



OBAMA-BIDEN TRANSITION PROJECT

Appleseed



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Chicago Appleseed
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LATHAM & WATKINS LLP

Appleseed Immigration Court Reform Project

Preliminary Summary of Issues and Recommendations



December 10, 2008





Introduction

There has been a massive increase in the number of immigration cases in the United States, straining the immigration adjudication system to its breaking point. This huge caseload has been accompanied over the past eight years by substantial changes in the way removal and asylum cases have been handled. Not surprisingly, complaints about the Immigration Court system have soared. Federal appellate judges have complained in their opinions about the quality of Immigration Judges. As Appleaseed *pro bono* volunteers interviewed dozens of stakeholders around the country, private practitioners voiced their complaints to us about a lack of cooperation from government attorneys and a not-so-subtle push by the federal government to serve political ends as opposed to due process of law. But we also heard that Immigration Judges and government attorneys face unrealistically high caseloads as they try to achieve justice. As one Immigration Judge said to us, “These are death penalty cases being handled with the resources of traffic court.”

In early 2008, Chicago Appleaseed and the law firm of Latham & Watkins LLP assembled a group of respected immigration practitioners in Chicago to plan an investigation of the Immigration Court system. The group developed a plan to review the policies and procedures of the Chicago Immigration Court to ensure that the court protects the due process of law.

To enhance the reach of the project, the investigation was expanded to other key Immigration Courts located in Virginia, Baltimore, New York, Los Angeles, and, most recently, Texas. In addition to Chicago Appleaseed and Latham & Watkins, we have coordinated with the national Appleaseed

organization and added Appleaseed Centers in New York and Texas, as well as partnered with the law firm of Akin Gump Strauss Hauer & Feld LLP.

We utilized Appleaseed staff and the *pro bono* services of more than ninety attorneys to conduct the investigation. We began the project with a thorough review of the literature pertaining to the function of Immigration Courts, as well as interviews with key experts. We then proceeded with nearly one hundred exploratory interviews with stakeholders in the Immigration Court system, including private attorneys, Immigration Judges, *pro bono* organizations, and academics. These exploratory interviews were conducted through the use of a questionnaire that contained open-ended questions designed to solicit from these experts the most pressing issues needing reform in the Immigration Court system and their proposed recommendations for addressing these issues.

While we were conducting the exploratory interviews, teams of trained court watchers in Chicago and New York observed over one hundred hours of master calendar hearings, merits hearings, and asylum cases in the Immigration Courts in those cities. Observers completed summaries for each hearing, in which they reported and commented on any problems that they identified. The observers also noted any other issues related to hearing procedures and the outcome of the hearing. The problems noted during these court-watching sessions largely reflected many of the same issues raised during our exploratory interviews. These court-watching efforts are currently being replicated nationwide.



Following the completion of the exploratory interviews and the initial court-watching sessions, we carefully researched and evaluated the identified issues and corresponding recommendations to develop a list of our most promising proposals. This list served as the basis for more than thirty additional interviews with leading private attorneys, Immigration Judges, *pro bono* organizations, and academics in our five original sites plus Texas, which was identified as a key area presenting Immigration Court issues. Each of these interviews was designed to solicit the opinions of these experts about our identified issues and the efficacy of the potential recommendations. We then carefully re-evaluated each recommendation and developed a refined list of our most promising recommendations.

The document on the following pages summarizes our initial recommendations based on these efforts. These recommendations are organized into eight areas: Immigration Judges, DHS Trial Attorneys, *Pro Se* Respondents, Interpreters and Interpretation, Videoconferencing, Recording and Transcriptions, Online Resources and Record-Keeping, and the Board of Immigration Appeals. The “Immediate Action Items” reflect reforms within these areas that could be implemented quickly and would make an immediate and meaningful improvement to the Immigration Courts across the country. The “Medium-Term Action Items” reflect reforms that will require a more significant effort or additional resources, including, in some instances, amendments to current regulations.

It is important to note that some of our initial recommendations are intended to be only interim solutions to

problems that may be best addressed through fundamental, systemic reforms. As a result, we anticipate that some of these proposals may no longer be necessary if the appropriate fundamental reforms are implemented in the future.

