COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND CITIZENSHIP

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

JANUARY 29, 2020

Serial No. 116–72

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

HEARING

BEFORE THE

SUBCOMMITTEE ON

IMMIGRATION AND CITIZENSHIP

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

JANUARY 29, 2020

Serial No. 116–72

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

40–776 WASHINGTON : 2020

COMMITTEE ON THE JUDICIARY

JERROLD NADLER, New York, *Chairman*

ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
THEODORE E. DEUTCH, Florida
KAREN BASS, California
CEDRIC L. RICHMOND, Louisiana
HAKEEM S. JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island
ERIC SWALWELL, California
TED LIEU, California
JAMIE RASKIN, Maryland
PRAMILA JAYAPAL, Washington
VAL BUTLER DEMINGS, Florida
J. LUIS CORREA, California
MARY GAY SCANLON, Pennsylvania, *Vice-Chair*
SYLVIA R. GARCIA, Texas
JOE NEGUSE, Colorado
LUCY MCBATH, Georgia
GREG STANTON, Arizona
MADELEINE DEAN, Pennsylvania
DEBBIE MUCARSEL-POWELL, Florida
VERONICA ESCOBAR, Texas

DOUG COLLINS, Georgia, *Ranking Member*
F. JAMES SENSENBRENNER, JR., Wisconsin
STEVE CHABOT, Ohio
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
MARTHA ROBY, Alabama
MATT GAETZ, Florida
MIKE JOHNSON, Louisiana
ANDY BIGGS, Arizona
TOM MCCLINTOCK, California
DEBBIE LESKO, Arizona
GUY RESCHENTHALER, Pennsylvania
BEN CLINE, Virginia
KELLY ARMSTRONG, North Dakota
W. GREGORY STEUBE, Florida

PERRY APELBAUM, *Majority Staff Director & Chief Counsel*
BRENDAN BELAIR, *Minority Staff Director*

SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP

ZOE LOFGREN, California, *Chair*
PRAMILA JAYAPAL, Washington, *Vice-Chair*

J. LUIS CORREA, California
SYLVIA R. GARCIA, Texas
JOE NEGUSE, Colorado
DEBBIE MUCARSEL-POWELL, Florida
VERONICA ESCOBAR, Texas
SHEILA JACKSON LEE, Texas
MARY GAY SCANLON, Pennsylvania

KEN BUCK, Colorado, *Ranking Member*
ANDY BIGGS, Arizona
TOM MCCLINTOCK, California
DEBBIE LESKO, Arizona
KELLY ARMSTRONG, North Dakota
W. GREGORY STEUBE, Florida

DAVID SHAHOULIAN, *Chief Counsel*
ANDREA LOVING, *Minority Counsel*

CONTENTS

JANUARY 29, 2020

OPENING STATEMENTS

WITNESSES

LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

WEDNESDAY, JANUARY 29, 2020

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP,
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met, pursuant to call, at 9:34 a.m., in Room 2141, Rayburn House Office Building, Hon. Zoe Lofgren [chairman of the subcommittee] presiding.

Present: Representatives Lofgren, Jayapal, Correa, Garcia, Neguse, Mucarsel-Powell, Escobar, Jackson Lee, Scanlon, Buck, Biggs, Lesko, Armstrong, and Steube.

Staff Present: David Shahoulian, Chief Counsel; Betsy Lawrence, Counsel; Alex Wang, Legal Fellow; Rachel Calanni, Legislative Aide/Professional Staff Member; John Williams, Parliamentarian; Andrea Loving, Minority Chief Counsel; James Rust, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Ms. LOFGREN. The Subcommittee on Immigration and Citizenship will come to order. Without objection, the chair is authorized to declare recesses of the subcommittee at any time.

We welcome everyone to this morning's hearing, "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts." I will now recognize myself for an opening statement.

With today's hearing, we shine a spotlight on an issue that requires urgent congressional attention: the crisis that is unfolding in our Nation's immigration courts. In order to be truly effective, the immigration court system should function just like any other judicial institution, where due process and fair procedure are held in the highest regard and where parties on both sides are treated equally and without bias.

Just like other judges, immigration judges should have the time and resources to conduct full and fair hearings, and they should have the independence to issue thoughtful, discretionary decisions that are consistent with immigration law. But for too long, our immigration courts, which are housed under the Department of Justice, have not functioned as they should. A historically high backlog now topping 1 million has pushed the system to the brink. And al-

though the administration claims that many of the policies it has implemented are intended to reduce the backlog, it appears that things are only getting worse.

In the name of backlog reduction, all immigration judges are now subject to case completion quotas and other performance benchmarks, forcing judges to choose between job security and fair process. In addition, judges' ability to manage their dockets has been severely curtailed. No longer do they have the discretion to administratively close cases, and their ability to continue cases is a fraction of what it once was.

As a result, immigrants and their families can be forced through chaotic hearings, often without having the chance to consult with their own counsel. Some will never see an immigration judge in person due to the ever increasing use of video teleconferencing technology. And sadly, many will be separated from their families and removed from the United States without a fair trial.

Despite their best efforts, immigration judges struggle to deliver just and timely decisions. Many judges lack the necessary resources and staff to maximize their productivity, as reports indicate that clerical and support staff haven't been hired at the same pace as new judges. The Attorney General has also empowered his subordinate, the Director of the Executive Office for Immigration Review, to overrule immigration judges in cases that have been assigned to them. The National Association of Immigration Judges has spoken out against these and other changes, and now, the Department of Justice has threatened to decertify their union status.

That said, these problems didn't start with this administration. Nonpartisan organizations like the American Bar Association have long decried the problems in our immigration courts. In 2010, the ABA released a comprehensive report documenting these problems, including underresourcing, ambiguous hiring standards, and perceived political influence. In that same report, the ABA called on Congress to establish an independent immigration court. Ten years later, groups like the Federal Bar Association, the American Immigration Lawyers Association, and the National Association of Immigration Judges joined with the ABA to reiterate that suggestion.

The current state of the immigration court system is really untenable. Judicial efficiency and respect for due process are basic principles of our democratic society revered by members on both sides of the aisle.

In other areas of the law such as bankruptcy and tax, Congress established independent Article I courts where political influence over adjudicators is limited. Creating an independent immigration court seems, to me, like a no-brainer, but I look forward to hearing from our witnesses as to how they think the system should be reformed.

And I should note that after my opening statement, I will be handing the gavel over to the vice chair, Ms. Jayapal, but I will carefully study your written statements as well as your answers to questions.

I actually think the time to act is, really, now. It's my hope that this hearing will be a first step towards negotiating a bipartisan workable solution to what is really a crisis in our immigration

courts. I am committed to working with my friends and colleagues across the aisle to make this a new reality.

And now I will recognize the ranking member of the subcommittee, the gentleman from Colorado, Mr. Buck, for his opening statement, and hand the gavel to Ms. Jayapal. Thank you very much.

Mr. BUCK. I thank the chair and the new chair for recognizing me.

I am confident in the due process of our immigration judges, that our immigration judges provide to the parties appearing before them, and I'm equally confident in their ability to faithfully apply the law to the facts of the case. U.S. immigration judges consistently rise to the challenge in a difficult environment, adjudicating cases impartially and professionally, and most do their jobs without complaint.

Even with a 35-day government shutdown, the immigration judge corps completed 275 cases in fiscal year 2019, and that is a historically high number of completions and nearly double the number from just 3 years ago.

In any court system, issues arise—I'm sorry. In any court systems, issues will arise that affect the caseload, backlog, and morale of those who work there. The Trump administration has recognized many of these issues and taken action.

For instance, the lack of electronic filing has been a concern for many years. This administration began implementing the ECAS system nationwide, and will continue to do so over the next year and a half until it is available at all immigration courts. The administration has prioritized case completion where the immigrant is being held in detention, in credible fear reviews, and in cases with a regulatory or statutory deadline. While reasonable minds can disagree on whether a given step is the right remedy, the fact that this administration is trying to fix problems cannot be disputed.

I understand that the size of the case backlog is a concern. For the first time ever, it stands at over 1 million cases, but we should be clear that this backlog is not a new phenomenon. It has been growing for years, and it's important to understand the factors that have been—that have driven the backlog.

Even during the 2019, when immigration judges completed a record high of 275,000 cases, the backlog increased substantially, given that nearly half a million new cases were added to the docket. Of course, no one should be surprised at that, given the astronomical number of immigrants presenting at the southern border seeking asylum or other immigration benefits.

It's not hard to understand that the backlog grows when individuals fail to appear for their court hearings, since the time allotted for those proceedings could have gone toward the completion of a case where an appearance is made. Unfortunately, the failure to appear rate is as high as ever. Forty-five percent of all case completions in fiscal year 2019, 89,919 cases, involved in in absentia removal orders.

Frivolous and fraudulent claims are also a problem that add to the backlog. The system rewards fraudulent claims by allowing the

claimant to remain in the United States for years. These cases also utilize precious court time that should go towards legitimate cases.

The current administration has made changes to reduce the number of continuances and to increase judicial efficiency. One such change followed GAO and DOJ and Inspector General recommendations to implement performance metrics and case completion goals. I understand that this has led to questions by the immigration judge union as to whether judges would be disciplined or fired if they did not meet the goal of 700 case completions in a year. The Executive Office for Immigration Review has been clear, however, that the completion goal was just one part of a multidimensional performance review and that factors specific to each judge's docket would be taken into account. And according to EOIR, for 2019, no judge was penalized in their performance evaluation if they failed to meet the 700-case completion goal.

In fact, immigration judges should be commended. On average, they completed a record high 708 cases.

In their written testimony, some of today's witnesses lament the perceived lack of judicial independence of the IJ Corps, but the immigration courts were created by Congress as a component of the Department of Justice, and they are bound by the law as interpreted by the Attorney General.

Some of the witnesses here today support the idea of making the immigration courts an Article I court. While that claim is—such a move will make the problems—while the claim is that such a move will fix the problems, I am unconvinced of that position.

I look forward to hearing from all the witnesses today, given their unique expertise in the field.

I thank the chair, and yield back.

Ms. JAYAPAL [presiding]. Thank you, Mr. Buck.

It is now my pleasure to introduce today's witnesses.

Judge Ashley Tabaddor. The Honorable Ashley Tabaddor is president of the National Association of Immigration Judges, an immigration judge based in Los Angeles, California, and an adjunct professor with the UCLA School of Law. She was appointed to the immigration bench in November of 2005. Prior to her appointment, Judge Tabaddor served as assistant U.S. attorney for the Central District of California and as a trial attorney with the Department of Justice Civil Division in Washington, D.C.

Judge Tabaddor has been honored for judicial excellence by numerous organizations, including the Mexican American Bar Association and the Arab American Lawyers Association. She received her B.A. from UCLA and J.D. from the University of California Hastings College of the Law.

Jeremy McKinney is an immigration attorney based in Greensboro, North Carolina, and is second vice president of the American Immigration Lawyers Association, or AILA. Mr. McKinney has more than 20 years of experience practicing immigration law and is founder of McKinney Immigration Law with offices in Greensboro and Wilmington, North Carolina. He has been active in AILA leadership since 1997, and has spoken extensively on national platforms regarding the immigration court system.

Mr. McKinney received his B.A. from Virginia Commonwealth University and his J.D. from Campbell University School of Law.

Judy Perry Martinez is president of the American Bar Association, or the ABA, and counsel at Simon, Peragine, Smith and Redfearn in New Orleans. Prior to assuming her current position, Ms. Martinez served in various positions, including assistant general counsel for litigation and chief compliance officer at Northrop Grumman. Ms. Martinez has been active with the ABA for 35 years, holding various leadership positions, including chair of the Standing Committee on the Federal Judiciary and member of the ABA Board of Governors.

She received her bachelor's degree from the University of New Orleans and her J.D. from Tulane Law School.

Andrew Arthur. The Honorable Andrew "Art" Arthur is a resident fellow in Law and Policy for the Center for Immigration Studies and former immigration judge serving at York Immigration Court in York, Pennsylvania, from 2006 to 2015. Mr. Arthur also served as an associate general counsel for the former Immigration and Naturalization Service, as well as counsel to the House Judiciary Committee and staff director to the House Oversight Committee.

He received his bachelor's degree from the University of Virginia and his J.D. from the George Washington University School of Law.

We welcome all of our distinguished witnesses and thank them for participating in today's hearing.

Now, if you would please rise, I will begin by swearing you in.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct, to the best of your knowledge, information, and belief, so help you God?

Let the record show the witnesses answered in the affirmative.

Thank you, and please be seated.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes, and to help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Judge Tabaddor, you may begin.

TESTIMONY OF THE HONORABLE A. ASHLEY TABADDOR, PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION JUDGES; JEREMY MCKINNEY, SECOND VICE PRESIDENT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION; JUDY PERRY MARTINEZ, PRESIDENT, AMERICAN BAR ASSOCIATION; AND THE HONORABLE ANDREW R. ARTHUR, RESIDENT FELLOW IN LAW AND POLICY, CENTER FOR IMMIGRATION STUDIES

TESTIMONY OF THE HONORABLE A. ASHLEY TABADDOR

Ms. TABADDOR. Chairman, Ranking Member Buck, and members of the subcommittee, thank you for the opportunity to testify before you today. I'm a novice at this, so bear with me.

My name's Ashley Tabaddor. I'm the president of the National Association of Immigration Judges and a sitting judge for the past

15 years. I appear today on behalf of NAIJ. As was mentioned, we're the official union for the 440 immigration judges across the United States.

I have served in the Department of Justice for well over 20 years, spanning four administrations, and at least a half a dozen Attorney Generals. And I've observed with each administration and each Attorney General, he or she has brought with them a set of law enforcement priorities for the Department to pursue. And each of them has had to grapple with this conflicting mission to the law enforcement priorities of the Department and the role of the Department of Justice as overseeing the immigration court. And I can assure you that each of you—each of them has failed in one way or another.

So in 2003, Congress took a major step forward by separating out the functions of the Immigration and Naturalization Service from the Department of Justice and moving it into the newly created Department of Homeland Security. This step forward demonstrated Congress' commitment to properly separate the law enforcement priorities of the executive branch from the adjudicatory role that the executive branch plays.

However, this conflict and this tension has continued to persist within the Department of Justice because of its close working relationship with the Department of Homeland Security. Regardless of the administration, law enforcement focus of the Department of Justice has consistently interfered with and compromised the immigration court system.

Yet in the 23 years that I have served at the Justice Department, I have never seen the level of hostility toward immigration judges who preside over immigration proceedings, the individuals who appear before them, or the due process rights that the Constitution and this body, Congress, has provided in our laws. Using the pretext of the backlog through one policy announcement after another, the Department of Justice has transformed the court into a law enforcement assembly line.

We've talked about the quotas and deadlines. Fiscal year 2019 was the first time that the Department subjected judges to this unprecedented act of 700 case completion quotas a year, and a series of metrics, as a condition of our continued employment. This policy pits the judges' personal financial interests, their job security, against the oath of office to be an independent, impartial decisionmaker.

Fiscal year 2019 is over. Did the policy reduce the backlog? Of course not. To the contrary, as we've heard, it has actually doubled in the last 3 years from 600,000 to well over 1 million cases. And this is in spite of the hiring spree of over 200 judges in the same period of time.

Now, we're the judges who spend every workday hearing cases, back to back, morning and afternoon. Some of my colleagues have upwards of 6,000 to 7,000 cases pending on their docket. Did they meet these quotas and deadlines? Again, of course not. Over 60 percent of the Nation's immigration judges did not reach the 700 case completion quotas. And a stunning 99 percent of the judges fell short of satisfying the requirements of the full metrics. The data is not surprising. The metrics are unrealistic.

Yes, we've heard that no one has been penalized this year. So why do it? The purpose of the metrics is to goad judges to put speed over substance and automate their decisions to the will of the administration.

And making matters worse, EOIR, the agency within the Department overseeing the court, recently issued a new regulation that fundamentally changed the nature of the agency. Overturning decades of rules and practice, the new rule vested the EOIR director, who is not even required to be an attorney, with the authority to review immigration judge decisions on appeal and to issue precedential decisions rewriting the law.

So now judges not only have to worry about the speed with which they process cases, but they have to consider whether the head of the agency is going to agree with their decisions granting or denying asylum in the life-and-death matters that are before them, or otherwise fear penalizing, suffering personally for it.

Not to be outdone, the Department of Justice has also filed a petition to decertify us and silence the public voice of transparency and accountability that we have brought to this immigration court system discourse. If they should prevail, it will be the proverbial final nail in the coffin of decisional independence for immigration judges.

Imagine stepping into a courtroom where your life depended on the outcome of the case, only to find out that the judge was hired by the prosecutor, that she can be fired by the prosecutor, that the prosecutor could step in anytime to overrule the judge, and by the way, the prosecutor would really like for the judge to finish the case today.

This is not what America stands for. These are not the principles upon which our Constitution and country were founded. We as a Nation can no longer afford the continuation of the status quo. Please create an Article I court. Give us the independence we need for the American people.

Thank you.

[The statement of Ms. Tabaddor follows:]

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Statement of Judge A. Ashley Tabaddor, President
National Association of Immigration Judges
January 29, 2020

Before

United States House of Representatives
Committee on the Judiciary
Subcommittee on Immigration and Citizenship

Hearing on "The State of Judicial Independence and Due Process in U.S. Immigration Courts"

INTRODUCTION

Chairwoman Lofgren, Ranking Member Buck and members of the Subcommittee, thank you for the opportunity to testify today before you. I am Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ) and a sitting immigration judge. Since 2005, I have served as an immigration judge with the Executive Office for Immigration Review, U.S. Department of Justice (DOJ).[1] I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of United States immigration judges. Since 1979, the NAIJ has been the recognized representative of immigration judges for collective bargaining purposes. Our mission is to promote the independence of immigration judges and enhance the professionalism, dignity, and efficiency of the Immigration Courts, which are the trial-level tribunals where removal

[1] I am speaking in my capacity as President of the NAIJ and not as an employee or representative of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent my personal opinions, which were formed after extensive consultation with the membership of NAIJ.

proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our court system through educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating to safeguard and ensure the integrity and independence of the Immigration Courts.

We also seek to improve the Court operations and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining. In addition, we represent immigration judges in disciplinary proceedings, seeking to protect judges against unwarranted discipline and to assure that when discipline must be imposed, it is imposed in a manner that is fair and serves the public interest.

I am here today to discuss the urgently needed creation of an independent Immigration Court. America needs an Immigration Court that is free from improper influence on the decisions of immigration judges. It must be free from the constantly changing (often diametrically opposed) politicized policy directives of the Department of Justice. To be a truly independent court, it must be free from the management practices which transform the Immigration Court into a widget factory management model of speed over substance.

We acknowledge that it is difficult to look past the immediacy of the overwhelming backlog of cases which currently stands just shy of 1.1 million cases. This amounts to an almost doubling of the backlog in three years, in spite of the largest ever immigration judge hiring initiative (over 200) and concomitant increase in court appropriations in the history of EOIR. The "backlog" has been used as a justification, an excuse, and most often as pretext for implementing otherwise indefensible policies and practices with respect to the Immigration Court. Yet the problem is not a backlog or lack of funds; it is the structural flaw of the Immigration Court, located within a law enforcement agency, that frustrates the ability to properly address the backlog or the appropriated funds. It is time to acknowledge the truth organizations such as the NAIJ, the American Bar Association, the Federal Bar Association, and numerous others have stated publicly for years: unless and until the Immigration Court is removed from the DOJ and established as an independent court, we cannot begin to adequately address the immigration crisis we face as a nation.

To provide more context, I will first discuss how the structural flaw of the Immigration Court's placement in a law enforcement agency has fostered improper cooperation between EOIR and DHS. Next, I will explain more subtle ways in which the independence of immigration judges has been impinged upon by the imposition of performance requirements based on quotas and time-based criteria, which improperly pressure immigration judges to speed up and deport more. I show how these metrics are incompatible with decisional independence, are a poor measure of

judicial performance, and are unrealistic and unfair to parties (particularly unrepresented individuals) who appear before the Courts. In light of the lack of any basis for these metrics, I next show how they are instead a sign of politicization of the Immigration Court, in stark contrast to the proper role of a neutral court system. The politicization of this system is further evidenced by regulatory changes removing the prohibition against the EOIR Director interfering with the decisions of the Board of Immigration Appeals and immigration judges. The trend towards politicizing the Immigration Court is also plainly revealed by the regulatory creation of an Office of Policy within EOIR, a component which has already encroached on the independence of the immigration judges through its creation of the stifling performance metrics. EOIR's resistance to oversight and transparency, an essential characteristic of any court system, is demonstrated by the lack of reliable data it provides the public through FOIA. I close with examples of EOIR's neglect, incompetence or design in failing to employ proper hiring protocols, misplaced priorities and the crippling and persistent lack of adequate staffing to support immigration judges. Lastly, I discuss the clear effort to silence the criticisms raised by NAIJ demonstrated by EOIR's disingenuous effort to decertify it. Taken as a whole, it is abundantly clear that Congress should act immediately to establish an independent Article I Immigration Court.

MANIPULATION OF THE STRUCTURAL FLAW OF THE IMMIGRATION COURT

 The lockstep approach of DOJ and DHS

In 1983, the current structure of our court system was established in response to the perceived and actual conflicts of interest that existed because immigration judges reported to the same supervisors as the immigration prosecutors in the former Immigration and Naturalization Service, which was also located within DOJ. When Congress created DHS in 2002, a significant step was taken toward protecting the independence of the Immigration Court by leaving the court within DOJ while removing the former Immigration and Naturalization Service and placing it in the DHS. This deliberate choice was intended to provide protection to safeguard the independence of the Immigration Court and to free it from the law enforcement priorities of the immigration enforcement agencies.

As history has amply demonstrated, placing a court under the direct authority of the nation's chief federal prosecutor, the U.S. Attorney General, cannot adequately insulate a neutral court system. DOJ and DHS are intertwined on immigration issues and successive administrations have often used the Immigration Court as an extension of their law enforcement priorities. For example, Congress provided immigration judges with contempt authority over 20 years ago. Despite an act of Congress, DHS has successfully blocked DOJ from promulgating regulations that would provide immigration judges with a valuable tool to better control immigration

proceedings. Another example of law enforcement encroaching upon the Immigration Court is DOJ's practice of wholesale reshuffling of existing cases for the sole purpose of messaging its law enforcement priorities, which has greatly contributed to the backlog of cases, while at the same time compromised the integrity of the proceedings before the Immigration Court.

In the thirty-seven years since EOIR was created, the political encroachment of previous administrations pale in comparison to the systematic and deliberate assault on judicial independence to which the Immigration Court has been subjected in the last three years in furtherance of the Executive Branch's law enforcement priorities.

 Imposition of quotas and deadlines on immigration judges as a pretext to interfere with their decision making authority

Metrics are not an accurate way to assess judicial performance

Citing the backlog as the justification for its unprecedented act of interference with immigration judge decision-making, on October 1, 2018, EOIR subjected all immigration judges to a complex set of metrics, including case completion quotas, a maximum remand rate, and a series of deadlines for case processing in the guise of performance measures for individual judges. These metrics do not constitute a valid performance measure of any judge's professional abilities and work product. Numeric and time-based measures of a judge's performance, measuring quantity over quality, are arbitrary because myriad factors influence how promptly cases can be decided. Factors including the nature and complexity of the claim, the availability of evidence, the involvement of counsel, and region-specific case law all play varying roles in each case. This heavy-handed and crude measurement of judges' performance only consumes valuable time for immigration judges and their supervisors. The number of new supervisory judges hired, relative to the total number of judges nationwide, has far outpaced the number of non-supervisory hires. These supervisory judges spend the vast majority of their time monitoring the immigration judges' case completion numbers instead of hearing cases themselves.

EOIR's metrics are not based on actual conditions

Not only are these metrics unrealistic and ill-conceived, they have no sound basis in past productivity. EOIR management has steadfastly refused to explain how these metrics were determined, particularly how the 700 completions per judge per year is valid in light of the great variety of cases and dockets that judges carry across the country. For example, one judge completed more cases in the last three months than he did in the entire past fiscal year, all due to the switch of his docket from a complex detained docket to a non-detained "family unit" docket with multiple completions per single session.

A second metric requires that judges should not be remanded in more than 15 percent of their appealed cases. A judge who completes the 700 cases, has been appealed only twice and is remanded once, will be deemed to have a 50 percent remand rate and fail this metric. A judge who has been appealed one hundred times and is remanded 15 times will pass. Again, despite requests, EOIR has repeatedly refused to explain how it arrived at this percentage. This benchmark clearly has no statistical value whatsoever, other than to give management a pretext to interfere with the decisional independence of judges in the guise of "evaluating" judges' decisions for alleged errors. In a court system, this is the job of appellate judges, not court managers.

The statistics support NAIJ's point that these metrics have no realistic basis. EOIR management has released the results for the first year these numeric performance measures have been in force. In fiscal year 2019, the span of "completions" per judge ranged from 36 to over 2,000. Over 60 percent of judges failed to complete 700 cases for the year, but 19 percent completed over 900 cases. What is clear is that the quotas and deadlines *cannot* actually provide a fair picture of a judge's performance. They are nothing more than a tool to bully judges into rushing through cases, curtailing or barring testimony and evidence, and issuing decisions without adequate deliberation.

Performance metrics create an uneven playing field for the parties

Equally troubling is that the impact of the time constraints imposed by the case completion quotas is not borne equally by the respondents and DHS. Instead, these metrics strongly favor DHS and prejudice the individuals DHS is seeking to remove. DHS is always represented by an attorney, typically one who has handled hundreds, if not thousands, of cases and can more readily accommodate a shortened time frame for trial. The respondents are often unrepresented, non-English speaking, and forced to appear before a judge who is penalized for slowing down to provide more guidance. The respondents also carry the burden of proof to persuade the judge to allow them to remain in the United States under the law. Any lack of evidence caused by the speed at which the metrics force judges to process cases works against the respondent and can be fatal to his or her case.

Additionally, it is often quicker for an immigration judge to deny a case than to grant the respondent's application for relief, particularly in the context of the claims of Central American applicants who make up a large part of the Court's current dockets. Immigration judges are caught in the crossfire between DOJ management and the appellate courts, being pushed to decide cases faster and on more limited records, only to be criticized or reversed later when the Circuit Courts become involved. The Attorney General and the Board of Immigration Appeals (BIA) recently published decisions disfavoring asylum applicants, whose claims rest on grounds other than religious or ethnic persecution. For the asylum applicant to prevail on their claim,

extensive testimony and evidence is required which the performance metrics penalize against the judge.

Agency metrics create tension with due process

The hostile nature of these quotas and deadlines to basic principles of due process is also readily apparent with "Benchmark 5," which requires that 95% of cases be completed on the initial trial date. Under this arbitrary standard, immigration judges are penalized for continuing a hearing, no matter how good the reason, or for taking more than one hearing session to complete a case. In addition, it penalizes judges for myriad events or issues beyond their control. The enormous backlogs facing the courts, and the artificial overbooking of judges' dockets at the direction of management, are well-known. Judges often inherit sisyphean dockets, with multiple complex hearings booked at the same time. Judges are also assigned new cases with no additional time provided on their dockets to schedule them. Essentially, judges are told to overbook and schedule the case anyway, regardless of whether there is actually time to complete the hearing that day, and then they are punished for not completing them on time.

Aside from these scheduling issues, there are many legitimate reasons why a trial date may need to be reset. For example, it is not infrequent that a case needs to be continued because evidence critical to a respondent's case arrives late from overseas and needs to be translated; or a respondent has only gathered the funds to hire an attorney shortly before the hearing in an area where pro bono attorneys are not accepting new clients; or DHS background checks are incomplete; or a change in the law requires additional briefing on a complex issue; or the mundane but frequent reason that a solo practitioner is ill on the day of the trial. No matter how good the reason, Benchmark 5 penalizes judges for continuing the hearing or allowing any trial to last longer than one session. Thus it is not surprising that *more than 97 percent of judges* failed to satisfy this metric last fiscal year!

Why were metrics really devised?

This program appears designed to mask its true underlying purpose, which is to incentivize judges to issue more orders of deportation, faster, at the risk of losing their jobs. The supervisory judges, who spend most of their time monitoring the metrics of immigration judges, would be far better deployed hearing a full docket of cases.

In a recent email correspondence, the Acting Deputy Director of EOIR criticized an immigration judge for noting on the record the existence of the quotas and deadlines and discussing the benchmarks when making a decision in a particular case. She wrote to the judge's supervisor that "*judges should be reminded that they should not be making decisions on the bench based on the performance metrics, but rather based on the facts of the particular case and applicable law*."

This hide-the-ball instruction is consistent with testimony at the January 8, 2020 hearing on EOIR's decertification petition, where the Agency repeated that judges should be making decisions based solely on the facts and the law and not the numeric performance standards. This clear admission highlights that even EOIR management recognizes that the quotas and deadlines have no legitimate purpose in a judge's duties and responsibilities. Otherwise, why can't a judge honestly mention the role of the metrics in his or her decisions?

Equally disturbing, because the performance metrics set the bar so high that all judges are incapable of meeting them, EOIR is empowered to dismiss judges who fail to follow their policy preferences under the pretext of inadequate performance. This is what happens when the structure of the Immigration Courts allow it to be used as a tool for immigration enforcement rather than as a fair and independent tribunal. They are a pretext. These meaningless and politically-motivated performance metrics are clearly designed to intimidate judges rather than to honestly evaluate their performance. It places each judge at odds with their oath of office to provide impartial justice because their continued employment hangs in the balance. Yet this is just another example of the pernicious effect of the structural defect of allowing the Immigration Court to remain in a law enforcement agency.

 Politicization of the adjudication process by vesting the Director of EOIR with adjudicatory authority

The Director is the senior official within EOIR who is responsible for the administration and management of all EOIR components, including the Immigration Court. The position entails regular *ex-parte* communications with high-level DOJ and DHS officials and is incompatible with serving in an adjudicatory capacity over any pending cases before EOIR. Accordingly, there is no statutory language that requires the "Director" of EOIR to even be an attorney. The regulation only requires that "[w]ithin the Department of Justice, there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General." 8 C.F.R. § 1003.0(a). This is in sharp contrast to the language describing the Board of Immigration Appeals, which states that the "Board members shall be *attorneys* appointed by the Attorney General." 8 C.F.R. § 1003.1(a)(1). Similarly, the term "immigration judge" is defined by statute as "an *attorney* whom the Attorney General appoints as an administrative judge." 8 U.S.C. § 1101(b)(4).

Moreover, the Director's role at its inception was limited to "the general supervision of the Board of Immigration Appeals and the Office of the Chief Special Inquiry Officer in the execution of their duties." 48 Fed. Reg. 8039 (Feb. 25, 1983). The 1983 regulations limited the ability of the Director to delegate authority granted to him or her by the Attorney General. The

Director could only delegate that authority to the Chairman of the BIA or to the Chief Special Inquiry Officer (later renamed as Chief Immigration Judge). 48 Fed. Reg. 8039 (Feb. 25, 1983). Importantly, the regulation did not grant the Director power to issue or review immigration decisions with precedential effect. Rather, at that time the regulation stated that the BIA had the ability to issue precedential decisions, and only the Attorney General or the BIA itself could modify or overrule those decisions. The Director's lack of adjudicatory power, consistent with the statutory scheme of proceedings before EOIR, was codified in 2007 in 8 C.F.R. § 1003.0(c), which stated that "*[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the [BIA], an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.*" (emphasis added) With the promulgation of the regulation, the Director of EOIR was expressly prohibited from interfering in the decision-making of BIA members and immigration judges and from adjudicating cases arising under the INA.

In a sharp departure from decades of precedent, on August 26, 2019, DOJ announced an interim rule, effective immediately, that vested the EOIR Director with the ability to decide cases pending before the Board of Immigration Appeals (BIA)—and by extension, the ability to bind all immigration judges. Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (August 26, 2019). This rule grants the Director unilateral ability to rewrite immigration law in conformance with the policy agenda of any administration, thwarting the Congressional scheme established in the Immigration and Nationality Act. This significant rule was promulgated with no notice and comment period before its effective date. As discussed in NAIJ's comment in response to the regulations, the professed reasons set forth by the Department to support this drastic change in the organizational structure and locus of decision making at EOIR is self-serving, circular, and strains credulity at best. https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Comment_Re_Interim_Rule_on_EOIR_Organization.pdf.

What is clear, however, is that the insertion of the Director into the role of direct line of review of immigration judge and BIA decisions provides significant new authority to control the outcome of immigration cases pending before the Immigration Court and the BIA. Through its newly created authority, the Director can unilaterally rewrite immigration law with the issuance of precedential cases, without even the internal checks in place for the certification process that apply to the Attorney General. Moreover, since EOIR has now imposed a maximum remand rate as part of immigration judges' individual performance evaluations, the Agency is ensuring that the judges (and the BIA) are mindful of how EOIR wishes for them to rule on a case or risk termination of their employment for a high reversal/remand rates.

In a telling preview of the impact of the politicization of the adjudicatory process at EOIR, in the case of *Baez-Sanchez v. Barr*, __ F.3d__ , Docket No. 19-1642 (7th Cir. Jan. 23, 2020), Judge Easterbrook had very strong words for EOIR's BIA (referred to as the Board in his published decision):

> "In sum, the Board flatly refused to implement our decision. . . . We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails. *The Board seemed to think that we had issued an advisory opinion, and that faced with a conflict between our views and those of the Attorney General it should follow the latter.* Yet it should not be necessary to remind the Board, all of whose members are lawyers, that the "judicial Power" under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government." (emphasis added).

This regulation illustrates the improper politicization of EOIR's adjudicatory functions and highlights the dangers of allowing the Immigration Court to remain at DOJ.

 The creation of the Office of Policy is a transparent politicization of our Immigration Courts.

The Office of Policy (OP) was first created by Attorney General Sessions on July 26, 2017. Initially, the OP was responsible for public relations for EOIR and to house EOIR's Law Library, Virtual Law Library, and Immigration Research Center. Had OP remained within those narrow confines, it might have passed scrutiny as merely administrative in its role, despite the name. However, even before it was formalized by the interim rule, the OP was already exceeding this role. The OP has been identified as the component responsible (under the direction of the Director) for the creation of the immigration judge quota of 700 case completions per year. As discussed above, the quotas and deadlines system is a direct interference in the decisional independence of judges and a challenge to the principles of due process in the Immigration Court.

The interim rule vesting new powers in the EOIR Director also formalizes and expands the OP's reach far beyond its initial formulation and its stated role of addressing the backlog in the Immigration Courts. As the DOJ's own public description readily concedes, the OP "is responsible for all agency policy and regulatory review and development, internal and external communications, official data collection and reporting, strategic planning, and legal education, research, and certifications." https://www.justice.gov/eoir/office-of-policy. The existence of a policy office as a high level component of any court system is troubling and calls into question the neutrality required of any fair and independent adjudicatory system. Courts, including the

Immigration Courts, are governed by the laws passed by Congress and properly promulgated regulations. The role of policy in a court setting, if any, should be administrative in nature and cannot be allowed to intrude into substantive legal issues. Yet the establishment of the OP enables EOIR to bring the Immigration Courts in closer policy alignment with DHS. This change flies in the face of congressional intent which was to distance the Immigration Court from DHS enforcement functions and provide safeguards against intrusion into the neutral adjudicatory role of the Immigration Court.

Within days of this interim regulation, on October 1, 2019, the OP issued a new directive on behalf of the Director that radically shortens and re-defines the BIA's processing times. Thus the OP has already shown its true colors in working to create a system of "assembly line justice" that favors speedy removals over deliberative review.

The Office of Policy issued political statements which threaten the Court's neutrality

Further demonstrating the dangers of a policy office within a court system, in May 2019, without even attempting to maintain a pretext of neutrality, independence or judicial demeanor, EOIR entered the foray of political propaganda by releasing a five-page document entitled, "Myths vs. Facts About Immigration Proceedings."
https://www.naij-usa.org/images/uploads/newsroom/NAIJFacts_vs_Fiction2.pdf
This document contained 18 assertions about the Immigration Court and the asylum process that parrotted the Executive Branch's talking points in support of its numerous controversial policy positions. The Agency's publication was met with instantaneous response by organizations that are active in the front line of the removal and asylum process. *See, e.g.,*
https://www.naij-usa.org/images/uploads/newsroom/Fact-checking_the_Trump_administration's_immigration_fact_sheet_-_The_Washington_Post.pdf (the Washington Post) (debunking the myth that most asylum seekers fail to show up for their hearing);
https://www.naij-usa.org/images/uploads/newsroom/McHenry_Letter_%28final%29.pdf (Roundtable of Former Immigration Judges) (calling out the Agency on its "political pandering");
https://www.naij-usa.org/images/uploads/newsroom/HRF_Notice_of_Rejection_of_EOIR_Factsheet_May_2019.pdf (Human Rights First);
https://www.naij-usa.org/images/uploads/newsroom/Facts_About_the_State_of_Our_Nation's_Immigration_Courts.pdf (American Immigration Lawyers Association).

Similarly, the NAIJ was compelled to issue its own public statement addressing EOIR's gross mischaracterization or misrepresentation of the facts.
https://www.naij-usa.org/images/uploads/newsroom/NAIJFacts_vs_Fiction2.pdf

Education of the public is a proper function of EOIR, but issuing blatantly one-sided political talking points is an unprecedented act of politicization of the Immigration Court system. Such statements make the job of immigration judges more difficult as it causes the public to lose trust in our neutrality. Why are taxpayer's dollars being spent on such campaign-like tasks? How does this relate to authority to adjudicate individual cases, which is the primary mandate of EOIR? Perhaps most importantly, how can such statements be squared with the primary duty of any court to remain impartial?

 EOIR's active dissemination of misinformation and half-truths in support of the Executive Branch's law enforcement priorities

Another extremely troubling action taken by EOIR which demonstrates partisanship rather than judicial temperament is EOIR's apparent manipulation of publically available data. It is no surprise that any statistics on the day-to-day operation of the Immigration Court must be gleaned from information maintained by EOIR in its database. This data is critical to EOIR's ability to efficiently and effectively manage its workload and is equally critical to the public and meaningful congressional oversight. Accordingly, the Transactional Records Access Clearinghouse (TRAC) at Syracuse University has been systematically gathering information from EOIR for public dissemination under a standing FOIA request.

On October 31, 2019, TRAC noted "severe irregularities" related to the data EOIR had been providing. The organization issued a public report documenting "*gross irregularities in recent data releases*" by EOIR. https://trac.syr.edu/immigration/reports/580/. Rather than addressing the documented deficiencies in the data, EOIR issued a blanket denial of TRAC's claim. On November 4, 2019, TRAC followed with a statement requesting "EOIR to Issue Correction to Public Statements Regarding Incomplete and Inaccurate Data." https://trac.syr.edu/immigration/reports/582/. Again, EOIR has dug in its heels and denied the allegations. On December 18, 2019, TRAC noted again that "New Immigration Court Data Released, Even more Records Missing Despite Assurance, further indicating the deletion of millions of records was likely intentional, and that EOIR demonstrated a 'lack of commitment…to ensuring the public is provided with accurate and reliable data." https://trac.syr.edu/immigration/reports/586/

Unfortunately, the Syracuse University findings are consistent with the experience of our judges, who find time and again that DOJ's data does not match the reality we see in our courtrooms.

The United States and the American people need a neutral fact-based Immigration Court system. This cannot be achieved if we do not have the reliable, accurate, and complete data to ascertain the facts. While in the past the sloppiness of EOIR's statistics was benignly attributed to

negligence or incompetence, EOIR's recalcitrance in the face of requests for correction has shown what appears to be gross negligence, a deliberate manipulation of statistics, or at worst, an outright misinformation campaign.

- **Mismanagement of resources and shabby hiring practices**

Lack of Support Staff

Under the guise of addressing the backlog, EOIR sought and received additional levels of funding to increase the number of immigration judges and support staff. To address their daily dockets, reduce the backlog, and remain current with new receipts, each immigration judge needs a team of support staff, which at a minimum should include two legal assistants for every 1,000 cases on a judge's docket and a judicial law clerk. Accordingly, Congress' funding for new judges comes with sufficient monies to hire teams. Yet EOIR's hiring practices have ignored congressional directives for effective use of funds and is primarily hiring judges and supervisory judges, rather than focusing on the required support team and concomitant resources such as contract interpreters. In the past three fiscal years, EOIR has hired over 200 immigration judges but failed to adequately budget for and hire the necessary clerical and support staff required for the successful administration of the court; nor have they allocated sufficient resources towards hiring in-house interpreters or augmenting their contract interpreter capacity.

Previously a judge who was assigned 2,000 cases was provided with at least one full-time legal assistant. Today, that same judge has a pending case load of 5,000 cases and is expected to share the clerk assigned to him or her. Currently, the largest courts in the country, such as those in New York and San Francisco, are functioning with only 40 to 50 percent of their needed staff, with legal assistants supporting two or even three immigration judges. The New York City Immigration Court has been without a Court Administrator to oversee support staff and court administration for over two years.

The continued hiring of immigration judges without concomitant hiring of support staff has resulted in an overburdened, stressed, and demoralized workforce. The added stressors placed on a bare-bones support staff have resulted in increased attrition and job dissatisfaction. In the New York City Immigration Court, for every two judges there is only one legal assistant to locate and prepare files for the docket, process motions and correspondence, prepare orders for judges to sign, and interface with attorneys and the public regarding their judges' dockets.

As one immigration judge recently noted to NAIJ:

> We are still woefully understaffed and I don't even have an assigned legal assistant anymore. . . . Someone called the director's office to complain about us never answering

> phone calls. We have not opened mail for about 8 weeks now. . . . 3 days this week I had respondents including MPP ["Migrant Protection Protocol" or "Remain in Mexico"] ones showing up for hearings for which they had notices that never made it to my docket or in some instances they were on my docket but no one could find the files.

This long-standing inability of EOIR to timely fill vacant positions has dramatically impacted the ability of the Immigration Courts to fulfill our function. Judges cannot effectively manage their dockets without support staff. The level of dysfunction caused by inadequate numbers of support staff are a serious impediment to the efficient and effective operation of the Immigration Courts and must be addressed.

Lack of Interpreters

Over 90 percent of individuals appearing in Immigration Court proceedings are non-English speakers who require interpreter services. Citing severe budgetary constraints, in December 2018, EOIR informed judges that in-person interpreters would be restricted to one in-person interpreter in the morning and one for the afternoon, regardless of the number of hearings scheduled on the judge's docket. Thus, even if an immigration judge knew that they could address multiple cases using multiple languages in a single morning or afternoon session, and thereby complete more cases, they would be unable to do so as they would not be afforded the in-person interpretation. Adding insult to injury, EOIR also advised judges to use telephonic interpreter services in the alternative, a time-consuming and often fruitless undertaking due to the lack of exotic language interpreters on standby.

Severe cutbacks on interpreter services due to an alleged budget shortfall were instituted despite massive budget increases and appropriated funds provided to EOIR. Over the course of the past several years, under the guise of lack of funding, EOIR has steadily eroded the ability of non-citizens who appear before the Court to actively participate in and fully understand what is being said in Immigration Court hearings. Without an interpreter, many are limited in their ability to understand the very nature of the proceedings or to be able to adequately present their case to the Court. Instead of recognizing the need for readily available in-person interpreter services, EOIR has systematically chipped away at access to this most basic of all due process requirements.

Questionable Hiring Practices

Instead of remedying the staff shortages and assuring the availability of adequate interpreter services, EOIR has focused on the hiring of mid-level management, supervisory judges called Assistant Chief Immigration Judges (ACIJs). This increased focus on the expansion of mid-level management has resulted in lopsided staffing. Currently, EOIR employs over 30 ACIJs, which is more than over a five- to six-fold increase from previous administrations. EOIR has indicated

its intention is to hire one ACIJ for every court with four or more judges. This would increase the number of ACIJs to over 60, a ten-fold increase in comparison to previous administrations. The need for more ACIJs would seem to flow directly from the addition of the numeric and time-based performance criteria. Because an ACIJ's primary role is management of the Court with a very limited (perhaps 10 percent) time on the bench, this disproportionate hiring does not help address case backlogs. Rather, instead of hearing cases, supervisory judges are tasked with micromanaging the immigration judges and other court personnel, a questionable way to utilize resources in light of the ever burgeoning caseload.

□ **DOJ's effort to silence the judges and erode decisional independence by petitioning to decertify the NAIJ**

On August 9, 2019, the EOIR petitioned the Federal Labor Relations Authority (FLRA) to decertify the NAIJ and silence the immigration judges. EOIR argues that immigration judges are "management officials" who formulate agency policies simply through their individual case adjudications. DOJ argued the same position two decades ago. In 2000, the FLRA, in a well-reasoned and thorough published opinion, rejected on all grounds the Agency claim that judges' duties and responsibilities somehow transform them into "management officials" under the law.

In the hearing conducted on January 7-8, 2020, the disingenuousness of the DOJ position was made ever more clear as EOIR stipulated to the threshold issue before the FLRA: that the duties and responsibilities of immigration judges have not changed since the FLRA ruling in 2000. EOIR was simply rearguing the case, twenty years later, hoping for a different result. The move by DOJ to seek decertification is nothing short of political retribution against the NAIJ for serving as an agent of transparency and accountability against EOIR's systematic encroachment on judicial independence and persistent efforts to transform the Court into a law enforcement tool of the Executive Branch. If EOIR prevails in its efforts to decertify the NAIJ, it will be the final nail in the coffin for the exercise of independent decision-making by immigration judges. The Immigration Court will no longer possess even the most basic qualifications of a court but rather become a deportation assembly line under one administration and perhaps an amnesty tool under another.

THE ONLY LASTING SOLUTION

The call for an independent Article 1 Immigration Court is not new. Many of these systemic issues have been raised and robustly discussed in the past. Every administration has been afforded the opportunity to implement its "solution." The benefit of the doubt has been repeatedly afforded to DOJ by Congress. More money has been thrown at the problem than

could reasonably be justified when flawed and politicized management practices have persisted unabated. It is quite evident that simply hiring more judges in the context of a fundamentally faulty system is tantamount to throwing good money after bad. It is equally evident that the will of Congress cannot be carried out by a court located within DOJ or in any other law enforcement agency.

Every reputable organization that has studied the Immigration Court has reached the same conclusion. The American Bar Association has produced an in-depth and extensive report of the need for an independent Immigration Court. The Federal Bar Association has drafted proposed Article 1 legislation. The American Immigration Lawyers Association, the largest organization of immigration law attorneys who practice on a daily basis before the Court, has formally endorsed an independent Immigration Court. If nothing else, the drastic pendulum swings between the previous and current administration's use and abuse of the Immigration Court has evidenced what our founding fathers knew at the inception of our country— the importance of separation of powers between the judicial role of the government from its law enforcement prerogatives. The judicial role of the Immigration Court is simply irreconcilable with the law enforcement mission and role of the DOJ. The only real and lasting solution is the establishment of an independent Immigration Court. Only then will we begin to move forward in solving the immigration crisis facing our nation.

Sincerely,

A. Ashley Tabaddor
President, National Association of Immigration Judges

Ms. JAYAPAL. Thank you, Judge Tabaddor.
Mr. McKinney, you are recognized.

TESTIMONY OF JEREMY MCKINNEY

Mr. MCKINNEY. Thank you so much.

Chairwoman Jayapal, Ranking Member Buck, and members of the subcommittee, thank you for inviting me to speak with you today about the urgent need to protect and reform our immigration courts. My name is Jeremy McKinney. I'm the American Immigration Lawyers Association second vice president and an attorney with more than two decades of experience representing people facing deportation, primarily in Charlotte, Atlanta, and Lumpkin, Georgia.

As an initial observation, two of the terms you will hear repeatedly today are misnomers: courts and judges. We call it immigration court, but in actuality, the parties appear before a Department of Justice entities known collectively as the Executive Office for Immigration Review, or EOIR. EOIR reports to the Attorney General, at the same time, as in the words of former Attorney General Jeff Sessions, the Attorney General, quote, effectuates the President's agenda, unquote. That includes supervision of the Department of Justice attorneys who prosecute immigration cases in Article III Federal courts.

The Department of Justice is not a court. It is a law enforcement agency, and yet the immigration court system is housed within it. We call the adjudicators in these Department of Justice entities judges, but the immigration judges are not considered judges by DOJ itself. They are simply employees of the law enforcement agency.

Our immigration court system has a conflict of interest built into it. To ensure fundamental fairness and an efficient functioning court system, judges must be allowed to act as neutral arbiters of facts and law, regardless of who is in power. Instead, this administration, and importantly, other administrations before it, exploit the structural infirmity to further political agendas.

President Obama's administration prioritized the adjudication of family unit cases. EOIR later reported the Obama administration's docket reshuffling, quote, coincided with some of the lowest levels of case completion productivity in EOIR's history, unquote.

The current administration also routinely places its finger on the scales of justice. Using his power to certify removal cases to himself, the Attorney General has ended administrative closure, ended the ability of judges to terminate cases, attacked the ability of judges to continue cases. These policies have directly impacted my clients.

For example, a Charlotte immigration judge who handles the juvenile docket recently chided our bar to stop filing motions to terminate in cases where a child is eligible for relief before another agency, in this case, USCIS. Instead, this judge is forced to clog her docket with contested hearings about children.

Many cases, many cases can be resolved by other agencies, including cases where a person can depart the United States and pursue an immigrant visa abroad, but this series of decisions re-

moves the power of immigration judges to control their own dockets and keeps the parties stuck in litigation.

EOIR itself has made it worse, following suit with actual quotas on immigration judges and attempts to terminate the judges' union. As a result, courts are in crisis and not resolving cases in a consistent manner. For example, if I appear in Arlington, Virginia, I know the chance my client will be denied asylum is a little over 50 percent, which is in line with the national average, about a 50–50 shot. If I appear closer to home in Charlotte, North Carolina, a jurisdiction under the Fourth Circuit with identical case law, that number jumps to 90 percent. Head down I-85 to Atlanta or Lumpkin, Georgia, and that number jumps to a staggering 97 percent denial rate. That is not the kind of justice that Americans want.

Regardless of one's substantive views on the law or one's preferred outcomes, we should all agree that an independent Article I immigration court removed from political pressure as much as possible is critically needed to secure due process.

But even beyond the constitutional guarantee of due process, the attempts at assembly line justice is simply not working. Under the current administration, the backlog has more than doubled and now exceeds 1 million.

Doing the right thing here is not only constitutionally required, it is also just sound public policy. When we curtail a person's right to a full and fair hearing, like plowing ahead with a contested hearing instead of allowing the parties to send it to another agency to resolve, we increase, not decrease, litigation. We increase appeals, not decrease.

Ms. JAYAPAL. Mr. McKinney, your time has expired.

Mr. MCKINNEY. Thank you.

[The statement of Mr. McKinney follows:]

Statement of Jeremy McKinney
Second Vice President, American Immigration Lawyers Association

Before the House Judiciary Committee's Subcommittee on Immigration and Citizenship
"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

Introduction

Chairwoman Lofgren, Ranking Member Buck, and members of the subcommittee, thank you for inviting me to speak with you today about the urgent need to protect and reform our immigration courts, a system that has long suffered from profound structural problems and where core principles of judicial independence and due process have badly eroded.

My name is Jeremy McKinney, and I serve as the elected Second Vice President of the nonpartisan American Immigration Lawyers Association. Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors who practice, research, and teach in the field of immigration law. As part of its mission, AILA strives to advance this body of law and facilitate fairness and justice in the field.

I am also the founder of McKinney Immigration Law firm, with offices in Greensboro and Wilmington, North Carolina, and practice frequently in immigration courts and the Board of Immigration Appeals. Indeed, I and thousands of other AILA members routinely represent clients before these Department of Justice entities, known collectively as the Executive Office for Immigration Review (EOIR). EOIR reports to the Attorney General, who simultaneously supervises the Department of Justice (DOJ) lawyers who prosecute immigration cases in Article III federal courts.

Today's hearing is an essential forum for exploring – and beginning to remedy – serious, systemic problems of due process that are widespread in current immigration court proceedings. A necessary component of ensuring fair adjudications in cases that determine life or death for some immigrants, permanent family unity or separation for others, is to tackle the glaringly inadequate independence from political interference of our nearly 500 immigration trial and appellate judges.

To ensure fundamental fairness and an efficient, functioning court system, judges must be allowed to act as neutral arbiters of fact and law, regardless of who is in power. Instead, this administration and other administrations before it has exploited the structural infirmity that classifies immigration judges as DOJ employees in order to further political agendas. Regardless of one's substantive views on the law these immigration judges are sworn to apply – or one's preferred outcomes – we should all agree that independent, Article I immigration courts, removed from political pressure, are critically needed to secure due process in immigration proceedings.

