so we can get a flavor systematically of what the circuit courts are concerned about.

Now, Professor Legomsky, you indicated concern about the independence of the judiciary. And it appears that the system, as it is operating now, really is weighted toward the prosecution, according to your testimony.

I mean, other than the ex parte communications, why would that be, in terms of the current——

Mr. LEGOMSKY. Well, I think that the affirmances without opinion are strongly weighted toward the government side. For one thing, it is only affirmances of the I.J. that can be handed down without giving reasons, not reversals.

So if you put yourself in the position of a BIA member who is tremendously backlogged—and I agree that the fault lies not with the BIA members but with the under-resourcing—they are tremen-

[34] 8 C.F.R. section 1003.1(h) (2008).

dously backlogged, they are probably going to be judged on their productivity, because there are performance——

Ms. LOFGREN. So if you say "no," you don't have to write an opinion.

Mr. LEGOMSKY. Exactly. So if you have a choice between deciding "yes" and having to write an opinion and saying "no" and you don't, there is a tremendous bias toward not having to do it.

In addition to that, so many of the people who appear before the BIA are not represented by counsel. They are not in a position to identify with clarity any mistakes that the immigration judge, who is also under tremendous time pressure, might have made. The government, in contrast, is represented by counsel, and so the system is biased in that respect as well.

Ms. LOFGREN. In terms of the ex parte communication, ordinarily at a judicial proceeding that is a big no-no. Would moving the court system into some more independent environment help address that issue?

Mr. LEGOMSKY. I think it would. It would certainly eliminate any job insecurity that might result from worrying whether your boss is going to fire you for going against the boss.

The point I would emphasize here is that what makes immigration judges and BIA members not unique, because there are some other judges in this position, but certainly distinctive is that the cases they are deciding are cases in which there are two opposing parties and one of the opposing parties is your boss. So there is a tremendous pressure to not anger the person who holds the authority to non-renew your contract.

Ms. LOFGREN. That obviously makes a lot of sense.

Mr. LEGOMSKY. Oh, I am sorry, can I make one other point on that, as well?

Ms. LOFGREN. Of course.

Mr. LEGOMSKY. At a time when the INS, the former INS, was in the Department of Justice, there was at least some benefit to keeping EOIR within Justice, because then the attorney general could maintain policy coherence, having INS and EOIR in the same department. I don't think that was ever a large consideration, but at least there was some benefit.

Now that the INS doesn't exist and the EOIR is under a whole different department, I am not sure that even that benefit exists. So my recommendation would be that EOIR either be made into a separate article from immigration court or otherwise be given the independence that it needs.

Ms. LOFGREN. I remember when the Republicans were in the majority, there was a proposal that Bill McCollum of Florida was pursuing. And it sort of dribbled away, but the Republican majority was very interested in pursuing that at the time. And it might be something we would look at next year.

Mr. King, I would invite you, since we still have time to get over there but only if we are prompt, to do your questions at this point.

Mr. KING. Well, thank you, Madam Chair. And I will keep my word and not use any more time than you did.

And I will direct my first question—well, first, to Professor Legomsky, I mean, isn't it true that the government's side of this, all the way through the appeals process, from the I.J. to the BIA

to the circuit and potentially to the Supreme Court, that if they lose at any level, what is the recourse of the government?

Mr. LEGOMSKY. If the government loses at the I.J. level, it has the same right to appeal to the BIA that the immigrant does.

If the government loses at the BIA level, it is true that the government has no right to appeal to the courts, but it doesn't need to do that because the attorney general can unilaterally reverse the decision.

Mr. KING. And then, in your analysis of this in making your recommendation to this Committee, did you evaluate or make recommendations as to statutory changes that Congress might make to reduce the number of appeals as an alternative to expanding the number of judges?

Mr. LEGOMSKY. I am sorry, I am not certain that I understand.

Mr. KING. Let me try again. There are certain parameters that allow for appeal. If Congress would narrow those parameters, they would theoretically reduce the number of appeals. In fact, that goes beyond theory; it would be a fact that it would reduce the number of appeals.

So have you evaluated those parameters and made any recommendations on what we might do to narrow them so that we could reduce the number of appeals, rather than increasing the number of judges?

Mr. LEGOMSKY. I understand now; I am sorry. In order to answer that question, I have to explain that Congress has already dramatically narrowed the number of cases in which it is even possible to file an appeal. Asylum cases today——

Mr. KING. I don't——

Mr. LEGOMSKY. It would be very difficult to find any additional categories, I think.

Mr. KING. Oh, I would submit I could probably do that, Professor. But I would just illustrate that. I don't know that there is a limit to how narrow we might be able to make it, as a matter of public policy. But I do agree that we need more judges and we need to have a legitimate evaluation system that moves quickly.

