IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590 (fax)
www.irli.org

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Lauren Alder Reid
Assistant Director
Executive Office for Immigration Review
5107 Leesburg Pike
Suite 2616
Falls Church, VA 22041

VIA Federal eRulemaking Portal

DOJ Docket Number EOIR-20-0010: Public Comment of the Immigration Reform Law Institute Re: Expanding the Size of the Board of Immigration Appeals

Dear Director Reid:

The Immigration Reform Law Institute (IRLI) respectfully submits the following public comment in response to the interim rule with request for comments (IFR) by the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ), as published in the Federal Register. *See Expanding the Size of the Board of Immigration Appeals*, 85 Fed. Reg. 18105 (April 1, 2020).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful.

IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

I. Executive Summary.

Overwhelming evidence accumulated by EOIR since 1995 shows that increasing the numbers of Board of Immigration (BIA) members will never reduce the caseload of appeals pending before the BIA for more than one year, and more often than not has worsened that backlog and promoted chaos and uncertainty in the removal process throughout the federal immigration system. Before recommitting to an institutional policy of "bloat and delay" and its pernicious effects on immigration enforcement and the national interest, IRLI urges Attorney General Barr first to mobilize and exhaust the powerful set of existing case and resource management authorities identified by IRLI in this public comment.

II. In 2002, the Attorney General determined, after comprehensive review, that adding new Board members will never resolve backlogs in BIA caseloads.

EOIR has decided to increase the number of BIA members to 23. 85 Fed. Reg. 181071 (amending 8 C.F.R. §1003.1(a)(1)). The wisdom and effectiveness of this significant change in removal policy must be assessed in the context of more than 25 years of changes in the size of the BIA, and the changing size and characteristics of Board caseload backlogs.

In 2002, then-Attorney General John Ashcroft issued a comprehensive regulatory "streamlining" reform that, *inter alia* reduced the number of BIA members from 23 to 11 to improve case management. *See* 67 Fed. Reg. 54878 (Aug. 26, 2002). The Attorney General's "objectives were to eliminate the case backlog gradually, apply the appellate practices and standards of Article III courts to the BIA, focus the resources of three-member panels on those cases that needed them the most, prevent unwarranted delays, and enhance the quality of BIA decisionmaking. 67 Fed. Reg. 7309, 7309–10 (Feb. 19 2002) (notice of proposed rulemaking).

After completing a multiple year Streamlining Pilot Study under the Clinton administration, *see* 64 Fed. Reg. 56135 (Oct. 18, 1999), EOIR had found that it was "now clear that *the addition of new Board Members will not reduce the backlog of cases*. The problem is rooted in the structure and procedures of the Board." 67 Fed. Reg. at 7310 (emphasis added). In commenting on the proposed reforms, IRLI's parent organization FAIR insightfully noted that "the 400% increase in members since 1995 has resulted in conflicting opinions, delays while personal disputes between members are resolved, and increased numbers of 'dissenting' opinions that are often political attacks on Congress by radical members." Public Comment by the Federation for American Immigration Reform: *Board of Immigration Appeals; Procedural Reforms to Improve Case Managemen*t, at 4 (March 20, 2002). In the final 2002 rule, EOIR emphasized again that

> beginning in 1995, the Department sought to aid the Board in reducing its burgeoning caseload by increasing its size from 5 to 23 Board members with

> increases in its attorney and support staff. It is now evident that the Board does not face a ''personnel-budget'' problem but rather a fundamental systemic problem. The continued expansion of the Board has not effectively reduced the existing case backlog. The one element that has begun to help reduce the backlog—streamlining—is being expanded through this rule.

67 Fed. Reg. at 54894. The findings of the Attorney General in 2002 were thus unequivocal: the mission of the Board was to promote uniformity and coherence in adjudications by immigration judges, not provide alien petitioners a chance to reopen their proceedings to strengthen the factual claims of their case for relief. In 2002 it was thus well-established that the expansion of the Board to 23 members had failed to produce greater uniformity in Board precedential cases, and as a consequence had aggravated rather than reduced Board caseload backlogs.

III. **Repeated expansions since 2002—as predicted—have had no discernable effect in reducing BIA adjudication backlogs.**

As predicted by the results of the 1999 Streamlining Pilot Study, reduction in Board size from 23 to 11 members—two three member panels and five single members—dramatically reduced adjudication delay and backlogs. The Ashcroft procedural reforms, which included the adoption of improved intake screening, single member affirmances without opinion, termination of *de novo* review of immigration court fact-finding, summary dismissal of frivolous petitions, remand of incomplete immigration court decisions, and more efficient filing deadlines, plus the improved collegiality of the smaller Board, were very successful.