Beyond offending the constitutional guarantee of due process – a right afforded to all persons in this country – the Administration's myriad attempts to fast-track deportations are not working. The case backlog has more than *doubled*. It often takes the Board of Immigration Appeals a year to resolve even simple joint or unopposed motions. Doing the right thing here is not only the constitutionally required path, but it is also sound public policy. When we curtail a person's right to a full and fair hearing, we increase, not decrease, litigation and wait times. More contested hearings in immigration court mean more appeals to the Board of Immigration Appeals and more petitions for review to our federal Circuit Courts.

Ultimately, our legal system is always more efficient if we get it right the first time. Attorneys and clients alike would be more likely to trust the decisions of an independent judiciary. Legal interpretations would be more stable and less subject to political whims, leading to many fewer appeals.

I. EOIR's Inherently Flawed Structure and Poor Results

Separation of powers is understood in bipartisan fashion to be a cornerstone of our republic, underpinned by the distinct roles of three federal-government branches. Many lawyers outside the immigration field therefore echo members of the public in expressing shock when I explain that in immigration cases judges are *not* insulated from executive branch interference. Rather, those judges are exposed to constant meddling by the very federal officials whose administration is also one side of purportedly adversarial proceedings occurring before them.

The Trump administration has taken a series of actions that are particularly hostile to independent adjudication, ranging from substantive alteration of judicial decisions to procedural requirements designed to force immigration judges into rulings that unreasonably accelerate cases to the detriment of due process and the rule of law. AILA agrees with Immigration Judge Ashley Tabbador, President of the National Association of Immigration Judges (NAIJ), who recently described EOIR as a "'major structural design defect' whose conflicts of interest, vulnerabilities and weaknesses have been particularly exploited" by this administration.[1]

Judge Tabbador has warned that, absent reform, immigration judges will become "prosecutors in a judge's robe."[2] Notably, fiscal year 2019 saw double the number of immigration judge departures from the bench compared with the prior two years, as a significant number of judges have resigned on principle.[3] Like AILA, the NAIJ, the American Bar Association, and the

[1] Joe Davidson, Trump has attacked federal unions. Now, for the first time, he's trying to bust one, WASHINGTON POST (Jan. 18, 2020), https://www.washingtonpost.com/politics/trump-has-attacked-federal-unions-now-for-the-first-time-hes-trying-to-bust-one/2020/01/17/3426d8ea-3971-11ea-a01d-b7cc8ec1a85d_story.html.
[2] Patt Morrison, How the Trump administration is turning judges into "prosecutors in a judge's robe", LOS ANGELES TIMES (Aug. 29, 2018), http://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-judgeashley-tabaddor-20180829-htmlstory.html.
[3] Priscilla Alvarez, Immigration judges quit in response to administration policies, CNN (Dec. 27, 2019), https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html

Federal Bar Association also support converting immigration courts and the Board of Immigration Appeals to Article I courts.[4]

Immigration judges are considered government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them at the whim of the Attorney General. They have no fixed term of office and can be fired by the Attorney General or relocated to another court.[5] The immigration courts have been repeatedly subject to "aimless docket reshuffling" based on politically motivated priorities.[6] President Obama's administration prioritized the adjudication of "family unit" cases, which EOIR determined "coincided with some of the lowest levels of case completion productivity in EOIR's history."[7] President Trump ordered IJs deployed to detention facilities on the border where they reported very few cases to adjudicate. More than 20,000 cases away from the border were rescheduled as a result of this "surge."[8]

In addition to EOIR's fundamentally flawed structure, a history of chronic and systemic problems has caused a severe lack of public confidence in its capacity to deliver just and fair decisions in a timely manner. Stakeholders have long expressed concerns about issues such as inadequate staffing and training, lack of transparency in hiring and discipline, a shortage of technological resources, perceived bias, and, perhaps most frequently, the ever-growing backlog of cases.[9] 542,411 cases were pending at the end of January 2017 when President Trump took office. Again, the pending case backlog has more than doubled and, as of December 31, 2019, reached 1,089,696 cases.[10]

In certain jurisdictions, immigration-court practices and adjudications have fallen far below acceptable norms. As recently as 2016, the Government Accountability Office (GAO) confirmed this disparity, noting that, "[f]or fiscal years 1995 through 2014, EOIR data indicate that

---

[4] Lauren Frias, Prominent legal organizations call on Congress to establish an independent immigration court system, BUSINESS INSIDER (July 12, 2019), https://www.businessinsider.com/legal-organizations-call-on-congress-for-independent-immigration-court-2019-7

[5] ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf

[6] Retired Immigration Judge Paul Schmidt, Speech to the ABA Commission, Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in Our Captive Dysfunction U.S. Immigration Courts! (May 4, 2018), https://www.aila.org/infonet/former-chairman-of-the-bia-paul-w-schmidts-speech; NAIJ, Letter to House CJS Appropriations Subcommittee (Mar. 12, 2019), https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf.

[7] Eric Katz, Government Executive, 'Conveyer Belt' Justice: An Inside Look at Immigration Courts (Jan. 22, 2019), https://www.govexec.com/feature/inside-conveyor-belt-behind-curtain-dojs-immigration-courts/; EOIR, Tracking and Expedition of "Family Unit" Cases (Nov. 11, 2018).

[8] National Immigrant Justice Center, Internal DOJ Documents Reveal Immigration Courts' Scramble to Accommodate Trump Administration's "Surge Courts (Sept. 27, 2017), https://www.immigrantjustice.org/staff/blog/internal-doj-documents-reveal-immigration-courts-scramble-accommodate-trump.

[9] AILA Policy Brief, Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts, (Oct. 13, 2017), AILA InfoNet Doc. No. 17101234, https://www.aila.org/infonet/aila-policy-briefimposing-numeric-quotas-judges

[10] TRAC Immigration, Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location (2020), https://trac.syr.edu/phptools/immigration/court_backlog/

affirmative and defensive asylum grant rates varied over time and across immigration courts, applicants' country of nationality, and individual immigration judges within courts."[11] Attorneys who practice in these jurisdictions report that it is as though they are practicing in an entirely different legal system, one that does not recognize the binding nature of jurisprudence regarding asylum law. In fiscal year 2019, 69 percent of asylum seekers were denied asylum or other relief.[12] However, asylum grant rates for some immigration courts are so low that it is virtually impossible to obtain protection. For example, TRAC reported that 12 immigration courts accumulated asylum denial rates above 90 percent including Atlanta which denied over 97 percent of more than 2,000 asylum applications.[13]

The highly disparate asylum grant rates among judges gives rise to criticism that outcomes turn on which judge is deciding the case rather than established principles and rules of law. My local immigration court in Charlotte is within the jurisdiction of the 4th Circuit Court of Appeals, along with immigration courts in Arlington and Baltimore. All three immigration courts share identical case law, so one would assume their asylum denial rates would also be similar. Yet Arlington and Baltimore's asylum denial rates are a little over 50 percent, a rate in line with each other and the national average. Charlotte's is over 90 percent.[14] A client of mine in Greensboro could move 40 minutes north into Virginia and more than double their chance of being granted asylum. Instead of working to ensure that judges across the country have the resources, training, and independence to apply the law with greater uniformity and fairness, EOIR recently eliminated the only in-person annual training for immigration judges.[15]

Hiring and promotion of judges and appellate judges have been politicized. In April 2018, several Members of Congress wrote a letter to Attorney General Sessions expressing concerns over allegations that the DOJ may be violating federal law by blocking the hiring of much-needed immigration judges based on ideological and political considerations.[16] EOIR also promoted to the Board of Immigration Appeals several immigration judges on the extreme end of asylum denials: "[E]ach of these newest six [Board Members] had an asylum denial rate over 80 percent, with Couch, Cassidy, and Wilson at 92, 96, and 98 percent, respectively. Nationally, the denial rate for asylum cases is around 57 percent."[17] Two of these appointees were among the

---

[11] GAO Report, 17-72, Asylum, Variation Exists in Outcomes of Applications Across Immigration Courts and Judges, (November 2016), https://www.gao.gov/assets/690/680976.pdf.
[12] TRAC Immigration, Asylum Decisions Vary Widely Across Judges and Courts – Latest Results, (Jan. 13, 2020), https://trac.syr.edu/immigration/reports/590/.
[13] *Id*.
[14] TRAC Immigration, Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more, https://trac.syr.edu/phptools/immigration/asylum/.
[15] National Association of Immigration Judges, "The Immigration Court --In Crisis and in Need of Reform (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf; Letter from EOIR Director McHenry to "All of EOIR", FY 19 Budget, (Mar. 6, 2019), *available at* https://www.muckrock.com/foi/united-states-of-america-10/mchenry-3619-email-and-responses-70281/#file-817454.
[16] House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process (Apr. 17, 2018), https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations
[17] Tanvi Misra, DOJ changed hiring to promote restrictive immigration judges, ROLL CALL (Oct. 29, 2019), https://www.rollcall.com/news/congress/doj-changed-hiring-promote-restrictive-immigration-judges/

most-reversed immigration judges in the country, with "the third and fourth highest number of board-remanded cases."[18] Politicization of appointments and adjudications are a deep stain on EOIR's credibility, one that can be removed only by restructuring the immigration courts as Article I bodies.

Short-term fixes are not workable. The U.S. immigration court system must be made independent to ensure fairness in court. A new Article I immigration court should be created that includes trial and appellate-level courts with further review to the U.S. Courts of Appeals, as is presently available. This structural overhaul would advance the immigration courts' status as neutral arbiters, ensuring the independent functioning of the immigration judiciary. We look forward to working with Congress to make these necessary changes a reality.

II. The Administration's Policies Have Damaged Immigration-Court Independence and Denied Due Process

Despite these well-documented flaws in the current immigration court system, DOJ and EOIR have failed to propose any viable plan to address them. Instead of working to improve the system, the administration has implemented a series of policies that further undermine the independence of immigration judges and due process, for the sole purpose of accelerating deportations.

a. Case Quotas

Despite opposition from immigration judges,[19] EOIR imposed unprecedented case-completion quotas in 2018, tying judges' individual performance reviews to the number of cases they complete.[20] Under these new requirements, known as the Enforcement Metrics Policy, IJs must complete 700 removal cases per year or risk losing their jobs. A strict timeframe for completion of cases interferes with a judge's ability to ensure that a person's right to examine and present evidence is respected, as well as to provide adequate time to obtain an attorney, secure various expert witnesses, and obtain evidence from overseas. This kind of rushed, assembly-line justice is unacceptable to impose on IJs who are making important, often life-or-death, decisions.[21]

---

[18] *Id.*

[19] National Association of Immigration Judges, Misunderstandings about Immigration Judge "Quotas" in Testimony Before House Appropriations Committee (May 2, 2018), https://www.aila.org/infonet/naij-letter-ag-sessions-misunderstandings-ij-quota.

[20] EOIR, Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges (Mar. 30, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics; *see also* National Association of Immigration Judges, Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts, (Jan. 31, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18._.pdf; EOIR's Strategic Caseload Reduction Plan (Oct. 23, 2017), https://www.aila.org/EOIRplan.

[21] INA §240(b)(4)(B) requires that a respondent be given a "reasonable opportunity" to examine and present evidence. *See* AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts (Oct. 12, 2017), https://www.aila.org/ijquotas#PDF.

During a March 7, 2019 congressional hearing, the director of EOIR asserted that several other agencies also have "case completion goals."[22] However, other agencies' goals are used to determine resource allocation, while EOIR's case-completion quotas are tied directly to an IJ's performance evaluations.[23] AILA and other legal organizations and scholars oppose the quotas, which have been described by the NAIJ as a "death knell for judicial independence."[24] In fact, recommendations made by an independent third party, in a report commissioned by EOIR itself, propose a judicial performance-review model that "emphasizes process over outcomes and places high priority on judicial integrity and independence."[25]

Immigration judges already have among the highest caseloads of any comparable federal adjudicator. Imposing numeric deadlines on judges will not improve their performance. Instead, quotas compromise the quality of their decisions and cause grave errors.

b. Attorney General Certifications

Under the Immigration and Nationality Act, the Attorney General has authority to re-open and adjudicate cases previously decided by the Board of Immigration Appeals.[26] Known as "certification," this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. Under the previous administration, Attorneys General Eric Holder and Loretta Lynch employed this power only four times over the course of eight years.[27] By contrast, the Trump administration has already certified twelve cases.

Overall, the decisions that emerge from this administration self-dealing are consistently aimed at minimizing the role of immigration judges by restricting their authority to manage dockets or make decisions based on the facts of each case. In the words of Judge Tabaddor, "[w]hen you provide a prosecutor with a super veto power, that's a design flaw."[28]

---

[22] House Committee on Appropriations, Commerce, Justice, Science, and Related Agencies (116th Congress), Executive Office for Immigration Review (Mar. 7, 2019), https://appropriations.house.gov/legislation/hearings/executive-office-for-immigration-review.

[23] In fact, Congress "specifically exempted ALJs from individual performance evaluations as a mechanism to ensure their independence from such measures and protect the integrity of their decisions." See National Association of Immigration Judges, Letter to House CJS Appropriations Subcommittee (Mar. 12, 2019), https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf.

[24] AILA and the American Immigration Council, DOJ Strips Immigration Courts of Independence (Apr. 3, 2018), https://www.aila.org/advo-media/press-releases/2018/doj-strips-immigration-courts-of-independence; *see also* National Association of Immigration Judges, Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges (Oct. 2017), https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

[25] AILA and the American Immigration Council FOIA Response, Booz Allen Hamilton Report on Immigration Courts, (Apr. 6, 2017), https://www.aila.org/casestudy.

[26] 8 U.S.C. § 1103(g)(2) ("The Attorney General shall establish such regulations . . . [and] review such administrative determinations in immigration proceedings . . . .").

[27] Sophie Murguia and Kanyakrit Vongkiatkajorn, Jeff Sessions Is Executing Trump's Immigration Plans With a Quiet, Efficient Brutality, MOTHER JONES (Sept. 7, 2018), https://www.motherjones.com/politics/2018/09/jeff-sessions-is-executing-trumps-immigration-plans-with-a-quiet-efficient-brutality/.

[28] Immigration Judge Ashley Tabbador, President of the National Association of Immigration Judges on C-SPAN, https://www.c-span.org/organization/?130013/National-Association-Immigration-Judges.

A few examples illustrate this ideological approach designed to expedite cases without regard for resulting obstacles to due process and immigration judge autonomy:

- **Bloating the Docket by Limiting Use of Administrative Closure**. In *Matter of Castro-Tum*, the Attorney General severely limited the discretion of judges and the BIA to administratively close cases, eliminating an important docketing tool.[29] An April 2017 report independently commissioned by EOIR had identified administrative closure as a helpful tool, specifically recommending that EOIR work with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.[30] The U.S. Court of Appeals for the Fourth Circuit has overturned *Matter of Castro-Tum*, concluding that immigration law unambiguously permits immigration judges to control their own dockets.[31]

- **Limiting Continuances and the Opportunity to Obtain Counsel.** In *Matter of L-A-B-R-*, the Attorney General made it more difficult for judges to grant continuance requests and implemented procedural hurdles that make it harder for people to request and immigration judges to grant continuances.[32]

- **Restricting Discretion to Terminate Cases.** In *Matter of S-O-G- & F-D-B-*, the Attorney General prevented immigration judges and the BIA from terminating or dismissing cases except in very narrow circumstances, eliminating a tool judges have traditionally used to increase efficiency by prioritizing which cases should move forward on their dockets.[33]

- **Foreclosing Asylum for Victims of Domestic Violence, Gangs, and Family-Based Persecution.** In *Matter of A-B-* and *Matter of L-E-A-*, the Attorney General attempted to make it far more difficult for survivors of domestic violence, gang persecution, and family-based persecution to apply for and qualify for asylum.[34]

---

[29] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), https://www.justice.gov/eoir/page/file/1064086/download.
[30] Booz Allen Hamilton Report, supra note 22.
[31] *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019).
[32] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), https://www.justice.gov/eoir/page/file/1087781/download. EOIR also issued guidance for judges discouraging the use of continuances and encouraging judges to sanction counsel that request continuances. Memorandum by MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download . The Attorney General also issued guidance directing judges to expedite. Memorandum from Jeff Sessions, Attorney General, Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest(Dec. 5, 2017), https://www.justice.gov/eoir/file/1041196/download.
[33] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), https://www.justice.gov/eoir/page/file/1095046/download.
[34] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), https://www.justice.gov/eoir/page/file/1070866/download; *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), https://www.justice.gov/file/1187856/download. For a discussion of subsequent federal-court litigation, see Victoria Neilson, New Government Guidance on *Matter of A-B-*Incorporates *Grace v. Whitaker* (Jan. 28, 2019), https://cliniclegal.org/resources/asylum-and-refugee-law/new-government-guidance-matter-b-incorporates-grace-v-whitaker

- **Denying Hearings to Asylum Seekers.** In *Matter of E-F-H-L-*, the Attorney General appeared to open the door for judges to deny asylum without first conducting a full evidentiary hearing, depriving asylum seekers of an opportunity to fully present their case.[35]

- **Limiting Bond for Asylum Seekers.** In *Matter of M-S-*, the Attorney General held that someone who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond.[36] The decision means that asylum seekers and their families will remain in detention for longer period of time.

Three of these decisions (*Matter of Castro-Tum, Matter of L-A-B-R-, Matter of S-O-G- & F-D-B)* are aimed at forcing judges to proceed in cases where an immigrant is eligible for some kind of relief. These are cases that could be resolved by other agencies with a grant of legal status. To compel immigration judges to move forward in such cases is a bafflingly inefficient and wasteful use of resources, particularly considering the more than one million cases that are backlogged. Combined with an unusual frequency of published BIA decisions along the same lines, DOJ is giving license to ICE to deport individuals who have approvable applications for relief that are pending solely due to DHS delay: processing backlogs beyond the immigrant's control.[37]

c. Docketing Interference

In August 2018, EOIR removed an immigration judge from a case due to the judge's decision to delay in the interest of due process.[38] Judge Steven A. Morley had decided to continue the high-profile case, *Matter of Castro-Tum*, to ensure adequate time for proper notice.[39] EOIR personally interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing.[40] Subsequently, EOIR transferred dozens of other cases from the judge's docket, allocating them to an immigration judge perceived as more likely to deny relief.[41] NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases.[42]

d. Politicization of Immigration Judges

---

[35] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), https://www.justice.gov/eoir/page/file/1040936/download.
[36] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), *available at* https://www.justice.gov /eoir/file/1154747/download.
[37] *See, e.g.*, *Matter of Mayen-Vinalay*, 27 I&N Dec. 755 (2020), https://www.justice.gov/eoir/page/file/1236941/download.
[38] National Association of Immigration Judges, Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts (Aug. 8, 2018), https://www.aila.org/infonet/judges-union-grievance-violation-due-process-right
[39] *Id.*
[40] National Association of Immigration Judges, Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ (Aug. 8, 2018), https://www.aila.org/infonet/naij-grievance-redress-removal.
[41] *Id.*
[42] *Id.*

DOJ in this administration has been alleged to engage in politicized immigration-judge hiring based on candidates' perceived political or ideological views.[43] On April 11, 2017, then-Attorney General Sessions announced that he "implemented a new, streamlined hiring plan" to reduce the time it takes to hire immigration judges.[44] Reports indicate that DOJ "surreptitiously has made substantive changes to the qualification requirements for judges, over-emphasizing litigation experience to the exclusion of other relevant immigration law experience" and providing political appointees with greater influence in the final selection of IJs. [45] NAIJ has opposed this policy, arguing that it will lead to even more skewed appointments favoring former ICE trial attorneys.[46]

e. EOIR Policies Undermining Due Process

EOIR has also issued policies that erode due process. These policies have a singular focus on speed and efficiency, and strike at the heart of a person's right to a full and fair hearing. Those policies include:

- **No Dark Court Room Policies and Rapid Expansion of Video Teleconferencing.** EOIR implemented a "no dark court room" policy, which directs immigration judges to reschedule and advance hearings to any period in which there is no case scheduled in their court room.[47] In addition to reducing the amount of time for judges to prepare and review cases, this policy led some judges to advance hearings with little notice to counsel, sometimes as little as 48 hours before a hearing.[48] In addition, despite widespread concerns around using Video Teleconferencing (VTC) for immigration hearings, EOIR has piloted use of VTC immigration adjudication centers (IACs), where

[43] In April 2017, House Democrats submitted a letter to the Attorney General expressing concern about reports that the DOJ "may be using ideological and political considerations to improperly - and illegally - block the hiring of immigration judges." House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process (Apr. 17, 2018), https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations. A month later, top Senate and House Democrats submitted a letter to the Inspector General requesting an investigation into allegations that DOJ has targeted candidates and withdrawn or delayed offers for immigration judge and BIA positions based on their perceived political or ideological views. Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ (May, 8, 2018), https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig).

[44] Department of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal.

[45] Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, Strengthening and Reforming America's Immigration Court System, 115th Cong. 5 (2018) (A. Ashley Tabaddor, President, National Association of Immigration Judges), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf; Department of Justice, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), Document Obtained via FOIA by Human Rights First, Memorandum for the Attorney General, Immigration Judge Hiring Process, Apr. 4, 2017.

[46] *Id.*;

[47] Hoppock Law Firm, "No Dark Courtrooms" is the Secret EOIR Policy That Might Ruin Your Summer, (June 1, 2018), https://www.hoppocklawfirm.com/no-dark-courtrooms-is-the-secret-eoir-policy-that-may-ruin-your-summer/.

[48] American Immigration Lawyers Association, EOIR Open Forum Notes (June 16, 2018), on file with author.

IJs will adjudicate cases from around the country.[49] Yet an EOIR- commissioned report recommended that EOIR limit the use of VTC to procedural matters *only* due to concerns about how difficult it is for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC.[50]

- **Discouraging Continuances.** In July 2017, EOIR issued a memorandum that discourages the use of continuances by judges and even encourages judges to consider sanctions for attorneys who request too many continuances.[51] Continuances are often a necessary means to ensure due process in removal proceedings. For example, the number-one reason immigrants request continuances is to find counsel, who play a critical role in ensuring a fair hearing.[52]

- **Restricting Change of Venue.** In January 2018, EOIR issued a memorandum that limited the authority of judges to grant change of venue motions, stating that changes of venue "create problems in caseload management and operational inefficiencies."[53]

- **Expediting Adjudications at the Cost of Due Process.** In December 2017, the Attorney General issued a memorandum encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.[54]

- **Establishing Arbitrary Deadlines for Court Proceedings.** In January 2018, EOIR issued new case priorities and immigration-court performance metrics.[55] These metrics established various deadlines for the immigration court to complete tasks, including completion of cases, adjudication of motions, and completion of credible fear interviews.[56] The metrics work hand-in-hand with the case-completion quotas discussed above to speed cases towards a resolution regardless of fairness.

- **Devaluing the Legal Orientation Program (LOP).** EOIR has operated LOP in immigration detention centers since 2003; LOP now operates in 38 facilities and provides

---

[49] DOJ Backgrounder, EOIR Strategic Caseload Reduction Plan (Dec. 5, 2017), https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction.
[50] Booz Allen Hamilton Report, supra note 22.
[51] OPPM 17-01: Continuances, supra note 30. ("[I]t may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. §1003.102.").
[52] Government Accountability Office, Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017), https://www.aila.org/infonet/gao-report-actions-needed-to-reduce-case-backlog.
[53] MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review Operating Policies and Procedures Memorandum 18-01: Change of Venue (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026726/download.
[54] Sessions Memo supra note 30.
[55] Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download.
[56] *Id.*

legal information to 50,000 people each year.[57] While not a substitute for legal counsel, LOP is often the only source of basic legal information that assists detained immigrants in navigating a complex court process. The American Immigration Council has reported that immigrants in detention are the least likely to obtain representation, with only 14 percent of detained immigrants acquiring legal counsel.[58]

LOP has been proven to increase court efficiency and save taxpayer dollars. A 2012 study commissioned by DOJ demonstrated that the program decreased the average length of time a person is detained by six days, saving approximately $17.8 million each year. EOIR's own website publicly endorsed the LOP program in 2017, stating that "[e]xperience has shown that the LOP has had positive effects on the immigration court process," and an independent report commissioned by EOIR recommended that DOJ "consider expanding know your rights and legal representation programs, such as … LOP."[59]

Despite this overwhelming support, DOJ attempted to end the program in April 2018 and removed content on its website that endorsed the program. After significant criticism, it rescinded its proposed termination, but continues to undermine the program by releasing flawed evaluations of its efficacy. Deportation is a severe consequence, yet the government does not guarantee legal representation to immigrants facing removal. Vulnerable individuals, including children, asylum seekers and those who speak little or no English, typically face immigration proceedings without any legal representation, so LOP is vital to protecting their rights and ensuring accurate adjudications.

- **Concentrating Power with Non-Judicial EOIR Officials.** A rule issued in August 2019 reorganized EOIR to delegate authority from the Attorney General to the EOIR director to adjudicate cases "that cannot be completed in a timely fashion."[60] As a senior bureaucrat and not an immigration judge, the director should not have that power. An October 2019 memo goes even further and pressures BIA members to speed up adjudications without care for due process.[61]

Taken together, these EOIR/DOJ policies have had the undeniable effect of eroding the most important guarantee of our legal system: the right to a full and fair hearing by an impartial judge. The changes harm families, children, people who qualify for relief under our immigration laws, and individuals who have suffered some of the most violent atrocities in their countries of origin and have the right to humanitarian protection. These policies have the greatest impact on

---

[57] Vera Institute of Justice, Statement on DOJ Analysis of Legal Orientation Program (Sept. 5, 2018), https://www.vera.org/newsroom/statement-on-doj-analysis-of-legal-orientation-program.
[58] Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court
[59] American Immigration Lawyers Association, Policy Brief: Facts About the State of Our Nation's Immigration Courts (May 14, 2019), https://www.aila.org/File/DownloadEmbeddedFile/80205.
[60] EOIR Interim Rule, Organization of the Executive Office for Immigration Review (Aug. 26, 2019), https://www.federalregister.gov/documents/2019/08/26/2019-18196/organization-of-the-executive-office-for-immigration-review
[61] James R. McHenry III, Case Processing at the Board of Immigration Appeals (Oct. 1, 2019) https://www.justice.gov/eoir/page/file/1206316/download.

indigent respondents and those who have fled from dangerous and violent circumstances and should have a meaningful opportunity to seek protection under U.S. law.

III. Tent Courts at the Border Are an Affront to Justice and Transparency

In September 2019, DHS opened massive temporary tent facilities in Laredo and Brownsville, Texas, that function as virtual immigration courtrooms for vulnerable asylum seekers subject to DHS's Migrant Protection Protocols (the Remain in Mexico policy).[62] During the hearings, asylum seekers are held in tents at the ports of entry while judges appear remotely via VTC. Access to counsel and witnesses is an enormous challenge in these remote locations.[63]

Unlike in other immigration courts, the government barred attorney observers, press, and the public from accessing these facilities, in violation of U.S. Department of Justice (DOJ) regulations requiring immigration hearings generally to be open to the public.[64] Access to the tent courts is critical to ensuring due process, and AILA, along with several other organizations [65] and numerous members of Congress,[66] repeatedly voiced concerns about the lack of transparency. Since they opened, AILA has sent three delegations to visit the tent facilities.

In response, and after months of public demand for access, the *Wall Street Journal* reported on December 29, 2019, that DHS directed component agencies to open the tent courts to the public.[67] The DHS acknowledgement that transparency is both necessary and required is a vital first step toward upholding due process in tent courts. On January 24, DHS and DOJ provided a tour of the Laredo facility to AILA and other organizations. This was an important step toward transparency which offered additional information about operations and procedures. However, thus far, DHS and DOJ have operationalized the facility in a way that still presents serious obstacles to transparency, access to counsel, and due process.[68]

The due process concerns with tent courts are severe – from the volume of cases and a dearth of counsel to the lack of notice and dangerous conditions in Mexico. The tent courts separate America's immigration courts even further from justice. In the words of Judge Tabaddor, "it's

---

[62] Haley Willis et al., Trump Is Having Tent Courthouses Built Along the Border. Here's What They Look Like N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/video/us/politics/100000006681200/border-immigration-tent-courthouses.html?src=vidm.
[63] American Immigration Lawyers Association, AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel (June 3, 2019), https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp.
[64] 8 CFR § 1003.27.
[65] Organizations Urge Congress to Conduct Significant Oversight of Remain in Mexico and Use of Tent Courts by DHS and DOJ (Oct. 7, 2019), https://www.aila.org/advo-media/aila-correspondence/2019/organizations-urge-congress-to-conduct-significant.
[66] Members of Congress Call for Investigation of Tent Courts (Oct. 17, 2019), https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/members-of-congress-call-for-investigation-of-tent.
[67] DHS spokeswoman Heather Swift said that: "In an effort to ensure consistency, clarity, and transparency, the acting secretary directed [component agencies] to formalize guidance for public access to these facilities, consistent with immigration courts across the country." -Michelle Hackman, U.S. Opens Immigration 'Tent Courts' to Public WALL STREET JOURNAL (Dec. 29, 2019), https://www.wsj.com/amp/articles/u-s-opens-immigration-tent-courts-to-public-11577620801.
[68] American Immigration Lawyers Association, Policy Brief: Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent (Jan. 10, 2020), https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful.

more like what you might see, perhaps, in China or Russia, countries that we hear asylum cases from."[69]

IV. AILA's Recommendations for Reform

For years we have seen the detrimental effects of a politicized immigration-court system. Administrations have repeatedly made policy decisions not because they are efficient or legally sound, but because they are politically expedient. The immigration courts have been pushed to their breaking point: band-aid fixes and short-term solutions are no longer enough to reverse course. To ensure an immigration court system that meets today's needs, Congress must enact legislation that moves them outside of DOJ and into an independent, Article I court system. In the immediate term, Congress should closely monitor EOIR practices and request data regarding the processing of cases to ensure that every individual appearing before the immigration courts receives a fair hearing.

[69] Gus Bova, Immigration Judge Slams 'Remain in Mexico' Tent Courts (Sept. 24, 2019), https://www.texasobserver.org/tent-courts-ashley-tabaddor-border-laredo-asylum-immigration/.

Ms. JAYAPAL. Thank you. Thank you so much.
Ms. Martinez, you are recognized.

TESTIMONY OF JUDY PERRY MARTINEZ

Ms. MARTINEZ. Good morning, Chair Jayapal, Ranking Member Buck, and members of the subcommittee. My name is Judy Perry Martinez, and I'm president of the American Bar Association. And the ABA appreciates the opportunity to share our views on the state of judicial independence and due process in the U.S. immigration courts.

I am not an immigration lawyer, but I have litigated for more than 35 years, both in private practice and as in-house counsel and also served as chief compliance officer in the aerospace and defense industry. I've traveled to Texas, to the border of south Texas several times, volunteering for a workweek. And when I did so, I traveled to help—at ProBAR work, and I traveled to help those seeking asylum. I interviewed individuals in detention, spent time observing proceedings in immigration court. I toured the Brownsville port court before it opened and crossed into Mexico to see how the asylum seekers are fairing in Matamoros as they waited for their day in court.

What I have seen personally and what the ABA has determined through its various projects and studies is that there are serious challenges to due process in our current immigration court system, judicial independence is at significant risk, and that fundamental change is necessary.

One of the distinctive hallmarks of our democracy is an independent judiciary, the principle that all those present in our country are entitled to a fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom, separate families, and in the case of those seeking asylum, may be a matter of life and death. Yet the immigration court system lacks the basic structural and procedural safeguards that we take for granted in other areas of our American justice system.

This issue is not new to the American Bar Association. The ABA Commission on Immigration in 2010 issued a comprehensive report on the immigration removal adjudication system. In an update in 2019, both reports found serious flaws in the system and ultimately determined that the immigration courts must be moved out of the Department of Justice to ensure judges have full decisionmaking authority and independence without fear of reprisal or improper political influence. After evaluating several models, we concluded that an independent Article I court should be established.

Judicial independence is a key component of due process, and over the course of many administrations, we have seen the adoption of policies that undermined independence of judicial—of immigration judges' ability to perform their role as neutral arbitrators of fact and law and the prioritization of cases accelerates over due process.

Recent examples include the increased use of Attorney General certifications authorities, implementation of and greater reliance on problematic performance metrics, reshuffling of dockets to match

enforcement priorities over efficient management, and the elimination of previously available docket management tools.

Other serious considerations that impact due process include the continuing challenge to ensure access to counsel in immigration proceedings. We hope that one day a system of appointed counsel will be available, but until that day, until that happens, it is vital to maintain an enhanced program such as the Legal Orientation Program that seeks to increase access to legal information and representation for noncitizens in immigration proceedings. We appreciate Congress' past support of LOP and urge that it continue.

Another serious issue of concern is EOIR's recent initiative to replace in-court interpreters with informational videos at initial immigration court proceedings. Without reliable and accurate interpretation services, unrepresented noncitizens have little or no ability to meaningfully participate in court proceedings. This is why the ABA has long supported the use of in-person language interpreters in all courts, including immigration.

Finally, many of our concerns regarding the lack of due process in immigration court systems are exemplified and exacerbated by the Remain in Mexico program. There are serious issues with access to counsel with only about 4 percent of persons in MPP having the ability to have representation. For those who do find a lawyer, their ability to consult is severely limited in the tent courts, forcing counsel to potentially travel to dangerous locations in Mexico.

The procedures also inhibit due process. Notices to appear issued with insufficient addresses, respondents having to travel through dangerous areas, and proceedings conducted through video teleconferencing, mostly out of sight of the public, and only limited access on the day of the hearing to meet with counsel, and no right to meet with counsel following a hearing.

This does not look like justice. These are fundamental violations of due process and the right to meaningful access, and we urge you to take action now.

Thank you.

[The statement of Ms. Martinez follows:]

STATEMENT OF JUDY PERRY MARTINEZ
President
American Bar Association

to the

SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

for the hearing on

"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Chair Lofgren, Ranking Member Buck and members of the Subcommittee:

My name is Judy Perry Martinez and I am the President of the American Bar Association (ABA). The ABA appreciates this opportunity to share our views for this hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts."

The American Bar Association is the world's largest voluntary professional organization of lawyers and legal professionals and our members include a broad cross-section of lawyers, judges, academics, and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. Through its Commission on Immigration, the ABA provides continuing education to the legal community, judges, and the public and develops and assists in the operation of pro bono legal representation programs.

The health of all our nation's court systems is of paramount importance to the ABA. One of the distinctive hallmarks of our democracy is our insistence on an independent judiciary - the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, the proceedings before an immigration court may be a matter of life and death. Yet, the immigration court system lacks the basic structural and procedural safeguards that we take for granted in other areas of our justice system.

Our perspectives on the state of the immigration court system are informed in part by the first-hand experiences of ABA staff and volunteer lawyer members who provide legal services to individuals in immigration proceedings. The ABA has two long-standing pro bono projects that provide direct legal services. The South Texas Pro Bono Asylum Representation project (ProBAR), located in Harlingen,Texas, provides legal services to immigrants and asylum-seekers, adults and children, particularly in detention. It is the largest provider of legal services for unaccompanied immigrant childen in the country. ProBAR recently began extending services providing limited legal assistance to asylum seekers living in Matamoros, Mexico while their U.S. immigration proceedings are pending, under the Remain in Mexico policy. The Immigration Justice Project (IJP), located in San Diego, provides legal orientation for 3,500 to 4,000 adult detainees every year as well as legal counsel for detained and non-detained adult migrants, including many who are mentally incompetent to represent themselves.

The ABA's views are also informed by extensive studies and reports undertaken by our various sections, commissions, and committees. In 2010 the ABA Commission on Immigration published a comprehensive report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of*

Removal Cases.[1] In early 2019, the Commission released an update[2] to this report which examined developments over the period of 2010-2018. The update report found that the state of the immigration court system has worsened considerably since the initial 2010 report. At that time, we identified numerous issues hindering due process and the fair administration of justice in the immigration court system and most of these issues continue today.[3] Crucially, the number of cases pending before the immigration courts (about 262,000 cases at the time of the 2010 report) has increased to unprecedented levels, with a current backlog of more than 1,000,000 cases.[4]

While the backlog and increased wait times negatively affect the fairness and effectiveness of the immigration system, current policies and enforcement priorities that aim to accelerate case resolution are further imperiling due process and the viability of the immigration courts.[5] Moreover, judicial independence has been called into question with the adoption of policies that undermine immigration judges' ability to perform their role as neutral arbitrators of fact and law.[6] These concerns go to the very essence of an impartial court.

We highlight below some recent developments that have had a serious impact on the immigration courts' independence and ability to ensure due process. While there are incremental reforms that we would recommend be implemented within the current structure, we ultimately believe the only way to resolve the serious systemic issues within the immigration adjudication system is through the transfer of the immigration court functions from the Department of Justice to a newly-created independent Article I court.

Challenges to Judicial Independence

One of the more pervasive ways in which judicial independence has been undermined is by ever-changing direction from the executive branch. Each administration has used the immigration courts as an extension of immigration enforcement mechanisms by adjusting priorities to align with the prevailing enforcement agenda. Executive orders and policies that reshuffle immigration

---

[1] American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010). https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf

[2] American Bar Association Commission on Immigration, *2019 Update Report, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2019). https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf

[3] *AP visits immigration courts across US, finds nonstop chaos*, KATE BRUMBACK, DEEPTI HAJELA and AMY TAXIN, Associated Press (Jan. 19, 2020) https://apnews.com/7851364613cf0afbf67cf7930949f7d3; *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?,* Marissa Esthimer, Migration Policy Institute, (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

[4] TRAC Immigration, *"Cubans, Venezuelans, and Nicaraguans Increase in Immigration Court Backlog,"* (Jan. 21, 2020), https://trac.syr.edu/immigration/reports/591/.

[5] National Association of Immigration Judges, "*The Immigration Court- In Crisis and in Need of Reform,*" (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf.

[6] *Id.*

judges' dockets without input or reference to the status of any other pending matters are disruptive and counterproductive to the independence of the courts and the administration of justice. This approach undermines judges' ability to independently manage their courtrooms and to administer their dockets in a fair and efficient manner, as well as the public's perception of judicial neutrality and independence. Efforts should be made to minimize political interference with immigration court operations and proceedings.

Adoption of Problematic Judicial Performance Metrics

Immigration judges are subject to performance criteria determined by the executive branch, which are often informed by policy goals rather than objective concern regarding the fair and unbiased functioning of the courts. In essence, immigration judges are in the untenable position of being both sworn to uphold judicial standards of impartiality and fairness while being subject to what appear to be policy-motivated performance standards.[7] While this has long been a reality of the immigration courts, the dilemma was elevated in 2018 when the Department of Justice (DOJ) announced a new performance evaluation system that requires immigration judges to complete 700 cases per year, have a remand rate of less than 15%, and meet at least half of six benchmarks without receiving an "unsatisfactory" rating in any of them.[8]

The National Association of Immigration Judges notes that the imposition of individual case production quotas and time-based deadlines tied to an individual immigration judge's performance evaluation is "unprecedented."[9] As Immigration Judges preside over individual cases they have in front of them on the desktops a color-coded dashboard on how they are doing against the required performance metrics.[10] Such an approach has the potential to pit personal interest of an Immigration Judge against due process and undermines judicial independence in a critical and direct way. While the justification has been to reduce case backlogs, the imposition of strict case production quotas ultimately is likely to expose judges' decisions to additional legal challenges and create additional backlogs. Individuals who believe that their cases were summarily decided because of an arbitrarily imposed deadline may be more likely to appeal, which would result in simply shifting the caseload burden to the Board of Immigration Appeals and the federal courts.

The case production quotas and time-based metrics should be rescinded and replaced with a more robust and transparent review process for immigration judges, where immigration judges are evaluated not only on management of their dockets but also, importantly, their command of substantive law and procedural rules, impartiality and freedom from bias, clarity of oral and

---

[7] Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" 2 (Apr. 18, 2018), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf.

[8] Memorandum from EOIR Director James McHenry, Immigration Judge Performance Metrics (Mar. 30, 2018), http://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.

[9] Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America's Immigration Court System, *supra* note 7 at 7-8.

[10] *FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog*, American Immigration Lawyers Association, Feb. 21, 2019 (providing a sample image of the "IJ Performance Data Dashboard"), https://www.aila.org/File/DownloadEmbeddedFile/79301.

written communications, judicial temperament, administrative skills, and appropriate public outreach. The ABA recommends a judicial performance review model based on the ABA's Guidelines for the Evaluation of Judicial Performance[11] and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System. These models stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence.

Elimination of Judicial Tools to Dispose of Cases

The potential negative impact of the increased emphasis on quantitative performance metrics is further compounded by DOJ policies and actions that prohibit or discourage the use of other case and docket management tools previously available to immigration judges. In 2017 and 2018, DOJ and the Executive Office for Immigration Review (EOIR) sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination of proceedings as avenues to resolve cases.[12] In the decisions implementing some of these changes, the then-Attorney General stated repeatedly that immigration judges may "exercise only the authority provided by statute or delegated by the Attorney General" and that they have no "inherent authority" to use docket management tools unspecified by regulation.[13]

Increased Use and Delegation of Attorney General Certification

The Board of Immigration Appeals (BIA) is the highest administrative body to interpret and apply the immigration laws throughout the nation.[14] The BIA has appellate jurisdiction and reviews cases on appeal from the immigration courts. BIA precedential decisions are binding on the immigration courts and provide guidance on the proper interpretation of the Immigration and Nationality Act and its implementing regulations.[15]

Pursuant to existing federal regulations, the Attorney General is authorized to refer BIA decisions to himself or herself for adjudication.[16] Since 2017, there has been a notable increase in the Attorney General's use of the referral and certification power. Recently the certification process has been used, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies,[17] but also to decide substantive questions

[11] American Bar Association, *Black Letter Guidelines for the Evaluation of Judicial Performance* (Feb. 2005), https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.authcheckdam.pdf.
[12] *See* EOIR, Memorandum from MaryBeth Keller, Chief Immigration Judge, "Operating Policies and Procedures Memorandum 17-01: *Continuances*," (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download; *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).
[13] *See Matter of Castro-Tum*, 27 I&N Dec. at 290, 292-93; *Matter of S-O-G- & F-D-B*, 27 I&N Dec. at 464-65.
[14] https://www.justice.gov/eoir/board-of-immigration-appeals
[15] 8 C.F.R. § 1003.1(d)(1).
[16] *Id.* § 1003.1(h)(1)(i).
[17] *See, e.g.*, *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

of law governing immigration proceedings that have resulted in reversing longstanding precedential decisions and limiting relief available under the asylum laws.[18]

The precedential implications of using the Attorney General's referral power to overturn longstanding precedent, diminish substantive relief, and eliminate traditional docket management tools is troubling from a due process and systemic standpoint. The Attorney General's referral authority should return to being used sparingly, and only to clarify immigration law after a full administrative review process at the BIA. Such review should be narrowly tailored to address the issues on appeal. It should not be used to rewrite immigration law or promote broad-based policy objectives.

Recently, EOIR issued an interim rule delegating to the EOIR Director the authority to refer a pending case for review and to adjudicate appeals that are not completed within certain time limits. The ABA is troubled by the authority delegated to the EOIR Director because it allows EOIR to pre-empt the process of full agency review by referring cases to the Director that have not been decided by the BIA. As the administrative body responsible for providing clear and uniform guidance to DHS, immigration judges, and the public on the relevant law, the BIA, not the EOIR Director (or the Attorney General), should be responsible for issuing appellate decisions. This is especially true for decisions that have the potential to create new precedent or revisit longstanding doctrine. Allowing the Director, who is appointed by the Attorney General, to refer cases to him- or herself without incorporating more transparency and due process safeguards into the process undermines the legitimacy of the immigration adjudication process.

Ensuring Due Process

Access to Counsel and Legal Information

Ensuring due process in the immigration court system is fundamentally linked to access to counsel and legal information. The ABA consistently has emphasized the importance of increased access to legal services and legal information for noncitizens in immigration proceedings because these services help noncitizens to navigate a complicated area of the law which, in turn, assists courts in making better informed and more efficient decisions.

The presence of competent counsel helps to clarify the legal issues, allows courts to make informed decisions, and can speed the process of adjudication.[19] Immigration judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens thus would facilitate the more efficient processing of claims and lessen the burden on the immigration courts. Moreover, whether a person has legal representation also has been shown to significantly impact the outcome of proceedings.

---

[18] *See, e.g.*, *Matter of E-F-L-H*, 27 I&N Dec. 226 (A.G. 2018) (holding that hearing not required in asylum case); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (limiting grounds for asylum claims based on domestic violence).
[19] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV. PA. L.REV. 1, 2 (2015), (finding that "involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings.").

For these reasons, the ABA supports the right to appointed counsel for vulnerable populations, such as unaccompanied children and the mentally ill and disabled, as well as for those who are indigent. However, until such a policy is put in place, it is critically important to retain and expand services such as the Legal Orientation Program (LOP). The LOP is administered by EOIR, which contracts with non-profit organizations to provide information about the court process and basic legal information to individuals in immigration detention through group orientations, individual orientations, self-help workshops, and pro bono screenings and referrals.

Until recently, LOP and several other important programs that seek to increase access to legal information and representation for noncitizens in immigration proceedings were administered by EOIR's Office of Legal Access Programs (OLAP). However, in a recent interim rule, EOIR eliminated OLAP and transferred its functions to the Office of Policy without ensuring that EOIR will continue to prioritize the important programs OLAP administered. For example, the rule removes prior regulatory language at 8 C.F.R. § 1003.0(f)(1) that provided OLAP with the authority to "[d]evelop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law[.]"[20] This language is replaced in new 8 C.F.R. § 1003.0(e)(1) with a passing reference to the Assistant Director of Policy's duty to "supervise and administer EOIR's *pro bono* and legal orientation program activities[.]"[21]

We hope that this reorganization of EOIR's internal structure will not impact the agency's commitment to the vitality of programs that facilitate access to legal information and representation for noncitizens. Any changes that would result in restricting access to, limiting the scope of, or politicizing the implementation of these critical programs would be strongly opposed by the ABA. We appreciate Congress' past support for LOP through the provision of increased funding and urge your continuing support for and oversight of this vital program.

Availability of Interpretation

The ABA has long supported the use of in-person language interpreters in all courts, including in all immigration proceedings, to ensure parties can fully and fairly participate in the proceedings. This is especially important for non-citizens, who are unfamiliar with the U.S. legal system, and face additional unique barriers to accessing information regarding their legal rights and responsibilities.

A noncitizen's ability to effectively communicate with the immigration court and make her case can be hampered by interpretation failures and these failures can undermine due process. Without reliable, accurate, and consistent interpretation services, unrepresented noncitizens have little or no ability to meaningfully participate in court proceedings. This problem is particularly pronounced for noncitizens whose primary language is uncommon or a regional indigenous dialect.

---

[20] *See* Executive Office for Immigration Review, *Organization of the Executive Office for Immigration Review*, 84 Fed. Reg. 44542 (Aug. 26, 2019).
[21] *Id.* at 44541.

We therefore are seriously concerned about EOIR's recent initiative to replace in-court interpreters with informational videos at initial immigration court hearings. This action has a detrimental impact on the fundamental due process rights of non-citizens appearing in immigration court. Replacing in-person language interpretation with informational videos at master hearings also is likely to undermine, rather than promote, the efficiency of the proceedings.[22] In addition, the accuracy and integrity of the proceedings are implicated when the non-citizen respondent does not have the information she needs to meaningfully participate. The inevitable barriers to communication and confusion that will result are likely to lead to additional delays, as well as an increased number of appeals and remands.

The ABA understands and is sensitive to the challenges inherent in finding qualified interpreters for the many languages spoken by non-citizens who appear before the immigration courts. Nevertheless, in immigration proceedings, where an individual's liberty and personal safety are often at stake, it is especially important that each non-citizen respondent clearly understands her legal rights and obligations, and can respond in a meaningful way.

The ABA believes that the challenges to judicial independence and due process discussed above, as well as others not addressed here, can ultimately only be truly alleviated by fundamentally restructuring the immigration adjudication system.

Remain in Mexico policy

Many of our concerns regarding the lack of due process in the immigration court system are exemplified, but also significantly exacerbated, by the Administration's Remain in Mexico, or Migrant Protection Protocols (MPP) policy. Under MPP, Customs and Border Protection (CBP) officials return Spanish-speaking nationals from non-contiguous countries back to Mexico after they seek to enter the U.S. unlawfully or without proper documentation, unless the individual can show – in a truncated interview – that it is more likely than not that she will be persecuted or tortured in Mexico.

For asylum seekers returned to the Mexican border cities of Nuevo Laredo and Matamoros, hearings take place in soft-sided tent courts that are adjacent to the international bridges that connect Laredo and Brownsville, Texas to the Mexican cities of Nuevo Laredo and Matamoros, respectively. I and several ABA staff toured the tent court in Brownsville last summer, prior to its opening. During our tour, we were told that the facility had 60 rooms for attorneys to meet with their clients; but, it has become apparent that these rooms are not able to be fully utilized. Attorneys may enter the tent courts only to appear at a hearing for an asylum seeker the attorney already represents; attorneys are not permitted to enter the tent courts to screen potential clients or provide general legal information. Nor are asylum seekers permitted to enter the U.S. to consult with their attorneys, other than for one hour preceding their scheduled hearings. And asylum seekers are not allowed to meet at the court with their attorney following their hearing. An asylum seeker who thus has questions about the proceedings in which she participated or has

[22] *Confusion, delays as videos replace interpreters at immigrants' hearings*, San Francisco Chronicle, Tal Kopan, Sept. 5, 2019, https://www.sfchronicle.com/politics/article/Confusion-delays-as-videos-replace-interpreters-14414627.php

further information to provide to her attorney under privilege cannot do so even though they are both physically present at the tent court. This makes it nearly impossible for MPP asylum seekers to exercise their statutory right to be represented by counsel in removal proceedings.

To render legal services to MPP asylum seekers, U.S.-licensed attorneys either must travel into dangerous Mexican border cities, or try to fulfill their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients. In Matamoros and other border cities, private attorneys and non-profit organizations have formed small groups of volunteers to provide pro se assistance to asylum seekers, but they can only help a small portion of the individuals who need assistance. They face persistent logistical challenges when helping asylum seekers to fill out applications for relief and translate supporting evidence into English. The data confirms that the barriers MPP places on meaningful access to counsel are nearly insurmountable. As of December 2019, fewer than 5 percent of asylum seekers subjected to MPP had secured legal representation.[23]

The hearing process for MPP asylum seekers also does not comport with fundamental notions of due process. MPP asylum seekers are handed notices to appear while in CBP custody in the U.S. before being returned to Mexico. But because most do not have stable shelter in Mexico, the government is not able to reliably serve them with notice if their hearing date changes or is cancelled. Paperwork that accompanies the notices to appear instructs MPP asylum seekers to present themselves at international bridges four hours before their hearings. If they are unable to make the dangerous journey or fail to receive notification of changes in their hearing date, asylum seekers risk being ordered removed *in absentia*.

During MPP hearings, the immigration judge and government counsel often appear via video conference, and no simultaneous interpretation is provided for MPP asylum seekers at the tent courts who are not fluent in English. Generally, the interpreter, who is present with the immigration judge via video conference, interprets only procedural matters and questions spoken by and directed to the asylum seeker by the immigration judge.

Instead of making immigration court proceedings more efficient, the MPP program has had the opposite effect of seriously delaying cases of individuals currently in detention in the border region. For example, attorneys in South Texas have shared that it is now taking two to three months to get a bond hearing, a matter that would have taken a week in the past. These delays raise serious due process concerns and increases the cost to the government when individuals who are eligible for release from detention are forced to remain detained for months before having and Immigration Judge review their custody status. Advocates at the border have also explained that MPP hearings are often changed at the last minute and without prior notice to respondents or their attorneys, causing chaos and confusion for all involved. Furthermore, policies around the MPP program have been implemented inconsistently, making it virtually impossible for attorneys to provide reliable legal advice. For example, over the last few months ICE and CBP have treated asylum-seekers who are granted relief differently, some have been returned to Mexico, others have been detained, and others have been paroled into the country.

[23] TRAC Immigration, "Details on MPP (Remain in Mexico) Deportation Proceedings", https://trac.syr.edu/phptools/immigration/mpp/ (data through December 2019).

