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Comments from Scholars and Teachers of Administrative Law and Immigration Law
Executive Office for Immigration Review, Department of Justice
Interim Rule "Organization of the Executive Office for Immigration Review"
84 Fed. Reg. 44537, 44537-43 (Aug. 26, 2019)
EOIR Docket No. 18-0502, RIN No. 1125-AA85, A.G. Order No. 4515-2019

Executive Summary

We are scholars and teachers of administrative and immigration law who write in opposition to the interim rule promulgated by the Executive Office for Immigration Review ("EOIR") on August 26, 2019. The rule, "Organization of the Executive Office for Immigration Review" (the "Rule" or "Interim Rule") gives a political appointee, the Director of the EOIR, broad power to decide cases, at times eliminating the decision-making authority of the members of the Board of Immigration Appeals ("BIA" or "Board"). We also oppose the attempt to codify the incongruous location of the Office of Policy within EOIR. It is improper to place a political policy office within the adjudicatory arm of our immigration system. The Rule poses serious threats to the immigration adjudication process and should be rescinded. Specifically, the Rule compromises the fairness of the proceedings by diminishing due process, creates inefficiencies in the adjudication process, and violates basic principles of good administrative process design. Because the Rule will not achieve its intended effect and because it is a part of a larger scheme to damage the independence of immigration adjudication, the Rule is arbitrary and capricious.

Though several significant changes are made to EOIR's organizational structure via this interim rule, this comment addresses only the creation of the Office of Policy and changes to the appellate review structure impacting the Board of Immigration Appeals ("BIA" or "Board") and the Director of EOIR ("Director"). It does not address other changes, including the redesignation of Board members as "Appellate Immigration Judges" or the move of the Office of Legal Access Programs into the newly-created Office of Policy.[1]

I. Substantive Changes and Stated Purpose of the Rule

The Interim Rule newly empowers the Director to adjudicate individual cases on appeal. Prior to this rule change, the Director was prohibited from adjudicating individual cases. Under the new Interim Rule, "the Director continues to be precluded from adjudicating cases or directing the results of certain adjudications, unless authorized to do so by another regulation or otherwise designated or delegated authority by the Attorney General to do so."[2] The new Interim Rule retains much of the original language regarding the prohibition on the Director's power to

[1] 8 C.F.R. § 1003.0(e), 1003.1(a)(1), (2), (4).
[2] *Id*.

adjudicate cases, but prefaces those limits with the following caveat: "Except as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General . . .".[3] The new caveat thus removes any substantive limits on the ability of the Director to adjudicate cases, so long as the adjudication has been delegated to the Director by the Attorney General.

In addition to this general grant of adjudicatory power via delegation, the Director is newly empowered to adjudicate a specific subset of immigration cases, namely, those that have exceeded the time frame established for the resolution of appeals before the BIA. The expansive scope of this newly created power is evident through sweeping new language:

> For a case referred to the Director under this paragraph, the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section, including the authority to issue a precedent decision and the authority to refer the case to the Attorney General for review, either on his own or at the direction of the Attorney General.[4]

Notably, a separate section of the regulations provides the Director the ability to delegate his own authority to a group of lower-ranked EOIR officials. This ability of the Director to delegate his authority has been a part of the regulations since 2007.[5] The delegation power is newly important, however, because the Director has never before had the power to adjudicate individual cases. Additionally, the new rule adds the newly created position of Assistant Director for Policy (of the newly created Office of Policy) to the list of positions to whom the Director may delegate his powers.[6] In other words, the new Interim Rule now permits the Attorney General to delegate his power to adjudicate individual cases to the Director of EOIR who may then delegate his power to the Assistant Director of Policy.

