

Assembly Line Injustice

Blueprint to Reform America's Immigration Courts



Acknowledgments

This report is the product of close collaboration between Appleseed and Chicago Appleseed, with the generous support of our pro bono partners at Latham & Watkins LLP and, more recently, with Texas Appleseed and Akin Gump Strauss Hauer & Feld LLP. The result of thousands of hours of research and field work by volunteer attorneys in Chicago, New York, Washington, Los Angeles and Houston, *Assembly Line Injustice* stands as a powerful demonstration of Appleseed's unique approach to promoting social justice.

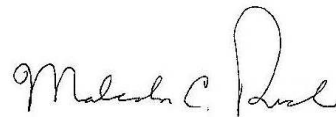
By appealing to the highest ideals of the bar, and by engaging top pro bono legal talent throughout the country, Appleseed uncovers systemic impediments to justice and economic opportunity and crafts effective, comprehensive solutions. Individuals and communities on the margins of society—the working poor, minorities, disadvantaged children or, as shown in this report, immigrants—too often fall through the cracks of our legal system, unfairly denied the opportunity to pursue the American dream.

Appleseed's pro bono partners share our commitment to advocating for practical, achievable ways to tear down barriers to justice, and we are grateful for their support. Indeed, Latham & Watkins committed more than 90 lawyers and 22 professional staff members to this critical effort. We would especially like to thank Jim Rogers, who led and inspired Latham's nationwide team. Special thanks also go to Dennis Craythorn, Daniel Glad and Seth Goldstein, the report's lead authors and national coordinators. Akin Gump added 12 attorneys in Texas, who were led by Steven Schulman. Without the concerted efforts of these scores of attorneys, such a groundbreaking assessment of the Immigration Court system—and future reform resulting from the project—could not have been accomplished.

Assembly Line Injustice would not have been possible without the collaboration and commitment of all these participants, applying their legal expertise to an issue of utmost relevance to this country's fundamental ideals. The report, to be sure, represents a milestone in the campaigns for immigrants' rights and a legal system befitting American ideals of justice. But Appleseed's work on this project is far from complete. Now begins the crucial advocacy stage to ensure the implementation of our numerous recommendations, which in turn will ensure that immigrants encounter a fair and unbiased system of justice. Please join Appleseed as we continue down this road to a stronger, more inclusive society. We wholeheartedly thank all of our partners and volunteers for helping us pave the way.



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May 2009

Appendices

The main body of the report stands on its own and may be read without the appendices. The appendices are intended only to amplify and extend the discussion of our recommendations and to provide interested readers with the underlying support for specific issues. Because some of the most useful data on Immigration Courts is difficult to find, the appendices provide a direct link to many of the resources we discovered during our investigation. Each section of this report will have a corresponding appendix that will be electronically available on Appleseed's website. The appendices will also include a fuller presentation of our methodology, including copies of the interview questionnaires.

The appendices will be available by clicking on hyperlinks contained in a PDF version of this report to be found on Appleseed's website at <http://www.appleseednetwork.org/bProjects/ImmigrantRights/tabid/81/Default.aspx>. Phrases or concepts in the report that benefit from some elaboration or are supported by a citation will be underlined in blue, indicating a hyperlink to the relevant portion of the appendix. Then, from the appendix, click on the heading of the appendix entry to return to where you were in the body of the report.

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Introduction

Every year, millions of people arrive at America's borders fortified by the hope of a better life. Some come to escape persecution or torture; others, to improve their economic situation; still others, to seek education or training. Some of these newcomers enter lawfully; others, illegally; still others enter lawfully but overstay their welcome and remain here in violation of our immigration laws.

Whatever brings them here, virtually all are inspired by the American promise of opportunity in a free society and our traditions of fair play and equal justice under the law. But many, particularly those who enter or remain illegally or who are simply unable to document their right to remain, get swept up in Immigration Courts that do not faithfully carry out these ideals. It is well documented that the single best predictor of an immigrant's success or failure in Immigration Court is the identity of the judge who hears the case. Moreover, countless immigrants are subjected to harassing or denigrating treatment in Immigration Court, cannot understand what they are being asked or told, or have no assistance in navigating the byzantine court process. Far too many immigrants are held in detention for so long, while their cases grind on at a glacial pace, that they ultimately decide to go back home, even if they are entitled to be here. Many immigrants face a courtroom experience that does not uphold America's commitment to the fair and dispassionate administration of the laws.

The sharp increase in the number of cases in Immigration Courts over the past decade, without a corresponding increase in resources, lies at the root of many of these problems. Immigration Judges, their clerks and the DHS Trial Attorneys who represent the government are overwhelmed, yet the stakes to the immigrants involved could not be higher: the outcome of these cases often determines whether a person will lose his livelihood, be torn from his family or even sent back to persecution. As one Immigration Judge, commenting on the crushing burden, said to us, "These are death penalty cases being handled with the resources of traffic court."

In response to this crisis of justice, the national nonprofit organization Appleseed decided in 2008 to investigate the Immigration Court system by gathering the opinions of those who face the challenges of that system on a daily basis. Appleseed sought practical, achievable steps to bring the system closer to our American ideals and prepared this report to highlight its findings and propose workable recommendations. This report takes no position on who should be entitled under the nation's immigration laws to stay, leave or become a U.S. citizen. Nor does it address every problem facing immigrants or the government that deals with them. (For example, we heard from many of our interviewees about—but do not address—problems in the private immigration bar.) Instead, our recommendations have been narrowly tailored to bring the reality—and the perception—of fair play and equal justice to the Immigration Court system.

Methodology

This report reflects our findings from a robust and comprehensive evaluation of the Immigration Court system across the country. In signature Appleseed style, we relied on the generous pro bono contributions of counsel in Chicago, New York, Washington, Los Angeles and Houston, with Latham & Watkins LLP committing more than 90 lawyers and 22 professional staff members and Akin Gump Strauss Hauer & Feld LLP adding 12 attorneys in Texas. What sets this report apart is that it is based on interviews of those who have actual day-to-day experience in Immigration Courts. Throughout 2008 and into 2009, we conducted well in excess of 100 interviews among a broad sample of experts, including practitioners (both fee-charging and pro bono), officials of nonprofit associations, leaders of professional organizations, academics and governmental players.

At the project's outset, we designed a structured interview questionnaire to elicit the stakeholders' views on the courts, with both broad questions (for example, "What is the biggest problem

with the Immigration Courts today?”) as well as specific, narrowly targeted questions (for example, “What is your experience with videoconferencing equipment?”). We then used the questionnaire to conduct more than 70 confidential, in-depth stakeholder interviews. These structured dialogues drew on the experience of a broad cross-section of participants to identify the most pressing problems facing the Immigration Court system. These interviews elicited numerous suggestions for reform and identified additional Immigration Court experts who were then interviewed.

We sought to interview various actors from within the government, including Immigration Judges and Trial Attorneys, but we were generally refused access. Fortunately, however, we were able to have very thoughtful, in-depth conversations with Immigration Judges Dana Leigh Marks of San Francisco and Denise Slavin of Miami, president and vice president, respectively, of the National Association of Immigration Judges, and BIA Chairman Juan Osuna, and their comments informed our final analysis and recommendations. We also were able to speak with only a very limited number of current and former Trial Attorneys, who provided comments on many of our proposals.

While we were conducting the initial interviews, teams of trained court watchers observed more than 100 hours of hearings in the Immigration Courts in Chicago, Los Angeles and New York. The court watchers reported their observations, identifying issues related to hearing procedures and outcomes. These court-watching sessions confirmed the findings of our initial interviews and gave rise to a handful of very informal but useful off-the-record conversations with Immigration Judges at the conclusion of a day’s hearings. As the interviews and court-watching were ongoing, we also undertook a thorough review of the literature pertaining to the Immigration Court system.

Following the completion of the first-round interviews and the initial court-watching sessions, we carefully researched and evaluated the identified issues and corresponding recommendations to develop a list of preliminary proposals for reform. This list served as the basis for more than 35 additional interviews with the stakeholders whom we had identified as

particularly knowledgeable. We used these second-round interviews to solicit these stakeholders’ opinions about our identified issues and the efficacy of our preliminary recommendations. We then carefully re-evaluated each recommendation and developed a refined list of our most promising preliminary recommendations, which we presented to members of President Obama’s transition team in late 2008. After further interviews, research and analysis, we developed the final recommendations contained in this report.

Underlying Values and Summary of Recommendations

In the course of conducting our interviews, we came to identify three core goals of any adjudicative system in the United States, and these are critical to the proper functioning of the Immigration Courts:

Accuracy—the system should achieve the correct result under the law. It should recognize truly meritorious claims and deny legally insufficient claims. Naturally, no court system will be accurate 100 percent of the time, but the system should strive for accuracy above all else. Achieving accuracy also results in similarly situated litigants receiving similar outcomes.

Legitimacy—the system must not only be accurate, it must be perceived to be accurate. Parties and observers must believe that each immigrant is given a fair opportunity to present his or her case to a neutral party, leading to the correct result. The goal of legitimacy requires that Immigration Courts operate in a professional, unbiased and transparent manner.

Efficiency—the system should operate as efficiently as possible, subject to maintaining accuracy and legitimacy. Efficiency is a goal for all litigants, but it is a particularly compelling goal for the Immigration Court system, which will always need to cope with a staggering caseload in a resource-constrained environment. Practices that waste the time and resources of Immigration Judges, Trial Attorneys or other governmental actors should be eliminated.

In the current budgetary environment, we recognize that only limited funds will be available to solve the nation’s Immigration Court problems,

and our recommendations have all been made with cost considerations in mind. We propose many no-cost or low-cost action items aimed at giving government officials the tools they need to achieve justice. Nonetheless, some of our recommendations will require additional appropriations of funds. In some cases, however, our recommendations (even those that initially cost money) should lead to overall cost savings. In particular, the savings that could be achieved by reducing the amount of time immigrants spend in detention could be substantial. Thousands of immigrants are held in detention centers during their Immigration Court proceedings at substantial government expense; accordingly, any recommendation that speeds up the Immigration Court process will inevitably save scarce governmental funds.

Consistent with Appleseed's approach, our recommendations are aimed at providing practical and achievable solutions. Many of our recommendations can be immediately implemented, without the need for congressional action or even administrative rule making. Others will require administrative or legislative action, but the benefits of these changes make the effort worthwhile.

We also outline our most comprehensive and sweeping reform, the restructuring of the Immigration Court system into a new court created under Congress's Article I powers. Many of our interviewees urged the creation of a new Article I court as the only means to achieve true judicial independence. Subjecting all of the legal, political and practical considerations of such a fundamental change to our interview methodology was beyond the scope of this project. Nonetheless, we have separately researched and analyzed the issue and have developed a suggested approach for establishing an Article I Immigration Court system. While it will take time to develop the political consensus to implement the sweeping change we outline at the end of this report, the benefits to the accuracy, legitimacy and efficiency of the Immigration Court system make the effort worthwhile.

Appleseed's recommendations (which are set forth in detail below) are as follows:

- We must **reform the selection process for Immigration Judges and the Board of**

Immigration Appeals to promote impartiality.

De-politicizing the hiring process for Immigration Judges and members of the BIA will help make accuracy the rule in Immigration Court proceedings, thereby evening the odds for immigrants who currently face a deck stacked in favor of the government. Hiring the best judges possible from a broader range of backgrounds will foster the perception and the reality of evenhandedness and fairness.