The ABA opposes the MPP policy given the serious due process deficiencies inherent in its operation and we are appreciative of the House's commitment to conduct oversight of this very troubling program.

Establishing an Independent Immigration Court System

The immigration adjudication system has evolved numerous times in recent history,[24] but there has been no major structural change since 1983, when EOIR was established.[25] The immigration court's continued existence within the Department of Justice, with its personnel and operations subject to direct control by the Attorney General, who is also the chief law enforcement officer for the Federal government, is a fatal flaw to the reality, and perception, of independence.

Proposals to create an Article I court to replace the current immigration adjudication system are not new or novel. In 1981, the congressionally-created Select Commission on Immigration and Refugee Policy made such a recommendation in its final report. Several bills were introduced in the House of Representatives in the late 1990s.[26] More recently, many experienced and respected organizations and individuals have reached a similar conclusion. These include, among others, the American Immigration Lawyers Association[27], the Federal Bar Association,[28] and the National Association of Immigration Judges. The ABA in 2006 urged that immigration judges and courts not be subject to the control of any executive branch cabinet officer. In 2010, we adopted a position specially calling for the creation of an Article I court.

In our view, any major court system restructuring should be aimed at attaining the following goals: (1) Independence - Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions without any improper influence, particularly where that influence makes the judges fear for their job security, (2) Fairness and perceptions of fairness - Not only must the system actually be fair, it must appear fair to all participants, (3) Professionalism of the immigration judiciary - Immigration judges should be qualified and experienced lawyers representing diverse backgrounds, and (4) Increased efficiency - An immigration system must process immigration cases efficiently without sacrificing quality, particularly in cases where noncitizens are detained.

With these goals in mind, we examined three basic restructuring options: 1) Article I Court - an independent Article I court system which would include both a trial-level and an appellate-level tribunal; 2) Independent Agency - a new executive adjudicatory agency, which would be independent of any other executive department or agency, to replace EOIR and contain both trial

---

[24] DOJ EOIR, *Evolution of U.S. Immigration Court System: Pre-1983*, https://www.justice.gov/eoir/evolution-pre-1983.

[25] DOJ EOIR, *Evolution of U.S. Immigration Court System: Post-1983,* https://www.justice.gov/eoir/evolution-post-1983

[26] *See* H.R. 185, United States Immigration Court Act of 1999, 106th Cong. (1999); H.R. 4107, United States Immigration Court Act of 1998, 105th Cong. (1998); H.R. 4258, United States Immigration Court Act of 1996, 104th Cong. (1996).

[27] RESOLUTION ON IMMIGRATION COURT REFORM, AILA Board of Governors, Winter 2018, http://www.aila.org/File/DownloadEmbeddedFile/74919.

[28] Federal Bar Association, *Article I Immigration Court*, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/

level administrative judges and an appellate-level review board; and 3) Hybrid - a hybrid approach placing the trial-level adjudicators in an independent administrative agency and the appellate-level tribunal in an Article I court.

While we believe all three models would have advantages over the current system, we determined that the Article I model presented the best option for meeting the goals and needs of the system. The Article I model is likely to be viewed as more independent than an agency because it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government. Given these advantages, in our view, the Article I court model is the preferred option.

The primary benefit of each of the models is to provide a forum for adjudication that is independent from any executive branch department or agency. Removing the adjudication system from the Department of Justice, whose primary function is a law enforcement agency, is vital to assuaging concerns about fairness and the perception of fairness. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication.

An Article I court also should attract highly-qualified judicial candidates and help to further professionalize the immigration judiciary. History has shown the potential for the politicization of the hiring process and an inherent bias toward the hiring of current or former government employees. Removing the hiring function from the Department of Justice also may increase the diversity of experience in the candidate pool. Providing for a set term of sufficient length, along with protections against removal without cause, will similarly protect decisional independence and make Article I judgeships more attractive.

By attracting and selecting the highest quality lawyers as judges, an Article I court is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal. When appeals *are* taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands requesting additional explanations or fact-finding.

These improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.

We recognize that restructuring alone would not immediately solve all the challenges facing the immigration courts. Regardless of the structure of the system, the immigration courts will have to deal with challenges faced by all courts, such as funding, hiring personnel, technology, and day-to-day management. However, while there may be some short-term costs and inconveniences,

we believe that transitioning the system to an Article I court will bring long-term benefits to the government and those in the system.

Conclusion

The core principle of any fair adjudication system must be that independent and impartial judges decide cases on the merits, evaluating the facts and the law in each case, after a hearing that fully comports with due process. The current immigration court system fails to meet those goals in many respects. It is time for Congress to establish a truly independent Article I court.

Thank you for this opportunity to share our views.

Ms. JAYAPAL. Thank you.
Mr. Arthur, you're recognized.

TESTIMONY OF THE HONORABLE ANDREW R. ARTHUR

Mr. ARTHUR. Vice Chairman Jayapal, Ranking Member Buck, and members of the subcommittee, thank you for inviting me as a guest today.

The 465 immigration judges in our Nation's 63 immigration courts and the agency for which they work, EOIR, play a crucial role in our system of justice and national security but face many challenges. EOIR had been an afterthought for decades. It was inadequately funded and did not receive appropriate guidance or oversight from the executive branch. It has also borne the consequences of various executive branch immigration policies and priorities, as well as statutory flaws and poorly reasoned judicial opinions, that have encouraged migrants to enter and remain in the United States illegally.

In fiscal year 2019, 851,508 migrants were apprehended entering illegally along the southern border, a 13-year high. And in a change from the not-so-distant past, the majority, 473,682, were adults with children, known as FMUs. The overwhelmed limited DHS resources, resulting in many being released with nothing more than an NTA and a court date.

A Federal bipartisan panel determined that such releases were the major, quote, pull factor, close quote, drawing those migrants to enter illegally a great danger to all and trauma to their children, which was exacerbated by a 2015 ruling that accompanied minors be released within 20 days by DHS.

Largely as a result of the border crisis, IJs now face a crushing caseload of almost 1.1 million, not counting hundreds of thousands that are administratively closed. The backlog is bad for the parties, bad for the court, and bad for our system of justice. The administration, and in particular, DOJ, have responded to the crisis where Congress has not. Using their certification authority, the last three Attorneys General have created bright-line rules for IJs and the BIA to follow. The administration has fought for funding and worked with our regional partners to craft policies to turn off magnets that draw migrants to enter illegally.

These policies, though controversial, have worked and done so consistently with due process. December 2019 saw the lowest number of migrants apprehended at the border in 15 months. One such policy, the Migrant Protection Protocols, which is authorized by section 235(b) of the INA, requires inadmissible migrants at the southern border to wait for their hearings in Mexico. Last week, I observed MPP hearings in Texas and found that the IJs went above and beyond providing due process to those respondents.

Performance metrics for IJs instituted in October 2018 have also been controversial, but I note that last year, IJs completed more than 275,000 cases, 92 percent more than in fiscal year 2016, with just 97 IJ complaints, 42 percent fewer than 4 years before. The number of circuit court remands to EOIR, 602, is the lowest in 12 years, and just over one-third of the number of remands in fiscal year 2008.

I would also notice—note that Congress itself has mandated completion goals for asylum cases in section 208(d) of the INA, requiring those cases be adjudicated within 180 days absent exceptional circumstances.

Some who oppose these initiatives have called for abandoning the EOIR system and creating an independent Article I court outside the executive branch. This will not resolve the issues IJs face, which are largely driven by a lingering lack of resources and the backlog which, in turn, is driven by the crisis at the border exacerbated by the aforementioned legal flaws. Moreover, any restructuring would be complicated and expensive, absorbing resources that would be better directed toward improving EOIR and providing it with more funding.

The arguments in favor of restructuring are less compelling than they would appear. I served Attorneys General from both parties, and my independent judgment was never impinged in any way, nor was there any perception that my decisions were influenced by the fact that I had been a former INS attorney. AILA gave me a plaque thanking me for my service. I had a relatively high level of autonomy over my docket and could rearrange cases in appropriate situations. Most importantly, I ran my court in a professional manner and expected the same of the parties who appeared before me.

The arguments against restructuring, on the other hand, are compelling. Removing the functions of the EOIR from DOJ would have serious constitutional implications. Immigration determinations are closely tied to the foreign policy of the United States, an issue traditionally recognized as solely within the purview of the executive branch. In fact, the Judicial Conference of the United States, the policymaking body for the Federal court, generally opposes specialized courts in the judiciary and advises that any Article I immigration court remain in the executive branch. It would also largely remove congressional oversight of the courts, an issue that matters to me as a former staffer.

Finally, an Article I court would struggle for resources. Immigration is a contentious issue, and a future Congress with the power of the purse could easily starve an immigration court it did not agree with of funding. Our IJs need more resources and bright-line rules to guide their determinations. Both resources and guidance have been lacking for years. Fortunately, the administration has made both a priority.

Thank you for the opportunity to appear today, and I look forward to your questions.

[The statement of Mr. Arthur follows:]

Testimony of Andrew R. Arthur

Resident Fellow in Law and Policy

Center for Immigration Studies

To the Subcommittee on Immigration and Citizenship

United States House of Representatives

Committee on the Judiciary

For A Hearing Titled:

"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

9:00 a.m.

Room 2141, Rayburn House Office Building

Washington, DC 20515

Chairman Lofgren, Ranking Member Buck, and members of the subcommittee, I thank you for inviting me here today to discuss these issues, which are not only critical to our national security, but also to our system of justice.

The Executive Office for Immigration Review (EOIR), an office within the Department of Justice (DOJ), is headed by a Director "who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals [BIA], the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3."[1] The current cadre of 465 Immigration Judges (IJs)[2] in the nation's 63 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA.[3]

---

[1] *Office of the Director*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 11, 2019, available at: https://www.justice.gov/eoir/office-of-the-director.

[2] *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir.

[3] *See Office of the Chief Immigration Judge*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Jan. 21, 2020, available at: https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.

With respect to the appointment and authority of IJs, section 101(b)(4) of the Immigration and Nationality Act (INA)[4] states:

> *The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a [removal] hearing under section [240 of the INA]. **An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe**, but shall not be employed by the Immigration and Naturalization Service [INS]. [Emphasis added].*

As the foregoing demonstrates, the attorney general has significant authority as it relates to the duties of the IJ corps.

The immigration courts are not the only tribunals within EOIR. That office also has jurisdiction over the Office of the Chief Administrative Hearing Officer (OCAHO).[5] As its website[6] explains:

> *[OCAHO] is headed by a Chief Administrative Hearing Officer who is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990. These acts, among others, amended the Immigration and Nationality Act of 1952 (INA).*
>
> *Administrative Law Judges hear cases and adjudicate issues arising under the provisions of the INA relating to: (1) knowingly hiring, recruiting, or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (employer sanctions); (2) immigration-related unfair employment practices in violation of section 274B of the INA; and (3) immigration-related document fraud in violation of 274C of the INA. Complaints are brought by the Department of Homeland Security, the Immigrant and Employee Rights Section in the Civil Rights Division of the Department of Justice (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices), or private individuals or entities as prescribed by statute.*

I am personally and professionally familiar with each of these tribunals. From June 1992 to September 1994, I served as a law clerk to the late Hon. Joseph E. McGuire, an administrative

---

[4] Section 101(b)(4) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.

[5] *Office of the Director*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 11, 2019, available at: https://www.justice.gov/eoir/office-of-the-director.

[6] *Office of the Chief Administrative Hearing Officer*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Jan. 9, 2020, available at: https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer.

law judge in OCAHO. From November 2006 to January 2015, I served as an IJ at the York Immigration Court in York, Pennsylvania. I also appeared before both the San Francisco and Baltimore Immigration Courts as an Assistant District Counsel for the former INS, as well as an Associate General Counsel in the INS's General Counsel's Office. At the INS, I took appeals to the BIA and on certification to the attorney general. In addition, I performed oversight of EOIR as counsel to the House Judiciary Committee's Subcommittee on Immigration and Claims from July 2001 until I was appointed to the bench in November 2006. I also performed oversight of that office as Staff Director for the National Security Subcommittee at the House Committee on Oversight and Government Reform, from January 2015 until September 2016.

As EOIR's website[7] states:

> *The primary mission of [EOIR] is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.*

Unfortunately, and for various reasons that I will discuss below, EOIR has failed to live up to at least one aspect of its mission as it relates to the immigration courts: the expeditious administration of the Nation's immigration laws, as the Government Accountability Office (GAO) detailed in great depth in a June 2017 report.[8] The backlogs identified by GAO affect each of the parties appearing before the immigration courts, both the alien respondents and the government, which is represented by attorneys from U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS).

With respect to the aliens, delays of years awaiting a hearing on removability and applications for relief can mean that evidence will be lost or unavailable, and that witnesses may die or become unavailable before their cases can be heard. That said, the Supreme Court has held that "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."[9] While this is true in many if not most cases, it is not true in the case of an alien whose due process rights have been affected by delays, or true in the case of an alien seeking relief for which the alien is eligible. In particular, aliens who are eligible for asylum must await adjudication on those applications before they are able to truly settle in the United States, and obtain status for their relatives abroad.

These delays affect the government and our system of justice, for many of the same reasons. Civil rights icon and first African-American woman to be elected to the House of

---

[7] *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: https://www.justice.gov/eoir.

[8] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017 *available at*: https://www.gao.gov/assets/690/685022.pdf

[9] *INS v. Doherty*, 502 U.S. 314, 323 (1992), *available at*: https://scholar.google.com/scholar_case?case=8707621299668215514&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

Representatives from the South, Barbara Jordan, was named by President Clinton to be the Chairman of the Commission on Immigration Reform in 1993.[10] She stated in February 1995 testimony before the predecessor to this subcommittee: "Credibility in immigration policy can be summed up in one sentence: those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave."[11] In addition, as with alien respondents, government evidence and witnesses may be unavailable at a hearing set years in the future.

These backlogs also affect the immigration courts themselves. It is difficult as a judge to fairly adjudicate a case that is subject to multiple continuances over a period of years. The court record is known as the Record of Proceedings (ROP). As the parties file evidence, those ROPs can become quite voluminous, sometimes running hundreds of pages in length. The judges must familiarize themselves with those ROPs for each individual hearing. Multiple continuances, and massive dockets, make this a daunting proposition, particularly given the fact (as I detail below) that immigration judges have only limited case-preparation time.

To put the immigration-court backlogs into context, I will summarize and detail the findings of GAO in its June 2017 report, and offer my perspective on the reasons for those backlogs. Put simply, however, the immigration courts have suffered from neglect for years, and have also been adversely affected by past failed immigration policies and convoluted federal court decisions, issues that the present administration has been attempting to address.

Summary of Immigration Court Backlogs as identified by GAO

On June 1, 2017, GAO issued a long-awaited report on the management of the immigration-court system by EOIR.[12]

In particular, GAO found:

- The immigration courts' "case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [(FY)] 2006 through 2015 . . . **primarily due to declining cases completed per year**." [Emphasis added].[13]
- The courts' backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000

---

[10] *Honor Barbara Jordan as a fiery apostle of moderation*, Editorial Board, HOUSTON CHRONICLE, Aug. 3, 2019, available at: https://www.houstonchronicle.com/opinion/editorials/article/Honor-Barbara-Jordan-as-a-fiery-apostle-of-14277522.php.

[11] *Hearing before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims*, 104th Cong. (1995) (statement of Barbara Jordan, Chair, U.S. Commission on Immigration Reform), available at: https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1995_Feb.%2024-1.pdf.

[12] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017 *available at*: https://www.gao.gov/assets/690/685022.pdf.

[13] *Id*. "Highlights."

pending cases at the start of FY 2015, when the median pending time was 404 days.[14] As I will explain below, those were the "good old days" as relates to backlogs.

- "[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015,"[15] and "[IJ]-related continuances increased by 54 percent from about 47,000 continuances issued in [FY] 2006 to approximately 72,000 continuances issued in [FY] 2015."[16] DHS attorneys and others complained that the "frequent use of continuances [by IJs] resulted in delays and increased case lengths that contributed to the backlog."[17]
- The number of cases the immigration courts "completed annually declined by 31 percent between [FY] 2006 and [FY] 2015 -- from 287,000 cases completed in [FY] 2006 to about 199,000 completed in [FY] 2015".[18]
- Total case completions declined, even though the number of IJs increased 17 percent.[19]

There are a number of reasons for the increase in the backlog:

- Resources. There were, and still are too few judges and support staff to do the job adequately, even though the number of immigration judges has increased by 85 percent over the past five years.[20]
- Increases in benefits and leave. IJs are government employees, and as they get more seniority, they receive more leave. This limits the amount of time that is spent hearing cases.
- The "surge." The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.[21] EOIR responded by "prioritizing" certain "cases involving migrants who ha[d] recently crossed the Southwest border and whom DHS ha[d] placed into removal proceedings."[22] This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also

---

[14] *Id*. at 22.
[15] *Id*. "Highlights."
[16] *Id*. at 68.
[17] *Id*. at 27.
[18] *Id*. at 22.
[19] *Id*. at 23.
[20] *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir.
[21] *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated Oct. 18, 2016, *available at*: https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.
[22] *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated Jul. 9, 2014, available at: https://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us.

more complicated[23] than cases involving single adult males, requiring more courtroom time (and continuances) per case.

- Case law: Recent federal court decisions have complicated IJs' removal decisions[24], slowing proceedings and requiring additional continuances. In addition, until reversed by the Supreme Court[25], decisions from the Ninth Circuit Court of Appeals[26] increased the number of aliens who were eligible for bond, requiring the scheduling of bond hearings and rescheduling of cases when aliens were released from custody.
- Obama administration immigration policies. Policies instituted in the last administration led to numerous continuances, as aliens sought counsel and applied for relief or discretionary closures, release, or termination based on those policies.
- IJ burnout. A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This, in turn, results in more reversals and remands, adding even more cases to the backlog.

Policies of the current administration will, if properly implemented and supported by Congressional appropriations, ease and begin to reduce the backlogs:

- The last three attorneys general (two permanent, one acting) have hired significantly more IJs in the last three years[27], and streamlined the hiring of IJs.[28]
- Changes in border enforcement policies will, if allowed to stand, limit the number of new cases that are added to the immigration courts' dockets.
- Changes to interior enforcement policies could reduce the incentives for aliens to remain in the United States and fight meritless cases.
- Rescission of policies from the previous administration could also reduce the incentives for aliens to remain in removal proceedings.

There is more that the administration can do, however:

- The attorney general must continue to use his certification authority to set bright-line standards for IJs to follow in adjudicating cases.

---

[23] *See Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 23, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[24] *Id*. at 27-28.

[25] *Jennings v. Rodriguez,* 138 S. Ct. 830 (2018) (2018), *available at*: https://scholar.google.com/scholar_case?case=14215050066188926450&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[26] See *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf.

[27] *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir.

[28] "Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement", U.S. Department of Justice, Office of Public Affairs, dated Apr. 11, 2017, *available at*: https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal.

- DOJ must vigorously litigate cases in the federal circuit courts to provide the IJs with more workable rules to follow in deciding cases, and to limit variations in the law among the 11 circuits with jurisdiction over immigration.

Findings of the GAO Report

GAO "is an independent, nonpartisan agency that works for Congress. Often called the 'congressional watchdog,' GAO investigates how the federal government spends taxpayer dollars."[29] The impetus for the June 2017 and report was a request from Congress that GAO "review EOIR's management and oversight of the immigration court system, as well as options for improving EOIR's performance, including through restructuring."[30]

GAO determined that EOIR's "case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [FY] 2006 through 2015 . . . primarily due to declining cases completed per year."[31] Specifically, GAO found that backlog rose from "about" 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.[32]

Because of this backlog, GAO noted:

> *[S]ome immigration courts were scheduling hearings several years in the future . . . . As of February 2, 2017, half of courts [*sic*] had master calendar hearings scheduled as far as January 2018 or beyond and had individual merits hearings, during which immigration judges generally render case decisions, scheduled as far as June 2018 or beyond. However, the range of hearing dates varied; as of February 2, 2017, one court had master calendar hearings scheduled no further than March 2017 while another court had master calendar hearings scheduled in May 2021—more than 4 years in the future. Similarly, courts varied in the extent to which individual merits hearings were scheduled into the future. As of February 2, 2017, one court had individual hearings scheduled out no further than March 2017 while another court had scheduled individual hearings 5 years into the future—February 2022.*[33]

Interestingly, however, the increase in the case backlog did not directly result from an increase in new case receipts. GAO found that:

---

[29] *About GAO*, GOVERNMENT ACCOUNTABILITY OFFICE, undated, available at: https://www.gao.gov/about/index.html.
[30] Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 3 *available at*: https://www.gao.gov/assets/690/685022.pdf.
[31] Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, Highlights, *available at*: https://www.gao.gov/assets/690/685022.pdf.
[32] *See id.* at 22.
[33] *Id.*

> *[T]otal case receipts remained about the same in fiscal years 2006 and 2015 but fluctuated over the 10-year period, with new case receipts generally decreasing and other case receipts generally increasing. Specifically, there were about 305,000 total case receipts in fiscal year 2006 and 310,000 in fiscal year 2015. The number of new cases filed in immigration courts decreased over the 10-year period but fluctuated within this period. New case receipts increased about four percent between fiscal year 2006 and fiscal year 2009, from about 247,000 cases to about 256,000 cases, but declined each year after fiscal year 2009, with the exception of an increase in fiscal year 2014. Overall, new case receipts declined by 20 percent after fiscal year 2009 to about 202,000 during fiscal year 2015.*[34]

While the number of new cases received fell, the number of "other" case receipts by the court, including motions to reopen, reconsider, or recalendar, and remands by the BIA, increased by 86 percent over this 10-year period, from 58,000 cases in FY 2006 to 108,000 cases in FY 2015.[35]

As new case receipts fell, and other case receipts rose, the immigration courts were completing fewer cases annually. Incredibly, GAO found, "the number of immigration court cases completed annually declined by 31 percent from fiscal year 2006 to fiscal year 2015—from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015," even as the number of IJs increased by 17 percent over that 10-year period.[36]

Even those statistics do not tell the whole story, according to the GAO: During this 10-year period, the number of cases that were decided on the merits declined from 95 percent of all cases completed in FY 2006 to 77 percent completed in FY 2015, while the number of cases administratively closed increased.[37]

A case is decided on the merits when the IJ resolves all of the outstanding matters in the case—that is, whether the alien respondent is removable (or, in some cases, is an alien at all) and whether the alien should be granted any benefit or relief from removal that he or she seeks.[38] "Administrative closure," on the other hand, "is a docket management tool that is used to temporarily pause removal proceedings."[39] As GAO noted:

> *An [IJ] may grant administrative closure for various reasons, including in cases for which DHS exercises prosecutorial discretion and requests a case to be administratively closed because the respondent does not meet enforcement priorities . . . . A judge may also administratively close a case where the respondent plans to apply for certain immigration benefits under the jurisdiction of [U.S. Citizenship and Immigration Services (USCIS)], such as an*

---

[34] *Id*. at 21.
[35] *Id*.
[36] *Id*. at 22.
[37] *Id*. at 24.
[38] *See Immigration Court Practice Manual*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, at 75-78, available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf.
[39] See *Matter of W-Y-U-*, 27 I&N Dec. 17, at 17-18 (BIA 2017) (citations omitted), *available at*: https://www.justice.gov/eoir/page/file/958526/download. That

> *unaccompanied alien child's initial asylum claim, or other forms of relief due to specific circumstances such as being the victim of a severe form of trafficking in persons or certain qualifying crimes. An immigration judge can return an administratively closed case to the calendar at his or her discretion or at the request of the respondent or DHS attorney. The primary consideration for an immigration judge in evaluating whether to administratively close or recalendar proceedings is whether the party in opposition has provided a persuasive reason for the case to proceed and be resolved on the merits; and in considering administrative closure, the judge cannot review whether an alien falls within DHS's enforcement priorities.*[40] *[Internal citations omitted].*

The major driver in the backlog appeared to have been a significant increase in the amount of time that it was taking IJs to complete cases. In particular, GAO found that "[i]nitial case completion time," that is, "the time period between the date EOIR receives the [removal case charging document, the Notice to Appear [the "NTA" from DHS] and the date an [IJ] issued an initial ruling on the case"[41] grew "more than fivefold,"[42] between FY 2006 and FY 2015, with the "median initial completion time for cases" increasing "from 43 days in FY 2006 to 286 days in FY 2015."[43]

One of the main reasons why IJs were taking more time to complete cases today than they did 14 years ago is an increase in the number of continuances that IJs have granted over that period. As the GAO noted, logically: "[C]ases that experience more continuances take longer to complete."[44] After reviewing 3.7 million continuance records from FY 2006 through FY 2015, GAO concluded that continuances increased by 23 percent[45] from FY 2006 to FY 2015 with "the percentage of completed cases which had multiple continuances"[46] also increasing during that period. Most critically, the cases with the largest number of continuances that GAO identified, those with "four or more continuances," increased from nine percent of cases completed in FY 2006 to 20 percent of cases completed in FY 2015.[47] Those continuances made an impact, as GAO found: "[C]ases that were completed in [FY] 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete" that year.[48]

---

[40] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 24 n. 48, *available at*: https://www.gao.gov/assets/690/685022.pdf.
[41] *Id*. at 25, n. 50.
[42] *Id*. at 25.
[43] *Id*.
[44] *Id*. at 68.
[45] *Id*., Highlights.
[46] *Id*. at 69.
[47] *Id*.
[48] *Id*.

Reasons for the Increased Backlog

Why was there such a stark increase in the backlog of cases, and decrease in the percentage of cases completed? A variety of factors, some of them susceptible to analysis, others less so, contributed to what has become a vicious circle of backlog, delay, and continuance.

Resources

The first is resources. There were, and still are, simply put, too few IJs (and complementary staff) to adequately do the job. There are currently 465 IJs, including Assistant Chief IJs in the field who hear some cases.[49] According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, through December 2019, there were 1,089,696 pending cases in the nation's immigration courts.[50] This means that there are approximately 2,343 pending cases per IJ. In FY 2019, on average, IJs completed 708 cases each.[51] Therefore, even if no new cases were filed, it would take the immigration courts more than three years to complete their pending cases. As explained below, however, the number of new cases added to the courts' dockets increased significantly in FY 2019, largely as a result of the crisis at the border.

IJs are not the only human resource in short demand. In June 2009, TRAC reported that there were just under four IJs for each judicial law clerk (JLC).[52] As TRAC noted, JLCs "perform many functions that can help Immigration Judges handle their caseload . . . [and] are hired each year for temporary one-to-two year positions from recent law school graduates through the Attorney General's Honors Program."[53] I relied extensively on mine for case preparation, analysis of issues, and the drafting of decisions. Consequently, the fewer hours of a JLC's time that an IJ can draw upon, the more time an IJ must spend doing research on unique issues and drafting opinions. GAO also found that a lack of "other support staff" (including clerical workers and legal technicians) was a "contributing factor" in the backlog.[54]

---

[49] *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, December 20, 2019, available at: https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir.

[50] *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Court*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), December 2019, available at: https://trac.syr.edu/phptools/immigration/court_backlog/.

[51] Press Release: *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Oct. 10, 2019, available at https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019.

[52] *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), Jun. If but up the 18, 2009, available at: http://trac.syr.edu/immigration/reports/208/. But

[53] *Id*.

[54] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 27, *available at*: https://www.gao.gov/assets/690/685022.pdf.

Increasing Seniority of Immigration Judges

Second, the number of hours that those IJs actually spend hearing cases is, on average, shrinking as the judges gain seniority. According to GAO, 39 percent of all IJs were eligible for retirement,[55] which means that many are senior government employees, at the high end of the pay and leave scale. Senior government employees, those who have 15 or more years of federal government service, are entitled to eight hours of leave each pay period, about 208 hours or 23 (nine-hour) days per year.[56] There are also 10 federal holidays per year when court is not in session.[57] Finally, many if not most IJs are on a "flex schedule," or "alternative work schedule" (AWS), meaning that they work eight nine-hour days and one eight-hour day per pay period, and get one extra day off, for an additional 26 "working" days off per year. Assuming that there are 260 working days in a year (five days in a work week times 52 weeks in the year), any potential IJ entitled to the full rate of leave receiving each federal holiday with AWS may only be working 201 of them (260-23-10-26), or just more than 40 work weeks per year. In addition, IJs receive one-half day every two weeks for case preparation (far too little time for this purpose), another 13 "working" days per year not spent in court.

As a result, as IJs work their way up the federal employment ladder, they spend fewer and fewer actual hours in court hearing cases—or should, if they take their leave, which is critical to avoiding burnout. This likely explains in part why, as GAO found, continuances for "unplanned immigration judge leave—sick or annual leave" were up by 95 percent between FY 2006 and FY 2015.[58]

The Surge

Third, the "surge" in families across the Southwestern border has also contributed to the backlogs and delays in completion of cases in the immigration courts.

The number of unaccompanied alien children apprehended along the border increased by 76 percent (to 68,541) between FY 2013 and FY 2014, while the number of "family units" increased by 360 percent (to 68,445) during the same period, according to U.S. Customs and Border Protection (CBP).[59] EOIR responded on July 9, 2014 by "prioritizing" certain "cases involving migrants who have recently crossed the southwest border and whom DHS has placed into removal proceedings" in order to ensure "that these cases [were] processed both quickly and fairly to enable prompt removal in appropriate cases, while ensuring the protection of asylum

---

[55] *Id.* at 34.

[56] *See Fact Sheet: Annual Leave (General Information), Annual Leave Entitlement*, U.S. OFFICE OF PERSONNEL MANAGEMENT, undated, available at: https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/.

[57] *2020 Holiday Schedule*, U.S. OFFICE OF PERSONNEL MANAGEMENT, undated, available at: https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=2020.

[58] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[59] *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated Oct. 18, 2016, available at: https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

seekers and others."[60] Those "new priority" cases consisted of "unaccompanied children who [had] recently crossed the southwest border; families who [had] recently crossed the border and [were] held in detention; families who [had] recently crossed the border but [were] on 'alternatives to detention [ATD];' and other detained cases."[61] Specifically, "[t]o allocate resources with these priorities, EOIR [] reassign[ed IJs] in immigration courts around the country from their current dockets to hear the cases of individuals falling in these four groups," and "rescheduled [c]ases not falling into one of these groups . . to accommodate higher priority cases."[62]

This is likely a major contributing factor for the 112 percent increase between FY 2006 (3,296 cases) and FY 2015 (6,983 cases) in continuances for "[u]nplanned immigration judge leave — detail or other assignment" identified by GAO.[63]

In addition, as "experts and shareholders" told GAO:

> *[T]he nature of cases resulting from the surge exacerbated the effects of the backlog. Specifically, many of the surge cases were cases of unaccompanied children, which may take longer to adjudicate than other types of cases because, for example, such a child in removal proceedings could apply for various forms of relief under the jurisdiction of USCIS, including asylum and Special Immigrant Juvenile Status. In such cases the immigration judge may administratively close or continue the case pending resolution of those matters. Therefore, these experts and stakeholders told us that the surge not only added volume to the immigration court's backlog, but resulted in EOIR prioritizing the cases of unaccompanied children over cases that may be quicker for EOIR to resolve.*[64]

Increasing Legal Complexity

Fourth, federal court decisions have complicated the task facing IJs of deciding issues in removal cases in recent years, slowing the issuance of decisions. For example, GAO cited "EOIR officials" and IJs who:

> *[H]ighlighted increasing legal complexity as a contributing factor to longer cases and a growing case backlog. In particular, EOIR officials cited Supreme Court decisions in 2013 and 2016, which define analytical steps a judge must complete*

---

[60] *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated Jul. 9, 2014, available at: https://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us.

[61] *Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, undated, available at: https://www.justice.gov/iso/opa/resources/214201479112444959.pdf.

[62] *Id*.

[63] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[64] *Id*. at 27.

> *in determining whether a criminal conviction renders a respondent removable and ineligible for relief.*[65]

The cases highlighted[66] by the referenced "EOIR officials" did, in fact, complicate courts' application of the "categorical approach" that IJs are required to apply in determining removability on many criminal grounds (*Mathis v. U.S.*[67] and *Descamps v. U.S.*[68]), as well as the standard for determining whether a drug offense is "illicit trafficking in a controlled substance" and therefore an "aggravated felony" under section 101(a)(43)(B) of the INA[69] (*Moncrieffe v. Holder*[70]). In certain instances, those decisions would have mandated remands from the BIA and federal circuit courts, and may have rendered otherwise-ineligible aliens eligible for relief; either scenario would have extended the length of removal proceedings for IJ review and briefing by the parties.

More directly, however, the Ninth Circuit's decision in *Rodriguez v. Robbins*[71], both increased the number of cases on the immigration courts' dockets in the Ninth Circuit, and gave aliens in that circuit cause to continue to litigate otherwise meritless cases. In that decision, the Ninth Circuit held that aliens in detention for more than six months must receive individualized bond hearings before an IJ to justify their continued detention, and be provided bond hearings every six months thereafter.[72]

Under *Rodriguez*, an alien was entitled to a bond hearing wherein the **government** bore the burden of showing by **clear and convincing evidence** that the alien posed a risk of flight or a danger to the community.[73] This is a higher burden of proof than the "preponderance of the evidence" standard, "which only requires a showing that something is more likely than not to be true."[74] Moreover, unlike an initial bond hearing, where the alien bears the burden[75] of showing

---

[65] *Id*. at 27-28.
[66] *Id*.
[67] *Mathis v. United States*, 136 S. Ct. 2243 (2016), *available at:* https://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf.
[68] *Descamps v. United States*, 133 S. Ct. 2276 (2013), available at: https://www.law.cornell.edu/supremecourt/text/11-9540.
[69] Section 101(a)(43)(B) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.
[70] *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *available at*: https://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.
[71] *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015) *available at*: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf, *reversed and remanded sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), *available at*: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.
[71] *Id*.
[72] *Id*. at 1078-85.
[73] *Id*. at 1086-87.
[74] Michael Kaufman and Michael Tan, *Bond Hearings for Immigrants Subject to Prolonged Immigration Detention, in the Ninth Circuit*, AMERICAN CIVIL LIBERTIES UNION, Dec. 2015, at 8, available at: https://www.aclu.org/sites/default/files/field_document/2015.12.11_rodriguez_advisory.pdf.
[75] *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016), *available at*: https://www.justice.gov/eoir/file/881776/download.

that he or she is not a danger or flight risk, as noted, under *Rodriguez*, the government bore that burden for continued detention past six months. This decision logically encouraged aliens with questionable cases to continue to fight those cases, knowing that they had a greater chance to be released after six months. That decision was reversed and remanded by the Supreme Court in February 2018.[76]

Continuances

In addition, as GAO noted:

> *[T]he percentage of completed cases which had multiple continuances increased from fiscal year 2006 to fiscal year 2015 and that, on average, cases with multiple[] continuances took longer to complete than cases with no or fewer continuances. Specifically, 9 percent of cases completed in fiscal year 2006 experienced four or more continuances compared to 20 percent of cases completed in fiscal year 2015. Additionally, cases that were completed in fiscal year 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete in fiscal year 2015.*[77]

There has historically been, however, significant pressure from federal courts and the BIA on IJs to grant continuances, and little downside for the IJs in doing so.

By regulation, an IJ "may grant a motion for continuance for good cause shown."[78] Despite this permissive standard, a number of decisions limited IJs' discretion when it comes to denying continuances.

For example, in *Matter of Hashmi*[79], the BIA held:

> *In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.*

---

[76] *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), *available at*: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

[77] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[78] 8 C.F.R. § 1003.29, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-33983.html.

[79] *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009), *available at*: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3640.pdf.

The BIA made clear, however, that while the IJ "may also consider any other relevant procedural factors . . . [c]ompliance with an Immigration Judge's case completion goals . . . is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances."[80] Nor, the BIA held, were "[t]he number and length of prior continuances . . . alone determinative."[81]

Similarly, in *Simon v. Holder*[82], the Court of Appeals for the Third Circuit held that the BIA erred in denying a motion to reconsider a case in which an alien had been granted four continuances (over a period of almost two years), including a six-month continuance to seek adjustment of status. When, at the fifth hearing, there was no visa number available to the alien, alien's counsel "sought a further continuance or administrative closure of the removal case until a visa number was available."[83] The government attorney refused to agree to these requests, and the IJ ordered the alien deported.[84] The alien's appeal to the BIA was dismissed, and the alien filed a motion to reconsider with the BIA that was denied.[85]

In his motion to reconsider, the alien "argu[ed] that the BIA committed error by failing to address *Hashmi*;" in its denial, the BIA held "that the *Hashmi* factors were not applicable because [the alien] could not establish prima facie eligibility for adjustment: i.e., he could not establish that a visa was immediately available."[86] The Third Circuit held (more than five years after the case started) that the BIA erred in relying solely on "the remoteness of visa availability," and remanded the case.[87]

Cases involving pending visas are not the only ones in which IJs feel pressure to grant continuances. If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the IJ runs the risk of being accused of denying due process. Similarly, an IJ who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process. In such an instance, the IJ's reputation would be besmirched, and the BIA or circuit court would simply remand the case, in essence granting the continuance requested.

If an IJ grants a continuance, on the other hand, there has traditionally been little downside for the court. Attorneys for the government (who, as noted, work for ICE) have in the past been limited by policy in the number of appeals that they were allowed to take. Moreover, an appeal from a continuance would be "interlocutory" in any case, that is, it "asks the [BIA] to review a

---

[80] *Id*. at 793-94.
[81] *Id*. at 794.
[82] *Simon v. Holder*, 654 F. 3d 440 (3d Cir. 2011), *available at*: https://scholar.google.com/scholar_case?case=8844616972290064841&hl=en&as_sdt=6&as_vis=1&oi=scholarr
[83] *Id*. at 441-42.
[84] *Id*. at 442.
[85] *Id*.
[86] *Id*.
[87] *Id*. at 443.

ruling by the Immigration Judge before the Immigration Judge issues a final decision."[88] As the BIA has often held, however: "To avoid piecemeal review of the myriad questions that may arise in the course of proceedings . . . [it does] not ordinarily entertain interlocutory appeals."[89] For these reasons, and to conserve resources, ICE attorneys rarely appeal continuance grants, even if they do not agree with them: as GAO noted, government attorneys to whom it spoke told it "that granting multiple continuances in cases resulted in inefficiencies and wasted resources such as [those] attorneys having to continually prepare for hearings that continued multiple times."[90]

Obama Administration Policies

Sixth, Obama administration policies exacerbated the backlog and increased the number of continuances. One example of such a policy is "Deferred Action for Childhood Arrivals" (DACA).[91] As USCIS explains DACA:

> *On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.*[92]

To be granted DACA, an alien has to have been born after June 14, 1981, have come to the United States before age 16, and "have continuously resided in the United States since June 15, 2007, up to the present time."[93] USCIS states that even aliens in "removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA."[94]

In fact, many DACA-eligible aliens were in proceedings at the time that DACA was announced, and many sought (or were granted) continuances to apply for that relief. As one immigration practitioner put it: "Requesting prosecutorial discretion or seeking time to have a DACA

---

[88] *Board of Immigration Appeals Practice Manual*, § 4.14, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, dated Jul. 27, 2015, at 69, *available at*: https://www.justice.gov/eoir/file/431306/download.
[89] See *Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007), *available at*: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3561.pdf.
[90] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, *available at*: https://www.gao.gov/assets/690/685022.pdf.
[91] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Feb. 14, 2018, *available at*: https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines.
[92] *Id*.
[93] *Id*.
[94] *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Mar. 8, 2018, *available at*: https://www.uscis.gov/archive/frequently-asked-questions#evidence.

application adjudicated can serve as a basis to seek a continuance. In other words, making such a request can serve as the 'good cause' required by the regulations."[95]

Another Obama administration policy that adversely affected the completion of removal proceedings is the aforementioned "prosecutorial discretion." Generally, "'[p]rosecutorial discretion' is the authority of an agency or officer to decide what charges to bring and how to pursue each case."[96] Explaining early prosecutorial actions of the Obama administration, the Immigration Policy Council stated in a May 26, 2011 fact sheet:

> *[M]any community groups . . . called for exercising prosecutorial discretion in individual cases by declining to put people in removal proceedings, terminating proceedings, or delaying removals in cases where people have longstanding ties to the community, U.S.-citizen family members, or other characteristics that merit a favorable exercise of discretion.*
>
> *Over the course of the summer [of 2011], the Obama Administration began to address these requests [and requests from Congress], relying on its ability to exercise prosecutorial discretion in deportation decisions. On June 17, 2011, [ICE] Director John Morton issued a memorandum directing ICE staff to consider many of these same factors when deciding whether or not to exercise prosecutorial discretion. On August 18, 2011, in a response to the letter from Senator Durbin and others, DHS Secretary Janet Napolitano declined to grant deferral of removal to DREAM Act students across the board, but indicated a willingness to re-examine individual cases. She announced a two-pronged initiative to implement the June 2011 Morton memo across all DHS divisions to ensure that DHS priorities remained focused on removing persons who are most dangerous to the country.*
>
> *The new initiative involve[d] the creation of a joint committee with [DOJ to] review each of the nearly 300,000 pending removal cases to assess whether each case me[t] the high priority factors set forth in the June 2011 Morton memo. In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases [were to be] administratively closed following this review – that is, they [would] be removed from the active docket of the immigration courts.*[97]

---

[95] Miley & Brown, P.C., *Removal Proceedings – Practical Tips In A Post DACA/DAPA World*, undated, *available at*: https://www.mileybrown.com/Articles/Removal-Proceedings-Practical-Tips-In-A-Post-DACA-DAPA-World.shtml.

[96] *Understanding Prosecutorial Discretion in Immigration Law*, AMERICAN IMMIGRATION COUNCIL, May 26, 2011, *available at*: https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law.

[97] *Understanding Prosecutorial Discretion in Immigration Law*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, dated September 2011, *available at*: https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf.

As the then-ICE Acting Principal Legal Advisor stated in a memorandum (OPLA memo) describing the agency's actions during this period: "In late 2011 and 2012, [ICE] attorneys performed a complete review of all cases pending on the [EOIR] court dockets, exercising prosecutorial discretion as appropriate."[98]

Thereafter, on November 20, 2014, then-Secretary of Homeland Security Jeh Johnson issued a new memorandum on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,"[99] also known as the "Enforcement Memo." The Enforcement Memo set the following immigration priorities for DHS:

> *Priority 1 (threats to national security, border security, and public safety)*
>
> *Aliens described in this priority represent the highest priority to which enforcement resources should be directed:*
>
> *(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;*
>
> *(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;*
>
> *(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 52 l(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;*
>
> *(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and*
>
> *(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the [INA] at the time of the conviction.*
>
> *The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.*

---

[98] Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Apr. 6, 2015, at 1-2, *available at*: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

[99] Jeh Johnson, Secretary of Homeland Security, "*Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*", Department of Homeland Security, Nov. 20, 2014, *available at*: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration

> *system or there are factors suggesting the alien should not be an enforcement priority.*[100]

As the Enforcement Memo stated:

> *In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release;* ***whether to settle, dismiss, appeal, or join in a motion on a case****; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.*[101] *[Emphasis added].*

Providing guidance to ICE attorneys on the implementation of these policies, the OPLA memo directed ICE attorneys to:

> *[C]ontinue to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of the enforcement priorities. OPLA should generally seek administrative closure or dismissal of cases it determines are not priorities. [ICE] attorneys should also review available information in incoming cases to determine whether, in a case that falls within an enforcement priority, unique factors and circumstances are present that may warrant the exercise of prosecutorial discretion. Understanding that these factors and circumstances may change as the case progresses, if further prosecutorial discretion review is requested by the respondent, the case should be reviewed again in light of any changed facts and circumstances. Keep in mind that prosecutorial discretion may encompass actions beyond offers for administrative closure or dismissal of the case, including waiving appeal, not filing Notices to Appear, and joining in motions.*[102]

As a whole, these policies required IJs to consider numerous motions to continue and administratively close cases, adding to the burden on their dockets. These policies are likely the reason that, as GAO found, continuances based on a joint request to continue by both parties increased by 518 percent between FY 2006 (1,319 cases) and FY 2015 (8,615 cases).[103]

These policies likely had another effect that is not quantifiable. Taken as a whole, DHS's purported "prosecutorial discretion" policies made it clear that most cases involving non-criminal aliens were not a priority for the Obama administration, and it would have been only

---

[100] *Id.* at 3-4.

[101] *Id.* at 2.

[102] Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, dated April 6, 2015, at 2, *available at*: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

[103] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 126, Appendix III, Table 13, *available at*: https://www.gao.gov/assets/690/685022.pdf.

natural for IJs to have placed a lower priority on completing those cases. It does not call the diligence of the IJ corps into question to suggest that many of the judges would have concluded that there was no reason to work overtime to complete matters that the president did not consider important, or to keep a docket of such cases on track.

This is especially true in light of the fact that the Enforcement Memo made clear that, as of November 20, 2014, final orders of removal issued before January 1, 2014 were not a priority.[104] Given the lack of emphasis on enforcement that memo represented, it would have been reasonable for any given IJ in a non-detained court to conclude that a removal order in today's case would soon no longer be tomorrow's priority, either.

IJ Burnout

This leads to the final factor: IJ burnout. A 2009 study found "many immigration judges adjudicating cases of asylum seekers are suffering from significant symptoms of secondary traumatic stress and job burnout, which, according to the researchers, may shape their judicial decision-making processes."[105] IJs' working conditions have only gotten worse as the backlogs have grown.[106] A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This would, in turn, result in more reversals and remands, adding even more cases to the backlog.

Solutions to the Backlog

Although the problem of the backlog in the immigration courts may seem insurmountable, and the causes of that backlog may appear intractable, in reality, solutions to most of these problems can be found, assuming that the president has the will to enforce the immigration laws and Congress has the willingness to provide adequate resources to do the job.

More Resources

DOJ has made significant strides under the current administration to boost the number of IJs who are on the bench, as stated above. This has, to a degree, fulfilled promises that the administration has made with respect to this effort.

In remarks to CBP Officers in Nogales, Arizona on April 11, 2017, Attorney General Jeff Sessions "revealed that [DOJ] will add 50 more immigration judges to the bench this year and 75

---

[104] Jeh Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, U.S. DEPARTMENT OF HOMELAND SECURITY, Nov. 20, 2014, at 4, available at: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[105] See Kirsten Michener, *Stress and burnout found among nation's immigration judges*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO, Jun. 25, 2009, *available at*: https://www.ucsf.edu/news/2009/06/4258/stress-and-burnout-found-among-nations-immigration-judges.

[106] See Rachel Glickhouse, *Immigration judges are burning out faster than prison wardens and hospital doctors*, QUARTZ, Aug. 3, 2015, *available at*: https://qz.com/469923/there-are-only-250-immigration-judges-in-the-united-states/. And

next year," and "highlighted [DOJ's] plan to streamline its hiring of judges, reflecting the dire need to reduce the backlogs in our immigration courts."[107]

In a public *Immigration Newsmaker* interview that I conducted with EOIR Director James McHenry on May 3, 2018, he noted that the administration had proposed increasing the size of the IJ corps to 700, but made clear that this effort would take two to three years.[108] And, of course, such hiring is subject to funding by Congress.

I would add, however, that simply hiring more judges is not enough. EOIR must position those judges where the need is greatest, and support those judges with enough staff, including clerks, to enable those IJs to discharge their duties efficiently. That said, more IJs are better than fewer.

As an added benefit, those judges will also (in many if not most instances) come in with less seniority than the immigration judges they join. This means that they will receive fewer hours of leave per pay period, and will therefore be available to hear more cases on an annual basis.

Change in Border Policy and Its Effect

A change in policy from the executive branch on immigration enforcement at the border and the interior could, however, likely be the biggest driver in lowering the number of incoming cases and shrinking the backlog.

Throughout the 2016 presidential campaign, then-candidate Donald Trump made it clear that he intended to enforce the immigration laws if elected.[109] Backing up this rhetoric as it pertained to those entering illegally, on January 25, 2017, President Trump issued Executive Order 13767, captioned "Border Security and Immigration Enforcement Improvements."[110] While each of the sections of that order enhance immigration enforcement, four in particular will reduce the number of aliens who are placed into removal proceedings by reducing the number of aliens entering the United States illegally.

First, section 2 of that order makes it clear that it is the policy of the executive branch to:

---

[107] *Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Apr. 11, 2017, *available at*: https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal.

[108] *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry.

[109] *See* Miriam Valverde, *Compare the candidates: Clinton vs. Trump on immigration*, POLITIFACT, dated Jul. 15, 2016 ("Presidential candidates Donald Trump and Hillary Clinton have taken opposite roads on their quest for immigration reform. Trump calls for mass deportations, migrant bans and a wall to keep away people from coming into the country, while Clinton wants a pathway to citizenship, immigrant integration and protection from deportation."), *available at*: http://www.politifact.com/truth-o-meter/article/2016/jul/15/compare-candidates-clinton-vs-trump-immigration/.

[110] *E.O. 13767, "Border Security and Immigration Enforcement Improvements*, THE WHITE HOUSE, Jan. 25, 2017, *available at*: https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/.

> *(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;*
>
> *(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;*
>
> *(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;*
>
> *(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; [and]*
>
> *(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities*.[111]

Section 5 of that order, captioned "Detention Facilities," stated:

> *(a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.*
>
> *(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.*
>
> *(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code*.[112]

Section 6 of that order, captioned "Detention for Illegal Entry," specified that the Secretary of Homeland Security:

---

[111] *Id*. at section 2.
[112] *Id*. at section 5.

> *[S]hall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.*[113]

Section 13 of that order, captioned "Priority Enforcement," provided:

> *The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.*[114]

The theory behind these provisions appears to be that, if a foreign national considering illegal entry into the United States knows that he or she will be arrested and detained (and possibly prosecuted) pending a determination of removability and relief, that foreign national will be less likely to try to enter illegally. If this is true, the order ostensibly had the intended effect, at least initially.

The number of aliens apprehended along the southwest border dropped precipitously immediately after the 2016 election and the issuance of this order. Specifically, according to CBP, the number of apprehensions along the border and of inadmissible persons at ports of entry declined from 66,712 in October 2016 to 63,364 in November 2016, 58,426 in December 2016, 42,473 in January 2017, 23,563 in February 2017, 16,600 in March 2017, and to 15,780 in April 2017.[115] They began to increase in May 2017 (19,940), reaching a post-inauguration high of 40,511 (in December 2017) before declining again in January 2018 (35,822), with a slight uptick in February 2018 (36,695).[116]

Unfortunately, after Congress began to discuss amnesty for DACA beneficiaries (and others)[117], and as smugglers and migrants realized that the president's rhetoric had not been matched by congressional action to plug the loopholes that encouraged migrants (and in particular, unaccompanied alien children (UACs) and family units (FMUs)-- that is adult migrants

---

[113] *Id*. at section 6.
[114] *Id*. at section 13.
[115] *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION, Dec. 15, 2017, *available at*: https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017.
[116] *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, *available at*: https://www.cbp.gov/newsroom/stats/sw-border-migration.
[117] *See* Dylan Scott and Tara Golshan, *The Senate's failed votes on DACA and immigration: what we know*, VOX, Feb. 18, 2018, *available at*: https://www.vox.com/policy-and-politics/2018/2/12/17003552/senate-immigration-bill-floor-debate.

travelling with children) to enter the United States illegally[118], the number of apprehensions and inadmissible aliens skyrocketed, reaching a high of 144,116 in May 2019.[119]

These numbers directly affect the backlog in the immigration courts, because the fewer aliens apprehended along the border and placed into expedited removal proceedings, the fewer new removal cases originating with credible fear claims will be filed in the immigration courts. This is reflected in EOIR statistics, which show that of the 986,383 removal, deportation, and exclusion cases that were pending before the agency at the end of FY 2019, 219,072—22 percent—originated with a credible fear claim.[120]

Some context for these numbers is in order. As I explained in an April 2017 backgrounder[121] on "Fraud in the 'Credible Fear' Process":

> *A credible fear request is a precondition to filing a defensive asylum application for an alien in expedited removal proceedings under section 235(b) of the [INA]. That section of the INA allows immigration officers — rather than judges — to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of the INA. DHS has expanded its use of expedited removal over the years.*
>
> *The most common instance in which DHS uses expedited removal is when it apprehends (1) an alien seeking admission without a proper entry document at a port of entry; or (2) an alien who is attempting to enter or who has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an asylum officer for a "credible fear interview." If the asylum officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an immigration judge, where the alien can file his or her application for asylum.*
>
> *Under section 235(b)(1)(B)(v) of the INA, "the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208."*

---

[118] *See* Andrew Arthur, *Catch and Release Escape Hatches, Loopholes that encourage illegal entry*, CENTER FOR IMMIGRATION STUDIES, May 4, 2018, available at: https://cis.org/Report/Catch-and-Release-Escape-Hatches.