This Interim Rule thus dramatically expands the list of individuals who may adjudicate individual immigration cases. In addition to the explicit grant of authority to the Director—who is now interposed between the Board and the Attorney General in the subset of cases that have exceeded the regulatory time frames—other portions of the Interim Rule offer no substantive limits at all to the power of the Director (or his designees) to adjudicate any type of case "arising under the Act or regulations," so long as that power has been delegated to him by the Attorney General.[7] There is no substantive limit in the regulation to the Attorney General's power to delegate a wide swath of adjudicatory powers to the Director (or one of his designees), including the power to adjudicate individual cases, to select individual cases for his personal review, to issue precedent decisions, and to further delegate these powers down the organizational hierarchy, including to the Assistant Director of Policy. These changes represent sharp breaks from agency precedent.

[3] 8 C.F.R. § 1003.0(c).
[4] 8 C.F.R. § 1003.1(e)(8)(ii).
[5] Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53673, 53674 (Sept. 20, 2007) (codified at 8 C.F.R. § 1003.0(b)(2)).
[6] Organization of the Executive Office for Immigration Review, 84 Fed. Reg. at 44,541 (codified at 8 C.F.R. § 1003.0(b)(2)).
[7] 8 C.F.R. § 1003.0(c).

Finally, EOIR issued these significant regulatory changes in the form of an interim rule. EOIR argues that the Interim Rule is exempt from the normal requirements of notice and comment because the Interim Rule "is an internal delegation of authority and assignment of responsibility, along with a change in nomenclature, and is thus a rule of management or personnel; it further relates to a matter of agency organization, procedure, or practice" and is therefore "exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date."[8] EOIR further argues that the Interim Rule is merely an "internal delegation of administrative authority" and thus "does not adversely affect members of the public."[9]

We do not believe this characterization of the rule is an accurate one. Rather than merely being an internal agency reorganization, substantial rights are affected by the rule change, as explained below. For the present moment, however, we simply observe that though the agency has issued the Rule to be effective immediately, its decision to issue an Interim Rule requires it to consider comments and to issue a modified rule in light of comments received.[10]

EOIR has promulgated this interim rule as a "further delegation of authority from the Attorney General regarding the efficient disposition of BIA cases on appeal."[11] The stated purpose of the Interim Rule is, then, to more efficiently dispose of immigration appeals by delegating to the Director the power to decide cases.

Prior to this Interim Rule, the regulations established a time frame for the resolution of appeals before the BIA (90 days within completion of the record for single-member appeals, 180 days within assignment for cases assigned to a three-member panel).[12] In cases in which those times frames were not met, the Chairman of the BIA was directed to either refer those cases to himself or the Vice Chairman for decision, or to refer the cases to the Attorney General.[13] This Interim Rule purports to relieve the Attorney General of the burden of deciding cases referred solely for timeliness reasons by delegating the responsibility to the Director of EOIR.[14] The rule also purports to correct a procedure that is "operationally anomalous," because the Chairman is under the supervision of the Director.[15] The rule thus requires the Chairman to first seek review from the Director, and prevents the BIA from making direct referrals to the Attorney General by requiring the Chairman to first refer through the Director, "consistent with standard management principles of the elevation of workload and performance issues."[16] The rule also purports to resolve tensions in different sections of the regulations regarding the ability of the Director to adjudicate cases.[17]

[8] Organization of the Executive Office for Immigration Review, 84 Fed. Reg. at 44540 (citing 5 U.S.C. § 553(a)(2), (b)(A)).
[9] *Id*.
[10] *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 705 n. 6 (1999) ("An interim-final rule is intended to apply indefinitely but has been adopted in an interim form that will be reconsidered and modified in light of public input.").
[11] Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44,537, 44,539 (Aug. 26, 2019).
[12] *See* 8 CFR § 1003.1(e)(8)(i).
[13] *See* 8 CFR § 1003.1(e)(8)(ii).
[14] Organization of the Executive Office for Immigration Review, 84 Fed. Reg. at 44,539.
[15] *Id*.
[16] *Id*. at 44,539-40.
[17] *Id*. at 44,540.

