AMERICAN IMMIGRATION **ISSUE PAPER** *LAWYERS ASSOCIATION*

THE IMPORTANCE OF INDEPENDENCE AND ACCOUNTABILITY IN OUR IMMIGRATION COURTS

ISSUE: Our immigration system is seriously deficient in training, coordination, and decision-making. Despite this fact, the Bush Administration has dismantled the only review apparatus currently in place, the immigration appeals system. In 2002, the Attorney General promulgated regulations that stripped the Board of Immigration Appeals (BIA), the court of last resort for many immigrants fighting deportation, of its ability to serve as the watchdog for the lower courts. In a one-year period, the rate of rejected appeals skyrocketed from 59% to 86%, and appeals of these decisions to the U.S. courts of appeals have surged. The Attorney General's directives systematically stripping the courts of any meaningful discretionary review highlight the urgent need for major reform of the immigration court system and increased independence for the courts.

The need for reform that would ensure efficiency and accountability, restore public confidence, and safeguard due process has been clear for many years. In 1980, a Congressional commission on immigration found that the structure of the immigration courts lacked an adequate framework for achieving efficient and fair proceedings. The United States Commission on Immigration Reform concluded in 1997, after years of study, that the Immigration Courts and the BIA should be removed from the DOJ and given the status of an independent agency within the Executive Branch. The report observed that: "Experience teaches that the review function works best when it is well-insulated from the initial adjudicatory function and *when it is conducted by decision-makers entrusted with the highest degree of independence.* Not only is independence in decision-making the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review."[1]

Yet despite this clear prescription for improving the fairness of our system, the DOJ elected to undermine rather than strengthen the independence of the BIA. In a single-minded effort portrayed as an initiative that would improve the BIA's efficiency and reduce the backlog of pending cases, regulations were issued that would, among other changes, limit the consideration that Board Members could accord to each case. A report commissioned by the American Bar Association to evaluate the regulations determined that the increased speed in the decision-making process has had a significant impact on substantive outcomes: "Decisions in favor of the respondents have decreased alarmingly from 1 in 4 to 1 in 10." Not only have the regulations failed miserably from a fairness perspective, they also have failed to achieve their stated purpose of improving efficiency. As a direct result of these regulations, the United States Courts of Appeals have experienced a massive surge in BIA appeals, in both volume and rate. Hence, the net effect of the streamlining measures has been to shift the backlog to another branch of government—the federal courts—rather than eliminate it, and raise serious concerns about due process and the adequacy of appellate review.

AILA'S POSITION: In furtherance of our country's historical and institutional commitment to protect due process, AILA supports the creation of an independent Executive Branch agency that would include the trial-level immigration courts and the BIA. Such an entity would best protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court system.

Such a court also would enhance administrative efficiency, increase accountability, and facilitate Congressional oversight of our immigration functions. Because the immigration courts handle more than 260,000 matters annually and employ 221 immigration judges in more than 52 locations across

the country, administrative efficiency is a practical necessity. To achieve this efficiency, our immigration system needs to have one full-time, high-level person in charge of administering our immigration courts. Such authority would: improve accountability by fully integrating policy making with policy implementation, ensure direct access to high-level officials within the executive branch, and attract top-flight managerial talent.

In the immediate term, AILA believes the following changes are necessary to improve the level of due process available to non-citizens appearing before our immigration courts:

The three-judge deliberative panel must be reinstated. The DOJ regulation that broadly expanded the types of cases that warrant single-member review presupposed that the cases the BIA reviews are simple, straightforward, and unambiguous and warrant little time for serious deliberation. Nothing could be further from the truth. These cases often raise complex questions of statutory and regulatory interpretation and arise in a constantly evolving legal landscape. The regulation dramatically reversed long-standing BIA practice and threatens the due process rights of immigrants who find themselves at the mercy of the courts. The three-judge panel is the appropriate and effective means of ensuring adequate deliberation and the diverse interplay of legal opinions in cases that could ultimately involve life and death determinations.