- We must **give Immigration Judges the tools they need to achieve justice.** They deserve, and they have demanded, the power to run their courtrooms efficiently and fairly. Most important, the number of sitting Immigration Judges and their clerks must increase dramatically in order to allow those on the bench to reduce caseloads and achieve a higher degree of accuracy and legitimacy.
- We must **cultivate a culture of professionalism in the Immigration Courts.** Immigration Judges must create a forum where professional, decorous conduct is the rule and must foster the appearance of legitimacy and the reality of accuracy. Accordingly, Immigration Judges should be subject to monitoring mechanisms and appropriately sanctioned for any failures to meet applicable standards. Moreover, increased training for Immigration Judges will allow those on the bench to be more impartial arbiters and to lead by example.
- We must **empower Trial Attorneys to handle cases more professionally and more efficiently.** Changes such as adopting a new mission statement, mandating pre-trial conferences and enhancing prosecutorial discretion will help ensure that DHS Trial Attorneys represent the government in an evenhanded, appropriate and efficient manner.
- We must **help the unrepresented.** Most immigrants in Immigration Courts are not represented by a lawyer and thus face seemingly insurmountable odds. Recognizing that justice would best be served by ensuring that as many immigrants as possible have lawyers, we need structural changes to increase pro bono representation. Acknowledging that counsel for every single immigrant is unattainable, we

must improve the resources available to the unrepresented in order to enhance their ability to present evidence and arguments.

- We must improve court processes to advance fairness and efficiency. Specifically:
 - » We must **enhance the accuracy of proceedings through effective translation.**
 - » We must **reduce the unfairness of videoconferencing.**

» We must **improve the reliability and availability of court records.**

- As important as ensuring the accuracy of the Immigration Courts themselves is **getting it right on appeal.** We must change the way the BIA selects its members and reviews cases, in the hope that it will continue down its current path toward restoring its ability to provide meaningful appellate review.

Recommendations

A more just system is unquestionably necessary, but it is also achievable. By adopting and implementing the action items identified in this report, we can enhance the face of American justice that so many immigrants see to one that upholds the American traditions of fair play and equal justice under the law.

Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

- Ensure that the hiring process for Immigration Judges and BIA members has been fully de-politicized.
- Broaden the candidate pool of Immigration Judges and BIA members.
- Increase the transparency of the BIA candidate nomination process.

Giving Immigration Judges the Tools to Achieve Justice

- Increase the number of Immigration Judges.
- Provide additional clerks to assist Immigration Judges in writing opinions.
- Expand Immigration Judges' sanctioning authority to include the ability to sanction DHS Trial Attorneys.

Cultivating a Culture of Professionalism in the Immigration Courts

- Enhance and implement the Department of Justice's proposed Code of Conduct for Immigration Judges.
- Fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct.
- Supplement the training of Immigration Judges via periodic and mandatory training sessions.

Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently

- Remind Trial Attorneys that their mission is to enforce the law as written, not to deport every immigrant.
- Enforce the DHS policy encouraging the use of prosecutorial discretion.
- Assign a Trial Attorney to each case.
- Mandate pre-hearing conferences at the request of either party.

Enhancing the Accuracy of Proceedings Through Effective Translation

- Mandate simultaneous translation of everything said in Immigration Court.
- Establish an improved certification system for interpreters.
- Improve the complaint-tracking procedure for interpreters.
- Enforce the prohibition on paraphrasing or opining.
- Question and, if necessary, remove an interpreter when the translation appears to hinder an immigrant's ability to testify fully and openly.

Reducing the Unfairness of Videoconferencing

- Return to in-person merits hearings.
- Restore confidential attorney-client communications.
- Provide technical training to Immigration Court staff.
- Provide the capability for real-time document transmission.

Improving the Reliability and Availability of Court Records

- Provide immediate access to records, filings and dockets.
- Create an electronic document filing system.
- Provide copies of recordings of Immigration Court hearings.
- Continue the installation of digital recording systems.

Helping the Unrepresented

- Ensure that the 2008 Pro Bono Guidelines are faithfully implemented.
- Use videoconferencing, even though flawed, to expand representation to immigrants in remote areas.
- Simplify the filing and pleading standards for unrepresented immigrants.
- Upgrade the Immigration Court hotline.
- Produce a pamphlet explaining essential immigration law and Immigration Court procedure.

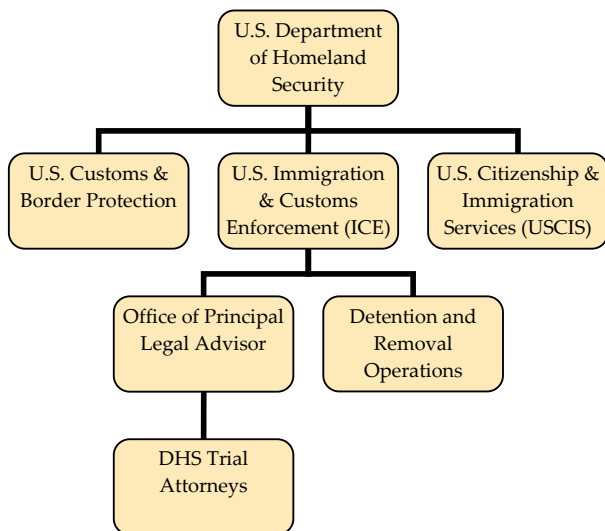
Getting It Right on Appeal

- Mandate the use of three-member panels except for purely procedural issues or motions that do not decide the outcome of a case.
- Eliminate the use of affirmances without opinion and require reasoned opinions.
- Increase the number of BIA members and staff attorneys.

Basic Structure of the Immigration Court System

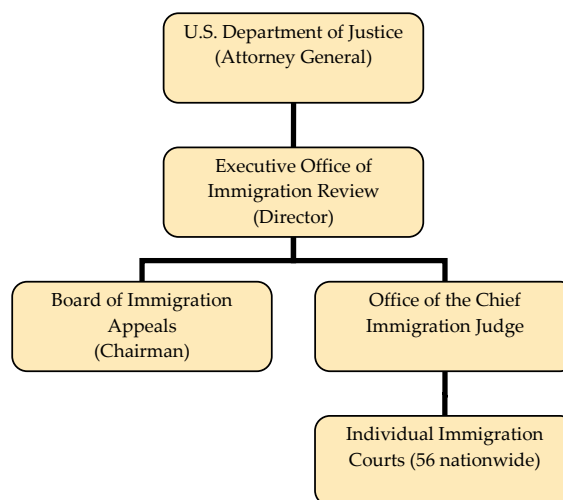
To appreciate fully the problems facing the Immigration Court system, one must first understand the structure of the system and the players involved. In a nutshell, the role of the Immigration Court system is to provide a forum to hear and adjudicate the claims of immigrants whom the government seeks to deport. (To avoid confusion, we use a single term throughout this report—“immigrant”—to refer to those who are processed by the Immigration Courts, but who may be termed “aliens” or “legal permanent residents” by statutes and “respondents” by regulations.)

Since the late 19th Century, various formulations of the Immigration & Naturalization Service (“INS”) held nearly exclusive dominion over immigration benefits and enforcement. INS was a part of the *Department of Justice* (“DOJ”) for the better part of the 20th Century. In 2003, however, the Homeland Security Act split the immigration-related functions that were traditionally associated with INS. Though INS is still popularly associated with immigration enforcement, the agency was disbanded by the 2003 restructuring; DOJ retained the adjudicatory function and the *Department of Homeland Security* (“DHS”) was given the enforcement and benefit-conferring functions.



The immigration adjudication process begins when DHS files “charges” against an immigrant by issuing a Notice to Appear. In many cases, DHS detains the immigrant in a prison-like detention center to prevent flight pending adjudication. The Notice to Appear initiates a removal proceeding in Immigration Court, where a government lawyer called a “*DHS Trial Attorney*” attempts to convince an Immigration Judge that the immigrant should be “removed” (in other words, deported). The Trial Attorneys are supervised by the *Office of the Principal Legal Advisor*, which in turn is an arm of DHS’s *Immigration and Customs Enforcement* (“ICE”).

The body that administers Immigration Courts and manages Immigration Judges, the *Executive Office for Immigration Review* (“EOIR”), lies within DOJ. In Immigration Court, the immigrant may offer reasons why he or she should not be deported, because, for example, he or she is eligible for asylum. After each side presents its evidence and arguments, the Immigration Judge decides whether the immigrant has a legal basis to remain in the United States. If either party is dissatisfied with the Immigration Judge’s decision, it may be appealed to the *Board of Immigration Appeals* (“BIA”), which is also administered by EOIR. The BIA’s decisions in turn may be reviewed by federal courts of appeals. In unusual cases, the Attorney General may, on his own initiative, review BIA decisions as well.



1

Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

John Adams urged that judges should be as “impartial and independent as the lot of humanity will admit.” Removing the Immigration Court system from the Department of Justice would help promote independence, but independence alone does not ensure impartiality. As the American Bar Association Commission on the 21st Century Judiciary has recognized, “a judge can be entirely independent but nonetheless biased and closed-minded.” Regrettably, stories of bias and closed-mindedness laced our interviews. Overcoming bias—and the appearance of bias—among Immigration Judges and BIA members must be a top priority.

The Immigration Courts and the BIA had never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts and BIA in favor of the government between 2004 and 2006. Immigration Judge and BIA positions are, by law, career civil service appointments. Nonetheless, a 2008 report by the DOJ Inspector General and Office of Professional Responsibility found a systematic campaign by members of the previous Administration to pack the Immigration Courts with “good Republicans” who were “completely on the team.” The report found that “all of the people who applied in response to vacancy announcements for IJs were ignored,” and instead Immigration Judges appointed between 2004 and 2006 were “screened for their political or ideological affiliations.” Many of these illegally appointed judges remain on the Immigration Court today.

Even putting aside this episode, a recent study entitled *Refugee Roulette: Disparities in Asylum Adjudication* makes clear that a large number of Immigration Judges are imposing their own personal views on the cases that come before

them. Indeed, data indicate that the fate of those who come before America’s Immigration Courts is largely determined by the particular Immigration Judge to whom the case is assigned. An interviewee suggested that many Immigration Judges have their own “nemesis countries,” of which they are particularly skeptical when it comes to asylum claims. Taking one example from the study, of the 18 Immigration Judges in the San Francisco court who handled more than 50 asylum requests by Indian immigrants, one of those judges granted only three percent of those asylum requests, despite a mean approval rate of 52 percent in that court for Indian immigrants. An Indian asylum seeker who is unfortunate enough to come before that particular judge would appear to have lost even before setting foot in the courtroom because of the judge’s personal views.

The Immigration Court Lottery

“There is definitely a sense of the lottery in the immigration system.”

“Success depends on the judge you get.”

“Half the battle is which judge you get assigned to.”

“The bias in Immigration Courts is ridiculous. There is no reward for judges who care.”

Moreover, the composition of the Immigration Courts favors the government. The *Refugee Roulette* study shows that the gender and the professional backgrounds of Immigration Judges significantly affect their decisions. The study found that male Immigration Judges

were 44 percent less likely to grant asylum than their female counterparts. Not surprisingly, Immigration Judges are overwhelmingly male—in fact, there are almost twice as many male Immigration Judges as there are female judges. The study was unable to answer why male judges are significantly more skeptical of asylum claims than female judges, but whatever the reason, this huge disparity hurts immigrants.

In addition, the study found that Immigration Judges with prior experience working in positions that were adversarial to immigrants (which the study defines as INS/DHS Trial Attorneys, Office of Immigration Litigation attorneys, special Assistant United States Attorneys, border patrol lawyers, and other similar positions) were 24 percent less likely to grant asylum than Immigration Judges with no such prior work experience. And the longer the judge worked against immigrants, the lower the approval rate—from 11 percent lower approval rates for judges with one year to five years of experience working against immigrants to 35 percent lower approval rates for judges with 11 or more years of such experience. According to the study, 55 percent of Immigration Judges had prior job positions that were adversarial to immigrants.