No other reasons are offered for the rule.

II. Problems Created by the Regulatory Change

We identify four categories of problems created by this significant change in the adjudicatory structure of EOIR, each of which requires the Rule to be rescinded.

A. The Interim Rule Compromises Fairness and Diminishes Due Process

We are seriously concerned about the fairness of any cases adjudicated under this new regulatory framework. The Due Process Clause of the Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property without due process of law."[18] It is well established that all persons within the United States—including the individuals subjected to this regulatory change, namely, individuals in removal proceedings or otherwise pursuing immigration-based claims in our immigration courts or before the BIA—are entitled to the protections of the Due Process Clause.[19] The specific procedures required for a given adjudication to comport with due process will vary with the circumstances, but in all cases, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[20] The Interim Rule fails to provide this bare minimum of constitutional protections for the adjudication of immigration claims by enabling a political appointee with no independence or judicial orientation to adjudicate the cases of individual immigrants. Regulations specifically require Board members to "exercise their independent judgment and discretion in considering and determining the cases coming before the Board," but there is no such requirement for political appointees like the Director and the Assistant Director of Policy.[21]

We recognize that these limits may be implicit on the Director (or his designee) when exercising power regarding timely BIA appeals under that section of the regulations, which specifies that "under this paragraph, the Director shall exercise delegated authority from the Attorney General identical to that of the Board as described in this section . . .".[22] Yet there is no such limitation imposed on the other, more expansive delegation of adjudicatory power that encompasses *all* immigration adjudications, not simply Board appeals that have exceeded their target time frame.[23] In other words, the new regulations do not impose the same obligations upon the Director (or his designees) in non-timeliness cases he takes on his own initiative or via Attorney General referral.

Even if the independent judgment regulatory command implicitly applies, it is not appropriate for the Director or his designees to engage in the adjudication of individual

[18] U.S. CONST. amend. V.
[19] *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). *See also Zadvydas v. Davis*, 533 U.S. 678 (2001) (observing that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presences here is lawful, unlawful, temporary, or permanent" and citing a string of cases dating back to 1886 that stand for this basic proposition).
[20] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).
[21] 8 C.F.R. § 1003.1(d)(1)(ii).
[22] 8 C.F.R. § 1003.1(e)(8)(ii).
[23] *See* 8 C.F.R. § 1003.0(c).

immigration cases because of their status as political appointees. In addition to the perception problems generated by their status as political appointees engaged in policy work rather than adjudication, these individuals also lack the expertise of Board members when it comes to immigration adjudications.[24] The Director is tasked with crucially important functions within EOIR, but none of those involves the adjudication of immigration claims, either in the first instance or on appeal. Until this interim rule, the Director's responsibilities have been of a distinctly managerial cast—for example, issuing procedural rules, managing the docket, and administering an exam for new IJs and Board members—and the adjudication of individual cases has been explicitly forbidden.[25] Nor is the Director a Senate-confirmed appointee like the Attorney General or other agency heads. The Director falls between the two poles of agency adjudication—neither an independent adjudicator nor a Senate-confirmed agency head—and is thus an inappropriate adjudicator of individual cases.[26] Additional problems are raised if the Director delegates his authority to adjudicate cases to lower-level employees like the Assistant Director of the Office of Policy.[27]

Additionally, there are no regulatory limits to how these cases are selected. The Director (or his designee, including the Assistant Director of Policy) could, for example, hand-select cases for his decision that he hopes will advance a particular political agenda without regard to any larger efficiency concerns or institutional policies. There is no regulatory guidance shaping that choice. There is also no requirement that the Director (or his designee) explain why a particular

[24] The danger of politically-motivated adjudications is particularly acute at this moment in time, when the administration has repeatedly politicized the immigration adjudication bureaucracy by punishing critics and rewarding judges who flout procedural and adjudicatory norms in ways that align with the political vision of the current administration. *See, e.g.*, Maria Sacchetti, *Immigration judges' union calls for immigration court independence from Justice Department*, WASH. POST, Sept. 21, 2018 (recounting episode in which cases were removed from an IJ who questioned whether an individual had been afforded a fair hearing); Noah Lanard, *Judge Promoted by Trump Administration Threatened a 2-Year-Old with an Attack Dog*, MOTHER JONES, Sept. 10, 2019 (recounting behavior by Immigration Judge Stuart V. Couch before he was elevated to the Board).