So I want to put that part into the record, and I want to thank the witnesses for their testimony. I yield back the balance of my time and head over to vote.

Ms. LOFGREN. I will thank both witnesses.

And we will keep the record open for 5 days if there are additional questions. We would ask that you respond promptly.

And we thank you very much for your very useful testimony.

This hearing is adjourned.

[Whereupon, at 11:46 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

On July 28, 2008, the Department of Justice's Office of Professional Responsibility and the Office of the Inspector General issued a report showing that three high-level Department of Justice officials, Kyle Sampson, Jan Williams, and Monica Goodling,

> *violated Department of Justice policy and federal law by considering political or ideological affiliations in soliciting and evaluating candidates for [Immigration Judges], which are Schedule A career positions, not political appointments. Further, the evidence demonstrates that their violations were not isolated instances but were systemic in nature.*

Based on this report, it appears Republican credentials, rather than knowledge of and experience in immigration law, became the main criterion in hiring Immigration Judges and members of the Board of Immigration Appeals. All three named officials only considered candidates referred to them by the White House, Republican members of Congress, Republican political appointees, the Federalist Society, the Republican National Lawyers Association, and individuals with Republican party affiliations, while ignoring candidates sent to them by the Executive Office for Immigration Review (EOIR).

This politicization of EOIR occurred at a time when the Immigration Courts and the Board of Immigration Appeals (BIA) were also suffering from systemic problems created by former Attorney General Ashcroft's "streamlining" plan.

In 2002, then-Attorney General John Ashcroft promulgated a rule that "establishe[d] the primacy of the streamlining system for the majority of the cases." The 2002 streamlining regulation made single member decisions and affirmance without opinions (AWO) "the norm rather than the exception."

At the same time, Attorney General Ashcroft also reduced the size of the BIA from 23 members to 11. Several analyses of the eliminated BIA members found that "the selections had been ideological; those with the voting records most favorable to noncitizens were the ones chosen for reassignment."

The result of the Ashcroft streamlining plan was a significant increase in the number of BIA decisions appealed to the federal courts of appeals. The courts of appeals not only reversed the BIA at a higher rate, but also "add[ed] uncharacteristically scathing comments" about the poor quality of IJ and BIA decisions.

Moreover, even as the Administration and Congress dedicated more resources to the arrest and detention of deportable non-citizens, both failed to commit a similar level of resources to the immigration courts, which is responsible for determining whether certain non-citizens are in fact deportable. The failure to devote adequate resources to the immigration courts has led to increased caseloads at all levels of the removal process, at the immigration courts, the BIA, and the federal courts.

EOIR has been too long ignored and the result has been politicization of the immigration courts, so-called "streamlining," and inadequate resources. I look forward to hearing from our witnesses today so that we may finally begin to address these very serious problems in the administrative removal process, which is the heart of our immigration enforcement system.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The Executive Office for Immigration Review (EOIR), which is part of the Justice Department, houses the Immigration Courts and the Board of Immigration Appeals (BIA). These are not an independent judiciary, but are administrative law judges appointed and employed by the Department of Justice.

EOIR's role in ensuring fairness is especially important, given that less than half of those brought before the courts are represented by attorneys.

This is the first oversight hearing that I can recall since 2002. Since then, EOIR has been weakened by politicized hiring by many of the same culprits who we are familiar with from the US Attorney hiring scandal. The system has also felt the stress of a continuing lack of resources and manpower.

First, the politicization of the Justice Department.

We are all by now intimately familiar with the havoc wreaked by the former inhabitants of the Office of the Attorney General, as Kyle Sampson, Monica Goodling, and others tried to change the Justice Department into an extension of the Bush White House political office.

> People were blacklisted or driven from office, while attorneys who were willing to insert partisan politics into the Department's work were rewarded and promoted. Politics did not just taint the treatment of presidentially-appointed federal prosecutors, but extended to the immigration courts as well.
>
> Republican credentials, rather than an expertise in immigration law, became the main criteria in hiring immigration judges and BIA members. Politicization of these positions clogged the entire system, creating major bottlenecks and wreaking havoc on the immigration courts' workload. The qualified candidates that EOIR forwarded to the Attorney General's office for consideration were simply ignored, while the AG's staff desperately sought Republican loyalists who they could shoehorn into judgeships whether they knew anything about immigration or not.
>
> And at the BIA, the number of appellate judges was cut from 23 members to 11 since our last oversight hearing. Independent analysis shows that the members with the voting records most favorable to the non-citizens were the ones chosen for demotion. Not surprisingly, the percentage of reversals plummeted. And there was a significant increase in the number of appeals to the federal circuit courts, which suffered an immigration backlog as well.
>
> So, today, I am interested in hearing not just how DOJ is planning to prevent future politicization, but also to learn "who was watching the store?"