After the reforms were implemented in FY 2003 the 11 member Board completed an average 4,314 cases per month, compared to the pre-reform average of just 2,649 cases per month completed by the bloated 23 member Board in FY 2001. Ashcroft and Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 Duke L.J. 1991, 1998 (2009). Between February 2002 and May 2003, the backlog of BIA cases pending for more than one year—the key metric for EOIR—dropped from 38,843 to 10,117. By January 2006, the backlog of older pending cases was eliminated. U.S. Dep't of Justice, *Fact Sheet: BIA Restructuring and Streamlining Procedures*, 2 (May 9, 2006), http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf. A second key metric, the rate at which BIA decisions were being reversed by the circuit courts, did not change significantly after implementation of the 2002 reforms. *Id*.

During the transition period for implementing streamlining adjudications and reassigning redundant Board members,[1] the Attorney General faced a barrage of legal challenges in federal circuit courts, primarily on due process grounds. Without exception federal appellate circuits dismissed these challenges, noting that the Board is only an administrative creation of the Attorney General, without an independent statutory basis, and that aliens seeking relief from removal have no constitutional due process right to administrative review of immigration court decisions. *See* Ashcroft and Kobach, at 2000-2008; Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 Catholic U. Law Rev. 999, 1014-1037 (2006).

Nonetheless, in 2006 Bush administration Attorney General Alberto Gonzales directed that the Board expand from 11 to 15 members. 71 Federal Register 70855, *Board of Immigration Appeals: Composition of Board and Temporary Board Members* (December 7, 2006). Attorney General Gonzales noted a significant increase in filings between FY 2002 and FY 2005, but justified the increase as consequent to an August 9, 2006, directive that the Board increase the use of one-member written opinions to address poor or intemperate immigration judge decisions and encourage more three-member panel (rather than *en banc*) precedential decisions on complex legal issues. 71 Fed. Reg. at 70855. EOIR explained that these policy changes would significantly increase per-member workloads by requiring preparation of more detailed legal analysis than needed for affirmation without opinion determinations. *Id.* Even so, the Attorney General cautioned that expansion of authorized members could again threaten the Board's core mission "of providing coherent direction with respect to the immigration laws," making it "considerably more difficult to fulfill…." *Id.* at 70856.

The 2006 interim rule also expanded the regulatory class of *temporary* Board Members by adding senior EOIR attorneys to the already eligible serving and retired immigration and EOIR administrative judges and retired Board members. *Id.* (citing 8 C.F.R. § 1003.1(a)(4)). This regulation "offer[s] a mechanism through which the Department can provide the Board temporary assistance *without changing the number of Board members.*" *Id.* (emphasis added). The Attorney General intended that temporary Board members could respond, *inter alia*, "to an unanticipated increase … in the number, size, or type of cases" but "do not participate in en banc proceedings." *Id.*

The Board remained at 15 authorized members until 2015, when Obama administration Attorney General Loretta Lynch ordered an increase to 17 members. 80 Fed. Reg. 31461, *Expanding the*

[1] BIA members are DOJ attorneys, who are all excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission.

Size of the Board of Immigration Appeals (June 3, 2015). EOIR gave two rationales: First, "EOIR is currently managing the largest caseload the immigration court system has ever seen." *Id.* at 31462 (418,861 total cases pending at the end of FY 2014). In fact, by 2015 the immigration system had been continuously operating with historically high pending caseloads for more than 25 years, both before and after the 2002 reforms. The 2014 caseload increase was due almost entirely to the government's self-inflicted surge of asylum applicants on the southern border consequent to the implementation by INS and DOJ of the so-called Flores agreement, and the chronic failure of the Board to produce a coherent uniform precedential definition of persecution by private non-state actors acceptable to a majority of federal appeals courts.