[25] *See* 8 C.F.R. § 1003.0(b).

[26] Russell L. Weaver has assessed the strengths and weaknesses of different agency review structures, with particular attention to the role of agency head review. The structure established with this interim rule—delegating agency head review to the Director or his designees—embraces all of the weaknesses of agency head review and none of the strengths. *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996). This entirely open-ended structure of decision making (insofar as any number of individual appointees have the power to make these decisions once the Attorney General delegates the power), for example, would not better enable policy control within the agency, *id*. at 287, nor would it provide better understanding to the agency head regarding the implementation of his agency's policies, *id*. at 289, since he would not be making the decisions himself. And indeed, unlike the other agencies studied by Weaver, the multi-agency universe of immigration adjudication means that EOIR is more often rendering decisions on policies implemented by other agencies, which poses additional challenges to this structure. Weaver's concerns about agency head review—that it prohibits meaningful participation by those affected by the decision, for example, and that it creates substantial "perception problems" regarding the fairness of adjudications, and renders the review process subject to "political manipulation"—are serious problems with the structural change imposed by this interim rule that we discuss in this comment. *Id*. at 290-94.

[27] We note that it is not clear how the current Assistant Director of the Office of Policy, Lauren Alder Reid, to whom this comment is addressed, was appointed to her position. As we note in Section II.D., the origins of the Office of Policy are murky, as is the appointment of Reid. We do not know whether Reid was appointed by the Attorney General or some other actor. The nature of that appointment may be in violation of the Appointments Clause, given the Assistant Director's expanded authority to issue individual adjudications. *See Lucia v. SEC*, 138 S.Ct. 2044 (2018).

case was chosen. The Interim Rule attempts to give the Director (or his designee) full, unfettered discretion in the selection of cases for review.

Additionally, individuals are not offered any standard procedural protections, such as notice and an opportunity to be heard, regarding the decision by the Director (or his designee) to select a particular case for decision. In other words, an individual may have their case adjudicated by the Director (or his designee) at any stage in his or her immigration proceeding, without any prior notice that the Director (or his designee) is reviewing the case and without any opportunity to directly address the decisionmaker (either in a hearing or via briefing) regarding the adjudication.

EOIR has not provided any information regarding the timeliness of BIA adjudications that may indicate this Rule is a necessary corrective to systemic failures to render timely decisions. Because the agency has provided no information to support the Rule, we are left to speculate regarding the empirical reality of timeliness at the BIA. This speculation leads us to consider two possibilities that would each pose serious challenges to the legitimacy of this rule. The first possibility is that the time limit is a practical fiction because most cases are not completed within the time frames. This, of course, would raise important questions regarding immigration adjudication that will be addressed below. But it would also be troubling for another reason, because it would mean that essentially any and all BIA cases are available for review by the Director under the provision related to timeliness, should he so choose to intervene. In other words, because nearly all appeals would be included within this regulatory category, it would give the Director full discretion (with no regulatory guidance) to select nearly any pending BIA case of his choosing for his own (or his designee's) review. The other possibility is that most cases are completed within the time frame. If that is the case, then we are simply left to wonder why this Rule has been promulgated in the first place. We note, however, that we are forced to speculate because EOIR has not provided essential data or other information that would justify this dramatic rule change.