[119] *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, *available at*: https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

[120] *Adjudication Statistics, Pending I-862 Proceedings Originating With a Credible Fear Claim and All Pending I-862s*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated on October 23, 2019, available at: https://www.justice.gov/eoir/page/file/1112996/download.

[121] Andrew R. Arthur, *Fraud in the "Credible Fear" Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES, April 2017, *available at*: https://cis.org/Report/Fraud-Credible-Fear-Process.

Once a "credible fear" case is referred to the immigration court, at least four separate hearings are held: a master calendar hearing at which pleadings are taken and the alien requests an opportunity to apply for asylum, withholding of removal, and/or protection under Article 3 of the Convention Against Torture (CAT)[122]; a request for a bond; a hearing at which the asylum application[123] is filed; and at least one hearing on the merits of that application.

While the first and second (or second and third) hearings are often held on the same docket, each requires at least a setting of the matter and takes up time on a docket. Moreover, there may be additional continuances, when for example an alien seeks counsel or is released (requiring the case to be reset to a non-detained docket), or when additional time is sought to complete the application or to obtain evidence or witnesses. The fewer the "credible fear" and "reasonable fear" cases, the fewer the hearings, and the lower the immigration-court backlog, or at least the lower the increase in that backlog.

In FY 2019, a total of 977,509 aliens were apprehended by CBP Border Patrol agents between the ports of entry along the southwest border or deemed inadmissible by CBP officers at those ports.[124] This was an almost 86 percent increase over FY 2018 (when there were 521,090 aliens apprehended or deemed inadmissible along the southwest border), and a 135 percent increase over FY 2017 (415,517).[125]

The number of credible fear and reasonable fear claims increased, as well. In FY 2019, USCIS received 105,439 credible fear claims[126], in addition to 13,197 reasonable fear claims.[127] Credible fear was established in 75,252 of those cases[128] (almost 74 percent of all cases in which

---

[122] *See Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections, Relief and Protections Based on Fear of Persecution or Torture*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 15, 2019, available at: https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.

[123] *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 23, 2017, available at: https://www.uscis.gov/i-589.

[124] *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, *available at*: https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

[125] *Id*.

[126] *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

[127] *Reasonable Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Reasonable_Fear_Stats_FY19.pdf.

[128] *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

there was a decision), and reasonable fear in an additional 3,306[129] (almost 28 percent of cases in which there was a decision).

This was an increase over FY 2018, when USCIS received 99,035 credible fear claims (in which fear was established in 74,677 cases)[130], and 11,101 reasonable fear claims (in which fear was established in 3,161 cases)[131]. Those positive fear findings, once made, are all headed to IJ dockets, to enable those aliens to apply for asylum. It should be no surprise, given the crisis at the border, that 208,942 asylum applications were filed with EOIR[132] in FY 2019 (alone), or that as of October 11, 2019, more than 476,000 asylum cases were pending with EOIR (48 percent of the then-immigration-court backlog of 987,198).[133]

That is in addition to 15,433 additional cases in which aliens in expedited removal cases requested IJ review of negative credible fear or reasonable findings in FY 2019.[134] Those cases, in turn, resulted in 3,189 vacations of negative credible fear findings and 552 vacations of negative reasonable fear findings.[135] Again, each of those reviews took up time on an IJ's docket to review the negative findings of a USCIS asylum officer, and then each vacation of a negative credible fear or reasonable fear case will be sent to IJ dockets, increasing the backlog.

Of course, the reason that a respondent is placed into removal proceedings after a positive credible fear finding is to apply for asylum. But, many fail to do so. According to EOIR statistics, between FY 2008 and FY 2018, 354,356 cases were referred to the immigration courts following a credible fear claim, but, as of November 2, 2018, only 189,127 cases that were referred following a credible fear claim included a filed asylum application (the same application is used for asylum, withholding of removal, and CAT)—a 53.4 percent filing rate.[136]

Given these facts, it is not surprising that the number of *in absentia* removal orders in cases originating with a credible fear claim has skyrocketed in recent years. In FY 2008, IJs issued

---

[129] *Reasonable Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Reasonable_Fear_Stats_FY19.pdf.

[130] *Credible Fear Workload Report Summary, FY 2018 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Nov. 16, 2018, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf.

[131] *Reasonable Fear Workload Report Summary, FY 2018 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Nov. 16, 2018, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf.

[132] *Adjudication Statistics, Total Asylum Applications*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1106366/download.

[133] Andrew Arthur, *Statistics Reveal the Scope of the Asylum Backlog, A lot of asylum claims, but few asylum grants*, CENTER FOR IMMIGRATION STUDIES, Nov. 25, 2019, available at: https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog.

[134] *Credible Fear Review and Reasonable Fear Review Decisions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1104856/download.

[135] *Id*.

[136] *Adjudication Statistics, Rates of Asylum Filings in Cases Originating with a Credible Fear Claim, Fiscal Year (FY) 2008- FY 2018*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 29, 2018 and Nov. 2, 2018, respectively, available at: https://www.justice.gov/eoir/page/file/1062971/download.

613 such orders, but by FY 2018, that number had increased almost 16-fold, to 10,724.[137] By FY 2019, that already unbelievable number of *in absentia* orders had increased by 60 percent over just the year before, to 17,770.[138]

Moreover, few of the alien respondents apprehended at the border with credible fear claims end up getting granted asylum—the relief for which they were placed into proceedings to begin with. According to EOIR statistics, in FY 2019 there were 55,549 decisions in cases that originated with a credible fear claim.[139] Of those, only 8,457 were grants (15.25 percent), while 17,621 were denials (31.77 percent).[140] Significantly, in 23,161 of those cases resulting in orders in FY 2019, 23,161 had no asylum application filed at all—41.76 percent of the total.[141] That does not even include the 6,203 cases (11.18 percent) that were abandoned, not adjudicated, withdrawn or "other."[142] There is no way to view these statistics without concluding that a significant number of migrants have gamed the credible fear process to gain entry, and release, into the United States, with a significant toll on the dockets of the immigration courts.

Unfortunately, even those statistics do not present the entire dire picture. In an April 16, 2019 "Final Emergency Interim Report," the Homeland Security Advisory Council's **bipartisan** CBP Families and Children Care Panel noted that FMUs who stated that they had a fear of return were simply being released from Border Patrol custody with an NTA and dropped at local bus stations.[143] As that panel stated:

> *The NTA, combined with long delays in the adjudication of asylum claims, means that these migrants are guaranteed several years of living (and in most cases working) in the U.S. Even if the asylum hearing and appeals ultimately go against the migrant, he or she still has the practical option of simply remaining in the U.S. illegally, where the odds of being caught and removed remain very low. A consequence of this broken system, driven by grossly inadequate detention space for family units and a shortage of transportation resources, is a massive increase in illegal crossings of our borders,* ***almost entirely driven by the increase in FMU migration from Central America.***[144] *[Emphasis added].*

---

[137] *Adjudication Statistics, In Absentia Removal Orders in Cases Originating with a Credible Fear Claim*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1116666/download.

[138] *Id*.

[139] *Adjudication Statistics, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1062976/download.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 1, available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

[144] *Id*.

That increase in FMUs is borne out by CBP statistics. In FY 2019, Border Patrol apprehended 473,682 aliens travelling in family units-- almost 56 percent of the total apprehensions last fiscal year.[145]

The release of those migrants with nothing more than an NTA encouraged many, if not most, of those migrants to come to the United States, worsened by the aforementioned loopholes. As the panel stated:

> *By far, the major "pull factor" is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in* Flores v. DHS *expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to [UACs]. After being given NTAs, we estimate that 15% or less of FMU will likely be granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals.*[146]

By way of background, the *Flores* settlement agreement was entered into 23 years ago, "to set immigration detention standards for [UACs], particularly regarding facility conditions and the timing and terms of the UACs' release."[147]

In 2015, Judge Dolly Gee of the U.S. District Court for the Central District of California issued a decision that applied the agreement not only to UACs, but also to alien children travelling with their parents, and mandating that they be released within 20 days.[148] That decision was affirmed by the Ninth Circuit the next year, and although the circuit court determined that the parents did not have an affirmative right to release[149], as a practical matter (with a brief 44-day interlude known as "zero tolerance"[150]), successive administrations have generally released the parents as well, to avoid separating families.

And, as noted above, these decisions, coupled with administration policy and a lack of family detention space[151], has encouraged vast waves of FMUs to enter the United States illegally.

---

[145] *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, *available at*: https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

[146] *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 2, available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

[147] Matt Sussis, *The History of the Flores Settlement, How a 1997 agreement cracked open our detention laws*, CENTER FOR IMMIGRATION STUDIES, Feb. 11, 2019, available at: https://cis.org/Report/History-Flores-Settlement.

[148] *Id*.

[149] *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), available at: https://scholar.google.com/scholar_case?case=12780774456837741811.

[150] *See* Andrew Arthur, *Trump Win in Decision on Family Separations, Judge rules government is not 'systematically separating families at the border'*, Jan. 15, 2020, available at: https://cis.org/Arthur/Trump-Win-Decision-Family-Separations.

[151] *See Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 7, ("ICE ERO has effective capacity to detain only 2,500 FMUs, and that capacity is woefully inadequate given the surge in FMU migration over the past year."), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf

On August 23, 2019, DHS and the Department of Health and Human Services (HHS) issued a final rule[152] to plug the *Flores* loophole and turn off this magnet that is encouraging parents, at great danger to themselves and danger and trauma to their children, to make the journey to enter the United States illegally[153]. Unfortunately, on September 27, 2019, Judge Gee permanently enjoined that rule from taking effect.[154] DOJ has appealed that decision to the Ninth Circuit[155], and assuming that appeal (or an ultimate appeal to the Supreme Court) is successful, the number of FMUs seeking illegal entry will inevitably fall.

In the interim, however, the wave of migrants seeking illegal entry has taken its toll on the immigration courts' dockets. In FY 2019, 504,848 additional cases were added to those dockets, in addition to 315,710 in FY 2018.[156] At the same time, the number of cases that were completed by the immigration courts in FY 2019 hit a high of 276,523 (compared to 143,491 completions in FY 2016)[157], but the vast increase in the number of cases on those dockets, largely driven by new cases from the border, has increased the total backlog.

Even absent the final *Flores* regulations, however, the administration has taken steps to turn off the magnets that encourage migrants (and especially FMUs) to take advantage of our broken laws and the lack of detention resources to enter the United States illegally.

On December 20, 2018, then-Secretary of Homeland Security Kirstjen Nielsen announced that DHS would begin implementing what it called the "Migrant Protection Protocols"[158] (MPP, better known as "Remain in Mexico"), issuing policy guidance for that plan on January 25, 2019[159]. The department explained that under MPP:

> *[C]ertain foreign individuals entering or seeking admission to the U.S. from Mexico — illegally or without proper documentation — may be returned to Mexico and wait outside of the U.S. for the duration of their immigration*

---

[152] *Final Rule, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44932–44,535, Aug. 23, 2019, available at: https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.

[153] *See* Andrew Arthur, *A Bipartisan Panel Reports Alarming Findings on the Border Crisis, Quantifying the scope of the problem gives the president ammunition to act*, CENTER FOR IMMIGRATION STUDIES, Apr. 25, 2019, available at: https://cis.org/Arthur/Bipartisan-Panel-Reports-Alarming-Findings-Border-Crisis.

[154] *Flores v. Barr*, Case No.: CV 85-4544 DMG (AGRx) (U.S. Dist. C.D. Cal. Sep. 27, 2019), available at: https://www.law360.com/articles/1203743/attachments/0.

[155] Emma Cueto, *Feds Will Appeal Block Of Migrant Child Detention Regulations*, Law 360, Nov. 15, 2019, available at: https://www.law360.com/articles/1220178/feds-will-appeal-block-of-migrant-child-detention-regulations.

[156] *New Cases and Total Completions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Jan. 23, 2020, available at: https://www.justice.gov/eoir/page/file/1238741/download.

[157] *Id*.

[158] *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY, Jan. 24, 2019, available at: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[159] *Memorandum from Kirstjen Nielsen, Secretary of Homeland Security, Policy Guidance for Implementation of the Migrant Protection*, Department of Homeland Security, Jan. 25, 2019, available at: https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.
Protocols

> *proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.*[160]

News reports indicate that more than 57,000 migrants have been returned to Mexico as of early January to await their removal proceedings, even as DHS is considering changes to the policy that are aimed at speeding up the proceedings in those cases, including conducting court proceedings at or near the ports of entry.[161] There are currently two of those so-called "tent courts" in operation, at Laredo and Brownsville.[162]

I returned last week from the "tent court" in Laredo, and the name is a bit of a misnomer. Proceedings are actually conducted in air conditioned and heated trailers configured to resemble court rooms, with the IJs that I saw appearing from the San Antonio Immigration Court via video teleconference (VTC) (I watched proceedings from both ends of the process, both in Laredo and in San Antonio). The screens in the court were large and clear, the audio was likely better than it was in my court room at the York Immigration Court, and alien respondents were able to have their documents scanned in while they were in court and sent to the remote IJs.

Most importantly, however, the IJs took great pains to ensure that the aliens who were appearing in these cases received due process—and in fact, more rights than are required by law. Notably, when one unrepresented alien expressed a fear of returning to Mexico because of cardiac issues, the IJ directed the ICE attorney to have the respondent interviewed by a USCIS asylum officer before she was returned, a request to which the attorney instantly acceded.

In another development, on July 16, 2019, EOIR and USCIS issued an interim final rule (IFR) that limits asylum eligibility for aliens who have entered or attempted to enter the United States across the southwest border without first seeking asylum or protection under CAT in a third country (that is, a country that is not the one from which they are seeking asylum or CAT) that they passed through in route to the United States.[163] As I have explained:

> *In essence, under the IFR, an asylum applicant would be subject to a "third-country-transit bar" from eligibility for that protection if the applicant is apprehended entering or attempting to enter the United States across the Southwest border without first applying for protection in a third country that the alien passed through on the way. There are exceptions to that bar, however, for an alien who demonstrates: (1) that the alien only transited through countries that were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the CAT, or (2)*

---

[160] *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY, Jan. 24, 2019, available at: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[161] Geneva Sands, *DHS memo outlines proposed changes to Remain in Mexico program*, CNN, Jan. 24, 2020, available at:

[162] Andrew Arthur, *DHS to Open 'Tent Courts' to Public, Likely less exciting than you would be led to believe*, CENTER FOR IMMIGRATION STUDIES, Jan. 1, 2020, available at: https://cis.org/Arthur/DHS-Open-Tent-Courts-Public.

[163] *Interim Final Rule, Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829-33845 (Jul. 16, 2019), available at: https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.

> *that the alien was a victim of "a severe form of trafficking in persons," as defined by regulation.*[164]

That IFR had been enjoined by a district court judge on September 9, 2019, an injunction that was partially lifted by the Ninth Circuit on September 10, 2019, before the injunction was stayed pending a full disposition of the government's appeal of that case by the Supreme Court on September 11, 2019.[165]

Similarly, on November 19, 2019, EOIR and USCIS issued an IFR captioned "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act."[166] That IFR implements the diplomatic efforts of the administration with the Northern Triangle of Central America (NTCA) countries of El Salvador, Guatemala, and Honduras (the countries of nationality of the vast majority of FMUs and UACs who were apprehended by Border Patrol in FY 2019[167]), to share the burden of protecting refugees with our regional partners.

The IFR modifies existing regulations to provide for the implementation of Asylum Cooperative Agreements ("ACAs"), also known as "safe-third country agreements," that the United States enters into pursuant to section 208(a)(2)(A) of the INA[168], and allows asylum officers and IJs to send third-country asylum applicants to a country with which the United States has an ACA to apply for asylum.[169]

As the IFR explains:

> *Hundreds of thousands of migrants have reached the United States in recent years and have claimed a fear of persecution or torture. They often do not ultimately establish legal qualification for such relief or even actually apply[] for protection after being released into the United States, which has contributed to a backlog of*

---

[164] Andrew Arthur, *Administration Issues Third-Country Asylum Eligibility Rule, Bars claims of aliens who failed to apply for asylum en route to the United States*, CENTER FOR IMMIGRATION STUDIES, Jul. 19, 2019, available at: https://cis.org/Arthur/Administration-Issues-ThirdCountry-Asylum-Eligibility-Rule.

[165] Andrew Arthur, *SCOTUS Hands Trump Win on Third-Country Transit Bar to Asylum, The long and winding road to the marble palace*, CENTER FOR IMMIGRATION STUDIES, Sept. 12, 2019, available at: https://cis.org/Arthur/SCOTUS-Hands-Trump-Win-ThirdCountry-Transit-Bar-Asylum

[166] *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-64011, Nov. 19, 2019, available at: https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

[167] *See U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, available at: https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019.

[168] Section 208(a)(2)(A) of the INA, available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[169] *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-64011, Nov. 19, 2019, available at: https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

> *987,198 cases before the Executive Office for Immigration Review (including 474,327 asylum cases), each taking an average of 816 days to complete. Asylum claims by aliens from El Salvador, Guatemala, and Honduras account for over half of the pending asylum cases.*
>
> *To help alleviate those burdens and promote regional migration cooperation, the United States recently signed bilateral ACAs with El Salvador, Guatemala, and Honduras in an effort to share the distribution of asylum claims. Pending the Department of State's publication of the ACAs in the United States Treaties and Other International Agreements series in accordance with 1 U.S.C. 112a, the agreements will be published in a document in the Federal Register.*[170]

The U.S. government began to send migrants to Guatemala pursuant to the ACA with that country in November 2019[171], and has sent some 230 Hondurans and El Salvadorans to Guatemala by late January.[172]

The administration engaged in other diplomatic efforts as well to limit the tide of migrants overwhelming the border illegally. In particular, Mexico deployed units of its newly formed National Guard to secure its southern border with Guatemala in response to a tariff threat from the president in June 2019.[173] As the *Washington Post* explained:

> *One approach the Mexican government has taken is to dispatch security agents — including those working with the country's migration agency — to checkpoints north of the border. It is a similar approach to that of U.S. Border Patrol, which apprehends a large number of migrants at "interior" checkpoints.*
>
> *Because a large number of migrants — especially those from Guatemala — are traveling by bus through Mexico, U.S. officials have suggested that Mexico should be able to easily identify and shutter smuggling operations.*[174]

As my colleague, Jason Peña, reported on November 12, 2019:

---

[170] *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-95, Nov. 19, 2019, available at: https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

[171] Adam Shaw, *Trump administration begins sending migrants to Guatemala as part of 'safe third county' agreement*, FOX NEWS, Nov. 21, 2019, available at: https://www.foxnews.com/politics/trump-administration-begins-sending-migrants-to-guatemala-as-part-of-safe-third-country-agreement.

[172] Sandra Cuffe, New Guatemalan gov't to stick with controversial US asylum deal, The so-call 'safe third country' agreement has drawn widespread criticism from migrant rights advocates, Al Jazeera, January 22, 2020, available at: https://www.aljazeera.com/news/2020/01/guatemalan-gov-stick-controversial-asylum-deal-200122194628878.html.

[173] *See* Kevin Sieff and Mary Beth Sheridan, *Mexico is sending its new national guard to the Guatemala border. The mission is unclear*, WASHINGTON POST, Jun. 10, 2019, available at: https://www.washingtonpost.com/world/the_americas/with-border-deployment-mexicos-new-national-guard-gets-its-first-big-mission/2019/06/10/91564d14-8ad2-11e9-b6f4-033356502dce_story.html.

[174] *Id.*

> *Through October, 62,299 people have applied for asylum in Mexico this year, nearly triple the 21,057 who applied during the same period last year. The number of applicants so far this year exceeds the previous six full years combined.*[175]

These efforts have also prompted the governments of the NTCA countries to take renewed interest in conditions for their own people—with positive results. For example, as I reported on October 3, 2019:

> *El Salvador, one of the three Northern Triangle countries of Central America (along with Honduras and Guatemala) has seen its crime rate drop by half, as new President Nayib Bukele has sent police to fight extortion and seal the country's border.*
>
> *AP reported on August 16:*
>
> > *El Salvador's justice minister says the country's homicide rate has fallen to about 4.4 killings a day since June, about half of 2018 levels.*
> >
> > *The country of 6.5 million people recorded 3,340 killings in 2018, or about nine a day. The bloodiest year of 2015 saw 6,425 homicides, or 17.6 a day.*
> >
> > *Justice Minister Rogelio Rivas said Friday that "homicides are declining across the country."*
>
> * * * *
>
> *As President Bukele told Martha McCallum on Fox News on September 26: "Whose job is it to fix El Salvador? It's El Salvador's job, right? So, we have [taken] the problem as our own."*[176]

Similarly, as I wrote on June 11, 2019:

> *In an eye-opening interview with Stephanie Hamill of the Daily Caller, Guatemalan Minister of Governance Enrique Degenhart explained some of the causes and effects of the exodus of that country's nationals. He stated that the "macroeconomic numbers" in Guatemala "are very good. We have actually the lowest criminal rates in the country that we have had for the past 15 or 20 years. Which means that the [departure of Guatemalan nationals is] probably not a factor of economics or security."*
>
> *Instead, he pointed to pull factors from Mexico that were encouraging the northward movement of migrants. He explained that Mexico has been granting*

---

[175] Jason Peña, *Asylum Requests in Mexico Triple Compared to Last Year*, CENTER FOR IMMIGRATION STUDIES, Nov. 12, 2019, available at: https://cis.org/Pena/Asylum-Requests-Mexico-Triple-Compared-Last-Year.

[176] Andrew Arthur, *El Salvador, Battling Corruption, Sees Murder Rate Drop by Half, And other good news you don't hear*, CENTER FOR IMMIGRATION STUDIES, Oct. 3, 2019, available at: https://cis.org/Arthur/El-Salvador-Battling-Corruption-Sees-Murder-Rate-Drop-Half.

> *"visas and other kinds of work permits and situations" that "enhance the interests of our Guatemalans in using Mexico on the route to get to the U.S." He agreed that most of the Guatemalans are "economic migrants", and are coming to this country looking for jobs.*
>
> *He did not want to discourage those Guatemalans who are leaving to legitimately look for asylum, but contended that there are "different processes that can be solved either in-country or in a neighboring country that does not necessarily mean that they have to come up [to the United States] in an irregular way." He asserted that the Guatemalan government is effectively adjudicating asylum claims, and that Guatemala is a better country for those seeking assistance than Mexico.*
>
> ***With respect to the departure of its nationals, he admitted that Guatemala would not be feeling the effects in the short term, but that in the near future and in a few years Guatemala "will be skipping a generation."*** *"When minors are being taken on the route," he contended, "that is something that we have to worry about." He expressed a feeling that there is an "additional activity" leading to the departure of minors that "may be a criminal activity." The minister specifically referred to a case of a 50-year-old national of a Central American country who was arrested and prosecuted after purchasing a six-month-old baby to facilitate his entry into the United States. For $100.*
>
> ***Transnational criminal organizations, he contended, are well-organized and have a "marketing organization" that uses various popular social media to "put out offers" to the Guatemalan population.*** *He also complained about the disconnect between the pictures of Guatemalans who have successfully made it to the United States (which are shown in the country), and the risks along the route, which are not. [Emphasis added].*[177]

The last point could likely be made in this country, as well.

As a result of these efforts, the number of migrants apprehended by CBP entering illegally and at the ports of entry along the southwest border began to drop, falling from the aforementioned 144,116 in May 2019 to 52,546 in September 2019, to 40,620 by December 2019, an almost 72 percent decrease in seven months.[178] Consequently, in September 2019, then-Acting Homeland

[177] Andrew Arthur, *Border Apprehension Numbers Reach New Highs, And fresh insights from Guatemala*, CENTER FOR IMMIGRATION STUDIES, Jun. 11, 2019, available at: https://cis.org/Arthur/Border-Apprehension-Numbers-Reach-New-Highs.

[178] *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION, Jan. 9, 2020, available at: https://www.cbp.gov/newsroom/stats/sw-border-migration.

Security Secretary Kevin McAleenan announced that widespread "'catch and release' for Central American families arriving at the border" would be ended.[179] As he explained:

> *"With some humanitarian and medical exceptions, DHS will no longer be releasing family units from Border Patrol Stations into the interior. . . . This means that for family units, the largest demographic by volume arriving at the border this year, the court-mandated practice of catch and release, due to the inability of DHS to complete immigration proceedings with families detained together in custody, will have been mitigated. This is a vital step in restoring the rule of law and integrity to our immigration system."*

This decrease in illegal entries along the border has been matched by a decrease in credible fear claims. Case receipts of such claims dropped from 10,854 in June 2019 to 4,782 in September 2019, a 56-percent decrease in three months.[180]

Such decreases will, by themselves, significantly relieve additional pressure on the immigration courts' dockets, as explained above. And, as noted, cases involving UACs and families are generally more complex (and time-consuming), so a decline in the number of those cases will provide even more relief to the IJs.

That said, however, the reassignment of immigration judges under section 5(c) of the aforementioned order has (or is likely to have) caused delays in the short term in the courts from which they were reassigned.[181] In the long run, however, by deterring future illegal entries of aliens who will never appear on court dockets, the result of this change in policy should be a net decrease in the immigration courts' backlog.

Change in Interior Enforcement Policy

A change in message and policy as it relates to interior enforcement will likely have a positive effect on the backlog as well, if those polices are allowed to take effect and are not impeded.

---

[179] *Press Release: Acting Secretary McAleenan Announces End to Widespread Catch and Release*, DEPARTMENT OF HOMELAND SECURITY, Sep. 23, 2019, available at: https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release.

[180] *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

[181] *See* Jonathan Blitzer, "What Will Trump Do with Half a Million Backlogged Immigration Cases?", *New Yorker*, June 20, 2017 ("Since March, New York City, for example, has had at least eight of its twenty-nine immigration judges reassigned, at least temporarily, to Texas and Louisiana, WNYC has reported. But in relocating them the federal government is exacerbating the city's own significant backlog: roughly eighty thousand pending cases and an average delay of six hundred and twenty-five days per case."), available at: https://www.newyorker.com/news/news-desk/what-will-trump-do-with-half-a-million-backlogged-immigration-cases.

On the same day the president issued the Executive Order above, January 25, 2017, he issued Executive Order 13768, "Enhancing Public Safety in the Interior of the United States."[182] Section 2 of that order, captioned "Policy," makes clear that the policy of the executive branch is to:

> *(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;*
>
> *(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;*
>
> *(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;*
>
> *(d) Ensure that aliens ordered removed from the United States are promptly removed; and*
>
> *(e) Support victims, and the families of victims, of crimes committed by removable aliens.*[183]

That policy was echoed in statements made by then-Acting ICE Director Thomas Homan on Capitol Hill.[184] In his June 13, 2017 written testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, Homan stated:

> *To ensure the national security and public safety of the United States, and the faithful execution of the immigration laws, our officers may take enforcement action against any removable alien encountered in the course of their duties who is present in the U.S. in violation of immigration law.*[185]

---

[182] *Executive Order 13768, Enhancing Public Safety in the Interior of the United States*, THE WHITE HOUSE, dated January 25, 2017, *available at*: https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

[183] *Id*.

[184] See Paul Bedard, *ICE chief rips critics of deportations, entering illegally 'is a crime'*, WASHINGTON EXAMINER, dated June 13, 2017, *available at*: https://www.washingtonexaminer.com/ice-chief-rips-critics-of-deportations-entering-illegally-is-a-crime/article/2625799.

[185] *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request: Hearing Before the House Comm. on Appropriations, Subcomm. on Homeland Security testimony*, 115th Congress (2017) (statement of Thomas Homan, Acting Director of U.S. Immigration and Customs Enforcement), *available at*: https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland.

Press reports state that in his oral testimony, Homan similarly told the Subcommittee: "If you're in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried . . . ."[186]

Homan contrasted ICE's current efforts in enforcing the immigration laws with those of the prior administration:

> *Under prior enforcement priorities, approximately 345,000, or 65 percent, of the fugitive alien population were not subject to arrest or removal. President Trump's EOs have changed that. As a result, ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers issued are up 75 percent. Thus far in this fiscal year, through May 15, 2017, [ICE Enforcement and Removal Operations (ERO)] has removed 144,353 aliens from the United States and repatriated them to 176 countries around the world; these are aliens who posed a danger to our national security, public safety, or the integrity of the immigration system. Of those removed, 54 percent (78,301) had criminal convictions. ERO has also issued 78,176 detainers and 63,691 charging documents; maintained an average daily population of 39,610 in detention; and monitored an average of 70,044 participants daily under the Intensive Supervision Appearance Program (ISAP) III contract or Alternatives to Detention (ATD) program.*[187]

Unfortunately, the crisis at the border subsequently limited ICE's efforts to enforce the immigration laws in the interior in FY 2019. In December 2019, the agency issued its "Fiscal Year 2019 Enforcement and Removal Operations Report."[188] That report explained:

> *Th[e] sustained increase in migration [across the southwest border] has stretched resources across the U.S. government,* ***requiring ERO to redirect its enforcement personnel and detention capacity to support border enforcement efforts as well as a significantly increased detained population. This has negatively impacted the number of ERO's interior arrests, as well as the percentage of removals stemming from such arrests, and has also changed the overall composition of ICE's detained population****. Because much of ERO's limited detention capacity has been dedicated to housing aliens arrested by CBP, many of whom are subject to mandatory detention under U.S. immigration laws regardless of criminality,*

---

[186] Stephen Dinan, *No apologies: ICE chief says illegal immigrants should live in fear of deportation*, WASHINGTON TIMES, June 13, 2017, available at: https://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/.

[187] *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request: Hearing Before the House Comm. on Appropriations, Subcomm. on Homeland Security testimony*, 115th Congress (2017) (statement of Thomas Homan, Acting Director of U.S. Immigration and Customs Enforcement), *available at*: https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland.

[188] *U.S. Immigration and Customs Enforcement, Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, undated, available at: https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf.

> ***the increase in border apprehensions has resulted in a lower overall percentage of ICE detainees who have a criminal history (the vast majority of those arrested by ERO in the interior have criminal convictions or pending criminal charges, while those arrested by CBP at the border often do not have any known criminal history)***. *[Emphasis added.]*[189]

In fact, that report showed that only 27 percent of all aliens detained by ICE were arrested by the agency (73 percent had been apprehended by CBP), and that whereas 54 percent of the average daily population of aliens in FY 2018 had been detained by ICE, only 40 percent in FY 2019 were.[190]

Most significantly, ICE reported:

> *As the ICE National Docket has continued to grow over the last several years, the number of fugitive aliens [aliens under a final order of removal, deportation, or exclusion] on the non-detained docket has continued to grow as well. At the end of FY 2019, the number of fugitives stood at 595,430, an increase from 565,892 in FY 2018 and 540,836 in FY 2017. The continued growth of the fugitive backlog is a direct result of the pressures placed on the immigration system by the crisis at the Southwest Border, as well as the fact that ICE's Fugitive Operations resources have remained static for many years in the absence of additional appropriations.*[191]

Put another way, due to a failure of Congress to increase appropriations in ICE detention in the face of the surge at the border in FY 2019, more fugitives—alien respondents who have received due process and been ordered to leave-- has increased significantly.

This has significant implications for the immigration-court backlog. If alien respondents know that they will not be removed at the end of their proceedings, they will be less likely to comply with the orders of the court, and in particular orders to appear for their hearings, just as the CBP Families and Children Care Panel had warned in its April report, referenced above.

In fact, the total number of *in absentia* removal orders for non-detained respondents in removal, deportation, and exclusion proceedings has skyrocketed, going from 19,274 in FY 2012 to 89,919 in FY 2019: a 367 percent increase.[192]

It also means that removal proceedings in non-detained cases are largely just for show—if the decision goes against the alien respondent. All of the court resources expended on those aliens are for naught if they know they will not be removed in the end.

The crisis at the border and Congress's failure to appropriate sufficient resources for ICE also limited the number of aliens whom ICE ERO was able to arrest in the interior of the United

---

[189] *Id*. at 3-4.
[190] *Id*. at 5.
[191] *Id*. at 10.
[192] *Adjudication Statistics, In Absentia Removal Orders*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1060851/download.

States. In FY 2018, ICE ERO arrested 158,581 aliens, 105,140 of whom were convicted criminals, 32,977 of whom had pending charges, and a mere 20,464 of whom had other immigration violations[193].

By FY 2019, that had dropped to 143,099 administrative ERO arrests, 92,108 of whom had criminal convictions and 31,020 of whom had pending charges.[194] Only 19,971 had "other immigration violations."[195] While this had a positive effect on the IJs' dockets (because fewer aliens were arrested, and therefore placed into removal proceedings), it had dire effects for public safety:

> *ERO continues to carry out its public safety mission with limited resources, and as a result, many of the criminal aliens it arrests have extensive criminal histories with multiple convictions or pending charges. Of the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal convictions and pending charges as of the date of arrest, which equates to an average of four criminal arrests/convictions per alien, highlighting the recidivist nature of the aliens that ICE arrests.*[196]

In the long run, however, the lack of resources that ICE ERO has to perform its mission in the interior of the United States will cause more aliens to enter the United States illegally, safe in the knowledge that if they avoid CBP enforcement, they will be able to live in the United States indefinitely, or if they are apprehended, they can claim credible fear, pass the low bar therefor, and reside in the United States, again, indefinitely, while their removal proceedings plod along.

A decrease in the number of aliens who are detained entering illegally at the border will alleviate this strain on the immigration courts' dockets, but it will also free up ICE ERO to arrest more aliens illegally present in the United States. In the short run, that will add cases to the courts' dockets, but in the long run, it will reduce the incentives for migrants to enter illegally to begin with.

Congress can help. Increased funding for detention will make it less likely that aliens with non-meritorious cases will remain in the court system. Logic and experience indicate that aliens enter the United States illegally to remain at large in the United States; assume for purposes of argument that they enter to work to provide for themselves and their families. The longer that the alien is able to remain at large and work, therefore, the better for that alien. If the alien is detained and cannot work, however, there is no longer an incentive to remain; instead, accepting an order of removal or a grant of the privilege of voluntary departure is therefore more advantageous to the alien than continued detention.

---

[193] *U.S. Immigration and Customs Enforcement, Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, at 13, undated, available at: https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf.

[194] *Id*.

[195] *Id*.

[196]

Rescission of DAPA

The rescission of the Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") by the Secretary of Homeland Security on June 15, 2017[197], ended a policy that needlessly extended removal proceedings, burdening the immigration courts. As USCIS has explained DAPA:

> *On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.*
>
> *These initiatives include: . . . Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new [DAPA] program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.*[198]

MPI estimated that as many as 3.7 million aliens could have been covered by DAPA.[199] Many aliens who were in removal proceedings at the time that DAPA was announced sought, and were granted, continuances to assess their eligibility and apply for that benefit, even though federal District Court Judge Andrew Hanen blocked that program from going into effect in February 2015.[200] The ending of the program should clear the way for the completion of those cases.

DOJ Guidance on Continuances

Significantly for purposes of the backlog, EOIR and the attorney general have taken steps to provide guidance to IJs in ruling on continuances in removal proceedings. As I explained above, there is currently little downside for an IJ who grants a continuance, but the judge may face significant problems if he or she denies one.

---

[197] *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ('DAPA')*, DEPARTMENT OF HOMELAND SECURITY, Jun. 15, 2017, *available at*: https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful.

[198] *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, dated April 15, 2015, *available at*: https://www.uscis.gov/archive/2014-executive-actions-immigration.

[199] *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, MIGRATION POLICY INSTITUTE, November 19, 2014, *available at*: https://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new.

[200] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *affirmed* 809 F.3d 134 (5th Cir. 2015), available at: https://www.documentcloud.org/documents/1668197-hanen-opinion.html.

First, EOIR, on July 31, 2017, issued an operating policies and procedures memorandum (OPPM) to curb the number of continuances that immigration judges issue. That OPPM, 17-01[201], captioned "Continuances," states:

> *This [OPPM] ... is intended to provide guidance to assist Immigration Judges with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.*

This OPPM expands on an earlier one, OPPM 13-01[202], which delineated in more general terms the factors that IJs should follow in ruling on continuances.

Importantly, the OPPM states:

> *Overall, while administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, Immigration Judges should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.*[203]

This OPPM provides a basis for denial of continuances where good cause is not shown, a critical protection for IJs in ruling on such motions.

Noting the "strong incentive by respondents in immigration proceedings to abuse continuances," the OPPM directs IJs to "be equally vigilant in rooting out continuance requests that serve only

---

[201] *Operating Policies and Procedures Memorandum 17-01: Continuances*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jul. 31, 2017, *available at*: https://www.justice.gov/eoir/file/oppm17-01/download.
[202] *Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Mar. 7, 2013, *available at*: https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf. For an in-depth examination of that OPPM, *see* Andrew Arthur, *DOJ Moves to Curb Continuances in Immigration Court*, CENTER FOR IMMIGRATION STUDIES, Aug. 1, 2017, *available at*: https://cis.org/Arthur/DOJ-Moves-Curb-Continuances-Immigration-Court.
[203] *Operating Policies and Procedures Memorandum 17-01: Continuances*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jul. 31, 2017, *available at*: https://www.justice.gov/eoir/file/oppm17-01/download.

as dilatory tactics."[204] The OPPM provides guidance to IJs to follow in considering requests for continuances for aliens to obtain counsel, for attorney preparation, and for continuances of merits hearings.[205] It also addresses the "rare" requests for continuances by the government.[206]

In an additional move intended to reduce the backlog facing the immigration courts by providing additional bright-line rules for IJs to follow in adjudicating continuances, then-Attorney General Jeff Sessions, using his certification authority[207], issued a decision on August 16, 2018, in *Matter of L-A-B-R-*.[208]

Before I continue, I believe that it is important to explain the attorney general's certification authority, which is little understood, even by many immigration practitioners.

Under section 103(a)(1) of the INA, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." I will discuss this provision further below, but this authority has been promulgated in one manner by regulation at 8 C.F.R. § 1003.1(h)(1)(i):

> *Referral of cases to the Attorney General.*
>
> *(1) The Board shall refer to the Attorney General for review of its decision all cases that:*
>
> *(i) The Attorney General directs the Board to refer to him.*

Alberto Gonzales, who served as attorney general in the George W. Bush administration, and Patrick Glen, senior litigation counsel DOJ's Office of Immigration Litigation (OIL), discussed the underuse of certification by the Obama administration in a 2016 article in the Iowa Law Review.[209] They noted:

> *"This certification power, though sparingly used, is a powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent." This authority, which gives the Attorney General the ability "to assert control over the BIA and effect profound changes in legal doctrine," while providing "the Department of Justice final say in adjudicated matters of immigration policy," represents an additional avenue for the advancement of executive branch immigration policy that is already firmly embodied in practice and regulations. It thus may be a less controversial method*

---

[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *See* 8 C.F.R. § 1003.1(h)(1)(i) ("Referral of cases to the Attorney General"), available at: https://www.law.cornell.edu/cfr/text/8/1003.1.
[208] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (2018), available at: https://www.justice.gov/eoir/page/file/1087781/download.
[209] Alberto R. Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841 (2016), available at: https://ilr.law.uiowa.edu/print/volume-101-issue-3/advancing-executive-branch-immigration-policy-through-the-attorney-generals-review-authority/.

> *by which to advance immigration policy than the executive-decree style thus far utilized by the Obama Administration.*[210]

Gonzales and Glen are correct in their assertions that the certification authority is "firmly embedded in practice and regulations." It is also rooted in the INA itself.

Specifically, as noted, section 103(a)(1) of the INA[211] states that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Given the hundreds of thousands of removal cases that are currently pending, the attorney general would be overwhelmed if he had to decide each of these cases individually. For this reason, Congress has provided for the appointment of IJs to handle all of those cases as a preliminary matter in section 101(b)(4) of the INA[212], as discussed above.

To review the decisions of the 465 IJs at the nation's 63 immigration courts, past attorneys general have delegated some of their review authority to the BIA by regulation, which is found at 8 C.F.R. § 1003.1(a)[213]:

> *There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director [of EOIR].* ***The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them****. [Emphasis added].*

In creating the BIA, however, attorneys general have retained review authority for themselves, as 8 C.F.R. § 1003.1(d)(7) makes clear: "The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General in accordance with" 8 C.F.R. § 1003.1(h).[214] That latter regulation[215] states:

> *Referral of cases to the Attorney General.*
>
> *(1) The Board shall refer to the Attorney General for review of its decision all cases that:*
>
> *(i) The Attorney General directs the Board to refer to him.*
>
> *(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.*
>
> *(iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the*

---

[210] *Id.*
[211] Section 103(a) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim.
[212] Section 101(b)(4) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim.
[213] 8 C.F.R. § 1003.1(a), available at: https://www.law.cornell.edu/cfr/text/8/1003.1.
[214] 8 C.F.R. § 1003.1(d)(7), available at: https://www.law.cornell.edu/cfr/text/8/1003.1.
[215] 8 C.F.R. § 1003.1(h), available at: https://www.law.cornell.edu/cfr/text/8/1003.1.

> *concurrence of the Attorney General, refers to the Attorney General for review.*
>
> *(2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.*

Thus, there are three categories of cases that the attorney general may review on certification: (1) cases that the attorney general directs be referred to him; (2) cases that the BIA refers to the attorney general for consideration; and (3) cases that DHS refers to the attorney general for review.

When I was an associate general counsel at the former INS, I requested (with the concurrence of the general counsel) then-Attorney General Janet Reno to review decisions of the BIA that the INS believed had been incorrectly decided. This was an important avenue for review, because there was no statutory authority for the then-INS, and is none for the current DHS, to seek review of a BIA decision by the Article III federal courts. If this authority did not exist, and the BIA erred in a decision (which happens), the government would have to live with the results, regardless of the consequences for the law, the community, and the national security.

The BIA may request attorney general review for major questions of law, or as a safeguard to ensure that a decision of importance was decided correctly. Inherent in such requests is the fact that the BIA is itself breaking new ground with respect to the immigration laws, or is interpreting a new statutory provision, or is dealing with a high-profile matter.

Finally, the attorney general may direct that a specific case be referred to him where he believes that the individual decision was in error, or to adopt a policy or legal change that would apply generally, and sometimes the attorney general does so to both correct an error in the underlying case and to change policy.

An example of the latter is *Matter of Jean*.[216] The BIA there granted a waiver of inadmissibility and adjustment of status to a Haitian national who had been admitted as a refugee. The respondent in that case had been convicted of second-degree manslaughter in connection with death of a 19-month-old child.[217]

In reversing that decision and ordering the respondent removed, then-Attorney General John Ashcroft make clear his disapproval of the BIA's laxity in granting immigration relief to criminals in the exercise of discretion:

> *According to the respondent's signed confession, R-J- [the victim] had been left in her care that day by the boy's mother. . . . Early in the afternoon, the young child fell off a couch in the apartment and began to cry. The respondent reacted by*

---

[216] *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3472.pdf.
[217] *Id*. at 374.

> *striking the toddler's buttocks two or three times with her open hand in an attempt to quiet him. When this effort proved unsuccessful, she picked the boy up by the armpits and shook him. She then hit him two or three times on the top of his head with her fist. Finally, she picked him up again and shook him until he lost consciousness. Upon observing that the child was no longer breathing and that his eyes, although open, had stopped blinking, the respondent placed him on a bed just off the living room.*
>
> * * * *
>
> *The medical examiner's report described bruises to R-J-'s head, chest, and back; internal hemorrhages of the lungs, pancreas, and diaphragm; and acute subdural and spinal epidural hemorrhages. The report determined that R-J- died from bleeding and swelling inside his skull caused by blunt trauma, and that the death was a homicide.*
>
> * * * *
>
> *The [BIA] . . . held that, under its own view of the evidence, the respondent had established her eligibility for a waiver of inadmissibility and an adjustment of status from refugee to lawful permanent resident. Finally, the [BIA] concluded in a single sentence that "the equities," when weighed against the respondent's criminal conviction, warranted the grant of such discretionary relief.*[218]

He continued, demonstrating his disagreement with the BIA's analysis and use of discretion:

> *The [BIA] here cited testimony and "lengthy letters" provided by members of the respondent's family, as well as the fact that the respondent's husband and children are permanent legal residents, as evidence that her removal would cause the family "severe emotional hardship." . . . On the strength of this scant summary, the [BIA] found that she "met the standard for granting" a waiver of inadmissibility and an adjustment of status.*
>
> *The [BIA]'s analysis, which makes no attempt to balance claims of hardship to the respondent's family against the gravity of her criminal offense, is grossly deficient. The opinion marginalizes the depravity of her crime, stating simply that the panel had "weighed the equities in this case against the respondent's criminal conviction" and concluded that discretionary relief was warranted. ... Little or no significance appears to have been attached to the fact that the respondent confessed to beating and shaking a nineteen-month old child to death, or that her confession was corroborated by a coroner's report documenting a wide-ranging collection of extraordinarily severe injuries. [Emphasis added.]*[219]

---

[218] *Id*. at 374-75, 378.
[219] *Id*. at 382-83.

The attorney general then set forth a new general policy to be followed in granting asylum and adjustment of status in the exercise of discretion to violent criminal aliens:

> *Aliens who have committed violent or dangerous crimes will not be granted asylum, even if they are technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.*[220]

Reading between the lines of this May 2002 decision, Attorney General Ashcroft used his certification authority not only to reverse an erroneous decision, but also to clarify the correct standard for the BIA to follow going forward in exercising his discretion and to signal that the then (fairly) new administration viewed such cases differently (and more harshly) than its predecessor.

Directing the IJs and BIA in the proper use of discretion is a complicated task, because the attorney general does not want to be accused of so-called "infringement on the independence of the Immigration Court," despite the fact that the IJs in removal proceedings are actually exercising the attorney general's discretion. Moreover, as noted above, the attorney general has only limited time and resources to correct erroneous exercises of that discretion. Again, with due respect to IJs and the BIA, the granting of discretionary relief in cases like *Matter of Jean* is strong evidence that the creation of Article I immigration courts, separate from their current structure within DOJ, are a bad idea.

Finally, I would note that Attorney General Barr, in *Matter of Thomas and Matter of Thompson*[221] underscored his power to establish immigration policy through certification. Specifically, he expressly rejected the argument that DOJ should proceed through "rulemaking" (that is, by promulgating a regulation in compliance with the Administrative Procedure Act or "APA") instead of through "adjudication," finding: "Supreme Court precedent confirms my authority as agency head to proceed by adjudication, and my authority here derives from the text of the relevant provisions in the INA."[222]

In short, certification is a powerful tool that allows the attorney general to set immigration law and policy in accordance with statute and regulation. It is also an effective way for the attorney general to use his suasion to correct improper exercises by his delegates of the discretion that he has been given under the INA. I would expect to see it used more in the future, to ensure that the often-arcane immigration laws are applied in a commonsense manner.

---

[220] *Id*. at 373.
[221] *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019), available at: https://www.justice.gov/eoir/page/file/1213201/download.
[222] *Id*. at 688.

Returning to *Matter of L-A-B-R-*[223], in that decision, the attorney general logically explained that:

> *When a respondent requests a continuance to accommodate a collateral proceeding, the good-cause inquiry thus must focus on whether the collateral matter will make a difference in the removal proceedings — that is, "whether a continuance is likely to do any good." . . . This will turn out to be true only if the respondent receives the collateral relief and that relief materially affects the outcome of respondent's removal proceedings.*[224]

On this basis, the attorney general found (consistent with BIA precedent) that continuances should not be granted where the respondent's "collateral pursuits are merely speculative."[225]

In addition, he found, IJs "must also consider any other relevant factors," although the attorney general admitted that not every good-cause factor could be identified.[226] He stated, however, that "germane secondary factors may include . . . the respondent's diligence in seeking collateral relief, DHS's position on the motion for continuance, and concerns of administrative efficiency."[227]

With respect to the position of DHS, the attorney general determined that while the department's position "will often assist the immigration judge's good-cause analysis," it is not dispositive of whether the IJ should grant or deny the motion. He also noted, though, that IJs "must also avoid improperly shifting the burden to DHS to demonstrate the absence of good cause."[228]

In explaining "administrative efficiency," the attorney general referenced OPPM 17-01, discussed above.[229] He explained that this OPPM "appropriately recognizes efficiency as a relevant factor in the good-cause analysis."[230] Significantly, the attorney general suggested, the number of prior continuances, and the impact of the continuance requested "on the efficient determination of the case, among other case-specific factors," were relevant considerations.[231]

In applying all the factors, Sessions held, a stronger factor may make up for weaker factors. For example: "A respondent who makes a compelling case that he will receive collateral relief and successfully adjust status may receive a continuance even if, for instance, he has already received previous continuances.[232]

---

[223] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (2018), available at: https://www.justice.gov/eoir/page/file/1087781/download.
[224] *Id*. at 413.
[225] *Id*. at 414.
[226] *Id*. at 415.
[227] *Id*.
[228] *Id*. at 416.
[229] MaryBeth Keller, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-01: Continuances*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, dated July 31, 2017, available at: https://www.justice.gov/eoir/file/oppm17-01/download.
[230] *Matter of L-A-B-R-*, 27 I&N Dec. at 416, available at: https://www.justice.gov/eoir/page/file/1087781/download.
[231] *Id*. at 417.
[232] *Id*.

That said, the attorney general made clear that "because the respondent's likelihood of success in the collateral matter is paramount, a truly weak showing on that front may be dispositive."[233] Among the examples he listed were applications that could not be granted, collateral attacks on criminal convictions, and collateral forms of relief that had already been denied where there were no changed circumstances.[234]

In addition:

> *Even if the respondent's collateral proceeding has clear promise, it will sometimes be impossible or too uncertain that the collateral relief will affect the disposition of the removal proceedings. For example, the immigration judge must deny a continuance if he concludes that, even if USCIS approved the respondent's visa petition, he would deny adjustment of status as a discretionary matter or because the respondent is statutorily ineligible for adjustment.*[235]

Finally, he held, "good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."[236]

The attorney general noted that in order to assess the speculative nature of the collateral matter, the IJ will generally need an evidentiary submission by the respondent, "which should include copies of relevant submissions in the collateral proceeding, supporting affidavits, and the like."[237]

In addition, the attorney general held that IJs should make clear on the record or in a written decision why they are granting continuances, because "[a] record of the immigration judge's evaluation and balancing of the relevant good-cause factors does not bind the Board . . . but it does aid the Board's review of a continuance order,"[238] indicting that such orders are, and should be, subject to review.

He concluded by making clear that while "the determination of good cause remains within the immigration judge's discretion," where an alien seeks to continue removal proceedings to pursue collateral relief, the regulation "requires scrutiny of whether the respondent's collateral proceeding is likely to make a difference."[239]

Other Certification Decisions

The attorney general has also used his certification authority to begin the process of addressing other issues that have slowed the completion of immigration cases.

---

[233] *Id*.
[234] *Id*.
[235] *Id*. at 418.
[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] *Id*. at 419.

For example, in *Matter of Castro-Tum*[240], then-Attorney General Sessions ended the general practice of administrative closure of removal cases. As he stated:

> *I hold that immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. Accordingly, immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.*[241]

In his decision, the attorney general noted that while administrative closure has been an authority utilized by the immigration courts and the BIA since the 1980s, the use of this authority has "grown dramatically as the [BIA] has made administrative closure easier to obtain."[242] In particular, in the 31 years from FY 1980 to FY 2011, 283,366 cases were administratively closed, while "in a mere six years, from October 1, 2011, through September 30, 2017, [IJs] and the [BIA] ordered administrative closure in 215,285 additional cases."[243]

That authority had become less of a tool of administrative convenience, and more of a tool to sweep cases under the carpet and make them disappear, as is best demonstrated by the fact (which the attorney general referenced[244]) that between 1980 and the attorney general's decision (a period of some 38 years), less than a third of those hundreds of thousands of administratively closed cases had been recalendared. Administratively closed cases had become a backlog of their own, albeit one hidden from public view.