Throughout the course of our interviews, we received numerous comments that some actors within the Immigration Court system face political and other pressures that are at odds with reaching a just result in all cases. Most notably, we found widespread concerns about the lack of independence of Immigration Judges due to the housing of the Executive Office for Immigration Reform, and the Immigration Courts it oversees, within the Department of Justice. Because it is imperative that Immigration Judges be faithful arbiters of justice in all cases, we are considering how to insulate Immigration Judges from political pressures, or even the appearance of political pressures, including possibly transforming the Immigration Courts into “Article I” courts.

In addition, we heard numerous reports that some Department of Homeland Security Trial Attorneys have lost focus on the goal of seeking a fair and just result under the law in each case, and instead simply try to deport as many respondents as possible. This mind-set manifests itself in many ways, from refusing to enter into stipulations or agreements that would be appropriate and efficient, to appealing cases that have no basis for appeal (many of which are ultimately abandoned by DHS), to treating respondents without the dignity and respect they are due. The pervasiveness of this attitude appears to vary from jurisdiction to jurisdiction due to



the inconsistent policies promulgated at various local field offices.

It is important to emphasize again that the recommendations that follow are only initial proposals. This brief document neither attempts to discuss all of the reasoning behind our recommendations nor all of the potential countervailing policy concerns that we have carefully considered. We will publish a final report detailing all of our proposals to reform the Immigration Court system, including the reasons for our proposals, in the first quarter of 2009.



APPLESEED IMMIGRATION COURT REFORM PROJECT
PRELIMINARY SUMMARY OF ISSUES AND RECOMMENDATIONS

Statement of the Issue	Immediate Action Item(s)	Medium-Term Action Item(s)
<p>Immigration Judges</p> <p>The quality of Immigration Judges is inconsistent. Although most Immigration Judges are doing their best under trying circumstances, poor decision-making is an overriding problem and is largely the result of two factors: (1) pressure to clear overcrowded dockets and (2) bias. Many Immigration Judges also lack sufficient knowledge of substantive immigration law and country conditions. In addition, there is a lack of professionalism in Immigration Court proceedings, which implicates issues of fairness and due process.</p>	<ul style="list-style-type: none"> ➤ Mandate in-court observations by the Assistant Chief Immigration Judge for the region (or another appropriate official or body) on a periodic and unannounced basis, focusing on those Immigration Judges with unusually high or unusually low asylum grant rate discrepancies or who have received a significant number of complaints. Use the results of these in-court observations to enhance judicial temperament, efficiency and fairness through regular performance evaluations, which could lead to the removal of an Immigration Judge in appropriate cases. ➤ Ensure that the hiring process for Immigration Judges has been fully de-politicized. ➤ Broaden the Immigration Judge corps by appointing a significant number of experienced private immigration attorneys and academics with the appropriate judicial temperament. 	<ul style="list-style-type: none"> ➤ Increase the number of Immigration Judges. ➤ Provide additional clerks to assist Immigration Judges in writing opinions. ➤ Enhance and implement the Department of Justice’s proposed code of conduct for Immigration Judges to include provisions on: <ul style="list-style-type: none"> ○ Running their chambers and courtrooms with the same level of professionalism and decorum as found in federal district courts; ○ Prohibiting fraternization with DHS Trial Attorneys (in addition to the prohibition on <i>ex parte</i> communications in the proposed code); ○ Ensuring that <i>pro se</i> respondents receive thorough translation of the proceedings; and ○ Explaining to <i>pro se</i> respondents their rights and crucial Immigration Court procedures, including how to appeal an adverse decision. ➤ Fashion appropriate mechanisms to sanction judges for violation of the enhanced, proposed code of conduct for Immigration Judges. ➤ Expand Immigration Judges’ sanctioning authority to include the ability to sanction DHS Trial Attorneys, and ensure that such authority is consistently and vigorously applied to both respondents’ counsel and DHS Trial



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		<p>Attorneys.</p> <ul style="list-style-type: none"> ➤ Supplement the training of Immigration Judges via periodic and mandatory training sessions in substantive immigration law, cultural sensitivity, bias, professionalism (fraternization with counsel, impartial procedural decisions, and creation of an open and evenhanded forum), how to conduct a hearing, appropriateness of exercising discretionary power, and country conditions. The current training for newly appointed Immigration Judges should be expanded to include a comprehensive immigration law “boot camp” in the above areas, which could be modeled after the training program for new asylum officers.