Finally, we observe that though exclusion and removal proceedings are not governed by the Administrative Procedure Act (APA), the Board handles cases arising in a number of different contexts, not all of which are removals.[28] Accordingly, the APA requirements for adjudications would apply to those individual adjudications.[29] Because this rule affects the organization of the BIA without reference to the type of case adjudicated, the Rule's lack of basic procedural protections (e.g., notice) poses serious problems under the APA.

B. The Interim Rule Creates Inefficiencies

The regulatory changes also create inefficiencies. The stated purpose of the change is to improve efficiency, but we find this rationale unpersuasive and indeed, perplexing. The Interim Rule recites the regulatory provision that permits the Board to refer cases to the Attorney General when the case has exceeded its processing time, but observes that "[d]ue to his numerous other responsibilities and obligations, the Attorney General is not in a position to

[28] For example, the BIA has appellate jurisdiction over the imposition of administrative fines and penalties, 8 C.F.R. § 1003.1(b)(4), and disciplinary proceedings involving practitioners or recognized organizations, 8 C.F.R. § 1003.1(b)(13).

[29] 5 U.S.C. § 554.

adjudicate any BIA appeal simply because it has exceeded its time limit for adjudication."[30] Yet this appears to be a solution in search of a problem, for we are not aware of a single case that has ever been referred to the Attorney General under this provision. There is no workload inefficiency that needs correcting by this rule, because this work does not appear to have ever been transferred to the Attorney General. Instead, the interim rule *adds* a layer of administrative review by interposing the Director between the Board and the Attorney General. It is hard to see how this change increases efficiency.

Regarding the larger change enabling the Attorney General to delegate *any* of his adjudicatory powers to the Director, we anticipate that empowering a political appointee to adjudicate individual immigration cases will simply shift the work of adjudication into the federal courts of appeals, for those cases where judicial review is available. When a previous administration attempted to speed up BIA processing times by demanding one-member, summary affirmances rather than reasoned decisions, there was a sharp increase in the immigration caseload of the federal courts of appeals.[31] If individual cases are hand-selected and adjudicated by political appointees such as the Director or his designees, these decisions surely will be challenged. Therefore, even if the Rule would create efficiencies in agency adjudication (which we contend it will not), the Rule will create inefficiencies by "passing the buck" to the courts of appeals. We also note that remands to the Board are common when courts of appeals are deciding appeals of one-member summary affirmances.[32] We expect a similar response is likely to decisions issued by a non-expert, political appointee with no requirement of judicial independence. In other words, these cases are likely to return to the Board.

There is, therefore, no increased efficiency that will result from this plan.

Despite the stated purpose of the interim rule to achieve the "efficient disposition of BIA cases on appeal," the Interim Rule in fact creates inefficiencies—both within the agencies and for the Article III courts that will hear these appeals—in the adjudicatory process.

C. The Interim Rule Violates Basic Standards of Administrative Process Design

There is widespread agreement among administrative law scholars that administrative procedures should be attentive to three crucial process values: accuracy, efficiency, and acceptability.[33] The Interim Rule undermines each of these process values.

[30] 44539.

[31] *See* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, GEORGETOWN IMMIG. L. J. 595, 605-06 (2009) (discussing the surge and competing explanations).

[32] These decisions are not entitled to *Chevron* deference. Accordingly, the Courts of Appeals often remand these cases to the BIA for a second round of review, thus *increasing* the work of the Board. *See, e.g.*, *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 168 (2d Cir. 2006) (per curiam) ("In *Shi Liang Lin v. DOJ*, we declined to accord *Chevron* deference to 'any statutory construction of the INA set forth in a summarily affirmed IJ opinion.' There, we withheld *Chevron* deference from a one-line disposition by the BIA because (1) in such a summary affirmance, the BIA has laid down no 'rule' carrying the force of law and promulgated in the exercise of the Attorney General's authority, and (2) the IJ would be improperly delegated rule-making authority delegated only to the BIA. . . . Accordingly, we remanded that petition to the BIA.").

