

Written Testimony of

Stephen H. Legomsky
The John S. Lehmann University Professor
Washington University School of Law

Before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law

Oversight Hearing on the Executive Office for Immigration Review
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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

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).

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

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).

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 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)

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).

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).

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

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.

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 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

¹⁷ Levinson, note 15 above.

¹⁸ 71 Fed. Reg. 70855 (Dec. 7, 2006).

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.*

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

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

There are many possible explanations for the emergence of these problems immediately following the 2002 reforms. The combination of far more single-member decisions, 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 members³² – evaluations that will undoubtedly include judgments about

F.3d 530, 533-35 (7th Cir. 2005).

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).

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 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 complaints 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

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

enough clarity to show that the arguments of the losing side were seriously considered and to give the opposing parties, and the reviewing court, 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.

³⁴ 8 C.F.R. section 1003.1(h) (2008).