The study found a similar result for Immigration Judges who had held other non-military government positions, excluding positions that were adversarial to immigrants. These Immigration Judges were 19 percent less likely to grant asylum than Immigration Judges with no prior government experience. Our review of the Transactional Records Access Clearinghouse database of 236 Immigration Judges found that about 24 percent of Immigration Judges had prior government jobs, not counting those who had a prior job that was adversarial to immigrants. Taken together, almost 80 percent of Immigration Judges have professional backgrounds that tend to cause them to find in favor of the government significantly more often than judges without these backgrounds.

The lopsided composition of the BIA also favors the government. Of the 14 BIA members listed on the EOIR website, only three are female. Furthermore, nine of the 14 had positions that

were adversarial to immigrants, while all but one have significant government work experience, mostly at DOJ. According to the *Refugee Roulette* study, Attorney General John Ashcroft “radically changed the composition of the Board” as part of the 2002 “streamlining reforms” by removing five members “who had come from the practice of immigration law, advocacy and law teaching” and were widely viewed as pro-immigrant. Not surprisingly, the success rate of asylum seekers at the BIA plunged by 70 percent in the wake of this streamlining.

Appleseed recommends the following action items to improve the impartiality of the Immigration Courts and the BIA.

Ensure that the hiring process for Immigration Judges and BIA members has been fully de-politicized.

In 2008 testimony before Congress, the director of EOIR stated that EOIR “now ha[s] in place a recruitment, screening, interviewing, recommendation, and selection process that, although time-consuming, is a premiere system for identifying and appointing the very best candidates to serve as Immigration Judges.” Indeed, the 2008 DOJ Inspector General’s report found that the responsibility for evaluating and selecting Immigration Judges has returned to EOIR after being hijacked by members of the former Administration. While we applaud EOIR’s efforts to reform the hiring process for Immigration Judges and the BIA in light of the DOJ Inspector General’s findings, it appears that shortcomings remain.

At least one BIA member appointed under the new hiring process is light on immigration experience but heavy on political connections. The Inspector General’s report chronicles how this person was appointed to the Immigration Court despite never interviewing for the position or submitting an application. In fact, shortly before his appointment, he needed an informational interview to learn what an Immigration Judge does. Once appointed to the Immigration Court, he “offered ‘to be of any assistance’ to Monica

Goodling in identifying IJ candidates.” He even recommended that a particular Immigration Judge be appointed as the Chief Immigration Judge, a career position, based in part on the judge’s “loyalty to the Bush Administration.” After less than two years on the bench, he was selected by Monica Goodling for a position on the BIA. He got his BIA seat in August 2008 under the new hiring process, leaving the distinct impression that his nomination amounted to a political appointment. Based on this episode, we believe that the new Administration should review the revamped hiring process with fresh eyes to ensure it has in fact been entirely de-politicized.

Broaden the candidate pool of Immigration Judges and BIA members.

There is almost an assumption within the Immigration Court system that the pool of DHS Trial Attorneys serves as the farm team for the Immigration Judge corps. This attitude was highlighted by one of our interviewees, recounting an incident when an immigrant mistakenly addressed a Trial Attorney as “Your Honor.” After the Trial Attorney laughed, the Immigration Judge commented—in open court—that in a few years the Trial Attorney would be a judge, adding for good measure that the attorney “certainly had the temperament for it.”

“In certain courtrooms it is like there are two prosecutors in the government—DHS counsel and the Immigration Judge.”

While 55 percent of Immigration Judges worked in positions that were adversarial to immigrants (the vast majority of whom were Trial Attorneys), only 14 percent have worked in a non-governmental organization and two percent have significant academic experience. Given these numbers, it is not surprising that some interviewees feel that the system is rigged, “like there are two prosecutors” in the courtroom. To address this fundamental problem, EOIR should more aggressively recruit candidates

for Immigration Judge positions from the ranks of experienced private immigration attorneys, academics and non-governmental lawyers who possess the appropriate judicial temperament. EOIR should also achieve greater gender balance on the immigration bench. In light of findings that those judges with an enforcement background and male judges are more likely to find in favor of the government, only with such a broadening of the pool of Immigration Judges will the system be viewed as balanced. In addition, a more diverse bench may promote cross-learning among the judges, leading judges to achieve more accurate results.

The same holds true for BIA members, 79 percent of whom are male. And with almost two-thirds of the BIA consisting of former immigrant adversaries and 93 percent having worked for the government (mostly DOJ), EOIR must look beyond its usual candidate pool and appoint new members from the best among the nation’s private immigration lawyers, academics and non-governmental lawyers, while also achieving greater gender parity. By selecting members from a diverse candidate pool, the BIA will gain some much-needed balance, ultimately allowing it to make more accurate decisions.

Increase the transparency of the BIA candidate nomination process.

Repairing the BIA’s severely damaged credibility after the 2002 “streamlining reforms” will require more transparency in the selection process. EOIR should provide interested groups, such as the American Immigration Lawyers Association, an opportunity to comment on proposed BIA candidates for 60 days prior to their appointment. A more open appointment process will help ensure that the public recognizes that those appointed to the BIA have the ability to be fair and impartial, which will increase confidence in the BIA as an appellate body.

2

Giving Immigration Judges the Tools to Achieve Justice

Immigration Judges face an overwhelming caseload. Approximately 220 Immigration Judges decided 229,316 cases in fiscal year 2008 alone, which works out to over 1,042 cases per judge. Effectively, this means that we are asking each Immigration Judge to make more than four potentially life-altering decisions every business day. And the caseload is growing.

These daunting numbers support the perception among a number of the people we interviewed that America's Immigration Courts have turned to assembly line justice. As one interviewee put it, "When Immigration Judges run through applications like a mill, that simply doesn't allow a judge to review and weigh the facts of a particular case very closely. If a judge can do three asylum merits cases in a morning from 8:00 to 12:30, I don't see how a normal individual can weigh all the factors and give a reasoned decision." Another said, "Immigration Judges are ... up against a wall." Considering that Immigration Judges have less than two hours on average to review each case file, conduct a hearing and render a decision, it should not be surprising that they do not always reach a reasoned, accurate decision.

This country is asking each Immigration Judge to make more than four potentially life-altering decisions every day. To reduce that number by one case per day would require about 76 new judges.

But even this assembly line justice breaks down. Many interviewees also complained that DHS Trial Attorneys regularly show up to court completely unprepared to discuss the case at hand, or missing critical evidence or even the case file itself. When this happens, Immigration Judges

have little choice but to delay the hearing, further clogging the system.

Immigration Judges need tools to control their courtrooms and achieve justice in an Immigration Court system that is bursting at the seams. As it stands, Immigration Judges—no matter how professional and competent—simply do not have what they need to be effective. Appleseed therefore recommends the following action items.

Increase the number of Immigration Judges.

The single most important way to help Immigration Judges achieve justice is by hiring more Immigration Judges—this would give Immigration Judges the tool of time. We heard repeatedly from interviewees that Immigration Judges simply do not have the time to hear their cases fully. One interviewee complained that the shortage of Immigration Judges causes the hearings to be shorter than they should be: "Compared to other hearings, immigration hearings are much shorter, and there are not enough judges to permit longer hearings to happen."

Therefore, it appears that an average of more than four cases per day is too many for an Immigration Judge to handle. Simply to reduce that number by one case per day, and considering the need for regular training sessions each year for all Immigration Judges, about 296 Immigration Judges would be needed, or about 76 new judges. A reduction of two cases per day would require about 424 Immigration Judges, or about 204 new judges. We do not profess to know the magic number of new Immigration Judges needed. It is clear, however, that even a small improvement will require significant additional resources. DOJ should work with Congress to put in place a multi-year plan to address the fundamental problem of too many cases for too few Immigration Judges.

Provide additional clerks to assist Immigration Judges in writing opinions.

Increasing the number of Immigration Judges should go hand in hand with increasing the number of clerks to assist them. At more than four cases per day, Immigration Judges are pressed to even consider all of their cases, let alone to write reasoned opinions when necessary. Currently, each clerk on average serves more than four Immigration Judges, while as many as 14 Immigration Courts do not have any clerks at all. At a minimum, each Immigration Judge should have a dedicated clerk to help work through the caseload, including helping the judge write opinions. Dedicated clerks would free up judges to conduct full hearings and evaluate the issues each case presents, which would lead to more accurate decisions and greater efficiency in the Immigration Court system.

Expand Immigration Judges' sanctioning authority to include the ability to sanction DHS Trial Attorneys.

With the mountain of cases facing Immigration Judges every day, judges need to run their courtrooms as efficiently as possible; this necessarily requires the power to discipline all attorneys who come to court unprepared, including DHS Trial Attorneys. Immigration Judges currently have, and on occasion make use of, the authority to sanction private attorneys. But even though Congress has specifically provided contempt authority to Immigration Judges, DOJ has yet to implement the regulations necessary to give Immigration Judges the authority to sanction Trial Attorneys, arguing that DHS already has the power to discipline its own attorneys. As a result, many interviewees complained that when Trial Attorneys show up unprepared for a proceeding there is little an Immigration Judge can do. One interviewee said, "[I] can't think of a single Immigration Judge" who would grant an immigrant attorney's request to delay the

proceeding because they are not fully prepared, but this is precisely what Immigration Judges routinely do for Trial Attorneys under the same circumstances, creating at least the appearance of unfairness.

The number of complaints we heard about Trial Attorneys' lack of preparation suggests that the existing DHS disciplinary policies and procedures are not addressing this conduct. In coordination with DHS, DOJ should implement the intent of Congress and extend Immigration Judges' disciplinary authority to allow them to sanction Trial Attorneys. Once provided, Immigration Judges must consistently and vigorously apply this sanctioning authority to both immigrants' counsel and Trial Attorneys.

3

Cultivating a Culture of Professionalism in the Immigration Courts

When individuals make decisions that can deprive their fellow human beings of liberty, family and community, those individuals must adhere to the highest standards of professionalism, lest their decisions be tainted by illegitimacy. Although we heard many stories of Immigration Judges who are highly professional and solicitous of the immigrants who appear before them, we also heard a shocking number of examples of a lack of professionalism that infects Immigration Court proceedings.

One Immigration Judge's conduct is so egregious that "law school clinics will not allow their students to appear in front of her."

During our interviews, we heard about an Immigration Judge who "cannot control her temper," "often yells at the attorneys and clients" appearing before her and "throws paper at people." Her conduct is so egregious that "law school clinics will not allow their students to appear in front of her." We heard about another Immigration Judge who scolded an attorney appearing before her pro bono "at least 10 times" and "told her that she was a naïve, inexperienced 'New York big firm do-gooder.'" We heard about yet another Immigration Judge who became enraged that an immigrant would not look him in the eye, not understanding that eye contact was inappropriate in this immigrant's culture. We heard about immigrants entering courtrooms to find the Immigration Judge and DHS Trial Attorney—the judge and prosecutor of their cases—laughing and joking in personal conversation. As one person succinctly put it, such ex parte communications between judge and

prosecutor are "fairly rampant."

While some of these lapses in professionalism betray outright bias on the part of an individual Immigration Judge, others convey the appearance of bias and leave immigrants with the feeling that they did not receive a fair hearing. Both types of misconduct severely undermine the Immigration Court system. With the stakes so high and the consequences so dire, any lack of professionalism—or even the appearance of impropriety—is simply unacceptable. Appleseed therefore recommends the following action items to cultivate a stronger culture of professionalism in the Immigration Courts.

Enhance and implement the Department of Justice's proposed Code of Conduct for Immigration Judges.