[33] *See* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, GEORGETOWN IMMIG. L. J. 595, 633-35 (2009) (discussing the broad consensus among administrative law scholars regarding these three values, even if there is "not total agreement on the details or terminology").

By entrusting decisions to a political appointee whose primary function is a managerial one, the Interim Rule takes adjudication decisions out of the hands of experts in immigration adjudication. Accuracy is likely to be compromised with the rule change.

As we have extensively documented, though the Interim's Rule ostensible purpose is efficiency, the interim rule actually creates inefficiencies, by adding a layer of administrative review and increasing the workload of both the Board and the Article III courts of appeals.

Finally, this Interim Rule poses significant dangers regarding the process value of acceptability. Acceptable procedures are those that "are considered fair by those whom they affect, as well as by the general public."[34] The Interim Rule takes adjudication out of the hands of Board members, who have a regulatory obligation to "exercise their independent judgment and discretion in considering and determining the cases coming before the Board," and places adjudications in the hands of political appointees with no such explicit obligation.[35]

The powers newly vested in the Director may be further delegated to the Assistant Director of the Office of Policy. That office was newly created in 2017, though its origin is somewhat murky. It was not created via notice and comment. Nor is there any press release or any other information about its creation on the EOIR website. The Rule itself tells us only that the Office of Policy was created in 2017 and cites no authority for its creation.[36] We note that many of the administration's most controversial initiatives regarding immigration adjudication have originated from this office, suggesting that its primary function is to advance the political agenda of the current administration. We oppose the creation of an Office of Policy within EOIR, the adjudicatory arm of our immigration system. Insofar as this regulation seeks to codify the creation of this inappropriate Office within EOIR, we oppose that codification and request the removal of the Office of Policy from EOIR. Any individual acting under the auspices of the Office of Policy should play no role at all in any individual adjudication. The acceptability of immigration adjudication—an arena already saddled with the perception that its judges and processes are being manipulated by the current administration for political purposes unrelated to the merits of any given legal argument—will be further sullied by implementation of the Rule and deeper involvement of this politicized subunit of EOIR within adjudications.

We are deeply concerned that the policies put forward by the current administration suggest that its intention is to undermine acceptability. We understand this Interim Rule to be part of a larger strategy of undermining our system of immigration adjudication. In addition to this Rule, we count the Attorney General's decision to strip IJs of the power to manage their own docket,[37] a proposed rule that would allow the Attorney General to take any case at any stage of any immigration adjudication process for his review,[38] the attempted decertification of the IJ

[34] Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964).
[35] 8 C.F.R. § 1003.1(d)(1)(ii).
[36] Organization of the Executive Office for Immigration Review, 84 Fed. Reg. at 44,537. A visit to the Wayback Machine reveals that the Office of Policy appeared on the EOIR website some time between December 7, 2017 (when it did not appear) and January 4, 2018 (when it does appear).
[37] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[38] This proposed rule has been placed on the Unified Agenda. *See* RIN 1125-AA86 at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1125-AA86.

union,[39] and the imposition of case closing quotas upon IJs,[40] as powerful examples of the administration's push to delegitimize our system of immigration adjudication. The Interim Rule's perplexing decision to empower lower-level political appointees to adjudicate individual immigration claims is less perplexing, but more deeply concerning, within this larger policy context.

There is, in short, no legitimate reason for the Interim Rule. It does not do what it purports to do and it violates the most basic tenets of administrative process design.

D. The Interim Rule is Arbitrary and Capricious

Reviewing courts are required to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[41] To determine whether a rule is arbitrary and capricious, the reviewing court will ask whether the agency supplied a "reasoned explanation" for the new rule. "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one."[42] In short, a reviewing court "must reverse an agency policy when [it] cannot discern a reason for it."[43] Setting aside rules that lack justification is, in the words of the Court, an "ordinary principle[] of administrative law."[44]

The stated purpose of the Interim Rule is to "delegate[] authority from the Attorney General to the Director in situations in which appeals pending before the BIA have not been timely resolved in order to allow more practical flexibility in efficiently deciding appeals."[45] Yet as we have explained, the Rule does not enhance efficiency, but introduces new inefficiencies in the context of an adjudicatory system with new concerns regarding fairness and due process.