Sessions' decision did not automatically recalendar those cases that had been administratively closed and that were subject to that decision. Rather, he ordered "that all cases that are currently administratively closed may remain closed unless DHS or the respondent requests recalendaring,"[245] As he stated: "I expect the recalendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets."[246]

While *Matter of Castro-Tum* may add additional cases to the IJs' dockets in the short term, it will allow EOIR to honestly state how large the backlog in cases before the immigration courts are, informing both Congress and the public as to whether the immigration courts have sufficient resources, and underscoring the effectiveness (or not) of other policies intended to facilitate the completion of removal proceedings, consistent with due process.

It also brings immigration policy in line with the regulations governing removal proceedings generally, and 8 C.F.R. § 1003.12 specifically. That regulation states: "These rules are

---

[240] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), available at: https://www.justice.gov/eoir/page/file/1064086/download.
[241] *Id*. at 272.
[242] *Id*. at 273.
[243] *Id*.
[244] *Id*.
[245] *Id*. at 293.
[246] *Id*. at 294.

promulgated to assist in the **expeditious**, fair, and proper resolution of matters coming before Immigration Judges." [Emphasis added].[247]

Finally, it reinforces the decades-old principle, best stated in *Lopez-Telles v. INS*, which states that IJs are "without discretionary authority to terminate deportation proceedings so long as [immigration-] enforcement officials . . . choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion."[248] Any procedure by which hundreds of thousands of removal, deportation, and exclusion cases are effectively shelved for decades is a de facto termination.

Interestingly, the Court of Appeals for the Fourth Circuit has held that (despite the fact that it is a procedural tool unmoored from direct basis in statute or regulation), administrative closure is still available in the courts in that circuit, subject to prior BIA guidance.[249]

In a separate case, *Matter of E-F-H-L-*, then-Attorney General Sessions used his authority to vacate an earlier BIA decision of the same name, in which it had held that "that a respondent applying for asylum and withholding of removal was ordinarily entitled to a full evidentiary hearing."[250] This decision will enable immigration judges to more quickly issue decisions in non-meritorious asylum cases.

Finally, in *Matter of A-B-*[251], then-Attorney General Sessions provided bright-line rules for IJs and the BIA to follow in evaluating asylum claims related to criminal activity, and in particular gang-related activity, largely by applying and reiterating BIA precedent on the issue of "membership in a particular social group."[252]

By providing immigration judges and asylum officers with better guidance on these issues, the attorney general has, logically, enabled IJs to decide those cases more quickly.

---

[247] 8 C.F.R. § 1003.12, available at: https://www.justice.gov/eoir/page/file/1064086/download.

[248] *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977), available at: https://law.justia.com/cases/federal/appellate-courts/F2/564/1302/82805/; *see also Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982) ("It has long been held that when enforcement officials of the Immigration and Naturalization Service choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged."), available at: https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2908.pdf.

[249] *Zuniga Romero v. Barr*, No. 18-1850 (4th Cir. Aug. 29, 2019), available at: http://www.ca4.uscourts.gov/opinions/181850.p.pdf.

[250] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), *available at*: https://www.justice.gov/eoir/page/file/1040936/download. .

[251] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

[252] *See* section 208(b)(1)(B)(i) of the INA ("The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) of [the INA]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

Improvements in EOIR's Processes

During my May 2018 *Immigration Newsmaker* interview, Director McHenry outlined three specific steps that the agency was taking to reduce the backlog.[253]

The first, as already mentioned, was an increase in IJ hiring.

The second was increasing EOIR's "existing capacity."[254] Specifically, McHenry mentioned work that the agency was doing on docketing efficiencies, as well as reducing the number of unused courtrooms by utilizing video teleconference (VTC) technology.[255] He also stated that EOIR was "shifting resources around," to enable courts that had "excess capacity" to hear cases from other courts that had less capacity to deal with its existing docket.[256]

I used VTC as an IJ to hear cases from remote locations, and in particular state and federal prisons that fell within my jurisdiction. I found that, with a few notable exceptions, the system as it worked five years ago enabled me to quickly, and consistent with due process, adjudicate cases. That technology has only improved in the last five years since I left the bench, as my recent trip to Laredo revealed. Respondents were able to have documents scanned in and sent to the court in real time, an advantage that would only have improved my ability to hear cases.

With respect to that last point, the third improvement McHenry referenced had to do with infrastructure, and in particular moving the immigration courts to an electronic-based system for the filing of motions, evidence, and applications.[257] As the EOIR website[258] explains:

> *EOIR is working to improve its court and appellate information systems.*
>
> *The EOIR Courts & Appeals System (ECAS) initiative is part of an overarching information technology modernization effort at our agency. The goal of ECAS is to phase out paper filing and processing, and to retain all records and case-related documents in electronic format. In support of the EOIR mission, it will further enable the timely and fair adjudication of immigration cases.*

ECAS is currently available at nine courts (San Diego, Atlanta, Denver, Baltimore, York, Aurora, the Falls Church Immigration Adjudication Center, the Fort Worth Immigration Adjudication Center, and Philadelphia), and will soon be available at the Imperial, Otay Mesa,

---

[253] *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry.
[254] *Id*.
[255] *Id*.
[256] *Id*.
[257] *Id*.
[258] *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated January 21, 2020, available at: https://www.justice.gov/eoir/ECAS.

and Stewart/Lumpkin Immigration Courts.[259] It is scheduled to be expanded to the rest of the courts and the BIA.[260]

As of November 2019, over 40,000 electronic cases had been created, and almost 16,000 attorneys had been registered to use ECAS.[261]

ECAS will improve the adjudication of cases by making the documents of record available to the IJ and the parties, reducing the lag time between filing and receipt, and ensuring that documents are not lost, as occasionally happens with the existing paper ROPs. And, as McHenry noted, electronic filing:

> *[M]akes it easier for the judges to look at while they're conducting a hearing. . . . easier for the law clerks later on if they need to review something to help write a decision. . . [and] easier for the public to be able to file more at their convenience than to have to go down to the actual window and file it.*[262]

Department of Justice Litigation

Finally, DOJ must fight vigorously for decisions that provide uniformity of law and "bright-line" rules for immigration judges to apply in real-world cases. Most people I talk to about my work as an immigration judge are surprised when I tell them that I handled more than 13,000 cases in just over eight years on the bench. Because of the volume of cases they handle, IJs must be able to decide cases quickly, or run the risk that their dockets will be uncontrollable; otherwise, justice suffers, and the job becomes overwhelming. Uniform, clear standards of law are essential to this task.

Conclusions on Immigration Court Backlogs

The backlogs in immigration courts are too large, but they are, to some degree, explained by the poor policies set by the executive branch in the past, and the recent crisis at the southwest border, which saw hundreds of thousands of migrants seek illegal entry into the United States. There is much that needs to be done to remedy the problem, but the administration has taken some crucial first steps. It must follow through on those steps and its promises on immigration enforcement to reduce those backlogs, and Congress must also do its part by providing the needed funding to support immigration enforcement and staff the immigration courts fully.

Oversight of the Immigration Courts and the BIA by DOJ

---

[259] *Id.*

[260] *Id.*

[261] *Unprecedented Migration at the U.S. Southern Border: The Year in Review: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, at 116th Cong. (2019) (statement of James McHenry, Director of the Executive Office for Immigration Review), at 2, available at: https://www.hsgac.senate.gov/imo/media/doc/Testimony-McHenry-2019-11-13.pdf.

[262] *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry

There has been significant attention paid by Congress and other organizations to oversight of the IJs and the BIA by DOJ generally, and EOIR in particular.

I have already addressed the issue of referral of BIA and IJ decisions by the attorney general through his certification authority, but it bears repeating that such authority is inherent in the attorney general under section 103(a)(1) of the INA.[263] Again, I will also note that, as an attorney with the INS, I relied upon that specific authority to correct serious errors and conclusions of the BIA in matters touching upon the national security and foreign policy of the United States. As I will address below, because of the executive branch's primacy in those issues, it is critical that the attorney general, as a representative of the executive branch, be allowed to continue to exercise his certification authority, and authority over immigration law as a whole.

There have also been issues raised concerning oversight of the immigration courts, in particular, by the director of EOIR and the Chief IJ, in an effort to ensure efficient adjudication of immigration cases in general, and removal cases in particular.

The director of EOIR has been given authority by the attorney general to supervise EOIR and its components, pursuant to regulations set forth in 8 C.F.R. § 1003.0.[264] That regulation states, in pertinent part:

> *(b) Powers of the Director -*
>
> > *(1) In general.* ***The Director shall manage EOIR and its employees and shall be responsible for the direction and supervision of each EOIR component in the execution of its respective duties pursuant to the Act and the provisions of this chapter.*** *Unless otherwise provided by the Attorney General, the Director shall report to the Deputy Attorney General and the Attorney General. The Director shall have the authority to:*
> >
> > > *(i)* ***Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities****;*
> > >
> > > *(ii)* ***Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by the Board, the immigration judges, the Chief Administrative Hearing Officer, or the administrative law judges****;*

[263] Section 103(a)(1)(A) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim.
[264] 8 C.F.R. § 1003.0, available at: https://www.law.cornell.edu/cfr/text/8/1003.0.

* * * *

(iv) Evaluate the performance of the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, and other EOIR activities, make appropriate reports and inspections, and take corrective action where needed;

(v) ***Provide for performance appraisals for immigration judges and Board members while fully respecting their roles as adjudicators, including a process for reporting adjudications that reflect temperament problems or poor decisional quality****;*

* * * *

and

(ix) Exercise such other authorities as the Attorney General may provide.[265] *[Emphasis added].*

The attorney general has also given, by regulation, authority to the Chief IJ to issue policy and direct the conduct of employees in the Office of the Chief Immigration Judge, set forth in 8 CFR § 1003.9.[266] That regulation states, in pertinent part:

(b) Powers of the Chief Immigration Judge. Subject to the supervision of the Director, the Chief Immigration Judge shall be responsible for the supervision, direction, and scheduling of the immigration judges in the conduct of the hearings and duties assigned to them. The Chief Immigration Judge shall have the authority to:

(1) ***Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities****;*

* * * *

(3) ***Direct the conduct of all employees assigned to OCIJ to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases, to direct that the adjudication of certain cases be deferred, to regulate the assignment of immigration judges to cases, and otherwise to manage the docket of matters to be decided by the immigration judges****;*

* * * *

[265] *Id.*, at subsection (b).
[266] 8 C.F.R. § 1003.9, available at: https://www.law.cornell.edu/cfr/text/8/1003.9.

and

(6) Exercise such other authorities as the Director may provide.[267] *[Emphasis added].*

Case Processing Priorities

Pursuant to her powers under 8 C.F.R. § 1003.9(b)(1)(i), on January 31, 2017, then-Chief IJ Keller issued a memorandum captioned "Case Processing Priorities."[268] That memorandum rescinded two prior memoranda, and limited case processing priorities to just three categories: detained respondents, UACs in HHS custody who did not have an identified sponsor, and respondents who had been released from custody pursuant to *Rodriguez*[269] (discussed above). Those priorities only applied to 10 percent of pending cases.[270]

That memorandum made clear that cases involving all other UACs, adults with children released pursuant to ATD, adults with children who had been released from custody, and recent border crossers who had been detained but were subsequently released were no longer docketing and processing priorities.[271]

Thereafter, on January 17, 2018, Director McHenry issued a separate memorandum captioned "Case Priorities and Immigration Court Performance Measures"[272] pursuant to his authority under 8 C.F.R. § 1003.0(b)(1)(i). That memorandum, in turn, rescinded the January 31, 2017 memorandum referenced above, and laid "out EOIR's specific priorities and goals in the adjudication of immigration court cases."[273]

Significantly, Director McHenry, noting "EOIR has always designated detained cases as priorities for completion," admitted:

> *The repeated changes in case prioritization have caused confusion and created difficulty in comparing and tracking case data over time.* ***But, most importantly, the frequent shifting priority designations did not enhance docket efficiency.***

---

[267] *Id*. at subsection (b).
[268] MaryBeth Keller, Chief Immigration Judge, *Case Processing Priorities*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 31, 2017, at 1, available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf.
[269] *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf, reversed and remanded *Jennings v. Rodriguez*, 583 U.S. __ (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.
[270] James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 2, Jan. 17, 2018, available at: https://www.justice.gov/eoir/page/file/1026721/download.
[271] MaryBeth Keller, Chief Immigration Judge, *Case Processing Priorities*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 31, 2017, at 1-3, available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf.
[272] James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 17, 2018, available at: https://www.justice.gov/eoir/page/file/1026721/download.
[273] *Id*. at 1.

> *Not only were cases repeatedly moved to accommodate new priorities without a clear plan for resolving both the new and older cases, but also the designations did not adequately stress the importance of completing all cases in a timely manner.*[274] *[Emphasis added].*

"Accordingly," McHenry stated, "to address concerns and confusion, it is appropriate to clarify EOIR's priorities and goals to ensure that the adjudication of cases serves the national interest consistent with the principles outlined by the Attorney General."[275]

Specifically, he identified as "priorities for completion . . . cases involving individuals in detention or custody, regardless of the custodian," as well as "cases subject to a statutory or regulatory deadline, cases subject to a federal court-ordered deadline, and cases otherwise subject to an established benchmark for completion, including" cases listed in an appendix, captioned "Immigration Court Performance Measures."[276]

Included in that latter group of priority cases were credible fear reviews, which are subject to a seven-day deadline under subclause 235(b)(1)(B)(iii)(III) of the INA[277]; reasonable fear reviews, which are subject to a 10-day deadline under 8 C.F.R. § 1208.31(g)[278]; and expedited asylum cases, which are subject to a 180-day deadline (not including appeals) from the date of filing "in the absence of exceptional circumstances" at clause 208(d)(5)(A)(iii) of the INA[279].

With respect to this last category of cases, on November 19, 2018, McHenry issued a Policy Memorandum captioned "Guidance Regarding the Adjudication of Asylum Applications consistent with INA 208(d)(5)(A)(iii)."[280]

Immigration Court Benchmarks and Performance Metrics

In the January 2018 memorandum, McHenry also noted the importance of benchmarks and performance metrics for IJs, and the history of such evaluative tools (and confusion surrounding them) at EOIR:

> *Apart from designated case priorities, EOIR's case processing has also involved other types of evaluative measures over time, such as statutory or regulatory deadlines for the completion of certain types of cases, including under the [INA], the Government Performance and Results Act (GPRA) of 1993, and the GPRA Modernization Act of 2010. Although these case completion goals have not*

---

[274] *Id*. at 2.
[275] *Id*.
[276] *Id*. at 2 and Appx. A.
[277] Subcl. 235(b)(1)(B)(iii)(III) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[278] 8 C.F.R. § 1208.31(g), available at: https://www.law.cornell.edu/cfr/text/8/1208.31.
[279] Cl. 208(d)(5)(A)(iii) of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim.
[280] James McHenry, Director, *Policy Memorandum 19-05, Guidance Regarding the Adjudication of Asylum Applications consistent with INA 208(d)(5)(A)(iii)*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Nov. 19, 2018, available at: https://www.justice.gov/eoir/page/file/1112581/download.

> *previously denoted case priorities per se, they do serve as indicators of the importance of completing certain classes of cases in a timely manner.*
>
> *Historically, EOIR also utilized case completion measures for non-detained cases from FY 2002 to FY 2009, but it eliminated those measures in FY 2010, leading to confusion regarding the extent to which the timely completion of non-detained cases was perceived as a priority for the agency. The abolition of non-detained case completion benchmarks was also subsequently criticized by both the [DOJ] Office of Inspector General and the [GAO], both of whom recommended that EOIR reinstate goals for the completion of non-detained cases. In 2016 and 2017, the House Committee on Appropriations also directed EOIR to establish a goal that the median length of detained cases be no longer than 60 days and the median length of non-detained cases be no longer than 365 days.*[281]

In November 2017, I wrote about the importance of such metrics:

> *If there were no accounting for the ability of a judge to issue a decision in a reasonable (or representative) period of time, absurd results would follow. [C]onsider two separate judges. . . in the same court. Each hears a case involving an identically situated alien seeking an identical form of relief. One judge disposes of the case (from master calendar to final decision) within a month, along with decisions in 60 similar cases. The other judge, however, is unable to make a decision on our hypothetical case. Multiple continuances are granted, multiple hearings are held, and other cases are bumped, but the second judge still cannot make a decision. Months go by with no determination, and the rest of the judge's calendar suffers as a result. The judge's other colleagues must take up the slack that results from the judge's indecision or inability to render a judgment. There is neither "fairness" nor efficiency nor "justice" in this scenario.*
>
> *Part of the issue with measuring immigration judge performance currently has to do with the expectations and behavior of the parties and the court. I have written extensively in the past about the large number of continuances that have plagued the court system and inflated the backlog. A major issue, as I have explained before, is that "[t]here is ... significant pressure from federal courts and the BIA on IJs to grant continuances, and little downside to the IJs in doing so."*
>
> *EOIR should, therefore, use metrics and goals to modify behavior of both the judges and the parties that is harmful to the immigration-court system.*[282]

---

[281] James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 3, Jan. 17, 2018, available at: https://www.justice.gov/eoir/page/file/1026721/download

[282] Andrew Arthur, *Balancing Independence and Accountability at the Immigration Courts, A CourTools solution*, Center for Immigration Studies, Nov. 8, 2017, available at: https://cis.org/Arthur/Balancing-Independence-and-Accountability-Immigration-Courts.

McHenry also noted the importance of such metrics in his memorandum:

> *Almost every trial court system utilizes performance measures or case completion metrics to ensure that it is operating efficiently and appropriately. Some of these are established by statute or regulation whereas others are set by policy; nevertheless, trial court performance measures are an essential and widely-recognized tool for ensuring healthy and effective court operations.*
>
> * * * *
>
> *In fact, over 25 years ago, the ABA recognized the importance of establishing court performance standards to ensure effective case management and to avoid undue delay; in doing so, it outlined seven essential elements for managing cases, including several that are now being implemented by EOIR such as "[p]romulgation and monitoring of time and clearance standards for the overall disposition of cases," "[a]doption of a trial-setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimizing resettings caused by overscheduling," "[c]ommencement of trials on the original date scheduled with adequate advance notice," and "[a] firm, consistent policy for minimizing continuances." In short, court performance measures and case completion goals are common, well-established, and necessary mechanisms for evaluating how well a court is functioning at performing its core role of adjudicating cases.*
>
> *EOIR is no exception to the rule that court performance measures are a necessary accountability tool to ensure that a court is operating at peak efficiency, nor is there anything novel or unique about applying performance measures to EOIR's immigration courts. Rather, a review of such measures is vital to ensure that the immigration court system is performing strongly, that EOIR is adjudicating cases fairly, expeditiously, and uniformly consistent with its mission, and that it is addressing its pending caseload in support of the principles established by the Attorney General.*[283]

McHenry then set forth "court-based performance measures" that EOIR would track and audit, which were "intended to help determine which courts are operating in a healthy and efficient manner" and on the one hand as well as those courts that "may be in need of more specialized attention in the form of additional resources, training, court management, creative thinking and planning, and/or other action as appropriate" on the other. [284] Those measures did not address metrics to evaluate the performance of any individual IJ.

---

[283] James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 3-4, Jan. 17, 2018, available at: https://www.justice.gov/eoir/page/file/1026721/download

[284] *Id*. at 4-5, and *see* Appx. A.

By E-mail dated March 30, 2018, however, the director of EOIR announced new performance metrics for IJs, which would be effective October 1, 2018.[285] Those metrics were to be added to the existing IJ Performance Work Plan under "Job Element 3: Accountability for Organizational Results."[286]

Most significantly, under "Performance Goals" for that element, a case completion rate of "700 cases per year" was added, as well as a remand rate of less than 15 percent from the BIA and federal courts, in addition to compliance with a series of "Benchmarks," for a finding of "Satisfactory performance."[287]

Those benchmarks include a finding that 85 percent of detained cases were completed within three days of the merits hearing, that 85 percent of non-detained cases were completed within 10 days of the merits hearing, that 85 percent of motions were adjudicated within 20 days of receipt, that 90 percent of bond requests were completed on the date of the initial hearing where the respondent was produced by DHS, that 95 percent of all individual merits hearings were completed on the initial hearing date (unless the alien was not produced by DHS), and that 100 percent of credible-fear and reasonable-fear reviews be completed on the initial hearing date (again, unless DHS failed to produce the respondent).[288]

I specifically asked McHenry about how these performance goals were going to be applied, and whether EOIR would receive feedback on these performance goals during our May 2018 *Immigration Newsmaker* event:

> *MR. ARTHUR: . . . . It was recently reported that EOIR plans to set a quota of 700 cases per year for immigration judges – for each immigration judge to complete. Are there performance standards for immigration judges?*
>
> *MR. MCHENRY: I think at this point most people are probably aware. There was an email that went out toward the end of March and it's been in the media. So we are – we do intend to implement performance measures – numeric performance measures. It's important to clarify, though, that immigration judges have been subjected to performance evaluations for a number of years. I don't know if they were in place when you were a judge, but it's not a new concept or a new idea to evaluate the performance of judges. The new part is having sort of numeric standards. And we think, from an objective perspective, if you're an employee and you're being evaluated, you know, it helps you to understand sort of what you need to do to get a certain level of performance. So we're trying to make it both more transparent and more objective to have the judges have a better understanding of what they need to do.*

---

[285] *E-mail from Director of EOIR to All of Judges (EOIR), Immigration Judge Performance Metrics*, Mar. 30, 2018, available at: https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics.
[286] *Id.*
[287] *Id., EOIR Performance Plan, Adjudicative Employees*, at 2.
[288] *Id.*

MR. ARTHUR: What happens if you're a judge in a court that only has 500 notices to appear filed each year? I mean, how are you going to meet 700 cases if you only get 500 NTAs?

MR. MCHENRY: ***Well, this is one reason, aside from semantics, that we don't call it a quota, or we don't consider it a quota. A quota is sort of a fixed number without any kind of deviation or without any sort of allowance or room for deviation. But when we evaluate the judges based on our measure, there are at least six discrete factors that we're going to take into consideration. And there's also a seventh sort of catch-all. So before we – before we come to a final evaluation, if for some reason, you know, a judge has not completed the number of cases that we think is appropriate, we'll look at these factors.***

We'll look at the catch-all. We'll look at sort of the overall context. And it could be something – obviously, if a judge doesn't get 700 cases, you can't expect the judge to complete 700 cases. So we're not – again, it's not an inflexible number. It's not quite as concrete or rigid as perhaps it's been portrayed. But we're going to look at factors like that, factors that may be beyond the judge's control. And that all goes into account for the evaluation.

MR. ARTHUR: And, yes indeed – it hasn't been that long that I was an immigration judge – we did have performance standards that I had to meet. And demeanor and, you know, various other competency requirements were part of that. But with respect to the number of cases that a judge has to complete per year, or that, you know, ideally will be completed, will there be feedback on that? ***Will you guys, you know, take a look at those numbers, determine whether that's the right number?***

MR. MCHENRY: Right now – and, first, the measures aren't scheduled to go into effect until the beginning of the next fiscal year, so that's October. ***So we've got – we've got training coming up for the judges. There'll be bargaining with the union on impact and implementation of the measures. So how it's going to be rolled out is subject to change between now and then. But we do want the judges to be aware of the numbers, to help try to make them more comfortable with them and understanding sort of where we're coming from.***

And in terms of feedback, you know, we're working on essentially an electronic dashboard system, so that the judges can call up, you know, their own caseload, their own numbers themselves in real time, you know, updated on sort of a daily basis. And they can see kind of where they stack up. You know, other agencies use similar systems. And other agencies who have similar performance measures use those types of systems. And we're going to make sure that the judges have enough feedback, have enough information so that they know kind of where they stand and where there may be some potential issues.

> *MR. ARTHUR:* ***What are going to be the implications if, you know, one fails to meet these standards? I mean, do you get fired? Is there an opportunity for additional training? Do you identify, you know, people that need some – a little bit more help?***
>
> *MR. MCHENRY:* ***Again, it's really going to be fact-specific and based on the particular situation. It could be a training issue. It could be a resource issue. You know, it could be somebody who's just been out for a while for some reason. It could be going on detail. There are a number of factors that might go into it. And we don't have sort of a one-size-fits-all of how we're going to – how we're going to, you know, make a decision. You know, we're going to look at it, see what the – drill down, see what the actual underlying issue is, and then address it – whether it's training, resources, or something else.***
>
> *MR. ARTHUR: But I anticipate this will be a feedback loop, where you're constantly, you know, looking at these numbers, looking at performance to, you know, see what the agency needs, correct?*
>
> *MR. MCHENRY:* ***Oh, definitely. I mean, the – one of the driving forces behind it is for us to understand better IJ – immigration judge productivity. So we're going to look at it. We're going to see, you know, where the metrics stack up.*** *We're definitely going to get feedback. We're already getting feedback to some degree. And we'll evaluate it on sort of an ongoing basis.*
>
> *MR. ARTHUR: Do you think this is a reasonable number, or that this is about right?*
>
> *MR. MCHENRY: Yeah. It's a policy judgement that this is a reasonable number that a – or, that this is a number that a judge – an experienced judge with proper training can reasonably be expected to complete. It's in line with historic averages. I think the productivity numbers you quoted earlier, it's actually a little bit lower than that. So we think, yeah, it's a reasonable number that the judges should be expected – everything else being equal – should be expected to meet. [Emphasis added].*[289]

I am familiar with IJ performance evaluations, having gone through several during my tenure, and can confirm that feedback from the IJ is a part of the process. They are fact-specific, and although a goal of 700 cases may seem daunting, (1) as the foregoing shows, the IJ has the opportunity to explain any reasons why he or she failed to meet the goal, and (2) according to EOIR, in FY 2019 "[o]n average, immigration judges who performed over the whole year

[289] *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry.

completed 708 cases each,"[290] despite a five-week government shutdown between December 2018 and January 2019[291] that closed non-detained immigration courts.[292]

Moreover, the number of complaints about IJs has actually *dropped* over the past three years, notwithstanding the issuance of the guidance described above, going from 156 in FY 2017 to 98 in FY 2018 to 97 in FY 2019[293], an almost 38 percent decrease. In fact, the 97 complaints in FY 2019 were just less than 50 percent below the number of complaints in FY 2009—192.[294] This is likely the truest measure of how the immigration bar views the performance of the immigration court during that period, and plainly, it is improving, even as the situation at the border got worse.

And, despite complaints from "[i]mmigrant advocates" who have "warn[ed] that the quotas could lead to an increase in erroneous deportations of immigrants, forcing many to return to the violence and persecution in their home countries that led them to apply for asylum in the first place,"[295] EOIR statistics show that the asylum grant rate was largely unchanged between FY 2018 (20.51 percent) and FY 2019 (20.25 percent), and was actually higher than it had been in FY 2016 (15.81 percent) and FY 2017 (19.58 percent).[296] The asylum denial rate did increase between FY 2018 (41.41 percent) and FY 2019 (48.82 percent; it was 21.36 percent in FY 2016 and 32.76 percent in FY 2017), but that is at least partially explained by the decrease in the administrative closure rate (39.38 percent in FY 2016, 20.25 percent in FY 2017, 3.27 percent in FY 2018, and .14 percent in FY 2019)[297], which suggests that most of the asylum cases that had been administratively closed were not meritorious to begin with.

Finally, it is clear that, for whatever reasons (but likely as a result of the factors discussed above, including the aforementioned performance-based metrics), the number of cases completed by EOIR has increased significantly over the past four years: from 143,491 in FY 2016, to 163,068

---

[290] *Press Release: Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Oct. 10. 2019, available at: https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019.

[291] Nicole Ogrysko, *OMB declares end to 35-day government shutdown, instructs agencies to reopen*, FEDERAL NEWS NETWORK, Jan. 25, 2019, available at: https://federalnewsnetwork.com/government-shutdown/2019/01/omb-declares-end-to-35-day-government-shutdown-instructs-agencies-to-reopen/.

[292] Victoria Macchi, *US Immigration Courts Affected by Government Shutdown*, VOICE OF AMERICA, Jan. 2, 2019, available at: https://www.voanews.com/usa/us-immigration-courts-affected-government-shutdown.

[293] *Adjudication Statistics, Immigration Judge (IJ) Complaints*, Department of Justice, Executive Office for Immigration Review, data generated Oct. 2019, available at: https://www.justice.gov/eoir/page/file/1104851/download.

[294] *Id*.

[295] Manuel Madrid, *Law Professors Denounce Sessions's Push for Case Quotas for Immigration Judges*, THE AMERICAN PROSPECT, Aug. 16, 2018, available at: https://prospect.org/justice/law-professors-denounce-sessions-s-push-case-quotas-immigration-judges/.

[296] *Adjudication Statistics, Asylum Decision Rates*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1163686/download.

[297] *Id*.

in FY 2017, to 195,088 in FY 2018, to 276,523 in FY 2019—a 92 percent increase[298], despite, as noted, a five-week government shutdown that closed non-detained immigration courts between December 2018 and January 2019.[299] In fact, the agency completed 99,889 cases in the first quarter of FY 2020[300], meaning EOIR is on pace to complete just less than 400,000 cases this fiscal year. If the goal of EOIR is to complete pending cases, the agency is plainly rising to that challenge.

Or, as Director McHenry told the Senate Homeland Security and Governmental Affairs Committee in November 2019:

> *These results are a testament to the professionalism and dedication of our immigration judge corps. These results unequivocally prove that immigration judges have the integrity and competence required to resolve cases in the timely and impartial manner that is required by law.*[301]

Attempted Decertification of the Immigration Judges' Union

Beginning on January 7, 2020, the Federal Labor Relations Authority (FLRA) held hearings[302] on a petition[303] filed by DOJ in August 2019[304] to decertify the National Association of Immigration Judges (NAIJ)[305], which is an affiliate of the International Federation of Professional and Technical Engineers.

By way of background, under federal law[306], "management official[s]" are excluded from bargaining units, like unions. For purposes of this statute, a "management official" is "an

---

[298] *Adjudication Statistics, New Cases and Total Completions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Jan. 23, 2020, available at: https://www.justice.gov/eoir/page/file/1238741/download.
[299] Dave Boyer, *Trump signs bill ending 35-day government shutdown without wall funding*, WASHINGTON TIMES, Jan. 25, 2019, available at: https://www.washingtontimes.com/news/2019/jan/25/trump-signs-bill-ending-35-day-government-shutdown/.
[300] *Id*.
[301] *Unprecedented Migration at the U.S. Southern Border: The Year in Review: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, at 116th Cong. (2019) (statement of James McHenry, Director of the Executive Office for Immigration Review), at 2, available at: https://www.hsgac.senate.gov/imo/media/doc/Testimony-McHenry-2019-11-13.pdf.
[302] Louis C. LaBreque, *Petition to Decertify Immigration Judges' Union to Get Hearing*, BLOOMBERG LAW, Jan. 6, 2020, available at: https://news.bloomberglaw.com/daily-labor-report/petition-to-decertify-immigration-judges-union-to-get-hearing.
[303] *Petition filed by Lee J. Loftus, Asst. Atty. Gen. for Administration, Department of Justice, with the Federal Labor Relations Authority*, Case No. WA-RP-19-67, Aug. 9, 2019, available at: https://aboutblaw.com/NS5.
[304] Josh Eidelson, *Trump Administration Moves to Decertify Immigration Judges' Union*, BLOOMBERG LAW, Aug. 12, 2019, available at: https://news.bloomberglaw.com/daily-labor-report/trump-administration-moves-to-dissolve-immigration-judges-union.
[305] *National Association of Immigration Judges*, available at: https://www.naij-usa.org/.
[306] *See* 5 U.S.C. § 7112(b)(1) ("A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes— (1) except as provided under section 7135(a)(2) of this title, any management official or supervisor . . . . ");, available at: https://www.law.cornell.edu/uscode/text/5/7112.

individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency."[307]

The Clinton administration tried, unsuccessfully, to decertify the union (which was certified in 1979) in 2000.[308] In the 2000 decision, the FLRA regional director held that IJs are not management officials, finding that IJs do not "make policy through the issuance of their decisions," that their decisions are not published, and that they do not constitute precedent. The regional director also rejected DOJ's claims that IJs "are management officials by virtue of their judicial independence, professional stature and qualifications, the formal amenities of the courtroom and other similar factors."[309]

With respect to that decision, the FLRA apparently failed to consider the fact that IJ decisions are final in all cases that are not appealed, and as such are res judicata[310] — that is, binding precedent with respect to the same issues of fact, as applied to the same alien. This is a fairly significant point, because in those cases, the IJ is determining the policies of the agency, at least as relates to that alien.

In addition, in certain categories of cases — including credible fear[311] and reasonable fear[312] review redeterminations, claimed status cases for respondents in expedited removal[313], and *in absentia* removal orders[314] — there is no appeal from the IJ's order at all. While credible fear and reasonable fear reviews were part of statute when the FLRA issued its 2000 decision, they were much rarer than they are today, as the number of credible fear and reasonable fear review cases

---

[307] 5 U.S.C. § 7103(a)(11), available at: https://www.law.cornell.edu/uscode/text/5/7103.

[308] U.*S. Department of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge (Petitioner/Agency) and National Association of Immigration Judges (Labor Organization/Union)*, 56 FLRA No. 97 (Sep. 1, 2000), available at: https://www.aila.org/File/Related/19081303c.pdf.

[309] *Id*.

[310] *See Ramon-Sepulveda v. INS*, 824 F.2d 749 (1987) (IJ found that INS had failed to prove alienage in July 1979 and terminated case; BIA subsequently affirmed IJ decision reopening for new evidence that Ninth Circuit thereafter determined "was not newly discovered evidence," and found that the BIA had abused its discretion; INS issued a new Order to Show Cause based upon the same evidence; Ninth Circuit held: "The immigration judge's initial decision at the July 1979 deportation hearing that the INS failed to prove that Ramon-Sepulveda 'is an alien' and 'that he is deportable,' is res judicata."), available at: https://scholar.google.com/scholar_case?case=16488788067711763963&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[311] *See* sections 235(b)(1)(B)(iii)(III)("Review of Determination") and 235(b)(1)(C) ("Limitation on Administrative Review") of the INA, available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.

[312] 8 C.F.R. § 1208.31(g)(1) ("If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien. No appeal shall lie from the immigration judge's decision."), available at: https://www.law.cornell.edu/cfr/text/8/1208.31.

[313] *See* 8 C.F.R. § 1235.3(b)(4) ("If the immigration judge determines that the alien has never been admitted as a lawful permanent resident or as a refugee, granted asylum status, or is not a U.S. citizen, the order issued by the immigration officer will be affirmed and the Service will remove the alien. There is no appeal from the decision of the immigration judge."), available at: https://www.law.cornell.edu/cfr/text/8/1235.3.

[314] Section 240(b)(5)(C) of the INA ("Rescission of Order"), available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim.

has skyrocketed, from a mere 197 in FY 2000 to 15,433 in FY 2019.[315] Again, in those cases, the IJ is dispositively determining the policy of the agency in the individual case. And, while IJs have issued *in absentia* orders for years, the number of such decisions has increased significantly in the last decade — from 25,345 in FY 2008 to 89,919 in FY 2019.[316]

Moreover, there have also been significant changes in procedural policies at EOIR since the 2000 FLRA decision that could affect the analysis of whether IJs are management officials. As I explained in a July 2017 post[317]:

> *BIA decisions were issued by three-member panels up until 1999, when, as the American Bar Association has noted, a new "rule permitted a single Board member to issue decisions in a limited range of cases." That said, the Justice Department admitted that: "Over 58 [percent] of all new cases in 2001 were sent to be summarily decided by single Board member review through streamlining."*
>
> *In 2002, the Justice Department issued new regulations that made single-member BIA decisions the norm. Under 8 C.F.R. § 1003.1(e), the chairman of the BIA:*
>
> > *[S]hall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition.*
>
> *Pursuant to the referenced provision, 8 C.F.R. § 1003.1(e)(6):*
>
> > *Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:*
> >
> > *(i) The need to settle inconsistencies among the rulings of different immigration judges;*
> >
> > *(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;*
> >
> > *(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;*
> >
> > *(iv) The need to resolve a case or controversy of major national import;*

[315] *Adjudication Statistics, Credible Fear Review and Reasonable Fear Review Decisions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Oct. 23, 2019, available at: https://www.justice.gov/eoir/page/file/1104856/download.

[316] *Adjudication Statistics,* In Absentia *Removal Orders*, Department of Justice, Executive Office for Immigration Review, https://www.justice.gov/eoir/page/file/1060851/download.

[317] Andrew Arthur, *Expand the Board of Immigration Appeals*, CENTER FOR IMMIGRATION STUDIES, Jul. 26, 2017, available at: https://cis.org/Arthur/Expand-Board-Immigration-Appeals.

> *(v) The need to review a clearly erroneous factual determination by an immigration judge; or*
>
> *(vi) The need to reverse the decision of an immigration judge or [DHS], other than a reversal under § 1003.1(e)(5).*

The last referenced provision, 8 C.F.R. § 1003.1(e)(5), states:

> *Other decisions on the merits by single Board member. If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.*

The practical effect of these reforms was to, in essence, make the decision of the IJ the decision of the agency (EOIR), albeit a decision blessed by a single Board member, in a significant number of cases. Thus, the IJ in those cases is formulating the policy of the agency.

While the 1999 streamlining rules went into effect before the 2000 decision of the FLRA, the expansion in 2002 occurred well after that decision was issued. And, to the degree that there is a difference between BIA decisions being published, as opposed to IJ decisions, the vast majority of BIA decisions are not published, and none of the ones subject to streamlining would be.

Whether these changes will make any difference, however, remains to be seen. On August 12, 2019, NAIJ issued a press release denying that it sets policies or manages staff, describing DOJ's efforts as "a desperate attempt by the DOJ to evade transparency and accountability, and undermine the decisional independence of the nation's [then-]440 Immigration Judges."[318]

I would note, however, that DOJ could have made other arguments in its attempt to decertify the NAIJ. As Government Executive[319] reported:

---

[318] *Press Release, Trump Administration Seeks to Silence Federal Immigration Judges' Union, DOJ Files Legal Documents to End the Labor Rights of Judges Retribution for Speaking Out and Exposing Problems in the Courts Judges Make Bipartisan Appeal Asking Congress to Create an Independent Court Free From Political Influence*, Nat'l Assoc. of Immigration Judges, Aug. 12, 2019, available at: https://www.aila.org/File/Related/19081303b.pdf.

[319] Eric Katz, *Trump Administration Looks to Decertify Vocal Federal Employee Union, The Justice Department says immigration law judges operate as managers, an argument the Federal Labor Relations Authority rejected in 2000*,

> *The administration could have pursued another track, as federal statute allows the president to unilaterally issue an executive order stripping employees of collective bargaining rights if they work in intelligence or national security. Presidents Carter, Reagan, George W. Bush and Obama all issued orders to that effect.*

That is, certainly, an argument that DOJ could have made, and it is not beyond cavil that IJs could be said to "work in intelligence or national security." I have argued national security cases to the immigration courts in the past (and briefly served as the Chief of the National Security Law Division at the former INS), and heard cases that touched upon the national security as an IJ.

Regardless of the FLRA's decision, either party can appeal it to the full Board of the FLRA.

Immigration Court Restructuring

In its June 2017 report[320], GAO noted:

> *Some immigration court experts and stakeholders have recommended restructuring EOIR's administrative review and appeals functions within the immigration court system—immigration courts and BIA—and OCAHO, with the goal of seeking to improve the effectiveness and efficiency of the system or, among other things, to increase the perceived independence of the system and professionalism and credibility of the workforce. To enhance these areas, these experts and stakeholders, such as individuals affiliated with professional legal organizations and former EOIR immigration judges, have proposed changing the immigration court system's structure, location among the three branches of government, and aspects of its operations.*

Some background is necessary in order to put the current EOIR structure into context. As the office's website[321] states:

> *[EOIR] was created on January 9, 1983, through an internal [DOJ] reorganization which combined the [BIA] with the [IJ] function previously performed by the former [INS] (now part of [DHS]). Besides establishing EOIR as a separate agency within DOJ, this reorganization made the Immigration Courts independent of INS, the agency charged with enforcement of Federal immigration laws. [OCAHO] was added in 1987.*

GOVERNMENT EXECUTIVE, (Aug. 12, 2019), available at: https://www.govexec.com/management/2019/08/trump-administration-looks-decertify-vocal-federal-employee-union/159112/.

[320] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[321] *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Dec. 14, 2017, *available at*: https://www.justice.gov/eoir/about-office.

EOIR's website[322] also provides a useful history of the evolution of responsibility for adjudication of immigration cases prior to that office's establishment:

> *1891 - The Immigration Act of 1891 was the first comprehensive law that placed immigration under federal control. It established:*
>
> *An Office of Immigration within the Department of Treasury (Treasury), headed by a Superintendent of Immigration;*
>
> *A process for inspection officers to examine and exclude individuals seeking to enter the United States;*
>
> *Authority for the Office of Immigration to deport individuals who had violated law; and*
>
> *An appeals process in which the Superintendent of Immigration decided case appeals and the Secretary of the Treasury could review those decisions.*
>
> *1893 - The Immigration Act of 1893 created Boards of Special Inquiry, consisting of three immigration inspectors, to review and decide cases related to the "exclusion" of individuals seeking to enter the United States, and the "deportation" of individuals who had violated the law. Boards of Special Inquiry continued to evolve for nearly 60 years. The Boards of Special Inquiry system provided for multiple levels of administrative review, but eventually raised significant concerns about due process.*
>
> *1903 - Immigration responsibilities moved from Treasury to the new Department of Commerce and Labor.*
>
> *1913 - Immigration responsibilities moved to the Department of Labor (DOL), as Commerce and Labor split into two separate departments.*
>
> *1917 - The Immigration Act of 1917 codified and expanded exclusion and deportation provisions.*
>
> *1921 - The Immigration Act of 1921 introduced the National Origins Quota System, which limited the number of immigrants to the United States by assigning a quota to each nationality. The new quota system prompted a growing workload of increasingly complex case appeals. In response, the Secretary of Labor created a Board of Review to review case appeals and make recommendations to the Secretary of Labor.*
>
> *1933 – [INS] was created within DOL to handle all immigration matters.*
>
> *1940 - INS moved from DOL to [DOJ] and the Attorney General reconstituted the previous Board of Review as the newly-created [BIA]. While the previous Board*

[322] *Evolution of the U.S Immigration Court System: Pre-1983*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Apr. 30, 2015, *available at*: https://www.justice.gov/eoir/evolution-pre-1983.

> *of Review had authority to make recommendations regarding case appeals, the BIA had authority to decide case appeals. The BIA was and remains an independent adjudicatory body that is responsible solely to the Attorney General in reviewing and deciding immigration case appeals. . . . .*
>
> *1952 - Congress combined all previous immigration and naturalization law into one statute, the Immigration and Nationality Act (INA). The INA eliminated the Special Inquiry Boards and established special inquiry officers to review and decide deportation cases.*
>
> *1973 - Special inquiry officers were authorized by regulation to use the title "immigration judge" and to wear judicial robes.*

As you can see, as the nation's interest in immigration moved from revenue to labor to law enforcement and national security, the immigration adjudication function also moved from department to department.

In its report[323], GAO stated that the experts and stakeholders to whom it had spoken supported three main scenarios for restructuring the immigration court system, each of which would require a statutory fix:

- *a court system independent (i.e., outside) of the executive branch to replace EOIR's immigration court system (immigration courts and the BIA), including both trial and appellate tribunals;*
- *a new, independent administrative agency within the executive branch to carry out EOIR's quasi-judicial functions with both trial-level immigration judges and an appellate level review board; or*
- *a hybrid approach, placing trial-level immigration judges in an independent administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.*

That report details the pros and cons of each of these proposals, as well as the costs of each, and compares each to various different current court structures.[324]

Among the positives it listed for restructuring the current immigration court system were: increasing the perceived independence of the court; greater judicial autonomy; improving the professionalism or credibility of the immigration court systems work force; and greater organizational capacity or accountability.[325]

Among the negatives identified by GAO were the fact that: "a court system independent of the executive branch may not address the immigration courts' management challenges, such as the case backlog;" "requiring presidential nomination and senate confirmation of immigration judges

---

[323] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73-74, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[324] *Id*. at 80-87.

[325] *Id*. at 80-84.

under an independent court system could" complicate and delay the hiring of new judges "by making the appointment of additional judges more dependent on external parties;" the difficulty in establishing and administering a court system independent of the executive branch; difficulties for the court for procuring resources outside of DOJ; and (under a "hybrid system") disconnection of the trial level court from the appellate court, particularly if the trial level court remains with in the Executive branch, with the appellate court outside of the Executive branch.

With respect to independence, GAO stated:

> *Six of the ten experts and stakeholders we contacted stated that establishing a court system independent (i.e., outside) of the executive branch could increase the perceived independence of the system. For example, one of the experts and stakeholders explained that the public's perception of the immigration court system's independence might improve with a restructuring that removes the quasi-judicial functions of the immigration courts and the BIA from DOJ because DOJ is also responsible for representing the government in appeals to the U.S. Circuit Courts of Appeals by individuals seeking review of final orders of removal. This same expert and stakeholder noted that removing the immigration court system from the executive branch may help to alleviate this perception that the immigration courts are not independent tribunals in which the respondents and DHS attorneys are equal parties before the court. Another one of the experts and stakeholders explained that under the existing immigration court system, respondents may perceive, due to the number of immigration judges who are former DHS attorneys and the co-location of some immigration courts with ICE's OPLA offices, that immigration judges and DHS attorneys are working together. Two of the ten experts and stakeholders we interviewed also proposed that an immigration court system independent of the executive branch would be less susceptible to political pressures within the executive branch. Experts and stakeholders cited similar independence-related reasons for supporting the administrative agency and hybrid scenarios.*[326]

This raises many important points. DOJ representation of the government in immigration matters before the courts of appeal would appear to be a very soft variable, particularly given the fact that a different DOJ component (OIL, within DOJ's Civil Division) [327] provides such representation.

Further, the fact that EOIR and ICE are both within the executive branch would be a factor in any court restructuring that left a trial-level court in that branch. The location of many immigration courts and ICE attorney's offices within close proximity to each other would likely continue, regardless of whatever restructuring plan were chosen, unless the government was willing to pay the costs of relocating each of those new courts, or alternatively the ICE offices.

---

[326] *Id.* at 81-82.

[327] *Office of Immigration Litigation*, DEPARTMENT OF JUSTICE, CIVIL DIV., updated Oct. 20, 2014, *available at*: https://www.justice.gov/civil/office-immigration-litigation.

Similarly, the number of ICE attorneys who become judges in any immigration court would likely continue as well, given that immigration is a highly specialized area of the law.

The "political pressure" factor raises different issues. It is not clear if the "political pressure" in question relates to such pressure on the IJs, or whether it refers to the attorney general's aforementioned certification authority.

If it is the former, as a former IJ under attorneys general from both parties, I can state without any hesitation that I never perceived any political interference in my decisions. To be clear: No one ever attempted to force me to issue any specific decision in any case; to the contrary, I was encouraged to apply the law evenly in all cases (a duty I took seriously). Any decision that I issued (except in credible-fear and reasonable-fear review cases) could be appealed to the BIA, and the attorney general could take any decision that I made (assuming that it was affirmed by the BIA) on certification and reverse it, but short of that, my decisions were mine and mine alone, as were the discretionary determinations that I made by statute.

If it is the latter, however, it is an issue that gets to the heart of any court restructuring that would take jurisdiction over the immigration court away from the attorney general. In *Arizona v. U.S.*[328], the Supreme Court held:

> *Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.* ***The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities****. (Emphasis added).*

The supremacy of the executive branch in issues of foreign policy is well-established. In *U.S. v. Curtiss-Wright Export Corp.*[329], the Supreme Court held:

> *Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm,*

---

[328] *Arizona vs. U.S.*, 567 U.S. 387, 396-97 (2012), *available at*: https://www.law.cornell.edu/supremecourt/text/11-182.

[329] *U.S. vs. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), *available at*: https://supreme.justia.com/cases/federal/us/299/304/case.html.

> *with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, '**The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations**.' [Emphasis added].*

Moving the adjudication of immigration cases out of the executive branch, therefore, would have serious constitutional implications. Nowhere is that more clear than from the Supreme Court's decision in *INS v. Aguirre-Aguirre*[330], were the Court held:

> *[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." . . . A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.*

Not only can no stronger argument be made against moving the immigration courts out of DOJ, but frankly, such constitutional concerns should be dispositive of the issue.

With respect to "judicial economy," GAO reported:

> *Four of the ten experts and stakeholders we interviewed stated that a court system independent of the executive branch might give immigration judges and BIA members more judicial autonomy over their courtrooms and dockets. For example, one of the experts and stakeholders stated that immigration judges in an independent court system would be able to file complaints against private bar attorneys directly with the state bar authority instead of filing the complaint with DOJ first, as presently required for immigration judges acting in their official capacity. EOIR officials explained that while immigration judges cannot directly file a complaint with the state bar authority, EOIR's Disciplinary Counsel, which is charged with investigating these complaints, can file a complaint with the state bar on behalf of the immigration judge.* [331]

---

[330] *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), *available at*: https://scholar.google.com/scholar_case?case=3793273925328568150&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[331] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 82, *available at*: https://www.gao.gov/assets/690/685022.pdf.

It is unclear how much more autonomy I would have had over my courtroom and docket if I had been an IJ in an independent court than I did as an IJ in EOIR. I had full control over my courtroom, and of the parties who appeared in it. My bailiff, who was a York County (Pennsylvania) Prison employee, was solely responsible to me when court was in session. I also had sufficient leeway to move cases around in order to accommodate my docket, consistent with due process.

As for filing bar complaints, this was a rarity for me. There was only ever one attorney whose conduct I never deemed rising to the level of a bar complaint, and that matter was handled by Disciplinary Counsel in a satisfactory manner. Any judge should generally be able to control the conduct of the parties in his or her courtroom in almost any situation without recourse to such measures. An inability to do so, respectfully, reflects more on the IJ then on EOIR generally or the location of the court within the U.S. government.

As for "workforce professionalism or credibility," GAO stated:

> *Four of the ten experts and stakeholders we contacted stated reasons why a court system independent of the executive branch might also improve the professionalism or credibility of the immigration court system's workforce. For example, one of the experts and stakeholders explained that placing judges in an independent immigration court system could elevate their stature in the eyes of stakeholders, and by extension, enhance the perceived credibility of their decisions. Additionally, one of the experts and stakeholders explained that if the judge career path was improved under a restructuring such that immigration judges were able to advance to more prestigious judgeships, this could assist in attracting candidates to the immigration bench. Regarding the hybrid scenario, one of the experts and stakeholders noted that this proposal may attract a more diverse and balanced pool of candidates for immigration judge positions.*[332]

Again, this is extremely soft variable, and one that would nowhere near justify the cost and difficulty (let alone, run the constitutional difficulties) of transitioning immigration courts out of EOIR. Respectfully, the "professionalism or credibility of the immigration court system's work force" is more a factor of that workforce rather than a factor of where they are positioned within the U.S. government.

As for elevating the stature of IJs, I never viewed the job as being beneath me, and I do not believe that any attorney who ever appeared in my court thought any less of me as a judge than that attorney did of any other judge. The fact was, I was the decision-maker with whom of those lawyers had to deal, and they acted accordingly.

Nor did I ever feel constrained in moving along in my career. I certainly could have applied for any other judgeship (state or federal) that had an opening for an attorney with my skills and experience. As practical matter, however, my skills and experience were better utilized on the immigration court than they would have been in some other tribunal.

---

[332] *Id.* at 82.

Finally, I was never aware of any difficulty that EOIR had with attracting a diverse pool of qualified candidates to the bench. The fact is, the job comes with many benefits -- a title, a relatively high rate of pay (up to $181,500 currently)[333], a pension, access to the federal Thrift Savings Plan and health benefits, generous vacation benefits, federal holidays, and the stature and dignity of being a judge. I will note that I receive a generous monthly pension from the federal government, partly on account of my years of service, but at a rate that fully reflects my pay during my time as an IJ.

Certainly, an IJ could advance to the position of Board Member at the BIA, or Assistant Chief IJ, and more than a few did. Many of my colleagues had, however, served for years as immigration judges, and intended to retire in that status.

Organizational capacity or accountability is an issue with which EOIR admittedly struggles. I believe, however, that this is largely due to the fact that many attorneys general in various administrations had neglected that office for a significant period of time. It is apparent from Attorney General Barr's statements and actions (and those of his immediate predecessors and his subordinates) that he is working on correcting these issues, and he should be given the opportunity to do so. This is especially true given the expense and difficulty of transitioning the immigration courts to a different organization, or making them independent. Simply put, there is no guarantee that an independent immigration court or BIA would be better run, and would definitely be less politically accountable to Congress, than EOIR currently is.