DOJ has long recognized concerns about the lack of professionalism in the Immigration Courts. In 2007, DOJ proposed a Code of Conduct for Immigration Judges, which according to DOJ is being revised and incorporated into the EOIR Ethics Manual but still has not been implemented. While the proposed Code is clearly a step in the right direction, we believe it should be significantly strengthened.

For example, while the Code requires Immigration Judges to avoid actions that create the appearance that they are violating the law or applicable ethical standards, the Code should go further by specifically prohibiting any actions that undermine, or give the appearance of undermining, confidence in the impartiality of the Immigration Judge. The Code should then provide specific examples of activities that fall under this prohibition, such as the following:

- an Immigration Judge shall not be present in the courtroom unless both the immigrant and DHS Trial Attorney are present (unless, of course, the hearing is being conducted by videoconference); and
- an Immigration Judge shall not yell at, verbally abuse, or engage in any other similar conduct toward any person appearing before the court or with whom the judge deals in his or her official capacity.

These enhancements are critical because many immigrants come from countries where a courtroom is not an institution of justice, but rather an extension of a corrupt state. Any actions that suggest the Immigration Judge is anything other than impartial irreparably damage the credibility of the court in the mind of such an immigrant because the Immigration Judge appears to be on the government's side rather than a neutral arbiter.

The Code should also require Immigration Judges to ensure basic due process safeguards for immigrants appearing in court. For instance, the Code should require that the Immigration Judge ensure that an immigrant receive a complete and simultaneous translation of the proceedings. Immigration Judges must make every effort to facilitate each immigrant's understanding of everything that is happening in court as it happens. The Code should also require that an Immigration Judge carefully and slowly explain—not simply recite from a prepared script—to an immigrant how to appeal an adverse decision in Immigration Court in every case, with particular care given to unrepresented immigrants. While this information may be explained in a number of Immigration Courts today, it should be mandatory in all cases; the right to appeal is a fundamental right that immigrants should understand up front. Including these due process safeguards in the Code would make them the explicit obligation of the Immigration Judge presiding in the case.

The Case for Court-Watching

The time is ripe to create a comprehensive court-watching program in Immigration Courts around the country to observe and report on the conduct of Immigration Judges. The sensitive nature of immigration proceedings demands that Immigration Judges exhibit the highest degree of professionalism and treat all participants in their courtrooms with courtesy, tact, sensitivity and patience. A court-watching program by independent observers would help determine the extent to which Immigration Judges demonstrate professionalism and an appropriate temperament. To be successful, EOIR should work with interested groups to establish the program and require that Immigration Judges allow the observers in their courtrooms, subject to the right of immigrants to request a closed hearing. Natural participants include the American Immigration Lawyers Association, other national and local bar associations, nonprofit groups and pro bono law firms. The data compiled by the program should be publicly available in order to spotlight the most and least professional Immigration Judges. The data will also be a critical resource for highlighting best practices in Immigration Courts throughout the country. EOIR should use the data to identify those Immigration Judges who require additional training and possible disciplinary action.

Fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct.

Unless it has teeth, the new Code will be just another well-meaning, but ultimately failed, effort to improve the Immigration Court system. There must be meaningful consequences for Immigration Judges who fail to live up to the high standards that America's Immigration Courts must demand. The proposed Code requires Immigration Judges to be patient, dignified and courteous to immigrants, witnesses and lawyers, and prohibits Immigration Judges from manifesting bias or prejudice. Based on the reports we heard, some Immigration Judges regularly fail to meet these standards. It is critical that DOJ implement appropriate mechanisms to discipline Immigration Judges for violations of the Code and that there be a credible process for submitting complaints about Immigration Judges who violate the Code. Many practitioners agreed that the current process for submitting complaints about Immigration Judges was a "black hole." Indeed, attorneys who submitted complaints said they did not receive any sort of acknowledgment or response from DOJ, while others said that they had given up on the process altogether, fearing retaliation by the Immigration Judge in future cases.

"My client was cross-examined by the DHS attorney, and then went on to be cross-examined again, as well as bullied and badgered, by the judge."

The mechanism for disciplining Immigration Judges for violating the enhanced Code must address these issues. Most importantly, the process must be transparent. DOJ should promptly acknowledge receipt of every complaint. In a reasonable amount of time thereafter, DOJ should provide a statement of the actions, if any, it is taking to investigate

or address the complaint. Each complainant should receive the final results of the inquiry and any action taken as a result of his or her complaint, where doing so would not violate DOJ's personnel policies or privacy obligations. DOJ should adopt appropriate procedures to ensure that the data on complaints is compiled and made available on a periodic basis, both to senior EOIR officials and (in redacted form if appropriate) to the public. Furthermore, judge-specific information should be provided to court-monitoring groups, with appropriate obligations of confidentiality, in order to permit them to prioritize their court-monitoring function.

Supplement the training of Immigration Judges via periodic and mandatory training sessions.

DOJ could also improve the level of professionalism among Immigration Judges through enhanced training. Better training might have prevented one Immigration Judge who, according to our interviewee, declared that the immigrant "didn't look gay" to the judge and therefore would not be subject to persecution in Mexico. Training in this case was provided by the Court of Appeals, which sent the case back to the Immigration Judge, who then reconsidered his earlier stereotyping and granted asylum.

We recognize that DOJ has conducted a number of training sessions since 2007, particularly on substantive immigration law issues and certain emerging issues in asylum adjudication. DOJ should institutionalize these training sessions so that they become regular and mandatory fixtures in an Immigration Judge's schedule, and DOJ should ensure that judges have the time to attend all sessions. Moreover, DOJ should significantly expand the training topics to cover cultural competence, country conditions, bias, professionalism (including problems with fraternization with counsel, impartial procedural decisions and creation of an open and evenhanded forum), and how to conduct a hearing, assess credibility and exercise discretionary power.

Furthermore, DOJ should expand the training for newly appointed Immigration Judges to include a comprehensive “boot camp” in the above areas. According to the *Refugee Roulette* study, asylum officers receive five weeks of intensive boot camp-like training, which includes testing. While we understand that DOJ has recently expanded training for new Immigration Judges from two weeks to five weeks, most of this time is spent “on the job” rather than in the classroom learning the fundamentals of what it takes to be a great Immigration Judge. It makes little sense that training for asylum officers is more extensive than the training of the Immigration Judges reviewing their decisions; thus, the length of classroom training for new Immigration Judges should at least match the amount of classroom training that new asylum officers receive.

4

Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently

Many of our interviewees believe that DHS Trial Attorneys face extreme pressure to remove from the United States every person who comes before an Immigration Court, even if there is scant basis for doing so. This deport-in-all-cases culture distracts Trial Attorneys from the goal of seeking fair and just results under the law. According to one interviewee, a Trial Attorney argued that a man provided “material support” to terrorists, a group of Burundi rebels, based solely on the fact that the rebels robbed him of \$4.12 and his lunch. This kind of blind obstinance caused one interviewee to refer to aggressive Trial Attorneys as “merchants of death.”

DHS Trial Attorneys have only about 20 minutes to prepare each case, leaving them little time to respond even to routine questions.

Poor management decisions have made matters worse. DHS’s practices of assigning Trial Attorneys on a hearing-by-hearing basis and limiting their prosecutorial discretion have clogged up the Immigration Courts. Interviewees complained time and again that Trial Attorneys often show up to hearings unprepared with excuses like “I can’t find the file, Your Honor,” or “That was a previous attorney.” Moreover, in our interviews we found that Trial Attorneys typically do not return phone calls, refuse to negotiate to resolve issues or settle cases and fail to drop weak cases when prosecutorial discretion would warrant. Instead, many interviewees believe that Trial Attorneys invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue, thereby undermining both the legitimacy and efficiency of Immigration Courts.

Partly because of these problems, Trial Attorneys are woefully overburdened. According to the ICE Principal Legal Advisor, in 2005 Trial Attorneys had only about 20 minutes to prepare each case, leaving them with little time to respond even to routine questions. One interviewee noted that it took her a week to find out whether the government had filed its motion before a deadline because no Trial Attorney responded to her inquiries and requests for a copy. The number of Trial Attorneys has increased somewhat since 2005 but has not kept pace with the burgeoning caseload. In addition to the burden on the Trial Attorneys themselves, these kinds of tactics by Trial Attorneys also increase the burden on the taxpayer. Litigation of extraneous issues that leads to delay means that immigrants are in detention longer, at a significant daily cost.

Appleseed therefore proposes the following action items to reduce the inefficiencies and improve the professionalism of DHS Trial Attorneys.

Remind Trial Attorneys that their mission is to enforce the law as written, not to deport every immigrant.

ICE’s website states its mission is to “protect national security by enforcing our nation’s customs and immigration laws.” This focus on immigrants as national security threats unfortunately leads to the practice of trying to remove from the United States every immigrant who appears before an Immigration Court. But this focus is misplaced: from 2004 to 2006, only 126 cases in Immigration Court (or 0.015 percent of all cases) involved terrorism or national security concerns, and the percentage of cases involving allegations of any type of crime amounted to only 13 percent. The vast majority of immigrants in Immigration Court present no

danger to the security of the United States.

Our interviews suggest that many Trial Attorneys do not recognize this fact and that a deport-in-all-cases mentality pervades many jurisdictions. A former Trial Attorney whom we interviewed told us that Trial Attorneys had previously been instructed to “see that justice is served” and operated with that mindset. In her view, the change to what she referred to as the current “zero-tolerance” directive is the primary source for the shocking Trial Attorney behavior identified by our interviewees. To restore an appropriate mindset, DHS should direct Trial Attorneys to approach each case objectively, with the goal of achieving the correct result under the law.

We also heard that the attitudes of Trial Attorneys vary due to inconsistent practices in the various DHS field offices. We repeatedly heard that Trial Attorneys are less influenced by pronouncements from Washington, D.C., than by the attitudes of their immediate supervisors. It is therefore critical that DHS require local Chief Counsels to ensure that Trial Attorneys under their supervision comply with these directives.

Enforce the DHS policy encouraging the use of prosecutorial discretion.

Existing DHS policy statements direct Trial Attorneys to exercise prosecutorial discretion in appropriate circumstances, but our interviews suggest that Trial Attorneys rarely do this in practice. Instead, they too often refuse to negotiate, charge ahead with losing cases and challenge even the clearest of issues at trial and on appeal. As one of our interviewees stated, “Even if nothing else changes, just re-training the attitude and direction of the Trial Attorneys could make a world of difference.” Many factors constrain Trial Attorneys’ discretion, including insufficient time to review cases, inexperience and orders from local supervisors who refuse to implement DHS prosecutorial discretion policy.

“Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.”

ICE Principal Legal Advisor

DHS should vigorously enforce its current prosecutorial discretion policy. DHS should remind Trial Attorneys that they are directed to enter into stipulations or settlements in suitable cases and to decline to appeal when appropriate in the interests of judicial economy and fairness. DHS Trial Attorneys should focus their efforts and marshal their scarce resources to go all out on those cases that present the highest priority—those in which the government seeks to remove immigrants who are a danger to national security or the communities in which they live. Moreover, there would be little benefit to assigning Trial Attorneys to cases or mandating pre-hearing conferences—two efficiency-enhancing suggestions described below—if Trial Attorneys cannot or will not exercise prosecutorial discretion when appropriate.

DHS should also hold local supervisors responsible for their own compliance with these policy directives and for the compliance of the Trial Attorneys they supervise. Our interviews suggest that Trial Attorneys follow the spoken or unspoken directives from their local supervisors in exercising prosecutorial discretion, even when those directives conflict with official DHS policy. For example, in a rare case related by an interviewee in which a junior Trial Attorney was willing to consent to relief, the Trial Attorney did not even try to confer with her supervisor, because the Trial Attorney believed her supervisor would not have allowed it. It is of course important that more senior lawyers oversee decisions by junior Trial Attorneys. It is equally important, however, that these senior lawyers follow official DHS policy.