Additionally, I want to know how the witnesses expect 215 Immigration Judges to handle a caseload of over 300,000 cases a year.

> That's 27 cases disposed of every week, without taking any vacation or sick days, and without taking the time to issue written opinions.
>
> When coupled with the crushing workload of the shrunken BIA, these statistics make me wonder how any immigration enforcement is done in this country.

In conclusion, throughout the hearings that we have held this year, we have heard a lot in the last year about immigration judges.

> Some have even suggested that the immigration judges are some kind of cabal of liberals, bent on using every ounce of discretion we give them to allow dangerous aliens remain in the country.
>
> That is not borne out by the facts.
>
> > They are hardworking, but they are swamped.
> >
> > Most of them, before the Bush Administration swung into action, were experts in the immigration field, devoted to neutrally applying our laws.
> >
> > They deserve better than to be starved of resources and litmus tested for partisan credentials.

PREPARED STATEMENT OF MARY M. SCHROEDER, JUDGE,
UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

My name is Mary M. Schroeder and I am a Judge of the United States Court of Appeals for the Ninth Circuit. From December 2000 through November, 2007, I served as the Chief Judge of the Circuit, the nation's largest federal circuit that handles approximately half of the entire workload of the Country in petitions for review of the decisions of the Board of Immigration Appeals. My colleagues in the Second Circuit handle roughly thirty percent, as our two Circuits contain the most important ports of entry to this Country. My home chambers are in Phoenix Arizona, where I practiced law and served on the Arizona Court of Appeals before being appointed to the federal bench. As an Arizonan, I am familiar on a daily basis with controversies surrounding immigration in our nation.

I wish to thank you for having this hearing and for asking me to present my views today on the important subject of the administration of justice in the immigration field.

Immigration cases in our court are appeals from final orders of deportation or removal. For years they constituted less than 10% of our total caseload. Beginning in approximately 2002, however, when the Executive Branch shrank the pool of available immigration judges and members of the Board of Immigration Appeals, our appeals ballooned dramatically. Over a course of a few years, we went from 900 petitions for review filed in 2001, to more than 6,000 in 2005. The principal reason for this dramatic increase was the effort to "streamline" immigration appeals to the BIA with one judge, rubber stamp orders affirming the immigration judge decisions with blanket approval. This practice meant that to obtain any meaningful appellate review, litigants had to appeal to the Court of Appeals.

This "streamlining" in turn increased the number of issues for us to decide exponentially, because there was no administrative appellate review to determine which were the dispositive issues. Thus every single issue decided by the immigration judge in each streamlined case would have to be reviewed to determine its validity or our jurisdiction to review it. Therefore, without meaningful BIA review, both the number of appeals to our court and the number of issues to decide in each appeal multiply.

The immigration load threatened intolerable delay in the processing of our remaining civil case load until our court determined that the immigration crisis in the Executive Branch should not result in the failure of our court to keep up with important cases in other areas, particularly in intellectual property and technology, criminal sentencing, and death penalty review. The result has, however, been a delay in the processing of immigration cases that can best be redressed, in my view, by Congress addressing the need for efficient administration review of deportation cases.

The current situation is not fair to anyone. Aliens in the United States who may qualify for relief from deportation should have their fate decided promptly, and those who do not have any plausible justification for remaining in the country lawfully should understand their position as well. Families should not live in uncertainty and fear for years on end. Employers should know the status of their employees caught up in deportation proceedings, and the public has a right to know that immigration laws are being enforced.

As expressed in the platforms of both political parties, there is everywhere a sense that we need overall comprehensive immigration reform. I can not speak to the policies that Congress should enact. My only concern is with the administration of justice in the court system. As a resident of Arizona, I know that the lack of coherent, efficient immigration law enforcement has an impact on all of our courts, state and federal, in this key border state. The lack of coherent national policy has resulted in local law enforcement officials taking immigration enforcement into their own hands, and it has also multiplied border related prosecutions in both state and federal courts. I have been on panels with the Chief Justice of Arizona, Ruth McGregor, the Chief Federal District Judge of Arizona, John Roll, state Superior Court judges and federal magistrate judges. All express acute frustration with the current situation. Our U.S. Attorney in Arizona, Diane Humetewa, has also spoken of the need for resources at every level of the system, from the immigration courts, prosecutors, trial courts, to the Court of Appeals.

The first step to fair and efficient administration of our laws lies in the Immigration Court and the Board of Immigration Appeals. At the present time, those bodies are completely the creation of regulations, and are subject to potentially abusive practices in hiring and firing.

During the time that I was Chief Judge of the Ninth Circuit we made it a point to meet periodically with judges of the Immigration Court and the Board of Immi-

gration of Appeals. Our then Clerk of Court, Cathy Catterson, and I traveled to Washington and met more than once with the Department of Justice in an effort to encourage more resources for administrative review of deportation orders, and to offer our support of the courts in obtaining those resources and in improving the quality of the judges occupying those positions. We did not meet with a great deal of success.