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<p>DHS Trial Attorneys</p> <p>DHS Trial Attorneys are overworked and generally unavailable. They are often unwilling to meet and confer before dispositive hearings, in part because they lack authority to resolve cases and resolve issues, and in part because they are often not assigned to cases until late in the process. Furthermore, they tend to possess a prosecutorial mentality that is at odds with the administrative process employed in the Immigration Courts.</p>	<ul style="list-style-type: none"> ➤ Mandate pre-hearing conferences between the parties (outside the courtroom), upon request of either party, in order to facilitate the resolution of the case and narrow the issues. ➤ Assign a Trial Attorney to each case soon after the Master Calendar hearing and maintain that assignment throughout the duration of the case, making appropriate accommodations for scheduling concerns. ➤ Reaffirm that the Trial Attorneys’ mission is to seek justice under the law in each case. In particular, issue a policy directive from the new Secretary of DHS to Trial Attorneys to highlight the following points: <ul style="list-style-type: none"> ○ Reaffirm that their goal is to seek a fair and just result under the law and not to deport as many respondents as possible. ○ Acknowledge that most Trial Attorneys are trying to obtain justice under the law but that political pressures and a burdensome workload serve as obstacles. ○ State that promotion and compensation decisions will not be based on the percentage of cases that result in deportation. ○ Ensure that Trial Attorneys are given sufficient authority (in conjunction with 	<p>None at this time.</p>



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	<p>supervisory personnel as may be appropriate) to: (1) agree to stipulate and otherwise resolve issues that should not be litigated; (2) to resolve appropriate cases; (3) to decline to appeal cases that should not be appealed; and (4) exercise that authority in furtherance of the efficient administration of DHS resources.</p> <ul style="list-style-type: none"> o Provide uniform guidance from DHS to all local offices and require local administrators to work with Trial Attorneys to ensure they understand and pursue the goal of justice under the law. Advise local offices to meet with the Trial Attorneys in their jurisdictions to reaffirm this policy. This direct action from the local offices is important in light of reports that Trial Attorneys in field offices may be less influenced by pronouncements from Washington, D.C. than by the attitude of their immediate supervisors. 	



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<p>Pro Se Respondents</p> <p>The Immigration Court system is nearly impossible for <i>pro se</i> respondents to navigate successfully. The large number of <i>pro se</i> respondents in the Immigration Court system leads to delays and inefficiency. Immigration Judges frustrated with <i>pro se</i> respondents have been known to subject them to verbal abuse.</p> <p>Mentally incompetent respondents have a particularly difficult time in the Immigration Court system. The statutes and regulations governing immigration proceedings provide little guidance on how Immigration Judges can ensure the fair and humane treatment of these individuals. Issues relating to mental competency will be addressed in our final report.</p>	<ul style="list-style-type: none"> ➤ Request that each Immigration Court promptly identify what steps it has taken to ensure that the Guidelines promulgated on March 10, 2008 by Chief Immigration Judge David L. Neal are being faithfully implemented. The directives include the following: <ul style="list-style-type: none"> ○ Designate a <i>pro bono</i> liaison judge or <i>pro bono</i> committee in each court. ○ Strengthen the Legal Outreach and Pro Bono Program (“LOPBP”). ○ Use <i>pro bono</i> training conferences and LOPBP’s Model Hearing Program to increase the size of the <i>pro bono</i> provider pool. ○ Enhance the scheduling flexibility of courtroom practices for <i>pro bono</i> attorneys. 	<ul style="list-style-type: none"> ➤ Prepare and distribute to every respondent an easily understandable pamphlet of information in various languages regarding immigration law and procedure in Immigration Courts. ➤ Create a comprehensive practice manual (for which the above pamphlet could serve as an introduction) written specifically for <i>pro se</i> respondents.



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<p>Interpreters and Interpretation</p> <p>There are frequent interpretation errors by court interpreters. Many interpreters are of poor quality and do not speak the same dialect as the respondent. Often, only direct conversations between the Immigration Judge and the respondent, not exchanges between attorneys and Immigration Judges, are interpreted. Important portions of hearings such as Immigration Judges' statements regarding their decisions are usually not interpreted; this selective interpretation is confusing to respondents and makes it difficult for them to follow the proceedings.</p>	<ul style="list-style-type: none"> ➤ Mandate that Immigration Judges instruct interpreters to translate everything that is said in court, not just the questions Immigration Judges pose directly to respondents. 	<ul style="list-style-type: none"> ➤ Establish an improved system of certification for court-provided interpreters, with an emphasis on general competency and dialectical differences. <ul style="list-style-type: none"> ○ Ensure that all interpreters have the ability to communicate clearly in English, the ability to interpret simultaneously, and an awareness of slang and social concerns. ○ Require cultural sensitivity training to prevent biased or culturally insensitive interpreters. ○ Prohibit interpreters from paraphrasing or opining. ○ Require interpreters to notify the court when any confusion arises.