I concur with the "experts and stakeholders" whom GAO contacted and who asserted "that a court system independent of the executive branch may not address the immigration courts management challenges, such as the case backlog."[334] The fact is, regardless of where they are placed, IJs will have a large caseload (particularly if Congress fails to address the loopholes in the law that draw migrants to enter the United States illegally[335], and CBP is consequently faced with another crisis at the border similar to the one that occurred in the spring and summer of 2019), with which the courts will have to contend.

Again, Attorney General Barr and his immediate successors have attempted, and Attorney General Barr is attempting, to obtain sufficient resources to enable the courts to handle that caseload. Congress will soon be considering the budget, and I would recommend that this committee of jurisdiction over DOJ advise that more funding be appropriated for the immigration courts and BIA.

---

[333] *2020 Immigration Judge Pay Rates*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, effective Jan. 5, 2020, available at: https://www.justice.gov/eoir/page/file/1236526/download.

[334] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 84, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[335] *See* Andrew Arthur, *Catch and Release Escape Hatches, Loopholes that encourage illegal entry*, Center for Immigration Studies, May 4, 2018, available at: https://cis.org/Report/Catch-and-Release-Escape-Hatches.

Moreover, absent a change to section 292 of the INA[336], aliens will either have to hire their own lawyers, obtain pro bono counsel, or represent themselves. This would be true regardless of where the court is located, and would be an issue with which the court would have to contend, regardless of whether it remains in EOIR or not.

Perhaps the strongest non-constitutional reason for not moving the immigration courts out of EOIR (aside from the cost and difficulty of doing so) is the need for more judges. As GAO stated:

> *Two of the ten experts and stakeholders we interviewed noted that requiring the presidential nomination and senate confirmation of immigration judges under an independent court system could further complicate and delay the hiring of new judges by making the appointment of additional judges more dependent on external parties.*[337]

The biggest issue facing the immigration courts is resources, and in particular (but not solely, as noted above) IJs. Simply put, there are too few judges to handle the immigration court caseload at the present time, notwithstanding the unprecedented increase in IJ hiring in the last three years.

Any proposal to restructure the immigration courts that would slow down the hiring of immigration judges by making the hiring of those judges dependent on any external party would do a disservice to the alien respondents, the government, and justice itself. If Congress is interested in acting on the crippling backlogs facing the immigration courts, it would be best to direct its efforts toward providing those courts with more money and resources.

Moreover, I again wholeheartedly concur with the "experts and stakeholders" who "expressed the concern that a restructured immigration court system, regardless of the scenario, would not be able to procure sufficient resources outside of DOJ."[338]

It would be an understatement to say that immigration is a contentious issue, and has been for the almost 28 years I have been involved in this area of the law. Given the significant passions that immigration as a subject is heir to, I have no doubt that a future Congress would limit resources to an independent court if one or another (or both) chamber's members did not agree with the decisions of that court. One look no further than the limitations over the past few years on the funding of ICE detention to understand this fact.

At least under the aegis of DOJ, EOIR is somewhat protected from these passing political passions when it comes to funding. On its own, an independent immigration court and/or BIA would have to fight for funding with little leverage. If members are concerned about political

---

[336] Section 292 of the INA, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9617.html.

[337] *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 84, *available at*: https://www.gao.gov/assets/690/685022.pdf.

[338] *Id.* at 85.

interference from within the executive branch as it relates to EOIR, they should be more concerned about political interference in an independent tribunal from the branch that holds the power of the purse—particularly if the makeup of that future Congress is significantly different than it is today.

One area, however, in which Congress should act is to create an Article III Court of Appeals for Immigration. Under current law, an alien who is seeking review of a decision of the BIA or attorney general can file a petition for review "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[339] .

Such a proposal, from then-Senate Judiciary Committee Chairman Arlen Specter, was included in section 501 of S. 2454 in the 109th Congress.[340] With respect to that provision, CRS explained:

> *Section 501 of S. 2454 would consolidate appeals regarding removal of aliens in the U.S. Court of Appeals for the Federal Circuit. It would increase the authorized number of judges on the Federal Circuit from 12 to 15 and would authorize sums necessary to implement these changes and the increased case load of the Federal Circuit for fiscal years 2007 to 2011. . . .*
>
> *This consolidation of appeals would remove pressure on the other federal appellate circuits from the dramatic increase in their caseload, largely resulting from immigration appeals; it would basically add the equivalent of another 3-judge panel to the Federal Circuit. This provision would also eliminate future inconsistency among appellate circuits in interpretations of immigration law, which in the past may have increased litigation as different circuits considered an issue for the first time and as the U.S. Supreme Court may have had to resolve circuit differences. Differences among circuits also may have necessitated congressional action to clarify or establish statutory standards in response to inconsistent appellate circuit interpretations.*[341]

Given the number of immigration cases that circuit courts handle each year, this proposal would have overwhelmed the Court of Appeals for the Federal Circuit, even if that court were assigned an additional three (or 30) judges. The creation of a new circuit court, solely dedicated to immigration, would provide the benefits suggested by CRS, and would expedite appeals because each of the judges on that court would be a subject-matter expert in immigration. Such a proposal would provide greater benefits to the interests of justice than the restructuring of the immigration courts.

---

[339] Section 242(b)(2) of the INA, *available at*: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html.

[340] S. 2454, 109th Cong., § 501 (2006), *available at*: https://www.congress.gov/bill/109th-congress/senate-bill/2454/text?q=%7B%22search%22%3A%5B%22S.+2454%22%5D%7D&r=49#toc-id734C06366FEF4789B17F956831288 7B3.

[341] Margaret Mikyung Lee, *Immigration Litigation Reform*, CONG. RESEARCH SERV., at CRS-4, May 8, 2006, *available at*: http://trac.syr.edu/immigration/library/P582.pdf.

Conclusion

The nation's cadre of some 465 immigration judges are, by and large, dedicated, experienced, and knowledgeable professionals dedicated to ensuring that the immigration laws are fairly and uniformly administered in each of the 63 immigration courts. Carved into the rotunda of the attorney general's office at DOJ is a quote from then-Solicitor General Frederick Lehmann: "The United States wins its case whenever justice is done one of its citizens in the courts."[342] The same is also true of the aliens who appear in DOJ's tribunals, and it is a fact that is known to, and taken to heart by, every IJ when he or she walks into court.

Unfortunately, for years, those immigration judges have been hobbled in performing their mission, largely as result of neglect of the agency in which they serve, EOIR, and of misguided immigration policies implemented in the past by the executive branch. Simply put, the immigration courts of the United States are failing at their primary mission of "adjudicat[ing] immigration cases by . . . expeditiously. . . interpreting and administering the Nation's immigration laws,"[343] largely due to no fault of the IJs and staff who work in those courts.

The attorney general and his subordinates are actively working to remedy this problem, by providing the needed resources to the immigration courts, and by implementing bright-line rules for IJs and the BIA to follow in adjudicating the cases they consider. He should be supported in those efforts by this committee and by the Congress as a whole.

Restructuring the immigration courts and the BIA will almost certainly not address the core problems that are facing those courts. Moreover, not only would such restructuring be complicated and costly (and likely ultimately pointless), but any proposal that would move either the immigration courts or the BIA out of the executive branch would implicate serious constitutional concerns.

I thank you again for your invitation to attend today's hearing, and I look forward to your questions.

---

[342] Michael Gartner, *The President's Man at the Supreme Court*, WASHINGTON POST, (Oct. 25, 1987), *available at*: https://www.washingtonpost.com/archive/entertainment/books/1987/10/25/the-presidents-man-at-the-supreme-court/ed5f19e1-4f16-4222-8e87-b8569b9663fe/?utm_term=.8eb68b6861a8.

[343] *Executive Office for Immigration Review*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: https://www.justice.gov/eoir.

Ms. JAYAPAL. Thank you, Mr. Arthur.

We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Judge Tabaddor, in your testimony, you describe the recent implementation of several new policies and Attorney General decisions that have significantly limited judicial discretion, both procedurally and substantively. Based on your own personal experience, as well as feedback from other immigration judges, how have these new policies, including the case completion quotas, changed the way that you conduct immigration hearings?

Ms. TABADDOR. Absolutely. Thank you. We've talked about the certification process. That's been one that has been used. It's a highly politicized process. It removed the ability of the judges that had been recognized for 40 years to administratively close cases that are not ready for review.

So I have been handling the juvenile docket now for the past 10 years. I used to be able to put those cases that need outside State court action first aside on admin closure. Now I have to carry hundreds of cases on my docket that I would like to use for live cases just because I'm no longer allowed to administratively close them.

We are then pushed to not continue cases, and while due process, of course, includes a recognition that justice delayed is justice denied; but by the same token, when a continuance is warranted, it should be granted, and judges are feeling the pressure. There's a constant pressure and fear of being penalized.

And finally, as I mentioned, the director is now being given—has been given the authority to overturn our decisions. And part of the metrics is, if we get more than a 15 percent remand, we may lose our job. So now the judges are very worried about the decisions they're making on asylum, on cancellation, on life-and-death decisions. So these are very real, concrete intrusion into our decisional independence.

Ms. JAYAPAL. And what has that done to the morale of the Immigration Judge Corps?

Ms. TABADDOR. I've been on the bench for about 15 years, and I've never seen it this bad. As I've said, the level of hostility towards us, the insulting and offensive way in which we are being treated by the imposition of these quotas, by the imposition of these rules, the micromanagement of our daily docket. It's, frankly, unprecedented.

Ms. JAYAPAL. Thank you.

Mr. McKinney, from your perspective, how have the case completion quotas, performance benchmarks, and other changes impacted your ability to ensure that your clients actually receive a fair day in court?

Mr. MCKINNEY. Thank you for the question. I first want to point out that I practice in the interior, in North Carolina and Georgia, primarily. And so while some may have you believe that this backlog is caused by the numbers of people applying for asylum at the border, it's really a combination of a lot of factors that have played into it, including and especially these AG certifications that have really taken away, stripped the judges of their ability to control their own docket.

So just as a—as a quick example, docket reshuffling. That is something that was engaged in by the Obama administration and the Trump administration. And what happens in both instances is that it results in a significant reduction in productivity from the judges.

A member in Colorado of AILA reported yesterday she has about 30 days to submit asylum evidence for four people instead of 3 months. And why? Because of docket reshuffling, this administration decided to start a pilot program this week to expedite family asylum cases, and the notices are coming like that. So suddenly, you have 30 days to find corroborating evidence for four people. This results in lower productivity.

I have a complex case where an immigration judge requested written closing arguments. When the parties pulled the audio, we discovered the microphones were not functioning properly. We brought this to the judge's attention, and the judge has decided to plow ahead anyway. Now, I don't know the impulse. I, of course, don't—I can't reach inside that judge's mind to know why, but I can't help but think it is because of the pressure he's receiving.

Ms. JAYAPAL. Thank you, Mr. McKinney.

And, Ms. Martinez, the ABA has as published two reports detailing the problems in our court system and have concluded that transitioning to an Article I court, as you mentioned, is the best approach. How would that solve many of the problems? And, I'm sorry, you just have about, you know, 38 or 37 seconds to answer that question. Thank you.

Ms. MARTINEZ. The most important thing that an Article I court would do is to assure greater independence of the courts. And that is critical, not only for the court itself, but for the perception of the independence of that court to the people who it serves and for the lawyers who come before it. And for those who look to our courts as a whole, we want them to have trust and confidence in our entire judicial system. And having our Article I court in the immigration courts would be one way to do that.

Ms. JAYAPAL. Thank you so much.

I now recognize the gentleman from Arizona, Mr. Biggs, for his 5 minutes.

Mr. BIGGS. I thank the gentlelady. And I appreciate all of you being here today. This is a—this is vexing and truly a problem that we need to get a handle on.

Judge Arthur, you said in your oral testimony today and also in your written testimony that more resources and bright-line rules are necessary to effectuate a reduction in the backlog. Tell me what you meant by resources, and tell me what you mean by bright-line rules.

Mr. ARTHUR. With respect to resources, Mr. Biggs, I'm talking about more immigration judges, but not just that, more staff, more judicial law clerks all around, because my staff, when I was a judge, was absolutely crucial to me getting my cases done on time. I read Judge Tabaddor's testimony. She makes some points about the inability to—or the failure to hire staff. That needs to be done.

With respect to bright-line rules, when I was a judge, we had vague concepts, like you can grant a continuance for good cause shown. Good cause isn't actually defined anywhere, and the case

law that existed really wasn't very helpful. Immigration judges run a risk if they deny a continuance and it goes up on appeal to the circuit court and they find that they violated due process. That's a serious blemish on a judge's record and one that could potentially result in punishment by the Department of Justice, punishment by the courts.

So bright-line rules like that are important. Bright-line rules for asylum cases where it's more clear to the judge in——

Mr. BIGGS. So, Mr. Arthur, before you continue, I have to yield to Congressman Buck.

Mr. BUCK. Finish your answer.

Mr. ARTHUR. In order to guide the decision and in order to make it easier for the tribunal to do it in a timely fashion, I note, Mr. Buck, as I stated in my opening statement, Congress has said judges have 180 days to adjudicate immigration—asylum cases absent due process. That truly does put the hammer on the judges. And that's not EOIR doing that, that's this body.

Mr. BUCK. I thank the gentleman for his answer, and I will yield back.

Ms. JAYAPAL. Thank you.

I now recognize the gentleman from Colorado, Mr. Neguse, for 5 minutes.

Mr. NEGUSE. Thank you, Madam Chair, for holding this important hearing. Thank you to each of the witnesses for your testimony today.

Shrouded in secrecy, the immigration court system run by the DOJ has been dysfunctional for years, as many of you have attested to during your testimony, and certainly, in my view, under this administration, it's only gotten worse. As we know from much of the testimony we heard this morning as well as press reports, again, my view, housing our immigration court system within the DOG—DOJ, excuse me, has left it vulnerable to political interference. It's a structural flaw that has been exploited time and time again. And despite the life-or-death stakes of many of these cases, our immigration court system has less to do with the rule of law than with the luck of the draw, and this administration has long allowed enforcement priorities to preempt a court process that is meant to be independent and fair.

And if that weren't enough, the mechanism to hold immigration judges accountable, the appeals process has been corrupted by the political interference of the Attorney General, both current and past. And this issue, as I suspect, is the case for many of the folks who are gathered here today to participate in this hearing. It's personal to me. My parents were refugees who came to this country nearly 40 years ago. Having an immigration system that works and having a judicial system that works with respect to immigration matters a great deal to my constituents and the people that I represent in Colorado.

I want to touch on an issue in particular that's occurred in the Denver immigration court system. As I'm sure each of you are aware, in fall of 2018, as part of a pilot program, the Department of Justice instructed 10 immigration courts to accelerate the cases of families seeking asylum. And in Denver, that instruction is being carried out in a series of group hearings designed to decide cases

in less than a year, and that compares to the 3 to 4 years it typically takes for asylum cases to be assessed.

Mr. McKinney, and then I'd like to have Judge Tabaddor answer this question as well, does this accelerated timeline make it easier or harder for families seeking asylum to attain a lawyer?

Mr. MCKINNEY. It, of course, makes it more difficult. Representative, thank you so much for your question. But even once you obtain counsel, if that happens, which, of course, happens in less than half of immigration cases, then we have the burden of reasonably corroborating everywhere we can possibly do so.

So our office, for example, will try to contact neighbors from the person's native country, medical professionals, courts, police, wherever we can, to corroborate our client's story. That takes time. Sometimes it does not. Sometimes we are ready to go. But it's that freedom within the court to have that conference with the judge and with DHS counsel and talk about the evidentiary needs. It will differ from case to case. So having these bright-line rules really impacts due process.

Mr. NEGUSE. Thank you.

Judge Tabaddor, do you care to comment both with respect to obtaining an attorney, but also as Mr. McKinney said, the perhaps equally important consideration of having time to acquire evidence?

Ms. TABADDOR. Absolutely. What we have seen is assembly line justice. So we had never seen a situation where the judges are told you have 365 days to complete this case. And because of that, the judges feel the pressure to shorten the amount of time that people need to be able to find counsel. And then once counsel is obtained, the judges feel pressure to want to schedule that case within that 360 days.

And then a lot of times what happens is the agency keeps track of every single one of these cases, and for every single one, you have to be accountable for. And so what they do is shuffle. So if a judge—they come in and say, oh, okay, you heard the first one. We're going to assign it to somebody else now. Now somebody else who hasn't had a history of dealing with this case has to get up to speed. Everything is about this factory model of management and treating people like widgets. So it's become very, very onerous on the judges as well.

Mr. NEGUSE. Thank you, Judge Tabaddor, for your answer and for your service.

We should all take a moment to pause, because what you said I thought is worth underscoring, the phrase that you used of assembly line justice. It should offend every person on this dais. It certainly offends me as a lawyer, and it offends me as the son of immigrants that this Department of Justice has decided to institute a pilot program that has resulted in that outcome, and we shouldn't tolerate it. And I appreciate the work that you and your colleagues are doing under such trying circumstances.

I yield back.

Ms. TABADDOR. Thank you.

Ms. JAYAPAL. I thank the gentleman.

I now recognize the ranking member of the subcommittee, Mr. Buck, for his 5 minutes.

Mr. BUCK. Thank you very much, Madam Chair.

I have to tell you, this is a very frustrating area. I think everyone up here is frustrated by this situation and for different reasons, frankly. And it's one of the beautiful things about Congress. I am working with people that are—I guess some people consider me to the right of center, and I am working with some people to the left of center, and we agree for different reasons on war powers, for example, on the detention of refugees and many other things.

But not one of you mentioned the cause of why we're here, and that is people breaking our law and crossing our border. Not one of you talked about the need for border security. Not one of you has talked about the process.

And, Judge, I have to tell you, I'm frustrated when you say in your opening statement—Mr. McKinney had me halfway there before the hearing, but when you say in your opening statement that this quota of 700 cases has not reduced the backlog, the truth is the backlog is caused by more illegal immigrants coming into this country and ending up in your court. It's not caused by quotas or lack of quotas. And when you talk about the difference in denial rates between northern Virginia and Atlanta, there are fundamentally different circumstances at play in northern Virginia than in Atlanta.

And so it's not just—it's not fair to make those kinds of comparisons. And I think if we're going to get to a good answer on this, and it may be an Article I court, I don't know, but I think we've got to, on both sides, stop dealing with the—somebody a lot smarter than me said there are three types of lies. There are lies, damn lies, and statistics. And I think when you use statistics in a misleading way, it doesn't help us get to the right answer.

And I have been very impressed with the American Immigration Law Association and their willingness to talk my language to me and help me grapple with these very difficult issues. But, Mr. McKinney, let me ask you a question. What happens if someone applies for a visa or asylum at one of our embassies? And I need a quick answer. They go—they go to a window, they file their application, a Department of State employee reviews that application and makes a decision.

Mr. MCKINNEY. That's correct, except for asylum which happens in the interior of the country, yes, sir.

Mr. BUCK. Okay. But they can make the same claims as to why they should be able to enter the country at a Department of State facility.

Mr. MCKINNEY. Very difficult to do so, but, yes, one could potentially seek refugee status outside of the United States.

Mr. BUCK. They could go from El Salvador, they could go to Mexico, enter the U.S. Consulate or a facility that's set up for that purpose, and they could apply for that.

Mr. MCKINNEY. I would—we need to reform the process to make it possible to do things like that, but in reality, and again, this is a reality that I've seen for two-plus decades, that is not the case.

Mr. BUCK. Okay. Then I'll stick with visa, okay. We both agree that's the process for a visa.

Mr. MCKINNEY. Absolutely.

Mr. BUCK. Okay. It's not a judge that reviews that application, is it?

Mr. MCKINNEY. It is not. It is a Department of State adjudicator.

Mr. BUCK. And it's not—they are not entitled to an attorney, are they?

Mr. MCKINNEY. Outside of the United States, one is not afforded constitutional protections.

Mr. BUCK. So when somebody breaks our law and comes into this country illegally, we all of a sudden—according to Ms. Martinez—we all of a sudden are supposed to give them enhanced rights for breaking our law. We're supposed to now say, you get a judge. Not only do you get a judge that's a Department of Justice employee, but you get a judge who is independent and unaccountable to a political system, to elected officials. You now get somebody who is insulated from the reality that the rest of us have to deal with, and you get a lawyer, or at least some people are advocating you get a lawyer for breaking our law. How is that a disincentive to break American law?

Mr. MCKINNEY. A couple reasons for that. One—one thing is that our Framers specifically used the term due process twice, both in the Constitution in the Fifth Amendment, and then later, after the Civil War, in the 14th Amendment, and it extended due process of law to all persons. So unless we choose to go down a road where we're debating whether undocumented immigrants are people, they have rights in the country, and one of those rights is to a fundamentally fair hearing.

Now, what our argument has been to you, Representative, is that both administrations have botched this up, whether it's Democrat or Republican, because at—fundamentally at the core, you have that administration's political proclivities directing what is supposed to be a neutral and fundamentally fair process, and that's what we're asking to change. I think there is a lot of middle ground here to be reached and that it's a nonpartisan issue.

Ms. JAYAPAL. The gentleman yields back.

I did want to clarify that you can't walk into a U.S. Embassy unless you have an actual applicant—if you have an actual appointment, an application, and obviously, asylum status is different than refugee status as well.

So now I'd like to recognize the gentlewoman from Texas for 5 minutes, Ms. Escobar.

Ms. ESCOBAR. Thank you, Madam Chair.

And thank you to our witnesses today. I really appreciate the information you provided us.

I represent El Paso, Texas, which has been on the front line of many of the Trump administration's policies, like MPP, like family separation. And what is troubling when we're talking about access to justice or access to the asylum process, what's troubling to hear is that, well, let's just speed it up because we have so many Central American families or Cuban families or Cuban individuals. Wherever they're coming from, arriving at our door, let's just speed it up. And so it's this idea that certain people don't deserve justice. We just want to kind of get rid of the cases and move along and avoid dealing with the fact that we have laws and that we should uphold justice for everyone. So your voices have been very important in this process. I want to thank you.

A recent report from the Transactional Records Access Clearinghouse, or TRAC, discovered gross irregularities in recent data releases from the EOIR, from garbled data to millions of records disappearing from one data release to the next. Several of my colleagues and I wrote a letter to GAO requesting that they investigate data management practices at EOIR. Fortunately, GAO agreed to review these practices, and, Madam Chair, I'd like unanimous consent to enter the letter into the record.

Ms. JAYAPAL. Accepted.

[The information follows:]

REP. ESCOBAR FOR THE RECORD

JERROLD NADLER, New York
CHAIRMAN

DOUG COLLINS, Georgia
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Sixteenth Congress

November 14, 2019

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

We are writing to request that the Government Accountability Office (GAO) undertake an investigation into data management practices at the Executive Office for Immigration Review (EOIR).

In May 2018, EOIR announced that it would begin releasing certain immigration court statistics as a first step in an effort to increase transparency into the immigration court system. As part of this "Transparency Initiative," EOIR's Director stated that the agency would be releasing its "full database" on a recurring basis. However, concerns have been raised about the accuracy and reliability of data EOIR is releasing on its public website.

Further, in October 2019, the Transactional Records Access Clearinghouse (TRAC)—a nonpartisan, nonprofit research center at Syracuse University—discovered "gross irregularities" in EOIR's data management practices, including millions of missing records in public data releases.[1] In accordance with the Freedom of Information Act (FOIA), TRAC makes regular requests to EOIR for anonymized immigration court case data and maintains a public repository of such data.[2]

In September 2019, TRAC reportedly received data from EOIR which was not only "garbled ... result[ing] in substantial confusion over the relationship between certain variables and values," but also omitted 2.8 million records relating to scheduled hearings.[3] TRAC soon discovered that since at least September 2018, EOIR has "delet[ed] swaths of records in their

---

[1] *Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy*, Transactional Records Access Clearinghouse (TRAC), Syracuse University (Oct. 31, 2019) (hereinafter "TRAC Report"), https://trac.syr.edu/immigration/reports/580/.

[2] *See e.g.*, *Backlog of Pending Cases in Immigration Courts as of September 2019*, TRAC, Syracuse University (2019), https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (pending case backlogs from FY 1998 onwards).

[3] TRAC Report, *supra* note 1.

entirety from the data releases," resulting in the deletion of nearly 900,000 case records.[4] EOIR states that the deletion of such records is necessary to protect immigrants' privacy.[5]

When TRAC previously raised data issues with EOIR, the research center found the agency to be "fairly responsive and committed to ensuring accurate reporting."[6] But according to TRAC, with respect to these latest irregularities, EOIR has refused to adopt quality control procedures and has not publicly responded to TRAC's findings.[7] Meanwhile, EOIR has continued to make public representations about annual case completions, announcing in October 2019 that the agency completed over 275,000 immigration court cases in fiscal year 2019.[8] However, the accuracy of this claim is questionable, given TRAC's findings.

For these reasons, we respectfully request that the GAO undertake a detailed audit of EOIR's data management practices, including the extent to which EOIR has omitted and continues to omit records from data released to the public, and any policy justifications for doing so. Additionally, the review should identify what steps, if any, EOIR is taking to improve its data management practices and the quality control steps that EOIR takes before releasing data on its public website to ensure the data are accurate and reliable.

Thank you for your cooperation and attention to this request.

Sincerely,

JERROLD NADLER
Chairman
Committee on the Judiciary

ZOE LOFGREN
Chair
Subcommittee on Immigration and Citizenship

---

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, Department of Justice (Oct. 10, 2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019.

MARY GAY SCANLON
Vice Chair
Committee on the Judiciary

PRAMILA JAYAPAL
Vice Chair
Subcommittee on Immigration and Citizenship

SHEILA JACKSON LEE
Member of Congress

HENRY C. "HANK" JOHNSON, JR.
Member of Congress

ERIC SWALWELL
Member of Congress

JAMIE RASKIN
Member of Congress

SYLVIA R. GARCIA
Member of Congress

JOE NEGUSE
Member of Congress

VERONICA ESCOBAR
Member of Congress

cc: The Honorable Doug Collins, Ranking Member, Committee on the Judiciary

The Honorable Ken Buck, Ranking Member, Subcommittee on Immigration and Citizenship

Ms. ESCOBAR. For Judge Tabaddor, shortly after TRAC made these data mismanagement practices public, you as president of the NAIJ, released a statement condemning the systemic inaccuracies and calling upon the DOJ to fix them. Can you tell us why these inaccuracies are harmful, like for the American public, why is this a bad thing, and has DOJ fixed these reports—or these records?

Ms. TABADDOR. Thank you for the opportunity to respond to this question. And as Representative Buck said, you know, statistics obviously have their controversial role. We rely heavily on the agency data. I mean, that's who we turn to. So when I'm citing to statistics, I'm not making it up, because I'm looking at what the agency has produced. And so it is really important for those numbers to be accurate.

And what we have seen, unfortunately, is that key portions of data are being manipulated. A lot of times the statistics matter, what you put in the denominator, what you put in the numerator. So if you don't have information to be able to verify, it can really impact the accuracy of it.

Personally, I remember getting calls from press asking me, saying, look, we've received this FOIA response, which is this response to a request for information on data. It's telling us that unaccompanied juveniles are failing to appear at rates of 40 percent. And I was shocked, frankly, to hear that, because I've been sitting on the juvenile docket in one of the largest courts in the Nation for 10 years, and we have a working relationship with other immigration judges across the country with this particular issue. We don't see anywhere near those numbers.

And then when the myths versus fact sheets came out, we saw a lot of numbers that they were putting forth, that there was no way to even verify whether it's accurate. So this type of information, this type of activity on the part of the court system that's supposed to be neutral is quite harmful because it, frankly, compromises the integrity and the respect that the court deserves.

Ms. ESCOBAR. And it's used sometimes by the administration or supporters of these policies to basically defend why or to claim that asylum seekers aren't adequately winning cases or showing up. So the data is important.

Ms. TABADDOR. It's been very difficult because it's been—they produce it in ways to support a specific narrative——

Ms. ESCOBAR. Right.

Ms. TABADDOR [continuing]. And that becomes difficult when we don't have all of the information.

Ms. ESCOBAR. And has DOJ fixed the problem?

Ms. TABADDOR. As far as I know, no.

Ms. ESCOBAR. Okay. I didn't think so. Thank you.

Today marks the 1-year anniversary of this administration's horrific, abhorrent migrant protection protocol policy, the Return to Mexico policy, a policy that essentially puts asylum seekers who are in the American court system in another country, a country that is not their own, where they don't know anyone, where they have no way of being safe or staying safe. We've had accounts of people in MPP who have been kidnapped, women who have been sexually assaulted, people who have disappeared altogether. The American Government has essentially created a new criminal en-

terprise on the other side of border communities like mine, a criminal enterprise that preys on vulnerable migrants.

For Judy Perry Martinez—oh, I'm out of time. Thank you all so much. Really appreciate it.

I yield back.

Ms. JAYAPAL. I thank the gentlelady for yielding.

And I now recognize the gentleman from North Dakota, Mr. Armstrong, for 5 minutes.

Mr. ARMSTRONG. Thank you, Madam Chair.

I think it's important to recognize, when we talk about this, that we're not starting at zero. And so since we've had a lot of talk about statistics, I'm going to do a couple more.

According to the Judicial Conference, there are 42 Federal judicial emergencies currently in Article I courts right now. As defined, any vacancy where weighted filings are in excess of 600 filings per judgeship, or any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship, or any vacancy where weighted filings exceed 800 per active judge.

In 2017, Judicial Conference requested Congress creates 57 new Article III judgeships, which included five new appeals court judgeships. Judicial Conference notes that since 1990, when the last omnibus judgeship legislation was enacted, appeal filings have increased 40 percent and district court filings have increased 38 percent, with civil case filings up 38 percent and criminal filings up almost 40 percent.

In 2018, the combined filings in district court for civil cases and criminal defendants rose 7 percent to 370,085. Civil filings increased 6 percent to 282,000. Filings for criminal defendants went up 13 percent to 87,149, and criminal filings rose in 64 of 94 districts.

Federal judiciary stats as of September 30th, 2019, is there were 456,827 pending cases in Federal district courts. For criminal cases, from filing to disposition, is an average of 7 months, which is actually a .5-month decrease since 2014, although I would argue, and hopefully at some point in time we can work on this, there are an unbelievable amount of incentives to get those down because of the incentives for pleading guilty and the disincentives for defendant to go to jury trial in Federal Court, which I think is something we should maybe look at.

And for civil cases, from filing to disposition, is 10.8 months, which is a 2½ month increase from 2014. Long-standing civil cases, there are 56,356 pending civil cases that are over 3 years old, which represents a 15.8 percent of all civil cases. And it's approximately 26,000 case increase since 2014.

All of this is to say that with regard—we deal with backlogs in immigration courts, but we have a problem in our Article I courts as it is. And so as a separate but equal branch of government, they are independent, and Congress has no ability to influence the, productivity outside of providing additional resources, which I don't think anybody disagrees, if we would make this move, there would be absolute need for increased resources.

So the case metrics and performance goals implemented by the Executive Office for Immigration Review help provide efficient adjudication in immigration courts, and if immigration courts were

transferred to Article I courts, there would be minimal ways to influence productivity.

And so I say all that with the recognition that I agree—I don't like a backlog in any court. I spent a lot of time with in-custody clients in Federal Court. It is an incredibly frustrating situation for them, their families, all of those things. Now, the benefit is, is they were earning good time provided what they were going to get their sentence on the back end.

But, Mr. Arthur, there's a case backlog currently exceeding a million cases, right?

Mr. ARTHUR. That's correct.

Mr. ARMSTRONG. And about half of those cases are asylum cases?

Mr. ARTHUR. Just about.

Mr. ARMSTRONG. Can you explain why an asylum application to—an individual would have an incentive to claim fear or to ultimately file an asylum case in the United States?

Mr. ARTHUR. If an individual arrives at the border, they're subject to expedited removal, which means that a DHS officer can simply remove them from the United States. If they claim credible fear, on the other hand, they are eligible to be interviewed by an asylum officer who, by the way, is also not an Article I judge, and if the asylum officer finds they have a credible fear, which they do in about 70, I think, –5 percent of the cases, those individuals are then allowed into the United States to apply for asylum before an immigration judge. Most of those individuals are released into the interior of the United States and can stay here until their case is resolved and ICE doesn't have the resources to find them.

Mr. ARMSTRONG. And then with my last just 27 seconds, I think it's important to recognize that when we're dealing this and moving them into Article I creates. So Judicial Conference has restated in talking to Federal judges their long-standing opposition to specialized courts in the Federal judiciary and regarding a legislative proposal to put immigration courts in there; that's exactly what we'd be doing.

So can you imagine the resources, just real quick, Mr. Arthur, we'd have to give to Article I if we were going to create a specialized court in the Federal judiciary?

Mr. ARTHUR. It would be as large as we would need to actually create an effective court within EOIR right now. And the other thing is there would be no congressional accountability. Right now, you can call in the director of EOIR if you have problems about the issues that have been discussed. You don't have that ability when you have an Article I court. Who are you going to call in, the Chief Justice of the United States? That's a problem.

Ms. JAYAPAL. The gentleman yields back.

I now recognize the gentlelady from Florida, Ms. Mucarsel-Powell for 5 minutes.

Ms. MUCARSEL-POWELL. Thank you, Madam Chair.

Thank you for coming this morning. I think we all agree that the current state of our immigration court system is not only completely inefficient; it is truly appalling. Backlogs, overworked judges, lack of access to counsel, all of these things are harming immigrants. We get so many calls on a daily basis in my district, in Florida's 26th District, asking for help because of these backlogs.

And to add to this problem, the administration seems to have designed a process where individuals appearing in immigration court face a staggering lack of access to counsel. Only 37 immigrants appearing before an immigration judge are represented by an attorney.[1] Matters are even worse for immigrants caught in the Remain in Mexico program, or those who are transferred hundreds of miles away by ICE, far from their attorneys. Lawyers are simply unavailable. They can't travel to these remote locations to represent their clients, undocumented immigrants.

This lack of counsel is not only limited to adults. A majority of children in removal proceedings are also not represented by counsel. Unaccompanied children, regardless of their age, are simply not entitled to an attorney. The system is vast and complex, but it is completely absurd and incomprehensible that a child is expected to appear in court without the representation of a lawyer and plead his or her case. I don't understand what is happening in this country. It's truly appalling.

What we're talking here is having immigrants have their day in court, they are trying to follow our rules, they're following the law, they're working through the process. Most are doing everything possible with the tools that they have available to follow the laws. And what we're seeing is that the system is built to work against them. They're stuck in limbo. They don't have the opportunity for basic due process or even to present their case because of this administration's anti-immigrant policies and the failure to effectively govern our immigration court systems.

So I want to start with Mr. McKinney. Almost 1 in 10 immigration court cases, 1 in 10, involves an unaccompanied child. Despite this, a majority of unaccompanied children in removal proceedings simply don't have representation. They don't have a lawyer. Mr. McKinney, in your view, how difficult would it be for any individual, an adult or a child, to work and navigate this process without an attorney?

Mr. MCKINNEY. Thank you for your question. Almost impossible. And let me describe to you the current system when a child is involved. A couple of years ago, I received a phone call from an immigration judge. Now, he had cleared this with the trial counsel for Homeland Security before calling. There was a 5-year-old in the backseat of a car and there was an accident and the mother died, leaving this child an orphan and in the custody of North Carolina Department of Social Services. And he didn't have an attorney. And so the only system we have in place right now is a phone call from an immigration judge asking if I would agree to do it pro bono or could find someone that could help.

That's unacceptable. That should be offensive to every American that we have a system like that. And I think that we're starting to see strides in the area of respondents with mental health problems, but youth, juvenile status is another form of incapacity, and I think that's a great place to start in making sure.

Counsel—access to counsel is a win for everyone. In absentia rates drop to about 3 percent when a person is represented by an

[1] Representative Mucarsel-Powel requested this be changed to: "Only 37 percent of immigrants appearing . . ."

attorney. Cases are presented properly. When someone doesn't have a case, they have an attorney to tell them that. It's a win for everyone.

Ms. MUCARSEL-POWELL. Thank you. And can you explain a little bit how the systems that have been implemented by this administration for immigration courts make it more difficult for children to find legal representation?

Mr. MCKINNEY. Absolutely. Well, first of all, this Department of Justice attempted to end the legal orientation program, but, fortunately, was halted by Congress. Too oftentimes we see these courts located in areas where there just simply aren't enough attorneys available, and at the end of the day, it is not free. Private attorneys have to charge. There's no system of legal aid or legal defense for respondents, and children, of course, aren't wage earners, so it's an area in desperate need of reform.

Ms. MUCARSEL-POWELL. Thank you, Mr. McKinney. One last question——

Ms. JAYAPAL. The gentlelady's time is expired.

Ms. MUCARSEL-POWELL. Oh. Thank you, Madam Chair.

Ms. JAYAPAL. Thank you.

I now recognize the gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Let me thank the witnesses, and thank you, Madam Chair, for the opportunity.

Let me, first of all, pose a question to Judge Tabaddor on possible solutions to what I've been hearing and what I'm reading and what I'm experiencing. I noted that the thousands of cases are mostly in jurisdictions, San Francisco—I think San Francisco and New York, but includes Houston, five top areas where asylum cases are. And we know that there's a question of overload. I also know that there's a question to my immigration friend lawyer there that we're questioning the kind of experience that immigration judges are now being appointed with; meaning, individuals are being appointed with no experience in immigration law at all.

But my interest is your thoughts about creating an independent executive branch agency or Article I court. I know you've discussed it, but I'd like to ask that to Judge Tabaddor and Mr. McKinney.

Judge.

Ms. TABADDOR. Thank you, Representative. As we stated, there are a number of components that are important in considering why an Article I court would be a solution for the issues we're facing. You've highlighted the issue of the immigration judge selection. While we have amazing judges on the bench, if you look at it, the diversity of professional background and personal background is lacking. So one of the issues has been the integrity and the respect that the bench would—the bar would have for the bench, because when they look at the bench, they only see a very sliver of the larger pie on the bench, and that compromises the respect and the integrity of the court.

And then we've seen, as you've mentioned, a lot of questionable hiring, particularly in the area of management positions for immigration—for the immigration court, the assistant chief immigration judges. We're seeing people who are being chosen to supervise immigration judges who've never been on the bench, much less been

immigration judges or they've been immigration judges for a second. You know, let's say just a few months before they're elevated.

Ms. JACKSON LEE. You would prefer the Article I courts?

Ms. TABADDOR. Absolutely, because it would allow for a degree of accountability on both merit and as well as the diversity of personal/professional background.

Ms. JACKSON LEE. Hopefully with a change of administration that might be accurate.

Mr. McKinney.

Mr. MCKINNEY. Representative Jackson Lee, I would argue that we need a change to the statute, because the problems with politicized hirings and judges having very similar government backgrounds was a problem in past administrations as well. I remember conversations with the late Director Osuna about this problem, and his response was, well, government attorneys tend to go through security checks quicker, government attorneys tend to want to stay in government. And so those are two drivers for why so many of the judges have this ICE attorney background.

Ms. JACKSON LEE. So my time is going. You want to just say what you would prefer.

Mr. MCKINNEY. What we need is an independent court where you have experience requirements for the judges and you have an advisory panel that's providing some guidance, and that panel is made up of a mix of different backgrounds.

Ms. JACKSON LEE. Thank you.

Let me focus on the asylum, which is now, I believe, in shambles, not because of the excellent persons that are working, including judges, committed judges, committed immigration lawyers. But let me wrap this question in, and I'm going back to the two of you for the answers.

I met with immigration judges this past week, and this does tie in to administration. They were disturbed because they were not able to meet with immigration services like they used to locally to get notice about things, changes and all, everybody was shut down. They weren't able to meet with ICE. This is not on a particular case. I'd just be interested, Mr. McKinney, if you find that to be the case.

But the real question I'm asking is the shambles of asylum and the process of Remaining in Mexico program, how that has impacted the hearing process, the denial process. Sixty percent denial in asylums or more. If you would in the short time, 33 seconds, so if you would take just a moment, Judge, and just a moment, Mr. McKinney.

Ms. TABADDOR. Just a quick point on that. I can tell you that my colleagues at the border are absolutely overwhelmed by the sheer number of cases that they are being told they have to process on a daily basis, up to 100 or 120 cases a day, without support staff, without filings, without an ability to be able to directly reach out to the individuals.

Ms. JACKSON LEE. Thank you.

Mr. McKinney. And there's no reason for people not to be able to sit in the court when there's an asylum hearing, but go right ahead.

Mr. MCKINNEY. With the permission of the asylum seeker, there should be no problem with that. Just imagine you're in a situation with a small tent, looking at a TV camera or a TV, it's almost Orwellian in an approach to persons seeking protection from persecution or torture.

Ms. JACKSON LEE. Thank you.

Thank you, Madam Chair. I yield back.

Ms. JAYAPAL. Thank you. The gentlelady yields back.

I now recognize the gentleman from North Dakota for a unanimous consent request.

Mr. ARMSTRONG. Thank you, Madam Chair.

I ask unanimous consent to enter the following into the record: Report of proceedings of the Judicial Conference of the United States, dated September 13, 2016, reaffirming its position that the immigration courts not be placed in the judiciary branch; chart from the Executive Office for Immigration Review showing the skyrocketing number of cases in the uptick and completions under the Trump administration; chart from the Executive Office of Immigration Review showing skyrocketing number of asylum applications immigration courts since 2016; and the chart from EOIR showing 80 percent of cases over the course of a year are represented by counsel.

Ms. JAYAPAL. So ordered.

[The information follows:]

REP. ARMSTRONG FOR THE RECORD

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2016

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2016, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Jeffrey R. Howard
Judge Paul J. Barbadoro,
District of New Hampshire

Second Circuit:

Chief Judge Robert A. Katzmann
Judge William M. Skretny,
Western District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Leonard P. Stark,
District of Delaware

Fourth Circuit:

Chief Judge Roger L. Gregory
Judge Robert J. Conrad, Jr.,
Western District of North Carolina

Fifth Circuit:

Chief Judge Carl E. Stewart
Chief Judge Louis Guirola, Jr.,
Southern District of Mississippi

Sixth Circuit:

Chief Judge Ransey Guy Cole, Jr.
Judge Paul Lewis Maloney,
Western District of Michigan

Seventh Circuit:

Chief Judge Diane P. Wood
Chief Judge Michael J. Reagan,
Southern District of Illinois

Eighth Circuit:

Chief Judge William Jay Riley
Judge Karen E. Schreier,
District of South Dakota

Ninth Circuit:

Chief Judge Sidney R. Thomas
Judge Claudia Wilken,
Northern District of California

Tenth Circuit:

Chief Judge Timothy M. Tymkovich
Judge Martha Vazquez,
District of New Mexico

Eleventh Circuit:

Chief Judge Ed Carnes
Judge Federico A. Moreno,
Southern District of Florida

District of Columbia Circuit:

Chief Judge Merrick B. Garland
Chief Judge Beryl A. Howell,
District of Columbia

Federal Circuit:

Chief Judge Sharon Prost

Court of International Trade:

Chief Judge Timothy C. Stanceu

The following Judicial Conference committee chairs also attended the Conference session: Circuit Judges Richard R. Clifton, Steven M. Colloton, Allyson K. Duncan, Julia Smith Gibbons, Thomas M. Hardiman, Sandra S. Ikuta; Anthony J. Scirica, D. Brooks Smith, and Jeffrey S. Sutton; and District Judges John D. Bates, Catherine C. Blake, Gary A. Fenner, David R. Herndon, Wm. Terrell Hodges, Irene M. Keeley, Royce C. Lamberth, Donald W. Molloy, Lawrence L. Piersol, Danny C. Reeves, Richard Seeborg, Rodney W. Sippel, Rebecca Beach Smith, and Lawrence F. Stengel. Attending as the bankruptcy judge and magistrate judge observers, respectively, were Chief Bankruptcy Judge Marcia Phillips Parsons and Magistrate Judge Kevin N. Fox. Clarence Maddox, of the Sixth Circuit, represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Jill C. Sayenga, Deputy Director; Sheryl L. Walter, General Counsel; Katherine H. Simon, Secretariat Officer, and Helen G. Bornstein, Senior Attorney, Judicial Conference Secretariat; Cordia A. Strom, Legislative Affairs Officer; and David A. Sellers, Public Affairs Officer. District Judge Jeremy D. Fogel, Director, and John S. Cooke, Deputy Director, Federal Judicial Center; and Chief District Judge Patti B. Saris, Chair, and Kenneth P. Cohen, Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as were Jeffrey P. Minear, Counselor to the Chief Justice, and Ethan V. Torrey, Supreme Court Legal Counsel.

Deputy Attorney General Sally Quillian Yates addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senators Patrick J. Leahy and Christopher Coons and Representatives John Conyers, Jr., Darrell Issa, and Jerrold Nadler spoke on matters pending in Congress of interest to the Conference.

REPORTS

Administrative Office Director James C. Duff reported to the Judicial Conference on the judicial business of the courts and on matters relating to the Administrative Office. Judge Jeremy D. Fogel spoke to the Conference about Federal Judicial Center (FJC) programs and Chief Judge Patti B. Saris reported on United States Sentencing Commission activities. Judge D. Brooks Smith, Chair of the Committee on Space and Facilities, presented a special report on space reduction efforts.

EXECUTIVE COMMITTEE

RESOLUTION

The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution recognizing the substantial contributions made by Judicial Conference committee chairs whose terms of service will end on September 30, 2016:

> The Judicial Conference of the United States recognizes with appreciation, respect, and admiration the following judicial officers:
>
> **HONORABLE CATHERINE C. BLAKE**
> Committee on Defender Services
>
> **HONORABLE STEVEN M. COLLOTON**
> Advisory Committee on Appellate Rules
>
> **HONORABLE IRENE M. KEELEY**
> Committee on Criminal Law
>
> **HONORABLE LAWRENCE L. PIERSOL**
> Committee on Audits and Administrative Office Accountability
>
> **HONORABLE DANNY C. REEVES**
> Committee on the Administration of the Bankruptcy System

HONORABLE D. BROOKS SMITH
Committee on Space and Facilities

HONORABLE JEFFREY S. SUTTON
Committee on Rules of Practice and Procedure

Appointed as committee chairs by the Chief Justice of the United States, these outstanding jurists have played a vital role in the administration of the federal court system. These judges served with distinction as leaders of their Judicial Conference committees while, at the same time, continuing to perform their duties as judges in their own courts. They have set a standard of skilled leadership and earned our deep respect and sincere gratitude for their innumerable contributions. We acknowledge with appreciation their commitment and dedicated service to the Judicial Conference and to the entire federal judiciary.

MISCELLANEOUS ACTIONS

The Executive Committee —

- Approved costs related to the 2016 and 2017 Ninth Circuit judicial conferences, pursuant to § 930(a)(2) of the Judicial Conference regulations on meeting planning and administration, *Guide to Judiciary Policy,* Vol. 19, Ch. 9.

- Received an update from the Administrative Office on efforts to enhance the judiciary's information technology (IT) security and reiterated its strong support for making cybersecurity a funding priority.

- Pending congressional action on the judiciary's appropriations for fiscal year (FY) 2017, approved FY 2017 interim financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners appropriations accounts, and endorsed a strategy for distributing allotments to court units.

- Referred a request related to the applicability of the judiciary's codes of conduct to the performance by judges or judiciary employees of

legal services during military reserve duty to the Committee on Codes of Conduct, which has issued several advisory opinions on this issue, and asked it to consider, in consultation with the Committee on Judicial Resources and the Committee on the Judicial Branch, whether any amendments to the codes of conduct or previous interpretations of the codes may be warranted in light of the issues raised in the request.

- Agreed to communicate to the Committee on the Budget and the Committee on Court Administration and Case Management its concern that the judiciary may be approaching a point where law book funding is insufficient to provide the resources that some judges deem necessary to do their work.

- Expressed the urgent need for implementation of enhanced IT security measures for all judiciary entities to protect IT systems and networks within the Third Branch, including the Defender Services program. While recognizing the unique concerns expressed by the Defender Services program stemming from defenders' ethical obligations to their clients, the Committee noted the need for uniform IT security standards throughout the Branch.

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY

COMMITTEE ACTIVITIES

The Committee on Audits and Administrative Office Accountability reported that it was briefed by independent audit firms on the status and results of several types of audits performed for the judiciary, including: cyclical audits of courts and federal public defender organizations; performance audits of Administrative Office procurement, contracts management, and property management functions; annual audits of community defender organization grantees; and audits of Chapter 7 and 13 bankruptcy trustees and debtors in Alabama and North Carolina, which are served by the bankruptcy administrator program. The Committee also received a detailed briefing from staff on the anticipated results of financial audits of the judiciary's appropriations for the Salaries and Expenses and Defender Services accounts, the Federal Judicial Center, and the Administrative Office. This briefing described corrective actions completed and in progress, as well as Administrative Office mechanisms to track, report,

and monitor the status of corrective actions. The Committee also discussed internal control program developments and forthcoming updates to the cyclical audit program for courts and federal public defender organizations.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

CONTINUING NEED FOR BANKRUPTCY JUDGESHIPS

In accordance with 28 U.S.C. § 152(b)(3), the Judicial Conference conducts a comprehensive review of all judicial districts every other year to assess the continuing need for authorized bankruptcy judgeships. By December 31 of each even-numbered year, the Judicial Conference reports to Congress its findings and any recommendations for the elimination of an authorized bankruptcy judgeship position that can be eliminated when a vacancy exists by reason of resignation, retirement, removal, or death. On recommendation of the Committee on the Administration of the Bankruptcy System, which relied on the results of the 2016 continuing need survey, the Conference agreed to take the following actions:

a. Recommend to Congress that no bankruptcy judgeship be statutorily eliminated; and

b. Advise the appropriate circuit judicial councils with respect to the districts of Alaska, California-Central, California-Eastern, California-Northern, California-Southern, Illinois-Central, Iowa-Northern, Iowa-Southern, Kansas, Maine, Massachusetts, New York-Eastern, New York-Southern, New York-Western, North Carolina-Middle, Ohio-Northern, Ohio-Southern, Oklahoma-Northern, Oklahoma-Western, Oregon, Pennsylvania-Eastern, and South Dakota, to consider not filling vacancies that currently exist or may occur because of resignation, retirement, removal, or death, until there is a demonstrated need to do so.

MULTI-DISTRICT DESIGNATION OF A BANKRUPTCY JUDGE

Under 28 U.S.C. § 152(d), a bankruptcy judge may be designated to serve in any district adjacent to or near the district for which the judge was

appointed "[w]ith the approval of the Judicial Conference and of each of the judicial councils involved...." The Committee noted that designating a bankruptcy judge to serve in multiple districts that need judicial assistance but not a full-time resident judgeship would be a cost-effective way of allocating judicial resources. In order to assist circuits with the process for obtaining Conference approval of a multi-district designation, the Committee recommended, and the Judicial Conference approved, Guidelines for the Multi-District Designation of a Bankruptcy Judge, and delegated to the Bankruptcy Committee authority to make non-substantive, technical, and conforming changes to the Guidelines, as needed.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Bankruptcy System reported that it is monitoring the judgeship vacancy pilot project, which was approved by the Judicial Conference in September 2014 (JCUS-SEP 14, p. 7). Two judges were appointed in districts that otherwise would have left the judgeships vacant and then loaned via intercircuit assignment to districts with immediate needs for additional bankruptcy judgeships. The Committee has also worked to seek bankruptcy courts to participate in its horizontal consolidation pilot, which was approved by the Judicial Conference in March 2016 (JCUS-MAR 16, p. 8).

COMMITTEE ON THE BUDGET

FISCAL YEAR 2018 BUDGET REQUEST

After considering the FY 2018 budget requests of the program committees, the Budget Committee recommended to the Judicial Conference a request of $6,942.2 million in discretionary appropriations, which is 3.9 percent above assumed discretionary appropriations for FY 2017 but $44.9 million below the funding levels requested by the program committees. The Judicial Conference approved the Budget Committee's budget request for FY 2018, subject to amendments necessary as a result of (a) new legislation,

(b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.[1]

COMMITTEE ACTIVITIES

The Budget Committee reported that it discussed the status of the FY 2017 appropriations cycle and its joint congressional outreach efforts with the Committee on the Judicial Branch. The Budget Committee also expressed support for ongoing cost-containment efforts and discussed the challenges facing the judiciary with regard to enhancing cybersecurity and replacing aging physical access control systems and how those efforts are being funded.