Assign a Trial Attorney to each case.

DHS's practice of assigning Trial Attorneys to cases on a hearing-by-hearing basis significantly bogs down the Immigration Court system. Instead, DHS should make a single Trial Attorney primarily responsible for each case, a practice known as vertical prosecution. This will reduce the occurrence of Trial Attorneys showing up to hearings unprepared and unfamiliar with the case, a frequent cause of courtroom inefficiency. In addition, vertical prosecution will provide an immigrant's counsel with a point of contact in the government, thereby encouraging negotiation and the appropriate use of prosecutorial discretion. Trial Attorneys are more likely to negotiate and to exercise discretion on cases with which they are familiar and will have less incentive to delay negotiations for "someone else" to handle.

We recognize that Trial Attorneys are extremely busy so scheduling conflicts are inevitable. Given the high turnover among Trial Attorneys, we also understand that maintaining Trial Attorney assignments will be impossible in some cases. Furthermore, a system of assigning a Trial Attorney to a case from start to finish will not be effective unless Immigration Judges cooperate with Trial Attorneys in setting case schedules. Although DHS will have to accommodate these realities at times, the assignment of Trial Attorneys to cases should be the rule rather than the exception. This new practice may also help reduce Trial Attorney attrition by giving Trial Attorneys ownership over their cases.

Mandate pre-hearing conferences at the request of either party.

Pre-hearing conferences allow the parties to resolve issues, voluntarily exchange information, simplify and organize the courtroom proceedings and dispose of clearly strong or hopeless cases without having to take up the court's time. Although the law encourages pre-hearing conferences in front of an Immigration Judge, they are not mandatory and, our interviews

indicate, are rarely held. There is no provision whatsoever regarding pre-hearing meetings solely between the parties, without the judge present. Mandating pre-hearing conferences at the request of either party would shorten hearings and make them more efficient by increasing Trial Attorneys' preparedness and by narrowing the issues before hearings.

"[P]re-hearing conferences between the parties to narrow the issues ... foster both more efficient proceedings and more efficient use of limited ... resources."

David L. Neal, Chief Immigration Judge

There are certainly cases where pre-hearing conferences are of little use. But because they will be held only upon the request of a party and need not be lengthy, this policy will impose only a slight burden on the government, wholly outweighed by its potential benefits. Pre-hearing conferences will ordinarily take place outside of the courtroom in light of Immigration Judges' already overcrowded dockets, but Immigration Judges will retain their authority to order in-court conferences as well.

5

Enhancing the Accuracy of Proceedings Through Effective Translation

Interpreters play a critical role in Immigration Courts. More than 85 percent of the people who come before Immigration Courts rely on interpreters to tell their story to the Immigration Judge in the same way as they have told it themselves. Given the central role that translators can play, courts have found, “Due process requires that an applicant be given competent translation services.”

More than 85 percent of the people who come before Immigration Courts rely on interpreters to tell their story to the Immigration Judge in the same way as they have told it themselves.

All too frequently, however, interpreters in Immigration Court fail in their role, and rather than allowing a person to tell his or her story, an incompetent translator can actually get the person deported. Even a seemingly small error in translation can have devastating consequences. One interviewee recounted an experience with an interpreter who paraphrased a Buddhist woman’s reaction to being persecuted as “Oh, my God.” The Immigration Judge relied on this inaccurate translation of her reaction in finding that she was not credible, stating that Buddhists do not believe in God and, therefore, a Buddhist would not have used that phrase. Another told us how an inaccurate translation led an Immigration Judge to believe mistakenly that the immigrant had started fires at a demonstration, when in fact the immigrant testified that fire trucks were called to hose down political demonstrators. Unfortunately, catastrophic translation errors such as these often are not subject to appellate review because they go

undetected by lawyers, Immigration Judges and immigrants alike.

Appleseed therefore recommends the following action items to ensure that immigrants have access to competent translation.

Mandate simultaneous translation of everything said in Immigration Court.

At the hearing that will determine whether a person can stay in the United States or must leave the country (and indeed, at any hearing), the immigrant often has no idea what is going on or being said in the courtroom because the interpreter is translating only direct discussions between the Immigration Judge and the immigrant. Statements by the DHS Trial Attorney, the immigrant’s lawyer and the Immigration Judge not directed to the immigrant often go untranslated. Immigrants placed in this situation feel vulnerable and frustrated, a perception that makes losing immigrants more likely to believe that they did not receive a fair hearing. But even beyond this perceptual problem, this practice also places immigrants at a real disadvantage because they cannot understand the context of questions that Immigration Judges pose or courtroom proceedings in general. To help ensure that every hearing is a fair one, in both perception and fact, EOIR should immediately mandate that Immigration Judges instruct interpreters to translate everything that is said in open court and not simply exchanges between the Immigration Judge and the immigrant. Immigration Judges and attorneys should be vigilant about ensuring interpreters comply with this full translation mandate.

Additionally, interpreters should translate everything simultaneously, rather than wait until the end to summarize what has been said. Simultaneous translation will help immigrants understand the discussion and proceedings in context and will reduce the risk that an important point will go untranslated. While we recognize that simultaneous, full translations will make hearings a bit longer than simply translating direct exchanges between the Immigration Judge and the immigrant, the enormous safeguard full translations will provide to an immigrant's due process rights outweighs this cost.

Establish an improved certification system for interpreters.

Private companies provide translation services in Immigration Court for all languages other than Spanish (for which the government generally provides translations). These companies are responsible for selecting and certifying their own interpreters, and several of our interviewees expressed dismay over the quality of the interpreters they provide. Furthermore, a number of federal courts of appeals have commented on the poor quality of translation in Immigration Court proceedings, particularly in instances where the Immigration Judge cannot understand the interpreter's English, or the interpreter and the immigrant are unable to communicate clearly because they speak different dialects of the same language. As one interviewee told us, the perception is "that if you cannot pass the federal court interpreter certification test, you become an Immigration Court interpreter."

To help improve the quality of private interpreters in Immigration Court, EOIR should ensure in the next translation services contract that the service provider establish an improved certification system for court-provided interpreters, with an emphasis on dialectical differences, general competency in both English and the foreign language for which the interpreter is certified and

the ability to translate simultaneously. Improved certification standards will result in better interpreters, which, in turn, will lead to fairer results in Immigration Court. It may also improve court efficiency as there will be fewer delays caused by unqualified interpreters and fewer appeals based on sub-par translation.

Improve the complaint-tracking procedure for interpreters.

EOIR maintains an online system for individuals to report any complaints, issues or concerns regarding an Immigration Court interpreter. Immigration Judges also may seek to have an interpreter disqualified for "substandard foreign language or English proficiency; lack of knowledge of Immigration Court terminology; [or an] inability to interpret accurately or completely." An interpreter can be disqualified from translating a particular language or dialect, appearing on an individual matter or appearing before an individual Immigration Judge or in any Immigration Court. Although the contractors track complaints and disqualifications, EOIR itself has no way of knowing whether the contractor is supplying an Immigration Court with an interpreter who has been previously disqualified. EOIR should close this loophole.

EOIR should compile its own database of disqualified interpreters and track interpreter orders by interpreter name to ensure that disqualified interpreters do not appear in Immigration Court. In addition, EOIR should feature the link to complain about an interpreter prominently on the main page of its website; right now, it is almost impossible to figure out where to submit a complaint about an interpreter on the website. By making it easier to file complaints against interpreters and monitoring interpreters who have been disqualified, EOIR will be better able to ensure that only competent interpreters appear in Immigration Courts.

Enforce the prohibition on paraphrasing or opining.

Interviewees also complained that interpreters often violate current rules by paraphrasing or opining, rather than providing an accurate translation. One practitioner told us about an interpreter who flatly refused to translate his client's testimony about being attacked and disfigured by anti-Semites in the Ukraine; the interpreter opined, "That sort of stuff doesn't happen in the Ukraine." Another practitioner indicated that he believed that his clients' testimony was frequently made less powerful because interpreters were uncomfortable literally translating slurs or insults. Watering down the stories of persecution or torture told in Immigration Court impedes the judge's ability to determine the person's credibility. Immigration Judges should therefore frequently remind interpreters not to opine or paraphrase during translation and remove an interpreter if it appears that he or she is interjecting opinion or paraphrasing testimony. In appropriate cases, the Immigration Judge should report the translator's dereliction to EOIR for it to consider disqualification.

Question and, if necessary, remove an interpreter when the translation appears to hinder an immigrant's ability to testify fully and openly.

Some interpreters exhibit the very intolerance that originally caused immigrants to flee their homelands. Immigrants should not have to confront these prejudices in an American courtroom. It is difficult enough for a person to recount the minute details of a traumatic experience in front of a judge and government attorney through the conduit of a foreign-language interpreter. This process becomes all the more intimidating when the very prejudice from which an immigrant fled is embodied by the interpreter she is relying on to tell her story.

"That sort of stuff doesn't happen in the Ukraine."

An interpreter's opinion of an asylum seeker's testimony, according to an interviewee.

Immigration Judges should ensure that the interpreter's bias, linguistic differences, ethnic background or other attributes do not interfere with the witness's full and open testimony in court. The Immigration Judge and counsel (both the immigrant's lawyer and the Trial Attorney) should be vigilant in observing the interaction between the interpreter and immigrant. If it appears that an interpreter is making an immigrant uncomfortable, the Immigration Judge should probe to determine the reason. Depending on the nature of the problem, the Immigration Judge should either instruct the interpreter regarding his role in the proceeding or, if necessary, replace him. By using these tools, Immigration Judges will help ensure that interpreters serve as a conduit to a fair hearing and not an impediment to justice.

6

Reducing the Unfairness of Videoconferencing

At the federal Immigration Court in Arlington, Virginia, the waiting room is packed. A standing room crowd spills into the hall that leads to five small courtrooms.... The Immigration Judge is here, and the attorneys for the aliens are also here. But the aliens are actually somewhere else.... No one whose immigration case is being heard today is in this building. Instead, about 150 detainees will be beamed into these courtrooms via video from local jails or federal detention centers around Virginia, Cincinnati, Cleveland and El Paso....

In the [courtroom], . . . a TV is set up on the side, with the screen split four ways. In an upper corner of the screen, one detainee appears. He is sitting against a white wall in prison-issue clothing. For activist Paromita Shah of the National Immigration Project, the effect is something of a wide-angle mug shot....

National Public Radio, All Things Considered,
"Debate Over Video In Immigration Courts,"
February 10, 2009

Unbiased judges, professional Trial Attorneys and competent interpreters are not enough so long as hearings are conducted by videoconference. Regrettably, the use of videoconferencing has become widespread in Immigration Courts, impairing the immigrant's ability to participate fully in court and compromising the right to receive the confidential assistance of counsel. According to a recent report on National Public Radio, DHS plans to install videoconferencing equipment in all new detention centers in the United States. Ultimately, nearly all detainees—who comprised 48 percent of all completed cases in fiscal year 2008—may be relegated to trial by videoconference.

The government conducts immigration hearings by videoconference because it allows judges to decide these cases without having to leave the

comforts of their courtrooms, and it means DHS does not need to transport detained immigrants to Immigration Courts. As a result, cases can be processed more quickly and cost effectively.

