

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.

- o 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.
- o 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.
- o 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.
- o 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.
- o 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 directed 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.