COMMITTEE ON CODES OF CONDUCT

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2016, the Committee received 30 new written inquiries and issued 27 written advisory responses. During this period, the average response time for requests was 15 days. In addition, the Committee chair responded to 33 informal inquiries, individual Committee members responded to 134 informal inquiries, and Committee counsel responded to 876 informal inquiries, for a total of 1043 informal inquiries.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

CIVIL JUSTICE REFORM ACT REPORTS

In September 2009, the Judicial Conference approved making all Civil Justice Reform Act (CJRA) reports created after September 30, 2009 available free of charge on the judiciary's public website, uscourts.gov

[1]Subsequent to the Conference session, the Executive Committee approved an adjustment to the FY 2018 budget request to add $10 million for emergency repairs to the Thurgood Marshall Federal Judiciary Building. With this addition, the FY 2018 request is $6,952.2 million which is 4.1 percent above the FY 2017 assumed appropriation.

(JCUS-SEP 09, p. 12). CJRA reports created before that date remained available only on PACER for a fee. At this session, noting that the pre-2009 reports are accessed by a limited number of PACER users and require the expenditure of judiciary resources to maintain, the Committee on the Court Administration and Case Management recommended that the Conference make all CJRA reports available free of charge on uscourts.gov. The Conference adopted the Committee's recommendation.

ELECTRONIC PUBLIC ACCESS FEE EXEMPTION

The Committee on Court Administration and Case Management recommended that the Judicial Conference amend Item 8 of the Electronic Public Access Fee Schedule, effective April 1, 2017, to allow Chapter 13 bankruptcy trustees to download quarterly, free of charge, a list of the trustee's cases from the PACER Case Locator. The Committee noted that this would facilitate the trustees' compliance with annual case reconciliation requirements and relieve clerks' offices of work they do to assist trustees in compiling the necessary information. The Conference adopted the Committee's recommendation.

MISCELLANEOUS FEE SCHEDULES

Inflationary Fee Increases. The Judicial Conference prescribes miscellaneous fees for the courts of appeals, district courts, United States Court of Federal Claims, bankruptcy courts, and Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. §§ 1913, 1914, 1926, 1930, and 1932, respectively. On recommendation of the Court Administration and Case Management Committee, the Conference raised many of these fees to account for inflation, as set forth below, effective December 1, 2016. The last time miscellaneous fees were increased for inflation was in September 2011.

Court of Appeals Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Record Search	$30	$31
5. Audio Recording	$30	$31
6. Record Reproduction	$83	$86

13. Attorney Admission Fee	$176	$181
Duplicate Certificate of Admission or Certificate of Good Standing	$18	$19

District Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Filing Document Unrelated to a Case or Proceeding	$46	$47
2. Record Search	$30	$31
3. Exemplification	$21	$22
5. Audio Recording	$30	$31
9. Misdemeanor Appeal	$37	$38
10. Attorney Admission Fee	$176	$181
Duplicate Certificate of Admission or Certificate of Good Standing	$18	$19
13. Cuban LIBERTAD Act Filing	$6,355	$6,548

Bankruptcy Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Exemplification	$21	$22
3. Audio Recording	$30	$31
4. Amended Schedules	$30	$31
5. Record Search	$30	$31
7. Filing Document Unrelated to a Case or Proceeding	$46	$47
19. Filing Specific Motions	$176	$181

United States Court of Federal Claims Fee Schedule

Item	Current Fee	New Fee
4. Attorney Admission Fee	$176	$181
Duplicate Certificate of Admission or Certificate of Good Standing	$18	$19
5. Receipt of Monthly Listing of Court Orders and Opinions	$22	$23
8. Record Search	$30	$31
9. Audio Recording	$30	$31
10. Filing/Indexing Document in Case for which a Filing Fee has not been Paid	$46	$47

Judicial Panel on Multidistrict Litigation Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$30	$31

Registry Funds Fee Structure. The Committee on Court Administration and Case Management recommended amendments to the District and Bankruptcy Court Miscellaneous Fee Schedules relating to the fees for handling registry funds in the custody of the court that are managed through the judiciary's Court Registry Investment System (CRIS). The amendments are intended to simplify the fees and more closely align them with the costs of operating CRIS. On recommendation of the Committee, the Judicial Conference approved amending Item 12 of the District Court Miscellaneous Fee Schedule and Item 17 of the Bankruptcy Court Miscellaneous Fee Schedule, effective December 1, 2016, to read as follows:

> For handling registry funds deposited with and held by the court, the clerk shall assess a charge from interest earnings, in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.
>
> For management of registry funds invested through the Court Registry Investment System, a fee at an annual rate of 10 basis points of assets on deposit shall be assessed from interest earnings, excluding registry funds from disputed ownership

interpleader cases deposited under 28 U.S.C. § 1335 and held in a Court Registry Investment System Disputed Ownership Fund.

For management of funds deposited under 28 U.S.C. § 1335 and invested in a Disputed Ownership Fund through the Court Registry Investment System, a fee at an annual rate of 20 basis points of assets on deposit shall be assessed from interest earnings.

The Director of the Administrative Office has the authority to waive these fees for cause.

PRO SE PRISONER E-FILING PILOT PROGRAM

To increase the efficiency of processing federal pro se prisoner cases and reduce the associated costs, the Court Administration and Case Management Committee recommended that the Conference approve a one-year joint pilot project with the Bureau of Prisons (BOP) for a prisoner e-filing program using digital kiosks in BOP facilities. The Committee also recommended that the Conference authorize the Committee, working in conjunction with the Administrative Office, to develop metrics to measure the effectiveness of the program and to issue and amend guidelines to assist pilot participants. The pilot would involve no more than 25 courts and would be limited to civil case filings. The Conference approved the Committee's recommendations.

JUROR QUALIFICATION QUESTIONNAIRE

On recommendation of the Committee on Court Administration and Case Management, the Judicial Conference approved a complete revision to both the style and substance of the Juror Qualification Questionnaire to make it clearer and easier for jurors to understand. The questionnaire has been modified to, among other things, present the questions and corresponding instructions in side-by-side columns; move an explanatory paragraph from the back to the front of the questionnaire; simplify language; and allow for local variation in the identification of political subdivisions in answers to questions about a juror's residence.

COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it reviewed an interim report from its cost-containment subcommittee (which includes representation from six Judicial Conference committees) on the subcommittee's efforts to develop and evaluate organizational models that could contain costs. The Committee also approved a memorandum encouraging courts to consider adopting guidelines aimed at preventing court documents from being used to identify government cooperators. In addition, the Committee agreed to pursue two new initiatives, one to update guidance on the preservation of judges' papers to include guidance for electronic documents, and the other to review how juror utilization statistics are collected and reported.

COMMITTEE ON CRIMINAL LAW

JUDGMENT FORMS IN CRIMINAL CASES

On recommendation of the Committee on Criminal Law, the Judicial Conference approved revisions to the judgment forms in criminal cases concerning the imposition of standard conditions of post-conviction supervision. The forms were revised to include (a) new standard conditions approved by the United States Sentencing Commission; (b) an explanation of the relationships between the standard conditions and (i) the purposes of sentencing pursuant to 18 U.S.C. § 3553 and (ii) the statutory duties of probation officers pursuant to 18 U.S.C. § 3603 to monitor and improve the conduct of persons under their supervision; and (c) a new section for a person on supervision to acknowledge receipt of and instruction on his or her conditions of supervision.

OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS

On recommendation of the Committee on Criminal Law, the Judicial Conference approved release of a document entitled "*Overview of Probation and Supervised Release Conditions*" as a resource for defendants, the courts, and other criminal justice practitioners regarding the recommendation, imposition, and implementation of conditions of supervision. It will assist with

providing notice to defendants of conditions of supervision that may be imposed; help to ensure that the conditions are clear, legally sound, appropriately tailored, and address the relevant statutory factors; and aid appellate courts when reviewing the conditions in individual cases.

PRESENTENCE INVESTIGATION REPORT

The Committee on Criminal Law recommended that the Conference approve two amendments to the *Presentence Investigation Report* (Monograph 107), *Guide to Judiciary Policy*, Vol. 8, Pt. D, concerning (a) when to disclose special conditions and (b) the timing for making a recommendation of special conditions. The first amendment would provide that a probation officer should attach any recommended special conditions and the reasons for the recommendations when the presentence report is initially disclosed and when the final report is disclosed, unless such disclosures are limited by the court, to give parties an opportunity to object and present arguments on why certain conditions should or should not be imposed. The second amendment provides examples of when it may be appropriate for probation officers to defer recommending special conditions. The Conference approved the Committee's recommendation.

SUPERVISION OF FEDERAL OFFENDERS

On recommendation of the Committee, the Conference approved an amendment to the *Supervision of Federal Offenders* (Monograph 109), *Guide to Judiciary Policy*, Vol. 8, Pt. E, concerning the privilege against self-incrimination during interviews between probation officers and offenders. The amendment provides guidance to probation officers that if a defendant refuses to answer a specific question during an interview on the grounds that it is incriminating, the officer should not compel the defendant to answer. If there is uncertainty about whether the invocation of the privilege against self-incrimination is valid, the probation officer should refer the matter to the court to make this determination.

GUIDELINES FOR SECOND CHANCE ACT AND JUDICIAL ADMINISTRATION AND TECHNICAL AMENDMENTS ACT

The Second Chance Act of 2007 (SCA), Pub. L. No. 110-199, and the Judicial Administration and Technical Amendments Act of 2008 (JATA),

Pub. L. No. 110-406, authorize the judiciary to contract for, or expend funds directly on, certain reentry services for defendants and offenders reentering the community. On recommendation of the Committee on Criminal Law, the Conference adopted a new Part L to Volume 8 of the *Guide to Judiciary Policy*, setting forth judiciary policies related the SCA and JATA as well as guidance for probation and pretrial services officers related to procurement of and expenditure of funds on such services.

COMMITTEE ACTIVITIES

The Committee on Criminal Law reported that it received an update on the Administrative Office's continuing efforts to monitor outcomes in post-conviction supervision cases. Those outcomes show improvements that coincide with the considerable investments in evidence-based practices made by the federal probation and pretrial services system. The Committee was also provided with the final report of the FJC's study of a federal reentry court program model policy as implemented in five participating districts. The Committee agreed to release the report to the courts while it continued to consider what recommendations it may offer to the Judicial Conference. To that end, the Committee formed a subcommittee that will develop possible recommendations for the Judicial Conference's consideration.

COMMITTEE ON DEFENDER SERVICES

MODEL PLAN FOR IMPLEMENTATION AND ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

The Criminal Justice Act (CJA) directs each district court to place in operation a plan for furnishing defense representation for any person financially unable to retain an attorney. 18 U.S.C. § 3006A(a). Currently, there are two model plans included in the CJA Guidelines, *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, to provide courts with guidance in crafting a local plan, the *Model Criminal Justice Act Plan*, at Appendix 2A and the *Model Plan for the Composition, Administration and Management of the CJA Panel*, at Appendix 2B. These plans were adopted in 1990 and have not been comprehensively revised since. Noting that CJA policies have evolved in the intervening years to address changes in program needs, legal precedent, and acceptable standards of practice for the legal profession, the Committee on Defender Services recommended that the Judicial Conference adopt a new model plan that consolidates the information from the two existing model plans

and incorporates updated policies pertaining to the CJA program. Adopting the Committee's recommendation, the Conference approved the 2016 *Model Plan for Implementation and Administration of the Criminal Justice Act* to supersede the existing model plans.

PERIODIC REVIEW OF CJA DISTRICT PLANS

As noted above, 28 U.S.C. § 3006A(a) requires each district court to adopt a plan for furnishing defense representation for persons financially unable to retain an attorney. To ensure that these plans remain up-to-date, on recommendation of the Committee on Defender Services, the Judicial Conference amended the *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 210.10.10 by adding subsection (e) to read as follows:

> Each district court should review, and amend as appropriate, the CJA Plan every five years to ensure compliance with the CJA Guidelines and other relevant Judicial Conference policies and legal authorities.

TRIBAL LAW AND ORDER REAUTHORIZATION AND AMENDMENTS ACT

The proposed Tribal Law and Order Reauthorization and Amendments Act of 2016, S. 2920, 114th Congress (as introduced on May 11, 2016) would reauthorize several provisions of the Tribal Law and Order Act of 2010 (Pub. L. No. 111-211), as well as address public safety in Indian Country through a number of requirements for data sharing, collaboration, and reporting. The proposed legislation would also require federal public defenders to appoint tribal liaisons, and authorize and encourage them to appoint special assistant federal defenders in districts that include Indian Country to mirror existing positions in U.S. attorneys' offices. Pursuant to the proposed legislation, the liaisons would undertake duties to promote the administration of justice in Indian Country, including coordinating the defense of federal crimes, coordinating with tribal public defenders in cases with concurrent jurisdiction, providing technical assistance and training, and coordinating with the Administrative Office. The special assistant federal defenders would represent Indian defendants charged with federal crimes in Indian Country and provide technical and other assistance to tribal governments and court systems.

The Committee on Defender Services noted that federal defenders often represent clients from Indian Country based on charges previously brought in Tribal Courts and that requiring federal defender involvement in the administration of tribal justice could place conflicting demands on federal defender organizations and potentially create ethical issues. Accordingly, on the recommendation of the Committee, the Judicial Conference agreed to inform Congress that while it recognizes the need for increased defense representation services in Indian Country, legal training to support the right to effective counsel in Indian Country, and funding to support these functions, it opposes Section 109 of the Tribal Law and Order Reauthorization and Amendments Act of 2016 (S. 2920, as introduced on May 11, 2016), or similar legislation, that would create tribal liaisons and special assistant federal defenders, or any requirement for individual federal defender offices to assist with the administration of tribal justice, as this creates possible conflicts in their representational work involving cases arising from Indian Country.

COMMITTEE ACTIVITIES

The Committee on Defender Services reported that it met with the Ad Hoc Committee to Review the Criminal Justice Act Program and received a status update on the comprehensive, impartial review of the CJA program currently underway. The final report is expected to be completed in Spring 2017. The Committee also met with Deputy Attorney General Sally Quillian Yates and discussed issues of mutual interest and collaboration, as well as Department of Justice policies and practices that have a significant impact on Defender Services program costs. The Committee received an update on the status of the implementation of eVoucher as a national electronic CJA panel management and voucher processing system, recognized the efforts made to deploy the system nationally, and reaffirmed its position that receiving data from the eVoucher system remains a high priority for the Defender Services program.

COMMITTEE ON FEDERAL-STATE JURISDICTION

ARTICLE I IMMIGRATION COURT

The Committee on Federal-State Jurisdiction was asked to consider a draft legislative proposal to create an Article I Immigration Court consisting of an appellate division and trial-level courts that would be administered by the Administrative Office. The proposed court would be created by transferring

the adjudicatory responsibilities currently performed by the Executive Office for Immigration Review in the Department of Justice to the judiciary, including functions of the Board of Immigration Appeals.

The Judicial Conference has a long-standing position opposing, with limited exceptions, specialized courts in the judiciary (JCUS-SEP 90, p. 82; JCUS-SEP 86, p. 60; JCUS-SEP 62, p. 54). With regard to an earlier legislative proposal to create an Article I Immigration Court, the Conference took no position on the merits of creating such a court, but stated that if Congress determined that there is a need for a separate Immigration Court, "consistent with its previously enunciated recommendations on the creation of a Social Security Court, or a Court of Veterans Appeals, under Article I of the Constitution...the court be created within the Executive Branch of Government" (JCUS-SEP 82, pp. 63-64). Consistent with these positions, and noting specific concerns regarding the draft proposal, including whether the judiciary had resources available to handle the high volume of immigration cases, what effect removing Attorney General discretion over the adjudication of immigration cases would have on the adjudication process, and possible constitutional and administrative concerns, the Committee recommended that the Conference reaffirm its long-standing position that if Congress determines there is a need to create an Article I Immigration Court, such court be established in the executive branch, and further, oppose placement of an Article I Immigration Court in the federal judiciary or the administration of an Article I Immigration Court by the federal judiciary. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Federal-State Jurisdiction reported that it continued its discussion of legislation that would make changes in the manner in which courts review claims that non-diverse defendants have been fraudulently joined for the purpose of defeating diversity jurisdiction. The Committee also reviewed legislation that would reverse judicial doctrines that currently provide deference to certain decisions of administrative agencies. The Committee received an update on the progress of a project to update the 1997 *Manual for Cooperation Between State and Federal Courts*, engaged in a roundtable discussion of ways to enhance communication between the federal judiciary and state courts, and received a report on the Civil Justice Initiative sponsored by the Conference of Chief Justices and the National Center for State Courts.

COMMITTEE ON FINANCIAL DISCLOSURE

COMMITTEE ACTIVITIES

The Committee on Financial Disclosure reported that the Administrative Office's comprehensive assessment of the future needs for the electronic financial disclosure report preparation and filing system has been completed and that software currently being utilized by the government was selected and will be customized for the judiciary. The Committee continued its comprehensive review of the financial disclosure regulations. It clarified the filing instructions regarding the deadline for employees filing initial reports, and it analyzed, and requested additional research about, the instructions for reporting property held in a business or trade.

As of June 6, 2016, for calendar year 2015, the Committee had received 3,256 financial disclosure reports and certifications (out of a total of 4,027 required to be filed) from nominee, initial, annual and final filers; and, for calendar year 2014, the Committee had received 4,411 financial disclosure reports and certifications (out of a total of 4,419 required to be filed) from nominee, initial, annual, and final filers.

COMMITTEE ON INFORMATION TECHNOLOGY

LONG RANGE PLAN FOR INFORMATION TECHNOLOGY

Pursuant to 28 U.S.C. § 612 and on recommendation of the Committee on Information Technology, the Judicial Conference approved the fiscal year 2017 update to the *Long Range Plan for Information Technology in the Federal Judiciary*. Funds for the judiciary's information technology program will be spent in accordance with this plan.

COMMITTEE ACTIVITIES

The Committee on Information Technology reported that it recommended additional funding be sought in FY 2017 and beyond for ongoing cybersecurity risk mitigation initiatives and to implement additional programs, tools, services, and staffing to safeguard the judiciary's data and systems. The Committee also endorsed language clarifying that parties identified in security policies are responsible for developing and implementing

procedures, rather than for the outcomes of the application of those procedures; strongly supported the use of a proposed scorecard as a mandatory information technology security self-assessment tool; and, recognizing the cost of upgrading existing internet connectivity, asked that judges and court staff be reminded of the costs associated with accessing streaming audio and video sites over the DCN and requested that further analysis of streaming be conducted following this reminder.

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

JUDGE SHARING PILOT PROGRAM

The Committee on Intercircuit Assignments recommended that the Conference approve a voluntary judge sharing pilot program that would assist courts with high weighted caseloads in obtaining long-term assistance through intracircuit assignments from judges in courts with low weighted caseloads. Judges in the lending court who agreed to participate through an intracircuit assignment would take a specified number of civil cases directly from the draw of the borrowing court and would handle those cases from filing to conclusion. Assignment of cases would be random, and participation in the pilot would not affect a court's requests for additional judgeship resources. For aspects of the arrangement not specified by pilot program requirements, a memorandum of understanding between the chief district judges of the borrowing and lending courts, approved by the chief circuit judge, would govern. The Judicial Conference adopted the recommendation of the Committee and approved the creation of a judge sharing pilot program in up to five circuits for three years, to be administered by the Committee on Intercircuit Assignments.

COMMITTEE ACTIVITIES

The Committee on Intercircuit Assignments reported that 105 intercircuit assignments were undertaken by 76 Article III judges from January 1, 2016, to June 30, 2016. During this time, the Committee continued to disseminate information about intercircuit assignments and aided courts requesting assistance by identifying and obtaining judges willing to take assignments. The Committee also reviewed and concurred with two proposed intercircuit assignments of bankruptcy judges.

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS

COMMITTEE ACTIVITIES

The Committee on International Judicial Relations reported about its involvement in rule of law and judicial reform throughout the world, highlighting activities in Africa, Europe and Eurasia, Latin America, the Middle East, and East and South Asia. Briefing reports about international rule of law activities were provided by the Department of State, the Department of Justice, the United States Agency for International Development, the Department of Commerce, the United States Patent and Trademark Office, the Open World Leadership Center at the Library of Congress, the United Nations Counterterrorism Executive Directorate, the Federal Judicial Center, the Administrative Office, the Defenders Services Office, and U.S. court administrators. The Committee also reported on hosting foreign delegations of jurists and judicial personnel for briefings at the Administrative Office.

COMMITTEE ON THE JUDICIAL BRANCH

REPORTING OF NON-CASE RELATED TRAVEL

In March 1999, the Judicial Conference adopted a policy requiring all federal judges to report annually their non-case related professional travel (Travel Regulations for Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 2, § 270; JCUS-MAR 99, pp. 19-20). At this session, on recommendation of the Committee on the Judicial Branch, the Judicial Conference approved changing the name of the policy from "Reporting of Non-Case Related Travel," to "Reporting of Governance and Education Travel," to more accurately describe the nature and purpose of the travel that is reportable.

COMMITTEE ACTIVITIES

The Committee on the Judicial Branch reported that it participated in the fourth Judicial-Congressional Dialogue, an initiative that began in 2014 with the goal of increasing understanding between the legislative and judicial branches. Associate Justices Stephen Breyer and Samuel Alito participated in a panel entitled "Reflections on Statutory Interpretation and Branch Relations." Opening remarks were provided by Representative Bob Goodlatte, Chairman,

House Judiciary Committee. Three senators and eleven representatives, all members of the Senate and House Judiciary Committees, attended, including Senator Chuck Grassley, Chairman, Senate Judiciary Committee.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

COMMITTEE ACTIVITIES

The Committee on Judicial Conduct and Disability reported that it discussed and considered complaint-related matters under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (Act), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules), including two petitions for review of circuit judicial council orders. In addition, the Committee approved changes to the judiciary's public judicial conduct and disability website related to the September 2015 amendments to the Rules. The Committee and its staff have continued to address inquiries regarding the Act and the Rules, and to give other assistance as needed to chief judges and circuit judicial councils.

COMMITTEE ON JUDICIAL RESOURCES

SENIOR JUDGE STAFFING RESOURCES

In October 2014, as part of the judiciary's continuing cost-containment initiative, the Administrative Office's advisory councils and peer advisory groups identified staffing for senior judges among the areas that warranted further analysis. In response, the Committee on Judicial Resources established an ad hoc subcommittee on senior judge staffing resources to oversee the analysis, and the Director of the Administrative Office established a Senior Judges Working Group to provide additional assistance and input.

A major goal of the effort was the identification of common statistical measures in an attempt to bring greater standardization and rigor to the senior judge staff certification process. After reviewing historical data and each circuit's standards for certifying staff for senior judges, the ad hoc subcommittee, in consultation with the working group, concluded that national guidelines would negatively impact existing practices and processes, but agreed that circuits should regularly review their certification process. To facilitate that review, the subcommittee recommended that the Committee ask the

Conference to make available the working group's *Report on Senior Judge Staffing Certification* and encourage its use as a resource for circuit judicial councils in certifying chambers staff for senior judges and for circuit chief judges and circuit executives in assessing and evaluating staffing needs for senior judges. The *Report* contains recommendations on establishing a robust and transparent process for senior judge staffing allocation. The Conference adopted the Committee's recommendation.

JSP Qualification Requirements for Unit Executives and Second-in-Command Positions

Four Judicial Salary Plan (JSP) unit executive and second-in-command positions, (a) circuit librarian, (b) chief probation/pretrial services officer, (c) chief deputy (appellate, district, and bankruptcy courts), and (d) deputy chief (probation/pretrial services officer), have time-in-grade or equivalent experience requirements. In order to be eligible for promotion to the next higher grade, employees in these positions must have 52 weeks of experience at or equivalent to the next lower grade. These requirements are not mandated for other executive-level JSP positions and put internal candidates at a disadvantage for pay-setting purposes as compared to external candidates. To rectify these inequities and give courts greater workforce management flexibility, the Committee recommended, and the Judicial Conference approved, eliminating the time-in-grade or equivalent experience prerequisite for all JSP unit executive and second-in-command positions upon qualification and grade determination.

Update to Probation Offices Staffing Formula

A new staffing formula for probation offices was recommended by the Committee on Judicial Resources and approved by the Judicial Conference in September 2015 that included a standard factor for all districts for the preparation of guideline presentence reports (JCUS-SEP 15, p. 24). At the time, the Committee noted that it intended to revisit that factor in the near future and develop case weights that would reflect the complexity of these reports. At this session, on recommendation of the Committee on Judicial Resources, the Judicial Conference amended the portion of the staffing formula for probation offices relating to the preparation of guideline presentence reports by replacing the constant of 2.66 full-time equivalent (FTE) positions and an additional 38.85 hours per guideline presentence report with a constant of 1.00 FTE position and weighted values based on the nature of the offenses of

conviction, occurrence of trial, number of counts of conviction, and number of criminal events in a client's history.

DEFENDER SERVICES NATIONAL PROJECTS POSITIONS

The judiciary's Defender Services program includes national projects that serve as shared operational expertise for federal judges, federal defender organization staff, Criminal Justice Act panel attorneys, and the Administrative Office by providing consultation, assistance, and training on specialized topics critical to high quality representation for indigent federal criminal defendants. To provide greater availability and access to these capabilities, on recommendation from the Committee on Defender Services, the Committee on Judicial Resources recommended that the Conference approve adding nine FTE staff positions for the Defender Services national projects to be funded as soon as fiscally possible, but no later than fiscal year 2018, as follows:

a. one position (paralegal) for the National Litigation Support Team;

b. three positions (attorney, investigator/mitigation specialist, paralegal) for the Capital Resource Counsel Project;

c. two positions (paralegal and research and writing specialist) for the Federal Capital Appellate Resource Counsel Project;

d. one position (investigator/mitigation specialist) for the Federal Capital (§ 2255) Project; and

e. two positions (infrastructure architect/engineer and project manager) for the National Information Technology Operation and Applications Development Project.

The Conference approved the Committee's recommendation.

CRIMINAL JUSTICE ACT PANEL MANAGEMENT RESOURCES

Although in most districts the clerk of court performs a majority of Criminal Justice Act (CJA) panel management work, many federal defender offices (FDOs) also perform this work as a service to the court. The Committee on Judicial Resources recommended that the Judicial Conference approve the addition of 13.96 FTE positions to the currently approved FDO

staffing formulas for fiscal years 2017 and 2018 to be distributed to fifteen designated FDOs to stabilize CJA panel management support. The Committee noted that it will consider an update to the district clerks' offices staffing formula in June 2018 for use in fiscal year 2019, and the work measurement study for that update will likely lead to a more equitable distribution of the CJA management workload between the district clerks' offices and FDOs. The Conference approved the Committee's recommendation.

MITIGATION SPECIALIST POSITION

At the request of the Committee on Defender Services, the Committee on Judicial Resources recommended that the Judicial Conference include a position description for a non-capital mitigation specialist and a capital mitigation specialist in the Defender Organization Classification System, the personnel classification system for the judiciary's Defender Services program. Among other things, a mitigation specialist assists appointed CJA counsel in investigating, analyzing, developing, and presenting any mitigation evidence that exists in the life history of a client and gathers information to present a more complete picture of the client throughout the court proceedings. The Conference approved the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Judicial Resources reported that it submitted a FY 2018 budget request for programs under its jurisdiction to the Budget Committee that was equivalent to a 3.0 percent increase over the FY 2017 baseline, which would result in 12,027 FTE positions for court support staff. Subsequently, the Budget Committee adjusted the request to limit funding for court support staffing to 11,845 FTE positions. The Judicial Resources Committee declined a request for conversion of a Navajo staff court interpreter position to a Spanish staff court interpreter position in the District of New Mexico. The Committee also received an update on the schedule of delivery dates for current and future work measurement studies, including the upcoming district clerks' offices work measurement study.

COMMITTEE ON JUDICIAL SECURITY

COMMITTEE ACTIVITIES

The Committee on Judicial Security reported that it was updated on the status of the courthouse Physical Access Control Systems (PACS) program, including the United States Marshals Service (USMS) development of a national standard for PACS systems in federal courthouses and coordination of a risk-based budget strategy for examining and prioritizing PACS replacements and upgrades in federal judiciary facilities. The Committee also heard presentations from Director L. Eric Patterson, Federal Protective Service, and Acting Director David Harlow, USMS, regarding issues relevant to their agencies' respective roles in protecting court facilities. Finally, the Committee discussed the status of the Home Intrusion Detection Systems (HIDS) program, including the new national contract service provider, Securitas Electronic Security, Inc., which assumed contractual duties from Diebold.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

APPOINTMENT REGULATIONS

On recommendation of the Committee on the Administration of the Magistrate Judges System, the Judicial Conference amended its regulations establishing standards and procedures for the appointment and reappointment of United States magistrate judges, *Guide to Judiciary Policy*, Vol. 3, Ch. 4, § 420, to (a) ensure that merit selection panel members have written notice of the restriction against being considered for a magistrate judge position within one year of concluding service on the panel; (b) require waivers from this restriction to be requested by the chair of the merit selection panel; (c) clarify that the restriction applies to members of merit selection panels for the reappointment, as well as the appointment, of magistrates judges; (d) establish criteria for the Committee's consideration of a requested waiver; (e) require the merit selection panel to indicate in its report to the court whether any of the applicants were former merit selection panel members who had been granted a waiver; (f) provide that a court may recommend more than five applicants if the panel is recommending applicants for more than one magistrate judge position; and (g) make stylistic changes.

RECALL REGULATIONS

Under the regulations governing the ad hoc and extended service recall of retired magistrate judges, *Guide to Judiciary Policy*, Vol. 3, Ch. 11, § 1120, and Ch. 12, § 1220, the Magistrate Judges Committee must approve any request for staff for recalled magistrate judges and any request for funds for recall of a retired magistrate judge that exceeds $10,000 in judicial salary, Office of Personnel Management annuity reimbursement, travel and subsistence (JCUS-SEP 12, p. 28). The regulations also set forth the criteria the Committee should consider in deciding whether to approve such a request. At this session, the Committee recommended that the Conference add two new criteria for determining whether to approve funds for recalled magistrate judges or their staff: the comparative need of the district judges for the assistance of magistrate judges and the overall workload of the court; and the commitment of the court to the effective utilization of magistrate judges. The Conference adopted the Committee's recommendation.

CHANGES IN MAGISTRATE JUDGE POSITIONS

After considering the recommendations of the Committee on the Administration of the Magistrate Judges System and the views of the Administrative Office, the district courts, and the judicial councils of the circuits, the Judicial Conference agreed to (a) authorize the conversion of the part-time magistrate judge position at Williamsport in the Middle District of Pennsylvania to a full-time magistrate judge position; and (b) redesignate the location of the part-time magistrate judge position at Middletown to Poughkeepsie in the Southern District of New York.

ACCELERATED FUNDING

On recommendation of the Committee, the Conference agreed to designate for accelerated funding, effective April 1, 2017, the new full-time magistrate judge position at Williamsport in the Middle District of Pennsylvania.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that it considered ten cyclical district-wide magistrate judge survey reports prepared by the Administrative Office and determined not to recommend any changes in the number, locations, salaries, or arrangements of the magistrate judge positions in those district courts. Pursuant to Judicial Conference policy regarding the review of magistrate judge position vacancies (JCUS-SEP 04, p. 26), for the period between its December 2015 and June 2016 meetings, the Committee, through its chair, approved filling 12 full-time magistrate judge position vacancies in 11 courts. At its June 2016 meeting, the full Committee considered requests to fill two magistrate judge position vacancies. The Committee approved one of the requests and the second request was later withdrawn by the court. The Committee also considered and approved requests from ten courts for the recall or extension of recall of ten retired magistrate judges.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1001 (Scope of Rules and Forms; Short Title), 1006 (Filing Fee), and 1015 (Consolidation or Joint Administration of Cases Pending in Same Court), together with Committee Notes explaining their purpose and intent. The Conference approved the proposed amendments and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with law.

The Committee also submitted to the Judicial Conference proposed revisions to Bankruptcy Official Forms 20A (Notice of Motion or Objection) and 20B (Notice of Objection to Claim) (renumbered as 420A and 420B) and Official Form 410S2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges) and recommended that they take effect on December 1, 2016, and that they govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending. The Conference adopted the Committee's recommendation.

CIVIL LITIGATION PILOT PROJECTS

As part of an ongoing effort to reduce the cost and delay of federal civil litigation, the Committee recommended that the Judicial Conference approve two civil litigation pilot projects, each for a period of approximately three years in at least three to five districts. The first project, the Mandatory Initial Discovery Pilot Project, would test a system of mandatory initial discovery requests to be adopted in each participating court by standing order. It would apply to all civil cases except those exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the district by the Judicial Panel on Multidistrict Litigation. The second project, the Expedited Procedures Pilot Project, would test the effectiveness of strict court-wide application of practices that under current rules have proved effective in reducing cost and delay. It would involve all cases in which discovery and trial are possible. The pilot projects were developed in consultation with the Committee on Court Administration and Case Management and the Federal Judicial Center. The Committee also recommended that the Conference delegate authority to the Committee on Rules of Practice and Procedure to develop guidelines to implement the pilot projects. The Conference adopted the Committee's recommendations.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Evidence Rules 803 (Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness) and 902 (Evidence That Is Self-Authenticating), together with Committee Notes explaining their purpose and intent. The Conference approved the proposed amendments and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved for publication for public comment proposed amendments to Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; proposed amendments to Bankruptcy Rules 3002.1, 3015, 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8022, 8023, new Bankruptcy Rules 3015.1 and 8018.1 and

new Part VIII Appendix, and proposed amendments to Bankruptcy Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; proposed amendments to Civil Rules 5, 23, 62, and 65.1; and proposed amendments to Criminal Rules 12.4, 45, and 49. The proposed amendments to Bankruptcy Rule 3015 and proposed new Bankruptcy Rule 3015.1 were published for a comment period from July 1, 2016 through October 3, 2016. The remaining rules and forms were published for a comment period from August 12, 2016 through February 15, 2017.

COMMITTEE ON SPACE AND FACILITIES

COURTHOUSE PROJECT PRIORITIES

The *Federal Judiciary Courthouse Project Priorities (CPP)* list was adopted by the Judicial Conference in September 2015 as the new planning tool for communicating the judiciary's priorities for new courthouse construction. Eleven projects were included on the FY 2017 *CPP*, which was the first time the list was issued. At this session, the Committee on Space and Facilities recommended that the Judicial Conference adopt a FY 2018 *CPP*. As eight of the 11 projects on the FY 2017 plan were fully funded in the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, only three projects remained (Harrisburg, Pennsylvania; Chattanooga, Tennessee; and Norfolk, Virginia) and were carried forward to the proposed FY 2018 *CPP*. In addition, after considering feasibility studies conducted by the General Services Administration (GSA), three new projects (Huntsville, Alabama; Fort Lauderdale, Florida; and Hato Rey, Puerto Rico) were recommended for inclusion on the FY 2018 *CPP*. The Conference adopted the FY 2018 *CPP* as recommended, with the projects listed in the following priority order:

a. Part I: (1) Harrisburg, Pennsylvania; (2) Huntsville, Alabama; and (3) Fort Lauderdale, Florida; and

b. Part II: All remaining projects (Chattanooga, Tennessee; Hato Rey, Puerto Rico; and Norfolk, Virginia) listed according to urgency evaluation score.

FEASIBILITY STUDIES

Courthouse constructions projects must have a completed GSA feasibility study prior to being placed on the *CPP* (JCUS-MAR 08, p. 26).

After considering the urgency evaluation scores for potential projects in McAllen, Texas (Fifth Circuit), Bowling Green, Kentucky (Sixth Circuit), and Green Bay, Wisconsin (Seventh Circuit) and ensuring that the relevant district court and circuit judicial council for each project have given the necessary approvals, the Committee recommended that the Judicial Conference approve requests to GSA to perform feasibility studies for these locations. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that it was updated on the judiciary's efforts to reduce by three percent its national footprint by the end of FY 2018. As of June 2016, the judiciary had achieved two-thirds of this goal. While this progress is commendable, all circuits must continue to focus on space reduction efforts to ensure the national goal is met by the deadline. The Committee was also updated on the status of the judiciary's Capital Security Program (CSP) and, in consultation with the Committee on Judicial Security, approved four courthouses for CSP studies in FY 2016: Portland, Maine; Detroit, Michigan; Augusta, Georgia; and Fort Wayne, Indiana. Finally, the Committee discussed the status of the National Joint Training Program that has begun to coordinate and implement the policy changes resulting from the Service Validation Initiative, a collaborative effort on the part of the GSA and the judiciary to improve the quality of the services GSA provides to the courts.

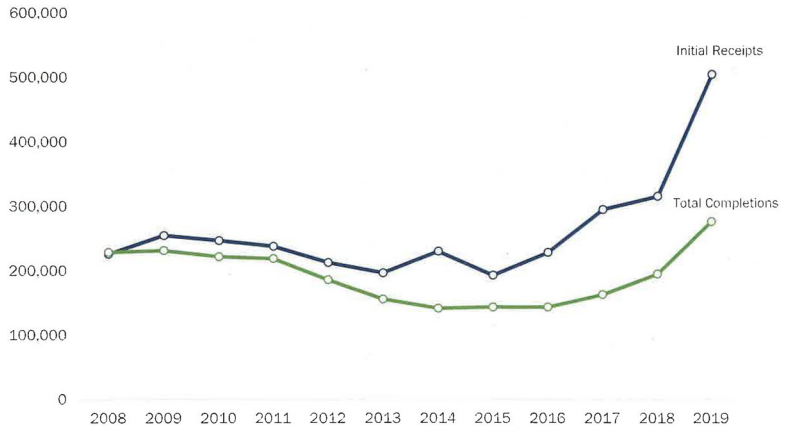
FUNDING

All of the foregoing recommendations that require the expenditure of funds for implementation were approved by the Judicial Conference subject to the availability of funds and to whatever priorities the Conference might establish for the use of available resources.

Chief Justice of the United States
Presiding

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS

New Cases and Total Completions



Fiscal Year	Initial Receipts[1]	Average Initial Receipts per Month	Total Completions[2]	Average Total Completions per Month
2008	225,871	18,823	228,833	19,069
2009	255,035	21,253	231,607	19,301
2010	247,185	20,599	222,275	18,523
2011	238,156	19,846	219,133	18,261
2012	212,934	17,745	186,084	15,507
2013	196,621	16,385	155,964	12,997
2014	230,177	19,181	141,692	11,808
2015	192,998	16,083	143,658	11,972
2016	228,451	19,038	143,491	11,958
2017	295,224	24,602	163,068	13,589
2018	315,710	26,309	195,088	16,257
2019	504,848	42,071	276,523	23,044
2020 (First Quarter)	111,218	37,073	99,889	33,296

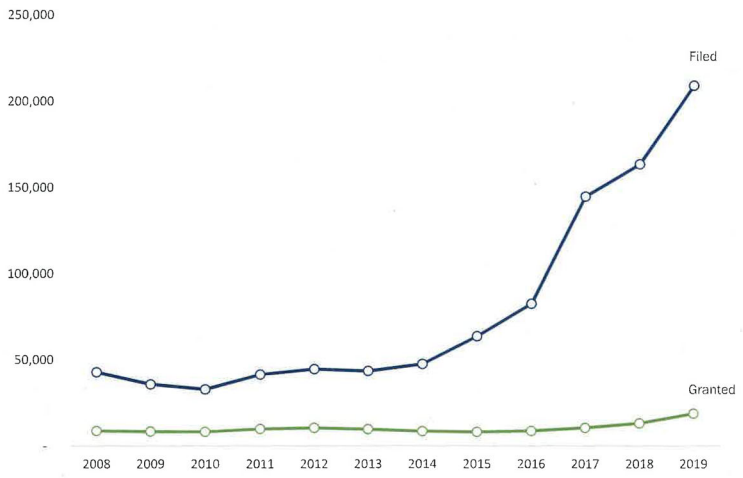
Data Generated: January 23, 2020

[1] Initial receipts equals removal, deportation, exclusions, asylum-only, and withholding only cases.

[2] Total completions equals initial case completions plus subsequent case completions and excludes "Failure to Prosecute" cases.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS

Total Asylum Applications[1]



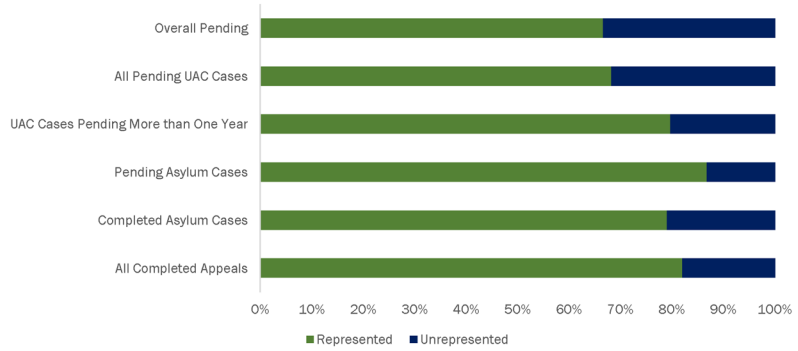
Fiscal Year	Filed	Granted	Total Receipts : Total Grants Ratio
2008	42,836	8,778	4.87:1
2009	35,812	8,384	4.27:1
2010	32,888	8,234	3.99:1
2011	41,462	9,866	4.2:1
2012	44,578	10,461	4.26:1
2013	43,463	9,692	4.48:1
2014	47,561	8,559	5.55:1
2015	63,657	8,108	7.85:1
2016	82,523	8,684	9.5:1
2017	144,725	10,539	13.73:1
2018	163,454	13,172	12.4:1
2019	208,942	18,809	11.1:1

Data Generated: October 23, 2019

[1] Total (affirmative and defensive) asylum applications filed and total asylum applications granted (initial case completions) in removal, deportation, exclusion, and asylum-only proceedings.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS

Current Representation Rates[1]



Fiscal Year	Universe	Unrepresented	Represented	Total	Representation Rate
2019	Overall Pending[2]	329,967	657,889	987,856	67%
	All Pending UAC Cases[2]	29,135	62,380	91,515	68%
	UAC Cases Pending More than One Year[2]	14,766	57,866	72,632	80%
	Pending Asylum Cases[2]	65,224	426,838	492,062	87%
	Completed Asylum Cases[3]	20,492	77,001	97,493	79%
	All Completed Appeals	4,544	20,662	25,206	82%

Asylum Decision Rates and Representation

Fiscal Year	Represented Grants	Represented Grant Rate	Overall Grant Rate	Represented Denials	Represented Denial Rate	Overall Denial Rate	Represented Others	Represented Other Rate	Overall Other Rate	Total Represented
2018	13,173	21%	21%	26,596	43%	41%	22,355	36%	35%	62,124
2019	18,813	20%	20%	45,352	49%	49%	28,606	31%	31%	92,771

Data Generated: October 23, 2019

[1] Representation status is recorded in EOIR's case management system when a representative of record is noted for a proceeding during an alien's immigration case.

[2]Representation in removal, deportation, exclusion, and asylum-only proceedings.

[3]Representation in removal, deportation, exclusion, and asylum-only proceedings. Initial and Subsequent Case Completions.

Mr. ARMSTRONG. Thank you, ma'am.

Ms. JAYAPAL. I now recognize the gentlelady from Arizona, Mrs. Lesko, for 5 minutes.

Mrs. LESKO. Thank you.

I apologize I couldn't be here to hear all of you. I was in another committee hearing where we had votes on bills, so I'm a little disappointed in that. But I do have a couple questions for our witness, Mr. Arthur, I believe. Mr. Arthur, thank you.

Mr. ARTHUR, are you aware of any effort by the EOIR under the Trump administration to tell immigration judges how they should rule in a particular case?

Mr. ARTHUR. No, I'm not. And, in fact, if you look at the asylum grant rates for 2019—fiscal year 2019 versus fiscal year 2018, they're almost identical. I think it's 20.25 versus 20.51. And the grant rates for asylum are actually higher in fiscal year 2019 than they were in fiscal year 2017. I think fiscal year 2016 as well.

Mrs. LESKO. And, Mr. Arthur, would you agree that it is really the underlying problems of all of the rush of people coming, especially from Central America, the families that are causing this backlog, not necessarily procedural type things within the courts?

Mr. Arthur. Actually, I would, Mrs. Lesko. And let me just make a very important point. Asylum is probably the closest thing that we have in Federal law to an almost sacred trust. It is the United States Government putting the cloak of protection over a person. It's absolutely crucial that good cases get heard, and what we need to do is diminish the number of bad cases.

EOIR issued some statistics on family units for selected courts, 10 selected courts. I don't know how represented they are. Family unit cases showed a 69 percent in absentia removal rate with respects to initial case completions. Now, that suggests to me that those individuals never actually had good asylum claims to begin with or any asylum claims to begin with at the time that they entered the United States. Absolutely crucial that we protect people who need protection, protect their loved ones abroad, so we've got to get to those good cases and eliminate the bad.

Mrs. LESKO. And I've got a couple more minutes, so, Mr. Arthur, are you aware of the ABA report on the state of immigration courts?

Mr. ARTHUR. I am aware of it, yes.

Mrs. LESKO. Do you believe that the report accurately reflects the state of immigration courts as inherently lacking in the ability to provide due process to litigants?

Mr. ARTHUR. I would not. And actually the word "due process" was used previously. I would note that due process is not a fixed term. It's the process that is due. So it varies from tribunal to tribunal and to the degree in which—to the application that someone's making.

So with respect to asylum, I commend Judge Tabaddor, who I've known for, I think, two decades, and my former colleagues on the bench, for their ability to provide due process to the individuals that appear before them. Again, Mrs. Lesko, keep in mind, Congress has had 180-day timeframe for the adjudication of asylum applications. This is nothing that this administration, nothing that EOIR has done. So the Department finds itself between the Scylla

and Charybdis, between complying with Congress and actually getting the cases done.

If we cut down the backlog—or if we cut down the number of people who enter the United States illegally and make fraudulent claims or make nonmeritorious claims, the quicker we're going to be able to get to those good claims.

We heard from Mr. Neguse earlier. I mean, that was a touching story about how his family came here as refugees. That's what we need to do. That's what we should be doing as a country, but what we have to do is we have to cut down the number of people who are going to come here and make fraudulent claims.

Mrs. LESKO. And thank you for that. I have introduced six bills myself to try to get at the root of the increase in the immigration crisis. Unfortunately, none of them have been heard. One of them would increase the number of immigration judges, and I was hoping that my Democratic colleagues would join me on that, because I also serve on the Rules Committee, where at least two of the members have said that that was a good idea, including, I believe, the chairman, if my memory is correct.

And would that help the problem, increasing the number of immigration judges?

Mr. ARTHUR. Absolutely. We probably need about 700 immigration judges to take care of the issue. We're at 465 right now. So we have about 235 to go, and even then, there's going to be a lag time in hiring.

Mrs. LESKO. Thank you. And I yield back.

Ms. JAYAPAL. The gentlelady yields back.

I now recognize the gentlewoman from Pennsylvania, Ms. Scanlon, for 5 minutes.

Ms. SCANLON. Thank you, Madam Chair.

We've heard some assertions today that the high backlog of immigration cases is due to some extraordinary number of undocumented immigrants either crossing our border now or being in the U.S. entirely, although both those numbers have dropped in recent years. We've also heard a suggestion that the failure of immigrants to appear for hearings is causing this backlog, and that's just flat-out wrong. I mean, the statistics show that—actually, the data shows that appearances have—the percentage of appearances have increased over time. And to the extent that the administration argues otherwise, that's because data has been manipulated to produce what one of my colleagues referred to earlier as lies, damn lies, or statistics. So I'd like to ask unanimous consent to introduce this Human Rights First report on immigration court appearance rates.

Ms. JAYAPAL. Without objection.

[The information follows:]

REP. SCANLON FOR THE RECORD

human rights *first*

American ideals. Universal values.

Immigration Court Appearances Rates

As Congress and the Trump Administration debate immigration policy reforms, one critical—and often misrepresented—piece of information is the extent to which individuals in immigration removal proceedings comply with their court appearance obligations.

Based on available data, it is clear that immigrants appear for their immigration court hearings at high rates, particularly when they have legal representation or case management support, and accurate information related to the court process.

However, some members of the administration and Congress, as well as media outlets, have asserted that immigrants are likely to skip their immigration court proceedings and that they must be held in detention facilities to assure their appearance for immigration appointments.

This inaccurate claim reflects a highly erroneous analysis of government data that is being used to justify further unnecessary levels of immigration detention. It also further exacerbates impediments to asylum and other immigration processes.

The use of immigration detention has far-reaching negative consequences on health and the ability to establigh asylum or other eligibility. Many are held in remote locations where they cannot access legal counsel or communicate with relatives. Family members suffer the collateral effects associated with losing a primary breadwinner, parent, or guardian.

Families and Children with Legal Counsel Are in Compliance Nearly 100 Percent of the Time

According to Syracuse University's Transactional Records Access Clearinghouse (TRAC), as of December 2017, 97 percent of represented mothers whose cases initiated in fiscal year (FY) 2014 were in compliance with their immigration court hearing obligations three years later.

Similarly, 98 percent of children in immigration proceedings whose cases initiated in 2014 and who had obtained counsel were in full compliance with their court appearance obligations as of December 2017.[1]

TRAC data also showed, however, that 44% of mothers were not able to obtain legal counsel. Additionally, among the 57,678 cases of children that were filed before the immigration courts in 2014, 36 percent had not obtained legal representation by December 2017.[2]

Human Rights First and other groups have noted numerous reasons that immigrants and asylum seekers often lack legal representation.

[1] There were 18,674 "women with children" cases filed in 2014 that had representation, of 33,129 total cases. Of those that had legal representation, 541 had received a removal order *in absentia* as of December 2017. Of the 14,455 cases that did *not* have legal representation, 11,305 had received a removal order *in absentia*. *See*, TRAC Immigration, Priority Immigration Court Cases: Women with Children, http://trac.syr.edu/phptools/immigration/mwc/, last accessed Feb. 1, 2018.

[2] There were 37,653 "juvenile" cases (defined as under 18 at the time the case begins who are appearing alone) filed in 2014 that had representation, of 57,278 total cases. Of those that had legal representation, 852 had received a removal order *in absentia* as of December 2017. Of the 19,625 cases that did *not* have legal representation, 12,698 had received a removal order *in absentia*. *See*, TRAC Immigration, Juveniles—Immigration Court Deportation Proceedings, http://trac.syr.edu/phptools/immigration/juvenile/, last accessed Feb. 1, 2018.

- ☑ Many cannot afford legal counsel
- ☑ There is only very limited government funding for legal representation.
- ☑ Pro bono legal representation is scarce and over stretched.
- ☑ Asylum and immigration laws are exceedingly complex, and without legal representation eligible indivuals often cannot satisfy the stringent legal and evidentiary requirements.

Statistics have shown that legal representation is the most important factor in determining whether an individual will succeed in their case.

The Trump Administration and proponents of legislation that seeks to block funding for legal representation are trying to thwart access to counsel, which in turn will lead to lower appearance rates.

Adults Released from ICE Detention Comply More Often than Government Reports Indicate

TRAC data indicates that *in absentia* rates—or rates of individuals ordered to be deported because they were not present in the courtroom—for adults who were released from Immigration and Customs Enforcement (ICE) custody due to an immigration judge's release decision have declined significantly in recent years.

- ☑ TRAC analysis found that *in absentia* rates for individuals who have been released from ICE custody pursuant to an immigration court bond hearing have declined by 33 percent over the past several years, from a high of 47 percent in 2002 down to 14 percent in 2015.
- ☑ This means that 86 percent of individuals released from ICE detention in 2015 pursuant to a bond hearing complied with their appearance obligations.
- ☑ The overall appearance rate for individuals released from ICE custody in FY 2015 was 77 percent. This includes both individuals released pursuant to an immigration court hearing, as well as those released pursuant to an ICE custody determination.

However, due to nuances in government reporting, some *in absentia* rates are misleading.

- ☑ The Executive Office for Immigration Review (EOIR)'s own analysis points to a lower appearance rate for individuals released from custody. In FY 2015, the agency reported a 42 percent *in absentia* rate (or 58 percent appearance rate), based on 11,346 *in absentia* orders out of 27,329 immigration judge decisions.
- ☑ According to TRAC analysis, however, there are two factors that impact this analysis, making the government's reported appearance rate lower.
  - One, EOIR calculates this rate based upon the initial proceeding, not the last proceeding. This leaves out cases in which an individual may have received inadequate information about the hearing and later had their case reopened which, according to TRAC, has a significant impact on the calculation.
  - Second, EOIR does not include all concluded cases in its calculation, leaving out what it calls "other completions" (such as administrative closings), which generally make up about a quarter of cases before the immigration court.[1]

[1] Syracuse University's Transactional Records Access Clearinghouse, "What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?" Sept. 14, 2016.

