

The National Immigration Forum appreciates all the hard work done by the Administrative Conference of the United States (ACUS) in looking at the U.S. immigration system. We are also grateful for the ability to comment on the February 2012 draft of “Enhancing Quality and Timeliness in Immigration Removal Adjudication.” Below we have highlighted some of the particularly positive and negative recommendations that we thought were important to bring to ACUS’s attention.

I. Positive Recommendations:

- a. DHS requiring that DHS attorneys pre-approve Notices to Appear (NTAs) before they are issued (on a pilot basis)

Currently, ICE attorneys have the authority to review and reject NTAs. As part of the Obama Administration’s new prosecutorial discretion guidance ICE attorneys review all NTAs filed with immigration courts.

The recommendation that DHS require its attorneys to pre-approve NTAs before they are issued is a welcome recommendation for many reasons. First, as ACUS mentions, this allows prosecuting attorneys to review NTAs before they are filed with the court to make sure the case fits within DHS’s enforcement priorities, further allowing prosecutorial discretion to take effect throughout DHS. All ICE attorneys have already received training in prosecutorial discretion so this added layer of screening will benefit the agency, the courts and individuals with matters before the courts. Exercising prosecutorial discretion at the beginning stage of removal proceedings has the potential to achieve the greatest efficiencies and cost-savings.

Second, thorough screening of NTAs will reduce time spent by immigration judges attempting to resolve NTA issues. According to the ACUS report on page 38, multiple judges stated that NTAs are poorly drafted. Many times, NTAs are so insufficient that they require an additional hearing to discuss fixing the NTA, which may ultimately lead to a case being terminated. A policy requiring ICE attorneys to approve NTAs before they are issued would avoid spending precious court time remedying defective NTAs.

- b. Vertical Prosecution

The idea of vertical prosecution is something that has only recently been tested in immigration proceedings. It is an attempt by ICE Offices of Chief Counsel to assign cases to specific ICE trial attorneys with the goal that the same attorney works on a case from the first Master Calendar hearing through completion.

We applaud the ICE Chief Counsels for attempting to create efficiency within the immigration court system. These vertical prosecution teams have the potential to make ICE trial attorneys more informed about their cases, and provide private attorneys a specific point of contact on each case. Better prepared and informed trial attorneys

could shorten the ever-expanding case backlogs and help shorten detained respondents' time in detention by reducing continuances caused by unfamiliarity with case files. The National Immigration Forum appreciates steps by ICE to improve efficiencies in our immigration system, especially where efficiencies lead to shorter periods of detention for respondents.

II. Negative Recommendation:

a. The Use of Stipulated Orders of Removal

Stipulated Orders of Removal are not a new tool in immigration removal proceedings. Stipulated orders allow individuals to accept a removal order without a hearing before an immigration judge. This approach has the benefit of saving judges' time and reducing case backlogs, but the due process concerns are legion. Pro se individuals are among the most susceptible to due process violations connected with stipulated orders. The vast majority of individuals in immigration detention, the American Bar Association pegs the number at 84%, are not represented by counsel.

Despite reservations voiced by other groups to earlier drafts of this report and the rapid expansion of both the detained population and the use of stipulated orders over the last few years, ACUS decided to not call for ending stipulated orders of removal for pro se respondents. The National Immigration Forum cannot support this recommendation by ACUS.

Instead, ACUS hopes that "know-your-rights" presentations combined with one-on-one consultations with presenters "could" be sufficient for a "number" of pro se detained respondents. This assumes that all detainees have access to "know-your-rights" presentations and/or consultations with the legal service providers presenting them. Unfortunately, this is not the reality. Not all immigration detention facilities are serviced by these types of presentations and not all detainees in facilities that do host presentations have access to them. There are no other real safeguards recommended by ACUS except that the Executive Office of Immigration Review (EOIR) should "consider" creating a random selection procedure for respondents who have agreed to a stipulated order of removal to be taken to immigration court to make sure they adequately understood the warnings and waivers. ACUS makes this recommendation despite admitting on page 82 that, "We agree that using stipulated removals is very problematic where the respondent has had no opportunity to consult counsel." Yet based on their recommendations ACUS will continue to allow exactly that to occur.