But this efficiency comes at a very high cost. In the case of *Rusu v. INS*, the U.S. Court of Appeals wrote that videoconferencing makes "it difficult ... to make credibility determinations and to gauge demeanor." The judge cannot read the person's body language or demeanor, which can provide the richest information as to whether the immigrant is lying or telling the truth. Even more importantly, videoconferencing dehumanizes immigrants. The immigrant becomes a blurry image in a corner of a small television screen, rather than a living, breathing human being in the courtroom. Videoconferencing can also make an immigrant—isolated in a room (typically in a detention center) looking at a video screen—uncomfortable or confused, which can result in the perception that he or she is being less than fully candid. Quite simply, removing the personal contact between the immigrant and Immigration Judge makes it harder for immigrants to make their cases. An interviewee said simply that the judge "can't feel [the immigrant's] emotion" when "they are talking to a TV." The *Rusu* court agreed, ultimately reaching the same conclusion that our interviewees expressed to us over and over again: "Virtual reality is rarely a substitute for actual presence and ... even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." We should not be making this tradeoff solely for the sake of expediency and convenience.

To address the problems identified by the Court of Appeals and scores of interviewees, Appleseed recommends the following action items.

Return to in-person merits hearings.

EOIR should bar the use of videoconferencing in merits hearings, except by written consent of the immigrant, and should allow immigrants to have in-person Master Calendar hearings for good cause. Although in-person hearings will impose additional financial costs to the Immigration Court system, these costs should not be overstated. For example, DHS transports detainees hundreds of miles to Broadview, Illinois, just outside of Chicago, for videoconference hearings, even though these hearings could be conducted in person just by driving a few more miles. In cases such as this one, the added transportation costs would be modest. Even in those cases where the incremental costs are significant, the problems with videoconferencing are so severe that we believe these costs are necessary to achieve fair and impartial justice. EOIR could minimize the cost somewhat by holding in-person hearings in the detention centers equipped with a courtroom. Eventually, all detention centers ought to be equipped with courtrooms. At that point, the need for videoconferencing will be vastly reduced, limited to cases in which it can facilitate pro bono representation or advance other compelling interests.

Restore confidential attorney-client communications.

When hearings are conducted by videoconference, any discussions between an attorney and a client may be overheard by the Immigration Judge and DHS Trial Attorney, so an immigrant is unable to confer privately with his or her lawyer. In theory, the lawyer could be at the same location as the immigrant, but in practice that rarely happens. As one interviewee said, “There is no way on earth” she would appear with her client due to concern over “what [she] might miss” by being apart from the Immigration Judge and DHS Trial Attorney. In most cases, the immigrant and the immigrant’s lawyer are in different locations and are unable to hold a private discussion. An attorney should not be forced to choose between effective assistance to

the client and appearing in court. One interviewee characterized this practice as “flawed due process.”

An attorney should not be forced to choose between effective assistance to the client and appearing in court.

EOIR should create the capacity for direct, confidential attorney-client communications during any videoconference. Immigrants should always be able to confer with their attorneys during hearings, without the lawyers having to give up the ability to file and review documents in the courtroom and confer directly with the Immigration Judge. One potential way EOIR could implement this capability would be through the use of headsets between the lawyer and the immigrant.

Provide technical training to Immigration Court staff.

No doubt, videoconferencing has many inherent limitations, but compounding these limitations by using untrained video-operating staff is inexcusable. One interviewee told us about an Immigration Judge who ruled that her client’s story about physical abuse was not credible. The judge could not see the scars on the back of her dark-skinned Somali client on the small, dimly-lit television screen. Had the immigrant been present in person in court, the judge would have been able to see the scars with ease. Appropriate use of zoom, contrast and brightness might have enabled the judge to see the evidence of torture and led to a different credibility determination. A trained video operator can be responsive to a judge’s requests to show as vividly as possible the essential visual elements of the witness’s testimony.

Rigorous technical training should be mandated for all Immigration Court personnel involved in operating videoconferencing equipment. EOIR could implement enhanced technical training quickly and with relatively little cost. The Immigration Judge Benchbook contemplates

the need for testing videoconferencing equipment “to make certain that an audible and accurate transcription of the proceedings is being created,” but there is no corresponding requirement that the individuals operating the equipment be technically proficient. For example, training should teach the video operators how and when to zoom in on the witness. Operators should also understand how to make use of contrast, brightness, sharpness and volume to make the testimony as close to an in-person experience as possible.

Provide the capability for real-time document transmission.

An immigrant appearing by videoconference is not only physically separated from her lawyer and the judge, but in many cases has no way during the hearing to review or provide documents, such as medical records or passports. In contrast, the DHS Trial Attorney in the courtroom can provide evidence to the court during the hearing and is able to review any evidence provided to the court by the immigrant. Although Immigration Judges often allow parties to fax documents to the court during videoconference hearings, the Immigration Court Practice Manual does not require judges to do so. Some courtrooms do not even have a fax machine or scanner for this purpose. In order to remedy these problems, EOIR needs to install the necessary equipment in those courtrooms and detention centers that currently lack them. Moreover, EOIR should require Immigration Judges to allow immigrants to send documents in real time during videoconference hearings and to review any relevant documents sent by the immigrant during the hearing.

7

Improving the Reliability and Availability of Court Records

The process for filing, storing and requesting documents in Immigration Court seems more fitting for 1909 than 2009. Many government agencies and most federal courts have transitioned to electronic filing and retrieval of documents from just about anywhere in the country, but the Immigration Courts still require immigrants to deliver paper copies of documents to the Immigration Court, even if they live hundreds of miles away. As a result, immigrants have no easy access to their case files. One interviewee told us that she could not find out whether the government had filed a motion by the deadline because government lawyers would not get back to her. She asked the court clerk, who told her that the clerk's office was not permitted to tell her whether something had been filed. In another case, she was not even able to see the motion the government had filed before the Immigration Judge considered it, violating basic principles of fairness and denying her the right to respond to the government's request.

The fact that the government rejects fewer than one percent of Freedom of Information Act requests by immigrants to get their own case files indicates that the entire process obstructs justice rather than serves it.

The government makes matters worse by putting up unnecessary roadblocks. Immigrants must file a Freedom of Information Act request, usually to both DHS and DOJ, to get their own case records. This process can take months, needlessly delaying an immigrant's hearing until the documents are received or leaving the immigrant with inadequate time to prepare his or her case. One government official admitted to us that this process is "arbitrary, slow and arcane." In the end,

both DHS and DOJ deny fewer than one percent of properly submitted requests. The entire process obstructs justice rather than serves it.

Not only paper documents get stuck in this morass of inefficiency. Audio recordings of hearings fall into this abyss as well. Interviewees pointed to several cases where Immigration Courts lost the recordings to their clients' hearings. They further stated that such errors could have been "fatal" to their cases, especially on appeal. Even when recordings are not lost, the transcriptions of recordings are too often unusable. One interviewee told us that 75 percent of one transcript he received simply said "inaudible." Another told us about large portions of a transcript labeled "indcipherable." When this happens, it is effectively the same as if the hearing was not recorded at all or if the recording was lost. Lost recordings or unusable transcripts can prevent any meaningful appellate review because there is no record of the hearing. In some cases, the BIA (or the federal Court of Appeals) has ordered an entirely new hearing, forcing the government to duplicate its efforts and often prolonging detention.

Appleseed recommends the following action items to improve the efficiency and fairness of the immigration records system.

Provide immediate access to records, filings and dockets.

President Obama has already asked the Attorney General to issue new Freedom of Information Act guidelines with the directive that agencies "take affirmative steps to make information public . . . [rather than] wait for specific requests from the public." DHS and DOJ should apply this principle to the Immigration Courts. The government should automatically provide all immigrants who are summoned to appear in Immigration Court their full case files, excluding only those

items the government determines may properly be withheld under FOIA. Detained immigrants in particular often have little or no help in navigating the immigration process, which means that requiring detained immigrants to submit a formal request can be tantamount to denying them their file. Providing detained immigrants with immediate access to their records will help resolve their cases faster and will reduce their time in custody. Even for those who are not in detention, forcing them to go through the hollow formality of a FOIA request wastes both their time and the government's resources.

DOJ and DHS should also publish a list of documents that can be immediately released, including all court filings, the Record of Deportable/Inadmissible Alien, the Warrant for Arrest of Alien, the Notice of Custody Determination and other salient and standard documents that are helpful to immigrants. If the immigrant believes that the government has wrongfully withheld materials, he or she can file a FOIA request. By giving immigrants immediate access to these routine documents and limiting the need to submit a FOIA request to only the most sensitive government documents, Immigration Court cases can proceed more efficiently while still addressing legitimate national security concerns. This recommendation is also consistent with the BIA Practice Manual, which does not require a FOIA request to access the record of proceedings.

Create an electronic document filing system.

To EOIR's credit, one of the goals of its strategic plan is to implement an electronic document filing system, called eWorld—a long overdue improvement. To be most effective, eWorld must be a comprehensive electronic document filing, recordkeeping, docketing and notification system, similar to the systems operating in many state and federal courts. It must provide immigrants and their lawyers with immediate access to all unclassified court filings. Such a system will significantly reduce the recordkeeping burdens of the Immigration Court staff and vastly improve access to the documents needed to resolve cases.

Some immigrants lack the resources or know-how to use computers or the Internet, and so for them EOIR should still permit paper filings, just as federal courts do.

Provide copies of recordings of Immigration Court hearings.

Rather than use court reporters, Immigration Judges themselves operate the typically antiquated equipment used to record the hearings in their courtrooms. These audio recordings are the basis for the official transcripts of these hearings, providing immigrants with valuable information as they prepare their cases for review. The process for obtaining these recordings varies among Immigration Courts. Generally, an immigrant must submit a request to the court clerk far in advance, and then in order to listen to the recording the immigrant must go to the Immigration Court during limited business hours, taking notes of any relevant information on the spot. This process is unnecessarily cumbersome.

The Immigration Courts should provide all immigrants, on request, with a copy of the recording (whether cassette or digital) of their proceeding. Each Immigration Court should be required to make these recordings available to the immigrant within five business days. We can see no acceptable reason for longer delays, particularly for those Immigration Courts that have converted to digital recording systems.

In addition, EOIR should create simple procedures and standardized forms for obtaining a recording. In addition to benefiting immigrants, these reforms will also reduce the burden on court staff, who must schedule these listening sessions, decipher poorly written requests and follow up with immigrants for missing information.

Continue the installation of digital recording systems.

Over the past few years, EOIR has been replacing its outdated cassette tape recording systems with digital recording systems. In its strategic plan and 2009 budget request, EOIR recognizes that a digital system will solve many of the problems of

inaudible or indiscernible statements in hearing transcripts and lost or damaged tapes, which sometimes are so bad that the courts must repeat the hearings. EOIR has already installed these digital audio recording systems in 21 Immigration Courts and the BIA Oral Argument Room. EOIR intends to install these digital recording systems in the remaining 35 Immigration Courts by the end of 2010. We applaud EOIR's efforts to meet this important goal. Once digital equipment has been implemented throughout the system, each immigrant should be provided with a digital copy of the recording at the conclusion of the hearing.

Detainees with Mental Illness: A Growing Challenge for Immigration Courts

An immigrant with mental health issues faces nearly insurmountable obstacles in an Immigration Court and detention system beset with problems for even the healthiest individuals. Without clear guidance for identifying mental illness or accommodating it in court proceedings, cases often move forward as if an immigrant were fully capable of participating. One Immigration Judge went so far as to issue an “in absentia” order to deport a mentally ill woman to China, even though she was sitting on the witness stand. Texas Appleseed, with pro bono assistance from Akin Gump Strauss Hauer & Feld LLP, is investigating the challenges faced by immigrants with mental illness in the Immigration Court and detention system.