While I no longer speak for the judges on our Court, I do speak from considerable experience. What is needed is a codification of the administrative processes, through legislation that statutorily establishes an immigration court and a board of immigration appeals as permanent bodies, and that also establishes tenure and standards for those who occupy those significant opinions. The future lives of many families and individuals as well as the quality of life for all of us in this country depend to a great degree on whether we succeed in achieving an independent, fair and efficient system of immigration law enforcement.

I thank the Committee for having this hearing that has been inspired by the Department of Justice's report on some of the shortcomings in the current system.

PREPARED STATEMENT OF DENNIS JACOBS, CHIEF JUDGE, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
DENNIS JACOBS
CHIEF JUDGE

UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007

September 22, 2008

Hon. Zoe Lofgren, Chair
Subcommittee on Immigration, Refugees,
Border Security and International Law
Committee on the Judiciary
House of Representatives
517 Cannon House Office Building
Washington, D.C. 20515

Dear Madam Chairwoman:

The other day I spoke with Traci Hong, counsel to your Subcommittee. She suggested that I record my comments in writing, and submit them to you in connection with your Subcommittee's oversight hearing on the Executive Office for Immigration Review. This letter expresses my personal views; I do not presume to express the views of any other member of my Court. I hope that my comments will assist your important work.

Everyone must realize that the volume of immigration cases is placing extraordinary demands on the agency as well as on the reviewing courts (including mine) that draw the lion's share of the petitions. The experience of my Court in adapting to this large increment in workload helps me appreciate the burdens that enhanced enforcement has placed on the agency, including its immigration judges and the members of the Board of Immigration Appeals (the "BIA").

I will not comment on the substance of the orders and opinions issued by the BIA; those comments should be confined to case-by-case disposition. However, on occasion, some courts of appeals (including mine) have voiced

criticism of agency performance in particular cases. My own view is that, considering the challenges, the immigration judges and the BIA have performed at a very high level of public service.

The number of cases that are heard every week by immigration judges is very high. Often, several full hearings are conducted daily, and opinions (usually dictated to a court reporter) are set down that same day. Given the burdens and responsibilities thus placed upon immigration judges, they are certainly among the hardest-working judges in the country--at least among judges whose work involves matters of high consequence. And they do all of this with extremely limited support. My understanding is that there is often no more than one law clerk to assist four or five immigration judges.

The BIA likewise has its hands full reviewing the prodigious output of the immigration judges. There was a time when a disquieting proportion of rulings by the BIA were sharply truncated and issued by a single member. That practice has been much reduced; and I have been assured that single-member summary affirmances were and are supported by detailed input from BIA staff, thus ensuring a detailed review of every case, even when the written disposition is bare-bones. Nevertheless, the past practices caused some circuit judges to develop a skepticism about whether BIA review was in fact searching and sufficient, and that skepticism still lingers--and in my view accounts for some of the sharper criticisms of the agency seen in individual appellate cases.

I have three points to make:

1. Immigration judges and the BIA have been under intense pressure and strain, working conscientiously on an exceedingly high volume basis. I feel uncomfortable as a member of the Judicial Branch recommending to a legislative body how to fund an agency of the Executive Branch: but I think it is evident that some enhanced resources are needed, either in the number of judges or the number of law clerks and other staff members to assist, or both.

2. I am aware that a couple of years ago the

Department of Justice adopted a score of well-calculated measures and goals to improve the operation of this agency and the quality of its output. One proposed measure was to increase the number of precedential opinions issued by the BIA. To my knowledge, that change has been implemented to some useful extent, and has increased the ability of the agency to assure that its interpretations receive deferential review. It has also helped to develop uniform national standards, rather than the piecemeal circuit-by-circuit standards we were seeing in the absence of BIA precedent.

3. I understand that the granting of petitions for review (with vacatur and remand) can sometimes lead to the opening of a disciplinary inquiry against the immigration judge who issued the ruling. No doubt, a pattern of error can raise a question as to the competence of any judge. But routinely initiating disciplinary inquiries into the conduct of immigration judges on the basis of criticism by a reviewing court (and especially on the mere basis of vacatur) can badly distort the decision-making process. Since agency rulings in favor of a petitioner cannot be appealed by the government to the appellate courts, it would not be surprising if immigration judges become intimidated into granting relief to applicants more frequently than the facts may justify, if only to avoid the risk of personnel actions that may threaten the judge's tenure on the bench. This is more than a matter of administration; it is a threat to judicial independence.

I am grateful for your interest in my views, and for this opportunity to express them.

Very truly yours,

Dennis Jacobs