Attorney General Lynch's second justification was that, as a large cadre of newly recruited "immigration judges enter on duty, the number of decisions rendered nationwide by immigration judges will increase and, in turn, the number of appeals filed with the Board will also increase." 80 Fed. Reg. at 31462. The logic of this claim was misleading, as it required a complete repudiation of the conclusion of previous Attorney Generals, experts in administrative procedure, and EOIR itself—that the mere addition of new Board Members will not reduce the case backlogs. The appropriate criterion under streamlining analysis and the Board's core uniformity and cohesion mandate should have been whether the number of appeals that clearly meet the *standards for three-member panel review* had increased to levels that were unmanageable using streamlining procedures. EOIR notably failed to consider or offer analysis of any aspect of streamlining, in particular enhanced initial screening, or related prescribed regulatory options such as the mobilization of temporary Board members. The 2015 interim rule thus lacked a reasonable explanation for a major change in agency policy, the paradigm for arbitrary and capricious rulemaking.

Under the current administration, Attorney General Jeff Sessions and EOIR regrettably issued a third interim rule in 2018 yet again expanding the Board, from 17 to 21 members. 83 Fed. Reg. 8321, *Expanding the Size of the Board of Immigration Appeals* (February 27, 2018). Remarkably, the Attorney General's rationale for the 2018 rule was almost a carbon copy of the 2015 interim rule. The Sessions rule parroted the misleading 2015 statement that pending EOIR cases were at their highest levels ever, and claimed that increased detainee populations (in custody of DHS) and increased hiring of immigration judges meant that "the number of appeals filed with the Board will increase as a result." *Id.* at 8322. Again, the agency's record evidence and findings over the past generation—*viz.*, that expansion of the Board had always failed to produce greater uniformity in Board precedential cases, and as a consequence aggravated rather than reduced Board caseload backlogs—were simply ignored. Attorney General Sessions may have commendably been seeking to control and roll back the contemporary surge crisis of family asylum applications at the southern border, but appears to have uncritically deferred to atavistic bureaucratic attitudes about

institutional staffing, ignoring prior immigration history and decades of investigation and legal reforms.

IV. EOIR has egregiously ignored important streamlining and case management authorities to manage and reduce the levels of alien appeals of immigration court decisions to sustainable levels.

IRLI is deeply concerned that the current interim rule represents a full policy circle back from the principle that uniformity and cohesion in the legal standards for relief from removal[2] was a compelling national interest and sole justification for the existence of the Board.

By restoring the Board's authorized size to 23 members—its undisputedly dysfunctional pre-2002 reform size—Attorney General Barr has effectively chosen to rely on bureaucratic delay as the government's primary enforcement management tool. This policy retreat is all the more disturbing when EOIR and BIA already have a flexible and powerful case management capability that can quickly and efficiently be scaled up (or down) to handle the surges in illegal entry and unlawful conduct that will surely be associated with immigration to the United States for the foreseeable future.

In particular, before recommitting itself to the failed policies of bloat and permanent delay, IRLI urges EOIR to consider auditing and revitalizing the streamlining reforms to better scale its caseload management up (or down) in response to the surge crises that are intrinsic to modern migration flows. Unless EOIR can demonstrate that appointment of more temporary Board members is no longer feasible, it should act urgently to augment this cadre to support initial screening reviews, with a goal of diverting more appeals to single member review for affirmance without opinion. The Board has the authority to increase filing fees to cover the costs of mobilizing temporary Board members as and where necessary, and providing them with full support staffs and systems. Incredibly, though, the Board failed until recently to conduct the biennial fee reviews mandated by federal law. *See* IRLI Public Comment, EOIR Docket No. 18-0101: Fee Review (Mar. 30, 2020).

The Board desperately needs to increase the rate of summary dismissals on frivolity grounds, but cannot do so until it publishes a useful definition of frivolity. Appeals based on mixed claims of law and fact regarding country conditions in asylum cases and appeals of denials of discretionary waivers of removability are prime examples of classes of appeals that could be better managed at the initial screening stage. As former INA General Counsel David A. Martin recommended at the

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[2] In the great majority of BIA cases the removability of the alien petitioner has always been conceded.

beginning of the era of bloating up Board member numbers, the Attorney General urgently needs to take further steps to make consideration of precedential issues more closely resemble a certiorari-like "leave to appeal" similar to that operated by Canada. David A, Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 Pa. L. Rev. 1247, 1356-57, 1364 (1990).

"The public will not allow governments to be generous if it believes they have lost control*." Id*. at 1269. EOIR's claims that it is supporting a core goal of "fairness" in relief from removal adjudications, *see e.g.,* 85 Fed. Reg. at 18105, are belied by the proposed continuation of "bloat and delay" policies in the face of overwhelming evidence that they will surely aggravate chronic case backlogs at the Board.

Respectfully submitted,

Immigration Reform Law Institute
by Michael M. Hethmon, Senior Counsel