Both attorneys and detention center personnel have reported increasing numbers of immigrants entering the immigration detention and court systems with significant mental health problems. Texas Appleseed has identified the following issues to date:

- Detention facilities use inconsistent standards to assess, evaluate and treat immigrants with mental illness leading to deteriorating mental health for many in their care.
- Immigrants receiving mental health treatment, including those taking medication to ensure their stability, often do not continue to receive the same treatment after transfer into or between detention facilities.
- Mental health is apparently not a consideration in transfer of detainees, though transfers can exacerbate symptoms of mental illness.

- Immigration Judges are given the undue burden to recognize and accommodate mental illness in court proceedings without clear procedures.
- Immigrants with mental health problems are particularly disadvantaged by the lack of representation and the use of videoconferencing.
- Medical records are often difficult to access, creating barriers to document mental health issues with the Immigration Court or detention facility.
- A lack of clear Immigration Court procedures for raising and addressing mental health issues creates unnecessary challenges for judges, attorneys and individuals in the immigration system.

Preliminary Recommendations:

- Establish enforceable standards to assess, evaluate, and treat mental illness and provide for continuity of care in immigration detention facilities.
- Require detention facilities to provide patient health records in a timely manner at the request of the immigrant or her attorney.
- Adopt regulations for Immigration Courts that establish explicit processes for competency hearings and for appointing guardians ad litem.

Once this research is complete, Texas Appleseed will present a supplemental report detailing its findings and providing expanded policy solutions to ensure that detainees with mental illness have access to justice in the Immigration Court system.

8

Helping the Unrepresented

In fiscal year 2008 alone, 168,810 people moved through the Immigration Court system without the help of a lawyer. The results are disheartening. According to *Refugee Roulette*, a person who is represented by a lawyer is nearly three times more likely to win asylum than an immigrant going it alone.

The top priority should be to ensure as many people as possible are represented by competent counsel. For those immigrants who remain on their own, the goal should be to make the process simpler.

Those immigrants appearing without a lawyer, or “pro se,” often enter the system without any understanding of the process before them, much less of the grounds for relief that may be available to them. The Immigration Court system, meanwhile, presents a maze of technical filing requirements and court procedures, as well as intricate legal burdens that can present difficulties for even experienced lawyers with significant resources at their disposal. For a person who speaks little English and has no legal experience, the Immigration Court process can be impenetrable.

Throughout our interviews, we heard just how difficult it is for these pro se immigrants. One person stated that pro se immigrants are the “worst off” and that “the system is not working for them.” We also heard considerable criticism of the existing pro se resources, which our interviewees characterized as inadequate. They also complained that the Immigration Court Practice Manual, the only comprehensive guide to Immigration Court procedure EOIR has published, was never intended for the unrepresented and is therefore not helpful to them.

Many Immigration Judges do their best to help pro se immigrants by offering multiple continuances to allow them to find attorneys and by taking time to explain their rights and the court’s procedures. This effort is admirable and should continue. The top priority, however, should be to ensure that as many people as possible are represented by competent counsel. For those immigrants who remain on their own, the goal should be to make the process simpler.

These two goals lead Appleseed to make the following recommendations.

Maximize Pro Bono Representation

Ensure that the 2008 Pro Bono Guidelines are faithfully implemented.

The best way to make the system fair would be for every immigrant to be represented by counsel. Few immigrants, however, can afford a good lawyer. For these people, the opportunities for pro bono representation should be significantly expanded. Private law firms and nonprofit organizations provide the pro bono lawyers, to be sure, but the government has a crucial role to play.

In 2008, the Chief Immigration Judge issued guidelines for facilitating pro bono legal services. These guidelines have been supported by pro bono providers and, if implemented, could significantly increase the number of immigrants who receive pro bono representation. The guidelines seek to reduce the administrative burden on pro bono counsel with a series of recommendations:

- Designate a pro bono liaison judge or committee in each Immigration Court to work with local practitioners to facilitate pro bono representation.
- Increase the flexibility of courtroom practices and scheduling for pro bono practitioners.

- Make greater use of pre-hearing statements and conferences to increase the efficiency of pro bono representation.
- Provide training to pro bono lawyers.

Unfortunately, the implementation status of these recommendations is unclear. As a start, EOIR should direct each Immigration Court to disclose the status of its implementation of the pro bono guidelines immediately and to provide (or create) a timetable for their full implementation. Immigration Courts can also share information to develop best practices to encourage pro bono representation.

Use videoconferencing, even though flawed, to expand representation to immigrants in remote areas.

In the opinion of many of our interviewees, even immigrants with meritorious claims have virtually no chance of success without legal representation. Unfortunately, representation is sometimes more a function of geography than merit. DHS detention centers are often located in remote areas, such as rural Texas, where bed space is less expensive but few if any lawyers are available for pro bono representation. EOIR cannot choose where to locate DHS detention centers but it can take steps to expand pro bono representation for detainees confined far from available lawyers.

Although our interviewees widely condemned videoconferencing, and we propose that its use be sharply curtailed, videoconferencing can bring pro bono representation to locations where lawyers are scarce. Already, the Headquarters Immigration Court in Falls Church, Virginia assists Immigration Courts from around the nation with their overflow caseload by videoconferencing, demonstrating EOIR's willingness to use videoconferencing for its own administrative benefit. EOIR should leverage this technology for the benefit of detained immigrants as well.

For those immigrants who have given their informed written consent to have their hearing conducted by videoconference, EOIR should

use videoconferencing to connect immigrants in remote regions with pro bono lawyers in other parts of the country. An immigrant without a lawyer faces such insuperable odds that the benefits of representation exceed the drawbacks of videoconferencing.

Make It Easier for the Unrepresented to Represent Themselves

Even after expanding pro bono representation, some immigrants will still be unable to obtain a lawyer. The following recommendations are designed to help pro se immigrants help themselves.

Simplify the filing and pleading standards for unrepresented immigrants.

Our interviewees repeatedly told us that the highly technical Immigration Court filing rules can trip up even experienced lawyers. Pro se immigrants, many of whom speak no English, have little hope of getting these technicalities right. Filings may be delayed, or even dismissed, for having the wrong size or grade of paper or for putting the documents in the wrong order. Therefore, EOIR should ease the filing requirements for pro se immigrants. Pro se immigrants should be held to the same standard as lawyers only for procedural necessities, such as required signatures.

After their documents have been filed, pro se immigrants are expected to comply with complex procedural regulations and rules of pleading. Courts around the country have implemented a variety of programs to assist pro se litigants. For example, the U.S. Court of Appeals for the Ninth Circuit has created instructions for pro se petitioners in immigration cases, including simplified checklists and an informal template "brief," which presents a set of questions structured around the law to develop the petitioner's claim. Private organizations have prepared analogous materials for immigrants to use in Immigration Court, but some Immigration Judges reject those pleadings out of hand. EOIR should instruct Immigration Courts not to reject

template pleadings out of hand but to accept any pleading from a pro se immigrant that contains the basic information and satisfies the minimum procedural necessities. To ensure that the same templates can be used around the country, EOIR should specify the minimum requirements for a pro se pleading.

Upgrade the Immigration Court hotline.

The government has no central resource for immigrants to call to get important information about the Immigration Court process and requirements. EOIR provides an automated telephone service by which an immigrant can check on the status of a pending case but does not provide any information about immigration law and procedure, which a pro se immigrant needs in order to be able to navigate the court system. Moreover, local Immigration Court staff are neither trained nor equipped to provide substantive advice to pro se immigrants.

The No-Help Desk

Immigration Court personnel are often unhelpful or worse to immigrants. One interviewee who watched the exchanges between the Baltimore “court administrator” and immigrants asking for procedural help noted that the administrator’s responses were completely unhelpful and confusing. To get these useless answers, the immigrants had to shout their most personal information because the court administrator was positioned behind bullet-proof glass.

EOIR should establish a toll-free hotline for immigrants to get basic information about the Immigration Court system and its procedures. The hotline should:

- Provide basic “Know Your Rights” information that tracks information provided by Legal Outreach Programs now available in some detention centers.

- Refer callers to immigration legal services across the country upon request.
- Be publicized in Immigration Courts and detention centers, with a number prominently posted.
- Be accessible through detention center telephones.
- Be staffed by agents who provide friendly and competent customer service in multiple languages (at a minimum, English and Spanish).

The IRS toll-free number could serve as an excellent model—it includes a sophisticated “phone tree” to narrow issues and route callers to an appropriate representative and earned a 91.2 percent accuracy rate on tax law questions in 2007.

Produce a pamphlet explaining essential immigration law and Immigration Court procedure.

When unrepresented immigrants enter the Immigration Court system, the government gives them little information about what lies ahead of them. This information vacuum makes immigrants vulnerable to unscrupulous practitioners and creates unnecessary hurdles for all but the most resourceful immigrants. Although EOIR has recognized the value of a “simple written description of Immigration Court proceedings,” it has not yet created such a document. It should.

All pro se immigrants should be given a simple pamphlet that introduces them to the Immigration Court: the hearings, the general grounds for relief, the deadlines and the acronyms, describing in detail the roles and responsibilities of Immigration Judges, Trial Attorneys and private counsel. The pamphlet should explain the mechanism for reporting any misconduct. In addition, to facilitate pro se immigrants’ access to more comprehensive resources, the pamphlet should also direct them to the Vera Institute, which is currently preparing a compendium of invaluable materials that other notable organizations have already developed. The pamphlet should be available at every Immigration Court in multiple languages and should describe available pro se resources.

9

Getting It Right on Appeal

When an Immigration Court makes a bad decision, immigrants rely on the BIA to get it right. Unfortunately, many of our interviewees believe that the BIA is falling short, agreeing with federal circuit Judge Richard Posner's damning statement from 2005 that the work of the BIA has "fallen below the minimum standards of legal justice." Most pointed to the 2002 "streamlining reforms"—in particular, slashing the size of the BIA, review by only a single member and the emphasis on affirming the decisions of Immigration Judges without explaining why—as the reason why the BIA has fallen into disrepute. In short, the 2002 streamlining replaced careful review with expediency.

When justifying the decision to slice the BIA in half, then-Attorney General John Ashcroft claimed that previous expansions of the Board "had no appreciable impact on the completion of cases" and that the Board had "grown too large to reach a consensus" for resolving complex legal questions. Most interviewees disagree. Instead, they believe the real motivation was to rid the BIA of judges perceived as pro-immigrant.

With this downsize, the 2002 streamlining dramatically changed the way the BIA handles its cases. Prior to 1999, three-member panels considered every appeal. After DOJ introduced review by just one member, the 2002 streamlining "expand[ed] the single-member process to be the dominant method of adjudication for the large majority of cases before the Board." Indeed, according to BIA Chairman Osuna, only about seven to eight percent of cases are decided by three-member panels. Our interviewees routinely singled out this near-elimination of the use of three-member panels as a leading cause of the BIA's diminished credibility. One interviewee called it a "disaster," while another pointed out that there is no "guarantee of . . . logical reasoning or acceptable or appropriate decision making."

This streamlining combined single-member review of cases with the practice of affirming Immigration Judge orders with no explanation,

known as an "affirmance without opinion" or "AWO." While these policies substantially reduced the BIA's backlog, they also fueled criticism from practitioners and federal appellate judges alike that the Board was no longer an appellate body at all, but merely a "rubber stamp" for Immigration Judge decisions. The perception was manifest among many of our interviewees that there were individual BIA members who would issue "50 cases in one day, and each of them was a denial." Decisions without explanation provide no comfort to immigrants that their cases received any review at all, let alone a thorough consideration.

It is clear from our interviews that the reputation of the BIA does not reflect its recent progress.