The BIA must end its practice of issuing one- to two-sentence summary opinions. The regulation also broadly expanded the class of cases deemed appropriate for summary opinions. The Supreme Court has held, however, that an agency's statement of reasons for its decisions is one of several "minimal" due process requirements that must be observed. The BIA must have the time and resources to fully explain the reasoning behind the decisions that it makes. Efficiency can and must be achieved without destroying the integrity of the process. Moreover, the efficiency gains touted by DOJ in reducing some of the backlog are illusory. The increase in one-line summary dismissals has precipitated a flight to the federal courts of appeals for those individuals fortunate enough to have legal representation. (Fewer than half of the individuals who appear before an immigration judge are assisted by counsel.) The federal courts, in turn, have no underlying decision to review and must remand back to the BIA. This circularity plainly breeds inefficiencies.

The Board of Immigration Appeals must have a sufficient number of judges to do its job fairly and efficiently. To prevent future backlogs and to ensure thoughtful and thorough deliberation, the BIA must have enough judges to get the job done. The Board annually adjudicates about 30,000 cases. This massive case load, in conjunction with the critical functions performed by the Board, illustrates the need to increase, not reduce, the number of BIA judges. The counterintuitive reduction in BIA members from 23 to 11, in the context of reducing current backlogs and preventing future ones, is plainly bad policy. The reduction in members, combined with the backlog reduction deadline, also sent a chilling message to Board members: reduce your backlog or lose your job. This message was not lost, as evidenced by the dramatic increase in the rate of rejected appeals. From October 2001, around the time the deadline was announced, to October 2002, the rate of rejected appeals skyrocketed from 59% to 86%.

The Board of Immigration Appeals must maintain its important role in ensuring that decisions are fair and correct by having de novo review authority. In the majority of immigration cases, the Board is the only avenue for appeal and an opportunity for a complete review of an immigration judge's decision that offers critical protections against mistake or malfeasance. Despite the important role that the Board plays in our immigration system, under the DOJ regulations, the BIA lacks the authority to review the facts and testimony of the underlying case in making its decision unless they are "clearly erroneous." The result is a cursory BIA review of matters that often rise or fall on the particular facts of a given case. The Board needs to be able to review all aspects of an immigration judge's findings before making a decision on appeal.

The Board has a strict policy for deferring to the findings of fact made by immigration judges. However, there are situations where a de novo review and analysis of an immigration judge's findings of fact are appropriate. Although regulations require that immigration hearings be recorded, in the vast majority of cases immigration judges render oral decisions immediately upon the completion of testimony. As a result, immigration judges occasionally will misstate or omit important factual information in their decisions. Further, 56% of all people who appear before an immigration judge do not have an attorney. When combined with the language barriers that many people face, immigration decisions are sometimes based on confusion or the innocent mistakes of an unrepresented person.

The unique perspective of the Board and the use of de novo review are particularly compelling in asylum cases. As the Board itself has recognized, "in many cases, the expertise, independence, and sound judgment of this Board is all that stands between an asylum applicant and return to a place where he or she will face persecution or death." For example, the Board established the right of a woman to seek political asylum based on genital mutilation (*Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)) after a de novo review of an immigration judge's decision denying relief. Without de novo review authority, this ground of asylum would not exist.

CURRENT LEGISLATION: The Civil Liberties Restoration Act (CLRA) (H.R. 1502), introduced on April 6, 2005, by Representatives Berman (D-CA) and Delahunt (D-MA), seeks to roll back some of the most egregious post-9/11 policies. Among other things, the CLRA would establish an independent immigration court system and establish, for the first time, explicit statutory parameters for its makeup and functions. A similar bill was introduced in the 108th Congress. Provisions of that bill were rolled into H.R. 10, the intelligence overhaul bill, but were not included in the Senate version that was enacted.

In addition to the CLRA, S. 2611, the comprehensive immigration reform bill that passed the Senate on May 25, 2006, would make some improvements to the process and structure at the Board of Immigration Appeals, and would increase the number of BIA Members, staff attorneys, and immigration judges. No similar provisions appear in the House bill (H.R. 4437), however, and it remains to be seen whether they will survive conference negotiations.

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[1] Unites States Commission on Immigration Reform, 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy*, at 175 (September 1997) (emphasis added).