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<p>Videoconferencing</p> <p>Videoconferencing makes it more difficult for the Immigration Judge to assess the respondent’s physical condition, demeanor, and facial expressions, all important factors in a credibility determination. In addition, the use of videoconferencing hampers confidential attorney-client communication in a hearing, preventing counsel from effectively advising and representing their clients.</p>	<ul style="list-style-type: none"> ➤ For merits hearings, establish regularly scheduled, in-person proceedings conducted by judges at detention centers. ➤ Create the capacity for direct, confidential attorney-client communication during videoconferences (for example, through a headset). ➤ Provide technical training to Immigration Court personnel running videoconferencing equipment. 	<ul style="list-style-type: none"> ➤ Consider ways to reduce the use of videoconferencing in manners that are inherently prejudicial to respondents. ➤ Mandate in-person hearings for certain classes of respondents, including unaccompanied minors and mentally incompetent respondents. ➤ Ensure that Immigration Judges in fact review all documents that a respondent provides during a videoconference, by creating a mechanism for such documents to be viewed immediately during the hearing.



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<p>Recording and Transcriptions</p> <p>The recording equipment used in many Immigration Courts is of extremely poor quality and often malfunctions, leaving counsel and the Immigration Judge with no reliable record of the hearing. In addition, Immigration Judges sometimes do not record all of the hearing, and crucial parts of the proceeding may therefore be left off the record. Finally, there is an inadequate structure for reviewing tapes and transcripts.</p>	<ul style="list-style-type: none"> ➤ Mandate that Immigration Judges record the entire proceeding, except in instances where both parties consent to go off the record. Ensure that a summary of off-the-record communications be reflected on the record. 	<ul style="list-style-type: none"> ➤ Make tapes available within five business days of the hearing date. ➤ Monitor and continue the installation of digital recording systems in all Immigration Courts.



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<p>Online Resources and Record-Keeping</p> <p>The system of filing documents in the Immigration Court is inefficient and burdensome, and does not allow respondents and counsel ready access to government evidence and filings. Necessary fingerprinting appointments are often difficult to obtain, and many proceedings are delayed due to the lack of fingerprint checks. The government’s forensic document system is overwhelmed, and many proceedings are significantly delayed while both the respondent and government attorneys await the authentication of the respondents’ documents.</p>	<p>None at this time.</p>	<ul style="list-style-type: none"> ➤ Institute an electronic document filing, recordkeeping, docketing, and notification system. ➤ Revise current regulations, the Immigration Court Practice Manual, and the Board of Immigration Appeals Practice Manual to provide that parties and their legal representatives may obtain records, filings, and docketing information immediately upon written request to the court clerk, without the need to file a Freedom of Information Act request. ➤ Notify <i>pro se</i> respondents when their documents do not comply with the Practice Manuals, and provide a fourteen-day window for them to correct them and comply. ➤ Create a centralized location for forensic documents to be processed.



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<p>The Board of Immigration Appeals</p> <p>While the 2002 streamlining reforms did decrease the backlog of appellate cases, they did so at the expense of the effectiveness of the Board of Immigration Appeals (the “BIA”). The BIA is largely seen as a highly politicized body that “rubber stamps” Immigration Judge decisions, thereby limiting its effectiveness as an unbiased appellate body.</p>	<ul style="list-style-type: none"> ➤ Increase the transparency of the BIA candidate nomination process by providing interested groups, such as the American Immigration Lawyer’s Association, an opportunity to comment on proposed BIA candidates for sixty days prior to their appointment. ➤ Fill current member vacancies on the BIA and take steps to ensure that new vacancies are filled in a prompt manner. 	<ul style="list-style-type: none"> ➤ Reinstitute the use of three-member panels in all cases. ➤ Sharply reduce or eliminate the use of affirmances without opinion. ➤ Increase the number of staff attorneys and clerks supporting the BIA. ➤ Consider increasing the maximum number of BIA members in light of our recommendations to: (1) reinstitute the use of three-member panels and (2) sharply reduce or eliminate the use of affirmances without opinion.