The "streamlining reforms" thus led to a rash of decisions with little or no analysis, which, in turn, has led to a flood of appeals to the federal courts. According to the *Refugee Roulette* study, "In February 2002, the month before Attorney General Ashcroft changed the procedures, 200 cases were appealed to the circuit courts each month. One year later, 900 cases a month were appealed, and by April 2004, more than 1,000 cases per month were being appealed." Thus, the reforms merely shifted the backlog upward to the federal appellate courts.

The BIA has recently tried to address many of these concerns. First and foremost, as the BIA reports, it has reduced the number of affirmances without opinion from 36 percent of all decisions in FY 2003 to 10 percent in FY 2007, and BIA Chairman Osuna has stated that the percentage has further decreased to approximately five percent of decisions for the first six months of FY 2009. As the number of affirmances without opinion has declined, however, the number of single-member opinions has increased. For many of our interviewees, these single-member opinions

are no better than affirmances without opinion. One interviewee noted that she “sees many one- or two-paragraph decisions where it is clear that the [member] has not reviewed the record and there has been no meaningful review.” Another noted an “opinion that was one paragraph long, [with] three case citations and ... no explanation of how the cited cases relate to the issue at hand.” Here, too, the BIA has made a concerted effort to improve by issuing longer, more substantive opinions that better address the issues in the case. Today, many, if not most, single-member opinions range from one to three pages, with some even longer. As a result of these improvements, the BIA’s reversal rate in the federal courts of appeals has dropped substantially, from 17.5 percent in 2006 to 12.6 percent in 2008.

It is clear from our interviews, however, that the reputation of the BIA does not reflect its recent progress. Profound cynicism and distrust toward the BIA arising from the “streamlining reforms” persists. Much more needs to be done.

In order to strengthen the reputation of the BIA as a legitimate appellate body and to ensure that immigrant appeals receive the level of consideration they are due, Appleseed recommends the following action items.

Mandate the use of three-member panels except for purely procedural issues or motions that do not decide the outcome of a case.

Almost universally, our interviewees felt that returning to three-member panels would help revive the BIA’s credibility. Interviewees widely believed that three-member panels provide a more robust review process, ensuring a comprehensive examination of each appeal. Even DOJ, in rules it proposed in 2008 to update the BIA’s procedures, acknowledges the superiority of three-member review, stating that it “enhance[s] the review and analysis” and “may provide more authoritative guidance.”

The proposed rules, which would “expand the criteria for three-member decisions by allowing

a Board member, in the exercise of discretion, to refer a case to a three-member panel when the case presents a complex, novel, or unusual legal or factual issue,” are a step in the right direction. We agree with the American Bar Association, however, that the proposed rules leave “little incentive for Board members to take advantage” of their discretion, making it “unlikely that this new flexibility will be widely utilized.” A truly effective rule must ensure that three-member review becomes the norm, not the exception, for BIA decision-making.

Accordingly, the new rules should mandate that three-member panels review every appeal, except for purely procedural issues or motions that do not decide the outcome of a case, consistent with the practice of many federal appellate courts. We understand that the return to three-member panel review may cause an undesired backlog of cases unless DOJ adds new members to the Board. Consistent use of three-member panels, however, will enable the Board to serve as a true arbiter of justice, which is worth any risk of short-term backlogs.

Eliminate the use of affirmances without opinion and require reasoned opinions.

While the BIA’s reduction in AWOs is a laudable improvement, the necessary mechanisms are not in place to prevent a reversion back to their more frequent use. Current rules require a Board member to use an AWO to dispose of an appeal in certain specified cases (essentially, correctly decided cases with only immaterial error and lacking novel or substantial issues). DOJ’s proposed rules would give Board members the discretion to choose either to write a decision or to affirm by AWO. Although AWOs would no longer be mandatory, the proposed rules do not require the use of written decisions any more frequently than the current rules, and they contain no incentive for a Board member to elect to write a decision rather than affirm by AWO. As the American Bar Association stated, “[T]he proposed rule does not go far enough to provide adequate safeguards to ensure quality decision-making and

adjudication, and therefore may result in little improvement in practice.”

Instead, the new regulation should require that the Board issue full written opinions in all matters. A full written opinion need not be lengthy. In many cases, a few paragraphs will be sufficient to address the issues. But every opinion—three-member opinions and single-member opinions—should provide the immigrant with the basis for the Board’s decision and sufficiently address the parties’ contentions.

Every opinion should provide the immigrant with the basis for the Board’s decision and sufficiently address the parties’ contentions.

Eliminating the current AWO practice to mandate more fully reasoned decisions serves several goals. First, immigrants and Trial Attorneys alike will know that their arguments have been given their due and have been fully and fairly considered. Second, if an appeal of the BIA decision is taken, the Court of Appeals will have a reasoned opinion to review and will not be forced to reach down to the Immigration Judge’s decision (often rendered orally at the hearing) and the case file without any guidance from the BIA. Moreover, written decisions will help the immigrant determine the strength of an appeal, which, together with the assurance that the case had been fairly and thoroughly considered, may help stem the flood of immigration cases currently overwhelming the federal courts.

Increase the number of BIA members and staff attorneys.

A return to three-member panels combined with full written opinions will significantly increase the BIA’s workload, even though the number of appeals to the BIA has declined in recent years. This greater workload will require additional BIA members and staff attorneys to support them. In June 2008, DOJ increased the size of the Board from 11 to 15 members. We applaud this increase,

but it will not be enough. When asked, Chairman Osuna estimated that the BIA will need at least 25 members if the BIA were to return to three-member review. This appears to be a reasonable starting point, considering that a larger BIA might be too unwieldy to function effectively when meeting as a single body, or “en banc.”

If necessary, DOJ should use temporary board members to fill out additional three-member panels to handle any excess caseload. Immigration Judges could perhaps serve as temporary board members in a regular rotation, which would not only provide a broader variety of expertise and experience to the BIA but could also be a training mechanism for Immigration Judges. It might also identify which Immigration Judges qualify for permanent appointment to the BIA. The use of temporary board members will ensure that the BIA can handle its caseload, and it will not interfere with en banc decision-making because current regulations do not allow temporary board members to vote on cases decided en banc.

Similarly, DOJ should significantly increase the number of staff attorneys to help members review cases and prepare well-reasoned decisions. When asked, Chairman Osuna estimated that the BIA will need at least 250 staff attorneys if it is to return to three-member review. Based on his estimate and the current headcount, the BIA will need about 110 new staff attorneys.

The BIA chairman and EOIR director should periodically evaluate the BIA’s workload to make any necessary adjustments to the BIA’s size, the use of temporary board members and the number of staff attorneys.

A Call to Independence

We began this report by recalling John Adams’s declaration that judges be as “impartial and independent as the lot of humanity will admit.” We have made a number of recommendations that the federal government can implement right now to improve the impartiality of Immigration Judges and BIA members. These recommendations can make modest improvements in the independence of Immigration Judges and BIA members from policymakers, but true independence of the Immigration Court system will require much more significant change. Indeed, we have seen time and again how DOJ can influence decisions by Immigration Judges and BIA members—from the 2002 “streamlining reforms” that replaced careful BIA review with expediency, to the Attorney General’s power to transfer Immigration Judges and BIA members with whom he disagrees, to DOJ’s ability to “manage the caseload and set the standards for review.” The ability to engage in this kind of mischief can never be fully eliminated unless immigration cases are heard in an independent court.

We must recognize, however, that independence is a two-edged sword. On the one hand, independence is essential to ensure that political pressures do not influence the decisions of judges. On the other hand, independence does not guarantee impartiality. In fact, it is possible that by making biased judges fully independent from oversight by policymakers, we could actually make some of the most pressing problems in Immigration Courts even worse. Any proposal to enhance the independence of Immigration Judges and the BIA must not entrench biased judges. Instead, we must carefully construct a new Immigration Court system that balances the competing concerns of independence and impartiality.

To achieve independence, we propose that Congress remove the Immigration Court

system from the Department of Justice and reconstitute the BIA as the appellate division of a new United States Immigration Court under Article I of the Constitution. We are convinced that it would be a daunting, if not insurmountable, task to achieve independence from DOJ’s political influence, while appropriately maintaining an ability to address biased judges and inconsistent decision-making, so long as the Immigration Court system remains in the Department of Justice.

To promote impartiality, we propose that federal courts of appeals (which already appoint bankruptcy judges) appoint the appellate division members of the U.S. Immigration Court. Each federal circuit would be entitled to appoint a number of members that bears a relationship to the number of Immigration Judges in the circuit, the number of appeals of BIA decisions that come to that circuit or some other metric that Congress may deem appropriate. The members of the new appellate division (who would now formally be called “judges”) would appoint a Chief Judge from among themselves. An appellate judge on the U.S. Immigration Court would have a renewable 15-year term and could be removed only by a majority of the circuit that appointed that judge and only on limited grounds, such as incompetence, misconduct, neglect of duty or physical or mental disability.

Congress should establish the current Immigration Courts as the trial division of the new court. The trial division would be headed by a Chief Immigration Judge appointed by the Chief Judge of the appellate division with the concurrence of the appellate division. Immigration Judges would also be appointed by the Chief Judge after a rigorous competitive appointment process that is similar to that used to appoint Administrative Law Judges. Although sitting Immigration Judges may temporarily stay on until permanent Immigration Judges are hired through the new process, sitting Immigration Judges should not be automatically appointed as Immigration Judges in the new court. Sitting judges

should have to complete the same rigorous process as all other candidates, taking into consideration the sitting judge's performance as an Immigration Judge.

Once appointed, Immigration Judges should be subject to thorough performance reviews by the Chief Immigration Judge, focusing on several "good judge" factors, such as:

- Whether the Immigration Judge has demonstrated personal bias in his or her decisions;
- Whether the Immigration Judge has exhibited the appropriate judicial temperament in his or her courtroom;
- Whether the Immigration Judge has demonstrated an appropriate mastery of immigration law and the judgment necessary to apply that mastery to individual cases; and
- Whether the Immigration Judge has been sufficiently diligent in the discharge of his or her duties.

An Immigration Judge who does not meet the appropriate standards in one or more of these areas could be removed from the bench by the Chief Judge of the appellate division after considering the Chief Immigration Judge's review.

In fashioning this proposal, we were guided by the premise—supported by academic research—that those with the greatest incentive to appoint the best adjudicators should have the power to appoint them. As we note in our discussion of the BIA, the U.S. courts of appeals have borne the brunt of the burden from the BIA's erosion as an effective appellate body. These courts have the greatest incentive to appoint competent, unbiased judges to the appellate division of the U.S. Immigration Court and should be vested with that power.

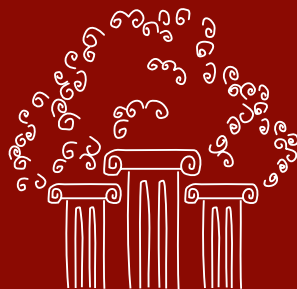
Similarly, the appellate division would bear the burden of incompetent or biased Immigration Judges, as it would have to review all appeals of Immigration Judge decisions. The Chief Judge of the appellate division would have

the greatest incentive to appoint the highest-quality Immigration Judges and should have that authority.

With such an incentive-driven appointment structure in place, we believe this proposal would result in an independent Immigration Court system that would not consign immigrants to the Immigration Court lottery indefinitely.

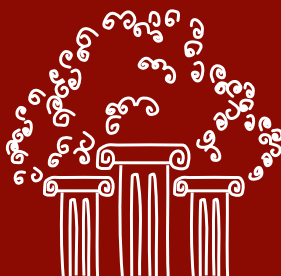
Appleseed wishes to thank and recognize the following attorneys and professional staff for their generous contributions and hard work.

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