The Interim Rule, in other words, does not accomplish any of the purposes it has set out for itself. It is accordingly "arbitrary and capricious" and unlikely to withstand judicial scrutiny.

[39] *See* Richard Gonzales, *Trump Administration Seeks Decertification of Immigration Judges' Union*, NPR, Aug. 12, 2019. Available at https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union.

[40] *See* Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, WALL ST. J., Apr. 2, 2018. Available at https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158. *See also* Priscilla Alvarez, *Jeff Sessions is Quietly Transforming the Nation's Immigration Courts*, THE ATLANTIC, Oct. 17, 2018. Available at https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/.

[41] 5 U.S.C. § 706(2)(A).

[42] *Judulang v. Holder*, 565 U.S. 42, 45 (2011). In reversing the BIA's policy in this case, the Court explained that the rule had "no connection to the goals of the deportation process or the rational operation of the immigration laws. Judge Learned Hand wrote in another early immigration case that deportation decisions cannot be made a 'sport of chance.' That is what the comparable-grounds rule brings about, and that is what the APA's 'arbitrary and capricious' standard is designed to thwart." *Id*. at 58-59 (internal citations omitted).

[43] *Id*. at 64.

[44] *Id*.

[45] 44538

III. Alternative Reforms

We recognize that the immigration adjudication system faces substantial institutional challenges. These challenges, however, will not be solved by "solutions" that aim to further reduce the independence of the system and to inject more politics, rather than reasoned judgment, into the system. We believe that organizational reforms may prove useful in addressing the BIA's caseload backlog, just not the reform contained in the Rule.[46]

A repeated refrain in assessments of the immigration court system has been the need for greater resources for the immigration court system.[47] Those resources can be deployed in particular ways to enhance immigration adjudication. For example, we suggest that EOIR recall senior judges or retired Board members for temporary assignment at the BIA to help relieve the case backlog.[48] Temporary Board members are expressly provided for by regulation and would thus pose no regulatory challenge to EOIR.[49]

We also observe that efficiencies may be gained by expanded access to legal representation for individuals in an immigration adjudication. EOIR should work to expand legal representation in recognition of the efficiency gains for the system when individuals receive adequate representation.[50]

IV. Conclusion

We offer these comments in the spirit of working to improve the nation's system of immigration adjudication, with an eye toward best practices within the realm of administrative process. With that perspective in mind, we believe the changes proposed by this Interim Rule will do further damage to the accuracy, efficiency, and acceptability of immigration adjudications and accordingly urge you to rescind the Interim Rule.

[46] Though we do not know the size of that backlog, we assume it is substantial and merits attention. EOIR has removed data on the BIA's pending caseload from its annual Statistics Year Book, but data is available from the 2016 Year Book. That report cited a pending caseload before the BIA of 13,930 cases, which represented the nadir of a downward trend in the volume of pending cases before the BIA (from a high of 24,824 in 2012). The downward trend of the caseload in the 2012-2016 EOIR Year Books suggests it is not an emergency.

[47] *See, e.g.*, Lenni B. Benson and Russell R. Wheeler, Enhancing Quality and Timeliness in Immigration Adjudication (2012), https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf;

[48] *See* Benson and Wheeler, *Immigration Adjudication*, at 32. We observe that in the past this idea has been put forward by the National Association of Immigration Judges. *Id*. at 33.

[49] 8 C.F.R. 1003.1(a)(4)

[50] Benson and Wheeler cite a survey of immigration judges in which 92 percent of respondents agreed that "When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly." Benson and Wheeler, *Immigration Adjudication*, at 56.