Providing Information about the Process Lowers *in Absentia* Rates

Research points to a variety of factors that may either improve or impede a person's likelihood of appearing for immigration court hearings.

Human Rights First and other groups have documented gaps by immigration agencies in providing asylum seekers and immigrants with adequate, accessible information—in the immigrant's best language—related to appearance and supervision requirements, as well as errors that can have serious consequences.

In a 2014 visit to the southern border, Human Rights First found that asylum seekers were sometimes given removal hearing notices for an immigration court located in a different state from where the individual will be living, with no explanation of the process for correcting such errors.

Other groups documented instances in which mothers traveling with their children were not provided information about their appearance obligations.

Many asylum seekers did not understand the multiple appearance obligations. For instance, some believed that reporting for Immigration and Customs Enforcement (ICE) was the same as reporting to immigration court.

Multi-year delays in court dates due to the chronic underfunding of the immigration courts could also lead to inadvertent failures to appear.

In one case, now represented by Human Rights First:

- ☑ Upon being released from immigration detention in November 2016, "Abigail" provided ICE with her address in Texas. ICE then scheduled her appointment to appear at an ICE office in Texas, which she complied with.
- ☑ Two weeks later, Abigail again reported to ICE, this time informing ICE of her plans to move to Maryland and providing her new Maryland address. Rather than assisting her to transfer her case to Maryland, the officer gave her another appointment with the same Texas ICE office the following June.
- ☑ Having told ICE about her move, Abigail believed that her address would be updated in the appropriate government systems. Furthermore, since ICE had not yet filed her Notice to Appear with the immigration court, there was no mechanism for her to separately update her address with the immigration court.
- ☑ She regularly checked the EOIR hotline for any scheduled hearings and regularly spoke with a family member who still lived at her prior Texas address to ask whether she had received any correspondence from the immigration court.
- ☑ When Abigail drove over 20 hours to Texas for her June ICE appointment, she was informed that she had been ordered deported *in absentia* in April. Government records showed that a hearing notice in her case was mailed to the Texas address only three days prior to a scheduled master calendar hearing.
- ☑ After obtaining pro bono counsel, Abigail filed a motion to reopen her immigration case based on lack of notice. She is now awaiting her final merits hearing on her asylum claim.

On the other hand, providing accurate information about the process—as well as legal counsel and social services—can positively impact an individual's compliance with immigration court proceedings.

Community-based case management programs piloted by Lutheran Immigrant and Refugee Services and U.S. Conference of Catholic Bishops' Migration and Refugee Services have shown high compliance rates of 96 to 97 percent. These programs adopted effective social service approaches to support individuals through the completion of their immigration proceedings. Both programs provided case management, legal, and housing services, and

helped individuals build critical community connections.

Now that Legal Orientation Programs (LOP) exist in 40 detention facilities out of 201, more individuals who have been detained have received information related to the court process and their appearance obligations. If the programs were expanded to the other 161 detention facilities, and to Customs and Border Patrol (CBP) facilities, individuals would have access to comprehensible information about their various appearance obligations.

Another program that was shown to improve court appearance rates was ICE's Family Case Management Program. The program provided case worker support to families that helped bring compliance rates with court appearances and ICE appointments to 99 percent. Under the Trump Administration, however, ICE discontinued the program despite its success in supporting high appearance rates.

Global research supports these conclusions. The United Nations High Commissioner for Refugees (UNHCR) found several factors across multiple countries that influence compliance with asylum procedures, including:

- ☑ ensuring that asylum seekers understand their rights and obligations, the conditions of their release, and the consequences of failing to appear;
- ☑ providing legal advice or counsel;
- ☑ providing adequate material support and accommodation throughout the immigration process; and
- ☑ strengthening community ties.

Having faith in the legal process, a belief in the importance of rule of law, and a desire to avoid irregular status or detention were also factors that supported compliance.

Recommendations

Rather than increasing costly immigration detention, the U.S. Department of Homeland Security (DHS), U.S. Department of Justice, and Congress should assure implementation of cost-effective policies that minimize or end unnecessary detention while promoting the integrity of the system by improving appearance rates.

Specifically, DHS, ICE, and DOJ should:

- ☑ **Expand the Legal Orientation Program (LOP) to cover all ICE detention facilities** (currently LOP is only available at 40 of 201). DHS and ICE should also develop an LOP at the border so that individuals who are in short-term custody will have the information necessary to understand the process and their appearance obligations.
- ☑ **Support access to, and funding for, legal representation in asylum and removal proceedings.**
- ☑ **Ensure Customs and Border Protection (CBP) and ICE staff, in addition to immigration judges, carefully explain appearance obligations and details in a language the asylum seeker or immigrant fully understands.** Explanations should include: immigration court appearance requirements or any conditions on release from immigration detention (such as reporting to an ICE office); the differences between various appointments; the locations of the relevant offices and the procedures to follow if the applicant should have to move addresses again.
- ☑ **Increase immigration court staffing to reduce wait times and safeguard courts from measures that undermine due process.**
- ☑ **Provide all individuals detained by ICE detention prompt access to individualized**

custody redetermination hearings before an immigration judge.

- ☑ Refer asylum seekers or immigrants who need appearance support to community-based case management programs
- ☑ End the detention of families and reduce unduly high and costly immigration detention levels overall.

Ms. SCANLON. Okay. Now, that report talks about a couple factors that I'd like to dig into a little more. One is the impact of lack of notice on people appearing for their hearings, and the other is the impact of access to counsel.

So, Judge Tabaddor, I know you're aware of a case that was infamous in Philadelphia a few years back where we had an immigration court judge who used a procedural tactic to delay an immigration case because the person in that case had not received notice of the hearing. So rather than deport the person for not showing up for a hearing that they had no notice of, the judge delayed the case, and it's my understanding that the case was then taken away from that judge and given to someone else who did deport that person.

Can you comment on that case and how it relates to this issue of your taking away judges' discretion and pressuring them to deport people?

Ms. TABADDOR. Yes, thank you. We've talked about the use of certification process in a politicized manner, and one of that has been taking away the judges' authority to administratively close a case, which is to put it aside until the issue that needs to be resolved is resolved. And my colleague was concerned about the issue of notice of an unaccompanied child. I can tell you that we started the Van Nuys immigration court just less than a month and a half ago, and for the entire month of January, we have cases that have been put on our calendar where I come to courtrooms that are half empty and realize that, actually, the notices were not sent out, even though we were told that notices had been sent. I also see regularly now, because they want to move up the cases, cases that have been scheduled for future dates are being moved up and people don't—it creates confusion as to the issue of notice.

So we have absolutely seen the problematic nature of dealing with the court as sort of a factory model of constantly moving the pieces and then expecting the court to function normally.

Ms. SCANLON. And expecting people who are subject to hearings to be able to show up if they don't know a hearing is coming.

Ms. TABADDOR. Absolutely.

Ms. SCANLON. Okay. I mean, this is a little bit personal. I've had a couple of immigration cases, and there was one that for 6 years the court couldn't or ICE or whomever couldn't seem to give me notice of when my client's next action was due, despite filing multiple notices of appearance. So it's kind of a systemic issue.

The other factor that plays heavily into whether people show up for their hearings is whether they have counsel. So, Mr. McKinney, I wanted to talk to you a little bit about that. I have some familiarity with the facility in Lumpkin, Georgia, the fact that it has the highest or it did at one point have the highest deportation rate in the country. About 98 percent of the people going to Lumpkin would get deported in large part because they didn't have counsel.

Are you familiar with the reports that at least one American citizen was deported from Lumpkin?

Mr. MCKINNEY. Yes. That was a North Carolina U.S. citizen, and I was a local counsel in the civil suit that followed once that person was finally returned home by a sympathetic consular officer overseas.

Ms. SCANLON. And, similarly, there are people there who have had what have been termed good asylum claims, credible asylum claims, that they would be subject to death if they were returned home to their countries, and without counsel, they were, in fact, deported and were, in fact, killed when they were returned to their home countries. Is that correct?

Mr. MCKINNEY. Absolutely. There have been a few studies on this. One shows that there's at least a—a respondent is 14 times more likely to gain relief if that person has counsel. And it makes sense, because a knowledgeable and effective attorney will know how to present a case and know when a case is bad also, Representative, so it's really the key ingredient. But I can't even—I mean, when I have a case in Lumpkin, I have to go from North Carolina, fly to Atlanta, rent a car, stay in Columbus, drive another 45 minutes south, and pray that I will get a waiting room, with the limited resources they have, to meet with my client. It's really a mess.

Ms. JAYAPAL. The gentlelady's time has expired.

Ms. SCANLON. Okay. Thank you so much.

Ms. JAYAPAL. Thank you.

Without objection, I request that the statements from the following organizations be included in the record: American Immigration Council, Center for Gender and Refugee Studies, Coalition for Humane Immigrant Rights, the Constitution Project at the Project on Government Oversight, Florence Immigrant and Refugee Rights Project, Human Rights First, Human Rights Initiative of North Texas, Kids in Need of Defense, law firm of Hassan M. Ahmad, National Immigrant Justice Center, National Immigration Forum, New York City Bar Association, New York Legal Assistance Group, Refugees International, Roundtable of Former Immigration Judges, Young Center for Immigrant Children's Rights, joint letter from Innovation Law Labs, Southern Poverty Law Center, Las Americas Immigrant Advocacy Center, Santa Fe Dreamers Project, and Catholic Legal Immigration Network.

[The information follows:]

REP. JAYAPAL FOR THE RECORD

April 3, 2019

Via Electronic Mail

James McHenry, Director
Executive Office for Immigration Review
U.S. Department of Justice
Washington, DC

Michael E. Horowitz, Inspector General
U.S. Department of Justice
Washington, DC

Corey R. Amundson, Director and Chief Counsel
Office of Professional Responsibility
U.S. Department of Justice
Washington, DC

RE: ADMINISTRATIVE COMPLAINT REGARDING EL PASO SERVICE PROCESSING CENTER IMMIGRATION COURT JUDGES

Dear Director McHenry, Inspector General Horowitz, and Director Amundson:

The American Immigration Council ("Council") and the American Immigration Lawyers Association ("AILA") jointly file this complaint[1] on behalf of immigration practitioners and their detained clients who appear for immigration proceedings at the El Paso Service Processing Center immigration court ("El Paso SPC Court") regarding:

> (A) The use of problematic standing orders by Immigration Judges ("IJs") at the El Paso SPC Court[2] that undermine due process and diminish access to counsel;
>
> (B) A culture of hostility and contempt towards noncitizens who appear at the El Paso SPC Court; and
>
> (C) The use of problematic court practices which undermine due process and a fair day in court for noncitizens appearing before the El Paso SPC Court.

This complaint is based on interviews and declarations from legal practitioners who appeared before the detained docket at the El Paso SPC Court, several IJ standing orders, and a court observation project conducted by the University of Texas at El Paso ("UTEP") and the Hope Border Institute involving hundreds of immigration court cases heard at the El Paso SPC Court.[3]

The court observations, declarations,[4] and statistics paint a sobering picture. The data suggest that noncitizens appearing in the El Paso SPC Court face some of the highest obstacles in the nation to due process and fair adjudication of claims for relief. IJs in the El Paso SPC Court granted only 31 out of 808 asylum applications (3.84 percent) decided on the merits between Fiscal Year (FY) 2013 and FY 2017, which makes the El Paso SPC Court the immigration court with the lowest asylum grant rate in the nation during this timeframe.[5] In FY 2016 and FY 2017 combined, IJs at the El Paso SPC Court granted just *seven* out of 225 cases (3.11 percent) that were decided on the merits.[6] The court's asylum grant rate is so low that one IJ referred to the El Paso SPC Court as "the Bye-Bye Place."[7] Showing similar hostility towards a fair day in court, one of the longest serving IJs in the El Paso SPC Court stated that "[d]ue process is an opportunity, not a privilege."[8]

Table 1: Asylum Decision Rate at El Paso SPC Court

Fiscal Year	Grants	Denials	Grant Rate
FY2017	4	88	4.35%
FY2016	3	130	2.26%
FY2015	6	165	3.51%
FY2014	18	307	5.54%
FY2013	0	87	0%

Source: Department of Justice

The due process concerns in the El Paso SPC Court illustrated throughout this complaint reveal a systemic pattern of dysfunction and lack of meaningful oversight in the U.S. immigration court system at large.[9] Immigration courts across the nation are suffering from many of the issues identified here, including the use of problematic standing orders, reports of inappropriate conduct from IJs, and highly disparate grant rates which suggest that outcomes may turn on which court or judge is deciding the case rather than established principles and rules of law.

The Executive Office for Immigration Review ("EOIR") should address these endemic problems in the El Paso SPC Court and other courts through corrective action. EOIR's failure to act is a strong indication that it is not providing adequate management and oversight to ensure that court proceedings are conducted in a fair and efficient manner. The agency's inadequate response also illustrates the weakness of an immigration court system not overseen by an independent judicial agency whose primary function is to ensure the rule of law, impartiality, and due process in the adjudication of cases.

We conclude by providing recommendations for corrective and remedial action for the EOIR, the U.S. Department of Justice's ("DOJ") Office of Inspector General ("OIG") and the DOJ's Office of Professional Responsibility ("OPR") to address these issues within the El Paso SPC Court and the U.S. immigration court system at large.[10]

KEY FINDINGS

1. IJs in the El Paso SPC Court use standing orders that undermine due process for respondents, including those seeking humanitarian relief, reduce access to counsel, and prevent release from detention, including:
    a. An arbitrary 100-page limit on evidence for applications for asylum, withholding of removal, or protection under the Convention Against Torture ("CAT"), which forces applicants to exclude necessary evidence;
    b. A requirement that applicants for relief from removal submit all evidence before any individual merits hearing is scheduled, which forces detained applicants to proceed without necessary evidence or remain locked up while waiting for additional evidence;
    c. A prohibition on supplementing previously submitted relief applications, including with evidence which was unobtainable at the time of filing;
    d. Blanket denial of telephonic appearances, increasing physical and financial burdens on attorneys and detained individuals and severely reducing access to counsel, especially pro bono representation; and
    e. A requirement to submit extensive evidence regarding applications for relief from removal before any request for bond is considered, leading to IJs denying bond based almost entirely on a prediction of the merits of the case, rather than whether the person is a danger or a flight risk.
2. A culture of contempt and hostility towards respondents and their legal counsel exists in the El Paso SPC Court, which manifests itself in inappropriate and egregious conduct in court. For example, attorneys and court observers witnessed IJs:
    a. Declaring that "You know your client is going bye-bye, right?" and referring to the El Paso SPC Court as "the Bye-Bye Place";
    b. Telling court observers that "There's really nothing going on right now in Latin America" that would provide grounds for asylum;
    c. Stating that "Due process is an opportunity, not a privilege";
    d. Openly calling a mentally ill respondent "crazy" and mocking him; and
    e. Telling an asylum seeker who asked for bond that she seemed "not serious about the process if she only wants to be released."

3. IJs in the El Paso SPC Court run their courtrooms in ways which undermine due process and prevent respondents from getting a fair day in court, including:
    a. Disregarding or ignoring evidence submitted by practitioners or substituting their own preconceptions about the case;
    b. Pre-adjudicating cases, including telling respondents at their initial hearings that they weren't going to win asylum before any application had been submitted, which encourages them to abandon their cases;
    c. Employing multiple problematic bond practices, including the presumptive denial of bond, setting bond amount based on the "going rate" for a respondent's country of origin, and denying bond because a respondent lacks financial resources;
    d. Prohibiting direct examination by counsel, undermining the practitioners' ability to represent the respondent and create a sufficient record for appeal;
    e. Perpetuating a culture of fear among practitioners appearing at the El Paso SPC Court that if they complain about IJ misbehavior, IJs will punish their clients; and
    f. Failing to address a variety of language access issues, including providing interpretation in hearings and interpreters who speak the respondent's language.

Table of Contents

I. The Problematic Use of Standing Orders in the El Paso SPC Court

Standing orders are individual IJ rules regarding the operation of an IJ's courtroom. In the immigration context, these standing orders may address content and format of court filings, relief applications, and associated processes. Several aspects of IJ standing orders at the El Paso SPC Court present serious due process-related concerns. This complaint focuses on three El Paso SPC Court standing orders (with one order containing multiple problematic directives):

1. Standing Order Related to Submission of Evidence ("Evidence Standing Order"). This order contains the following three directives:[11]
    a. Early Submission Rule;[12]
    b. 100-Page Limit on Evidence Rule;[13] and
    c. Supplementary Evidence Order.[14]
2. Bond Hearing Standing Order;[15] and
3. Telephonic Appearance Standing Order.[16]

These standing orders are included in their entirety in Appendix A.[17] Different IJs adopt different standing orders, with only IJ William L. Abbott ("IJ Abbott") adopting all three. It is our understanding that IJ Abbott originally established many, if not all, of these standing orders and other IJs subsequently adopted some orders.[18] The potential impact of IJ Abbott's use of standing orders is extensive. From FY 2013 through FY 2018, IJ Abbott decided 412 asylum claims on their merits, and only granted asylum in 29 of these cases.[19]

The standing orders are not publicly available online. On three separate occasions in February 2019, we attempted to obtain standing orders directly from the El Paso SPC Court. Each time, court representatives said that the orders could not be shared with the general public and could only be shared with EOIR-registered attorneys. Based on our data collection,[20] the table below—*which may not reflect the full extent or adoption of these standing orders*—provides an overview of which IJs use these standing orders:

Table 2. Standing Orders at El Paso SPC Court by IJ

Immigration Judge	*Early Submission (Evidence Order)*	*100-Page Limit (Evidence Order)*	*Supplementary Evidence (Evidence Order)*	*Bond Hearing Standing Order*	*Telephonic Appearance Standing Order*
IJ Abbott	✓	✓	✓	✓	✓
IJ Ruhle					
IJ Tuckman	✓			✓	
IJ Pleters	✓		✓	✓	

Source: Appendices A1 – A3; Appendix B1.

The lack of transparency around the existence and use of standing orders is troubling, particularly in light of EOIR's Immigration Court Practice Manual ("ICPM"),[21] a nationwide

practice resource that EOIR adopted in 2008 with the stated goal of "establish[ing] uniform procedures" nationwide.[22] At the time that the ICPM was first brought into use, EOIR told immigration lawyers that the ICPM would supersede any contradictory local standing orders.

> The provisions in the Immigration Court Practice Manual are to be applied in a uniform manner nationwide. Therefore, local practices which contradict the Practice Manual's provisions *are no longer permitted, including local practices expressed through "standing orders."* If an Immigration Judge is continuing to use standing orders, this should be brought to the attention of the appropriate Assistant Chief Immigration Judge.[23]

Nothing in the ICPM explicitly authorizes the use of standing orders, and EOIR itself agrees that the ICPM precludes the usage of "local rules."[24] Nevertheless, many of the El Paso SPC Court standing orders—some of which have been in place for years—directly contradict guidelines established by the ICPM.

In fact, EOIR has been on notice of this issue for years and has failed to address these concerns. In 2017, AILA specifically notified EOIR Headquarters in advance of a stakeholder meeting that IJs in El Paso had adopted the practice of issuing blanket denials of motions for attorneys to appear by telephone at Master Calendar Hearings ("MCHs").[25] EOIR subsequently canceled the stakeholder meeting. We are unaware of any action taken by EOIR in regards to this matter.

Further, EOIR is *statutorily required* to post standing orders on its website pursuant to 5 U.S.C. §§ 552(a)(1)(A) and (B), which require that an agency proactively disclose how "… the public may obtain information, make submittals or requests, or obtain decisions… or statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available."

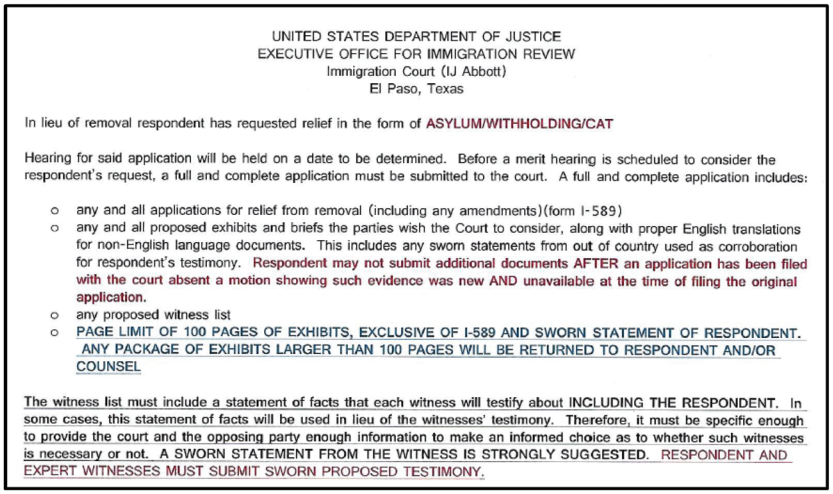
A. The Evidence Standing Orders

The Immigration and Nationality Act ("INA") provides that respondents must be given "a reasonable opportunity . . . to present evidence on [their] own behalf."[26] However, IJs in the El Paso SPC Court have standing orders which contain various rules which limit the ability of respondents to submit evidence in support of their cases. These rules include requiring respondents to submit their application before a merits hearing is even scheduled; limiting that submission's exhibits to 100 pages; and then refusing to accept supplementary evidence. The standing orders related to evidence strip due process away from respondents and unreasonably prevent them the opportunity to present evidence on their own behalf.

Each rule contained within the Evidence Standing Order violates the ICPM and raises serious concerns about fairness and due process; but when operating in tandem, they severely limit the universe of available supporting evidence, require respondents to limit the quantity of submitted evidence, and force respondents to submit their claims on an expedited timeline. The Evidence Standing Order is problematic, not just for an individual preparing for his or her

merits hearing before an IJ, but because of the limitations on the individual's ability to seek meaningful legal review of the case by the Board of Immigration Appeals ("BIA") or other appellate body.

Figure 1: Excerpt from IJ Abbott's Evidence Standing Order (Containing All Three Rules)



UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court (IJ Abbott)
El Paso, Texas

In lieu of removal respondent has requested relief in the form of ASYLUM/WITHHOLDING/CAT

Hearing for said application will be held on a date to be determined. Before a merit hearing is scheduled to consider the respondent's request, a full and complete application must be submitted to the court. A full and complete application includes:

- any and all applications for relief from removal (including any amendments)(form I-589)
- any and all proposed exhibits and briefs the parties wish the Court to consider, along with proper English translations for non-English language documents. This includes any sworn statements from out of country used as corroboration for respondent's testimony. Respondent may not submit additional documents AFTER an application has been filed with the court absent a motion showing such evidence was new AND unavailable at the time of filing the original application.
- any proposed witness list
- PAGE LIMIT OF 100 PAGES OF EXHIBITS, EXCLUSIVE OF I-589 AND SWORN STATEMENT OF RESPONDENT. ANY PACKAGE OF EXHIBITS LARGER THAN 100 PAGES WILL BE RETURNED TO RESPONDENT AND/OR COUNSEL

The witness list must include a statement of facts that each witness will testify about INCLUDING THE RESPONDENT. In some cases, this statement of facts will be used in lieu of the witnesses' testimony. Therefore, it must be specific enough to provide the court and the opposing party enough information to make an informed choice as to whether such witnesses is necessary or not. A SWORN STATEMENT FROM THE WITNESS IS STRONGLY SUGGESTED. RESPONDENT AND EXPERT WITNESSES MUST SUBMIT SWORN PROPOSED TESTIMONY.

1. The Evidence Standing Order: 100-Page Limit on Evidence

In order to win asylum, withholding of removal, or protection under CAT, an applicant bears the burden of proving to a judge that he or she qualifies for protection.[27] To meet this burden, applicants for relief often must submit significant amounts of evidence. Evidence in support of an application for protection typically may include documentation of the harm the applicant has experienced in the past (such as medical records, police reports, sworn affidavits, newspaper articles, and even written threats from persecutors), and evidence that indicates that the applicant is at a risk of persecution in the future (such as expert reports, reports on country conditions, or evidence that internal relocation is impossible). Unfortunately, at least one IJ in the El Paso SPC Court has a standing order that makes meeting this legal burden effectively insurmountable.

Under the 100-Page Limit Rule, part of the Evidence Standing Order, applicants for humanitarian protections are required to meet a "page limit of 100 pages of exhibits, exclusive of I-589 and sworn statement of respondent."[28] Any applications in excess of 100 pages of

exhibits "*will* be returned."[29] Currently, we believe that only IJ Abbott has formally adopted this requirement as part of his Evidence Standing Order.[30]

The 100-Page Limit Rule forces practitioners to exclude critical or supporting evidence and undermines practitioner efforts to build a record for future appeals. By forcing attorneys to limit the evidence they can submit on their client's behalf, the standing order requires respondents with fear-based claims and others to make a "difficult and unfair decision in determining what evidence is most helpful even though additional evidence might also be equally as important."[31]

As Brooke Bischoff ("Ms. Bischoff"), an attorney who has represented numerous detained respondents before the El Paso SPC Court, notes, the standing order "prejudiced [her] clients by limiting the amount of evidence [she] can submit in support of an application for relief."[32] This impact is not just felt at the trial level, but also on appeal:

> [t]he 100-Page Standing Order is especially harmful because it not only hinders clients' cases during initial hearings, but the inability to fully include all relevant evidence on the record is also harmful to clients in their future ability to properly appeal an unfavorable decision due to the inability to develop a more complete record.[33]

This order is particularly harmful for individuals seeking protection whose cases are more complex or where country conditions are at issue. One pro bono attorney noted that his client—a rare language speaker who appeared before the El Paso SPC Court—required extensive evidence to demonstrate persecution stemming from indigenous ancestry, a need which was undermined by the order.[34]

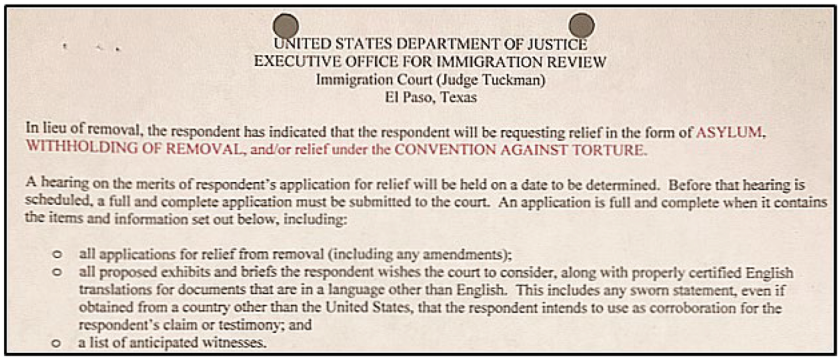
2. The Evidence Standing Order: Early Submission Requirement

The Early Submission Requirement, part of the Evidence Standing Order, forces respondents to expedite the timeframe for submission of an application for relief, reducing the amount of time available for the respondent to prepare and document their case, and decreasing the likelihood that the respondent will be able to locate and retain counsel.

Under this order, "[b]efore a merits hearing is scheduled to consider the respondent's request, a full and complete application must be submitted to the court," which includes all applications for relief, exhibits, and a proposed witness list.[35]

IJs Abbott, Tuckman, and Pleters have adopted this requirement as part of their Evidence Standing Order.[36] Court observers have also witnessed IJ Ruhle requiring the submission of the asylum application before he would schedule an individual merits hearing.[37]

Figure 2: Excerpt from IJ Tuckman's Evidence Standing Order



UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court (Judge Tuckman)
El Paso, Texas

In lieu of removal, the respondent has indicated that the respondent will be requesting relief in the form of ASYLUM, WITHHOLDING OF REMOVAL, and/or relief under the CONVENTION AGAINST TORTURE.

A hearing on the merits of respondent's application for relief will be held on a date to be determined. Before that hearing is scheduled, a full and complete application must be submitted to the court. An application is full and complete when it contains the items and information set out below, including:

- all applications for relief from removal (including any amendments);
- all proposed exhibits and briefs the respondent wishes the court to consider, along with properly certified English translations for documents that are in a language other than English. This includes any sworn statement, even if obtained from a country other than the United States, that the respondent intends to use as corroboration for the respondent's claim or testimony; and
- a list of anticipated witnesses.

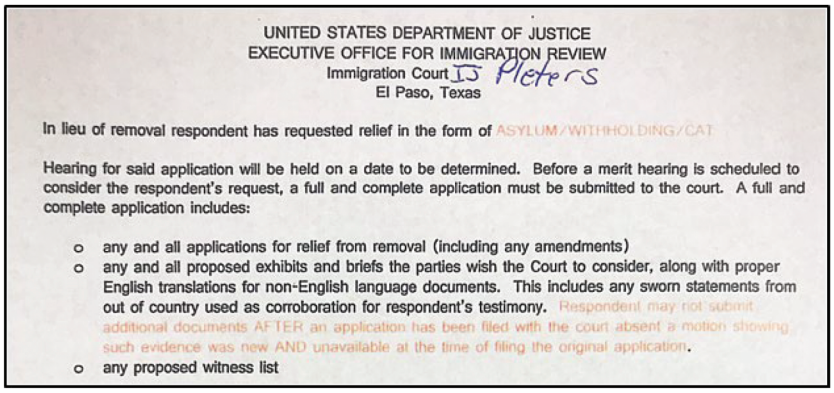
Winning a case for asylum or other humanitarian protection often requires substantial evidence, including evidence produced from the applicant's country of origin. Because obtaining evidence through international mail is difficult—particularly for those who are incarcerated in an immigration detention facility—respondents may wait weeks to obtain evidence necessary for their case. Respondents who have been detained for lengthy periods of time may be forced to choose between submitting an application for relief and receiving a trial date or asking for a continuance to wait for more evidence, thus unnecessarily prolonging detention. As Ms. Bischoff noted, her clients were prejudiced as a result of the order because evidence "being mailed from abroad [was] not received before the full 100-page submission in support of the asylum application [was] due."[38]

This rule also interferes with due process because it does not apply equally to respondents and government attorneys. As recently as January 16, 2019, a practitioner witnessed IJ Pleters grant government counsel from U.S. Immigration and Customs Enforcement (ICE) a greater number of days to submit evidence, while not providing that same date to the respondent.[39]

3. The Evidence Standing Order: Supplementary Evidence Rule

The Supplementary Evidence Rule, part of the Evidence Standing Order, effectively prevents respondents from submitting newly discovered or acquired evidence after submission of an initial application for relief. The order states that a "[r]espondent may not submit additional documents AFTER an application has been filed with the court absent a motion showing such evidence was new AND unavailable at the time of filing the original application."[40] Both IJ Abbott and IJ Pleters have adopted this requirement as part of their Evidence Standing Order.[41]

Figure 3: Excerpt from IJ Pleters' Evidence Standing Order



UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court IJ Pleters
El Paso, Texas

In lieu of removal respondent has requested relief in the form of ASYLUM/WITHHOLDING/CAT

Hearing for said application will be held on a date to be determined. Before a merit hearing is scheduled to consider the respondent's request, a full and complete application must be submitted to the court. A full and complete application includes:

- any and all applications for relief from removal (including any amendments)
- any and all proposed exhibits and briefs the parties wish the Court to consider, along with proper English translations for non-English language documents. This includes any sworn statements from out of country used as corroboration for respondent's testimony. Respondent may not submit additional documents AFTER an application has been filed with the court absent a motion showing such evidence was new AND unavailable at the time of filing the original application.
- any proposed witness list

The Supplementary Evidence Rule, in conjunction with the Early Submission Requirement, creates serious obstacles to the submission of evidence. A blanket prohibition on *any* supplementary evidence outside of a limited exception does not provide respondents a reasonable opportunity to submit evidence and may also limit their ability to later seek meaningful review of their case if the IJ denies their application for relief.

Making matters worse, IJ Abbott has interpreted the Supplementary Evidence Rule to bar respondents from submitting supplementary evidence that was unavailable at the time of the initial evidentiary submission, so long as that evidence "existed" somewhere.[42] When a practitioner informed IJ Abbott that supplementary evidence would likely be necessary because the respondent was waiting for ICE counsel to provide additional evidence, IJ Abbott denied the request.[43]

According to the transcript of the hearing, IJ Abbott stated, "Well, this is closed—the case closes for you today," indicating that IJ Abbott would not accept further evidence after that day's hearing.[44] IJ Abbott then declared that information in the possession of ICE—and unobtainable by the respondent—was "not evidence that didn't exist," and stated "there's a reason why I issued a pre-trial order."[45] The practitioner responded by saying, "Your honor, I understand that. But just if anything else comes up, due process-wise—." IJ Abbott then interjected and declared that: "*Due process is an opportunity not a privilege*. So, believe me, if you don't submit it with your application of this size, we will not hear that information."[46]

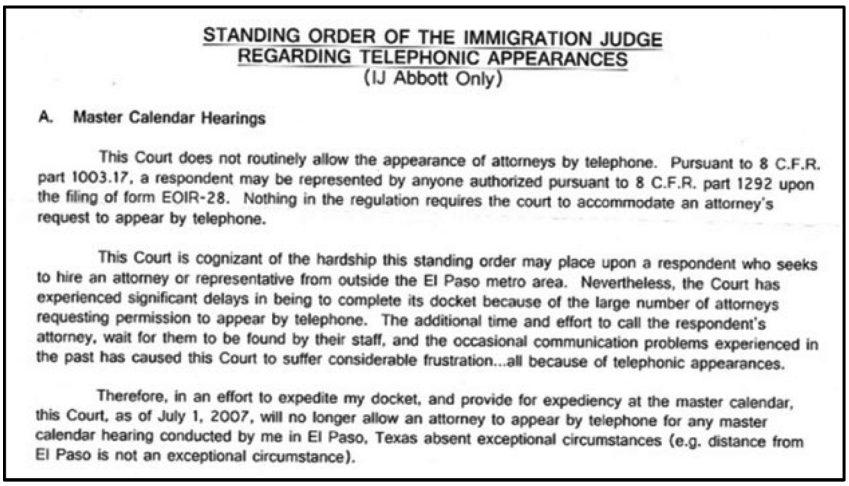
Other attorneys have noted the ways in which this standing order affected their cases. Ms. Bischoff noted that she had to "exclude highly relevant and supportive country conditions that supported the Respondent's claim for relief" because of the order.[47]

As with the Early Submission Requirement, the Supplementary Evidence Rule has been applied only to respondents, leaving ICE counsel free to submit supplementary evidence.[48]

B. The Telephonic Appearance Standing Order

Respondents in immigration court have a statutory and regulatory right to be represented by an attorney at their own expense.[49] Under the INA, immigration hearings, such as a MCH (a brief hearing usually for initial procedural matters or scheduling) and bond hearing, may be conducted through telephone conference.[50] The implementing regulations state that an IJ may "conduct a hearing through telephone conference," excepting evidentiary hearings without the respondent's consent.[51] The ICPM explicitly spells out that IJs "are authorized by statute to hold hearings by . . . telephone conference."[52] Despite the clear availability of telephonic hearings, the Telephonic Appearance Standing Order—which is currently in use by at least IJ Abbott and has historically been used by other judges in El Paso[53]—leads to the denial of *essentially all* telephonic MCHs. This imposes a substantial cost on respondents and their attorneys, and limits access to due process.

Figure 4: IJ Excerpt from IJ Abbott's Telephonic Appearance Standing Order



STANDING ORDER OF THE IMMIGRATION JUDGE
REGARDING TELEPHONIC APPEARANCES
(IJ Abbott Only)

A. Master Calendar Hearings

This Court does not routinely allow the appearance of attorneys by telephone. Pursuant to 8 C.F.R. part 1003.17, a respondent may be represented by anyone authorized pursuant to 8 C.F.R. part 1292 upon the filing of form EOIR-28. Nothing in the regulation requires the court to accommodate an attorney's request to appear by telephone.

This Court is cognizant of the hardship this standing order may place upon a respondent who seeks to hire an attorney or representative from outside the El Paso metro area. Nevertheless, the Court has experienced significant delays in being to complete its docket because of the large number of attorneys requesting permission to appear by telephone. The additional time and effort to call the respondent's attorney, wait for them to be found by their staff, and the occasional communication problems experienced in the past has caused this Court to suffer considerable frustration...all because of telephonic appearances.

Therefore, in an effort to expedite my docket, and provide for expediency at the master calendar, this Court, as of July 1, 2007, will no longer allow an attorney to appear by telephone for any master calendar hearing conducted by me in El Paso, Texas absent exceptional circumstances (e.g. distance from El Paso is not an exceptional circumstance).

Under the Telephonic Appearance Standing Order, IJ Abbott "does not routinely allow the appearance of attorneys by telephone."[54] Attorneys are not allowed "to appear by telephone for any master calendar hearing conducted by [IJ Abbott] in El Paso, Texas absent exceptional circumstances (e.g. distance from El Paso is not an exceptional circumstance)."[55]

The blanket denial of motions requesting telephonic appearances denies respondents access to this important statutory and regulatory right and violates due process. The Telephonic Appearance Standing Order prevents attorneys from appearing telephonically and makes obtaining representation significantly more difficult, especially for pro bono attorneys.

One pro bono attorney indicated that the denial of a single motion to appear telephonically for a brief hearing "cost my firm $5,000 in expenditure for travel and lodging."[56] He also noted that the difficulties of travel from New York to El Paso "increased the physical and emotional burden associated with representing my client."[57]

Alexandra Bachan ("Ms. Bachan"), an Oakland-based immigration attorney, undertook the representation of a client at the El Paso SPC Court.[58] As Ms. Bachan resided over 1,000 miles from the El Paso SPC Court, she filed a motion for telephonic appearance for a forthcoming MCH.[59] IJ Abbott denied the motion, stating that vast distance from the court was not an "extenuating circumstance," and issued a boilerplate denial.[60] Consequently, Ms. Bachan was forced to hire a local attorney to attend the MCH—essentially a scheduling hearing—at significantly extra cost to the client.[61] Ms. Bachan states, "I strongly feel my client would have been even better served by my representation if I had been able to appear telephonically," especially because of her sensitivity and understanding of the language issues associated with Mam, the indigenous language spoken by her client.[62]

Facing prolonged detention and a negative credible fear review by IJ Abbott, Ms. Bachan's client ultimately chose voluntary departure.[63] Ms. Bachan indicated that, based on her experience, she believed that her client, in another jurisdiction, would have likely succeeded on the merits and that the "[d]eterminative factor in [her] client being deported was his assignment in front of Judge Abbott and not the underlying merits of the case."[64]

C. The Bond Hearing Standing Order

Many individuals held in ICE detention are eligible for release on a bond.[65] In order to qualify for bond, respondents must demonstrate to a judge that it is more likely than not that they are not a danger to the community or a flight risk.[66] An IJ must consider a wide variety of factors when determining whether to grant bond, such as the respondent's ties to the United States (whether they have family or friends here who can help them appear in court), criminal record, history of employment, credibility, immigration history, financial resources, and any other factors which may have a bearing on flight risk or danger.

Despite the law requiring a careful balancing of the factors, for individuals seeking protection in the El Paso SPC Court who request bond, IJs in the El Paso SPC Court focus almost exclusively on a single factor: whether they believe the person requesting bond will win humanitarian protections. Indeed, IJ Abbott has stated on the record that "the majority of factors that I take into account is the strength of the application for asylum" when "determin[ing] whether a bond will be set."[67]

Figure 5: Excerpts from IJ Tuckman's Bond Hearing Standing Order[68]

Custody Redetermination ("Bond") Hearings
Judge Tuckman

Respondent's counsel need not be present for any bond hearing. The Respondent's bond package must be filed no later than two business days prior to the bond hearing regardless of whether counsel intends to attend the hearing. Bond hearings may be conducted on the papers, including those contained in the bond package. **THE ATTACHED "BOND EXHIBIT SUMMARY" MUST BE FILLED OUT COMPLETELY AND SUBMITTED AS PART OF THE BOND PACKAGE.** In addition to the "Bond Exhibit Summary" the bond package must include documents relating and responding to the following issues and questions:

...

13. Identify any defense to, or relief from, deportation/removal Respondent intends to pursue. A sworn statement of facts supporting any intended relief request must also be submitted. For example, if Respondent will be seeking cancellation of removal and is not a Legal Permanent Resident, Respondent must submit a sworn statement that articulates the facts Respondent is intending to later introduce to meet Respondent's burden of proof on Respondent's request for relief (such as length of residence in the U.S., any departures, family ties, a brief description of the hardship to family members removal would cause, criminal history, etc.). If Respondent is seeking asylum, withholding of removal, or relief under the Convention Against Torture, Respondent must submit a sworn statement that articulates the facts Respondent is intending to later introduce to meet Respondent's burden of proof on any of the intended applications for relief, including:
    a. Who wants to harm Respondent? (identify the persecutor);
    b. What has happened in the past and/or what might happen in the future? (identify the persecution); and
    c. Why is the persecutor motivated to harm Respondent? (Identify the nexus).

Under the Bond Hearing Standing Order, a version of which is in use by IJs Abbott, Pleters, and Tuckman, respondents seeking relief must submit a sworn declaration that identifies their persecution, describes past or future persecution, and explains the persecutor's motives and their connection to the legal grounds under which asylum may be granted.[69] The latter requirement is especially difficult for respondents without an attorney; "identify[ing] the nexus" often requires extensive fact investigation and complicated legal analysis, all of which can take substantial time and effort even for experienced practitioners.

Under this standing order, IJs essentially pre-adjudicate the merits at the bond hearing—before respondents have had the opportunity to develop the record and submit evidence—and then grant or deny bond based on that factor alone.[70] These observations match a June 2018 Human Rights Watch report, which noted that "[o]ne immigration judge in El Paso stated that he rarely grants bond for asylum seekers because he determines flight risk not by whether or not the individual will appear for hearings, but by whether they are likely to be successful in their application for relief in the federal circuit."[71]

At a bond hearing on November 9, 2017, IJ Abbott denied bond after explaining to a respondent—who had not yet submitted an asylum application—that he had not tried hard enough to avoid threats in Guatemala, then stated, "[h]aving money in your pocket is not grounds for asylum. Bond is denied."[72] At a bond hearing on November 15, 2017, IJ Abbott stated that a respondent did not have an asylum claim because the threat was localized and not national in nature, then qualified the comment by stating that it was "just a preliminary

observation," but denied bond anyway.[73] In another case that day, IJ Abbott refused to issue bond until the respondent "developed a better case" in support of a CAT claim.[74]

During a bond hearing on November 11, 2018, an observer noted that the attorney for the respondent was attempting to present the case for bond, but IJ Abbott only wanted "to talk about [the] asylum proceeding," and that IJ Abbott was "dismissive of bond talk."[75] It goes without saying that an IJ should not dismiss "bond talk" during a bond hearing.

IJ Abbott is not alone in basing bond decisions on an inappropriate pre-adjudication of the merits of a protection application. At a hearing on November 29, 2017, IJ Ruhle opined that "I prefer to deny bond" to individuals who may not win asylum because "I'm sure that if bond is given and at the end of trial the person is not approved… there would be no way to make them leave."[76]

The adjudication of these cases at the bond stage can have significant consequences on respondents, with IJs "known to discourage clients from fighting their cases by citing likelihood of long-term detention or expressing a presumptive opinion before hearing any evidence or testimony," and openly telling respondents they "would be better off choosing deportation."[77]

D. Impact of Standing Orders on Access to Counsel and Representation

Together, the various standing orders serve to discourage representation of individuals detained in the El Paso SPC Court and reduce access to counsel. Without appointed counsel, detained individuals in remote facilities such as those in and around El Paso, have a very difficult time locating and affording an immigration attorney who can provide them with critical legal services. According to a 2016 study, only about 14 percent of detained individuals are represented by counsel in their immigration proceedings, and they rely heavily on the services of pro bono attorneys from around the country.[78]

As one long-time practitioner shared:

> I am frequently contacted by out-of-town attorneys both private and pro-bono, who contact me for insight in navigating the immigration courts in the El Paso area. The various standing orders discourage these out-of-town attorneys from taking on cases as those attorneys are intimidated and discouraged by the strict nature of the standing orders. It is my belief that approximately a dozen out-of-town attorneys who reach out to me each year ultimately decide not to take an El Paso case because of the . . . standing orders.[79]

In one case, the practitioner described an instance of an attorney who, after appearing before IJ Abbott, swore "they would never accept another case in the El Paso area or before IJ Abbott" because of the Bond Hearing Standing Order.[80]

Similarly, a pro bono attorney from outside of El Paso stated that his firm incurred "unnecessary and costly hardship" as a result of the Telephonic Appearances Standing Order.[81] As this

particular attorney was traveling from New York, the forced travel "increased the physical and emotional burden associated with" representation and "ma[de] pro bono representation generally more burdensome and discouraging."[82]

Taken together, the standing orders in the El Paso SPC Court make it substantially more difficult to place pro bono attorneys and for them to serve noncitizens held at detention facilities in the El Paso area.

II. Inappropriate and Egregious Conduct by IJs in the El Paso SPC Court

A. Comments and Behavior by IJs Which Demonstrate a Lack of Professionalism And Undermine Confidence in Their Impartiality

IJs have a duty to "observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities."[83] Unfortunately, both declarants and court observers have noted a variety of inappropriate statements and conduct by the IJs in the El Paso SPC Court. These comments violate basic courtroom decorum, denigrate respondents and attorneys, and indicate bias on the part of IJs.

One declarant shared firsthand accounts of IJs openly voicing disapproving and negative opinions about attorneys, calling them "dishonest" and "lazy."[84] These statements infringe on the right to "a hearing before a fair and impartial arbiter" absent "pervasive bias and prejudice."[85] EOIR's Ethics and Professionalism Guide directs that IJs be "patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers, and others with whom the Immigration Judge deals in his or her official capacity," and states that "[a]n Immigration Judge . . . should not, in the performance of official duties, by word or conduct, manifest improper bias or prejudice."[86]

Examples of inappropriate comments by IJ Abbott include:

- "Due process is an opportunity not a privilege."[87]
- "I'm going to basically go through your application and pick about three or four things that I think that are important . . . the rest of the application I'll most likely ignore."[88]
- Asking whether a respondent on probation for prostitution was "still in the oldest profession."[89]
- Calling a respondent who suffered a mental breakdown while in detention "crazy" and openly mocking his mental health in court.[90]
- Reading the results of a credible fear interview in court and then commenting, "I wonder if and how the asylum officer passed the required test for his job," indicating his belief that the underlying case was frivolous.[91]

Figure 6. Excerpt from Transcript of Master Calendar Hearing before IJ Abbott

JUDGE TO [redacted]

Well, this is the closed -- the case closes for you today.

[redacted] TO JUDGE

Your honor, I understand that. But just if anything else comes up, due process-wise --

JUDGE TO [redacted]

Due process --

[redacted] TO JUDGE

I mean, we are hoping --

JUDGE TO [redacted]

-- is an opportunity not a privilege. So, believe me, if you don't submit it with your application of this size, we will not hear that information.

- In response to attorneys challenging documents prepared by Border Patrol agents, declaring that federal agents never lie on the forms and implying that any contradiction on the form is a result of asylum seekers fabricating claims for asylum.[92]
- Stating that "it would not be so bad" if respondent was removed to Mexico because he has friends there, it is an inexpensive place to live, and respondent's children were so young she could convince them they were still living in the United States.[93]
- Stating that a female respondent was very attractive and that that was likely the reason she was being persecuted.[94]
- Use of an incredulous and abrasive tone when examining respondents who are women, compared to male respondents.[95]
- Making comments about a female respondent's appearance that her attorney found inappropriate.[96]

Examples of inappropriate comments by IJ Ruhle include:

- Berating attorneys as "useless" and baselessly accusing attorneys of submitting too much evidence because they "charge clients by the page."[97]
- Referring to El Paso as the "bye-bye place" due to the low rate grant rate for asylum.[98]
- Stating "this is not the time to cry," in response to a respondent sobbing in court.[99]
- Telling a respondent to "sit right and take your elbow off the chair." [100]

These comments, drawing from only a handful of court observations over a relatively short period of time, are likely just the tip of the iceberg. The comments create serious concerns about impartiality and the appearance of impropriety, both of which are the guiding principles behind EOIR's Ethics and Professionalism Guide. As discussed below, unprofessional behaviors such as this have also raised fears that if an attorney files a formal ethics complaint, the IJ will retaliate against him or her.

B. Fear of Retaliation by Immigration Judges

In the Fall of 2018, we contacted private and pro bono practitioners who appeared in the El Paso SPC Court to collect declarations regarding their experiences. Many were reluctant to provide declarations containing personally identifiable information for them or their clients regarding their experiences, for fear of IJ retaliation in current or future cases.

In many cases, practitioners communicated that they did not believe the process by which they could file complaints against IJs was effective and would only serve to bring about retaliation against them and their clients.[101] One long-time practitioner stated that if she submitted a non-anonymous declaration, the "IJs in the El Paso area might use their discretion to deny my clients opportunity to fairly plead their cases, including perhaps denying bond . . ."[102] Another attorney, who represented more than one hundred respondents, was not willing to disclose his identity, that of his office, or his client "for fear of retaliation on future matters."[103]

Ms. Bischoff, stated that, after discussing complaint and retaliation issues in the El Paso area with practitioners, she "believe[s] that attorneys and clients who witness . . . these abuses believe . . . [they] will face retaliation if they file a complaint . . . ."[104]

These statements strongly suggest that EOIR's existing complaint process has not been able to prevent abuses in the El Paso SPC Court. For this reason, we utilize both anonymous and non-anonymous declarations throughout this complaint.

III. El Paso SPC Court Practices that Undermine Due Process and Prevent Respondents From Getting a Fair Day in Court

A. Disregarding Evidence

Multiple practitioners report that IJ Abbott refuses to consider evidence submitted by respondents. In a March 2018 case, IJ Abbott stated on the record: "I'm going to basically go through your application and pick about three or four things that I think are important . . . The rest of the application I'll most likely ignore."[105] In August 2018, IJ Abbott, after receiving respondent's evidence in support of an appeal from a credible fear claim which had been denied by an asylum officer, stated "I don't know why you submit these materials," and quickly

thumbed through the pages, which the practitioner interpreted to mean that IJ Abbott did not plan on reviewing the evidence.[106]

Other practitioners have reported that IJ Abbott frequently will ignore evidence which contradicts his preconceptions about a case. Ms. Bachan describes a case involving a client who spoke the Mam language and "extremely limited Spanish." Ms. Bachan, who speaks fluent Spanish, could only communicate with her client through the use of an interpreter. At the client's bond hearing, IJ Abbott refused to believe that Ms. Bachan's client did not speak Spanish, disregarded evidence submitted in support of his credible fear claim, and determined that the client was lying about not being proficient in Spanish.[107] He then found that the client was a flight risk based on this supposed lack of credibility.[108] IJ Abbott relied primarily on U.S. Customs and Border Protection's ("CBP's") Record of Deportable/Inadmissible Alien (Form I-213), where the respondent was listed as having spoken Spanish and had supposedly said he came to work—even though Ms. Bachan demonstrated that her client had limited English proficiency and could not have made the questioned statements.[109]

As with Ms. Bachan's case, another practitioner confirmed that IJ Abbott provides near-complete deference to statements contained in CBP documents, even when presented with evidence contradicting those statements.[110] The practitioner reports that IJ Abbott frequently expressed his belief that "federal agents never lie on these forms."[111]

B. Pre-Adjudicating Cases

Practitioners also report that IJs in the El Paso SPC Court appear to reach decisions in cases before examining the evidence or hearing any testimony. In one case, IJ Ruhle, before reviewing the merits of a case and shortly after the practitioner said "hello," stated "you know your client is going bye-bye, right?"[112] According to Ms. Bischoff:

> IJ Ruhle would regularly pre-adjudicate clients' cases and expressed opinions regarding the strength of the underlying merits case before submission of an application for relief, going so far as to state for the record that he would likely deny a respondent's case before an application had even been submitted.[113]

In September of 2018, Ms. Bischoff consulted with a potential client who had "a strong claim for derivative citizenship," but who had been told by IJ Ruhle—before reviewing the merits of the case—that he would keep the client detained and ultimately deny his case, convincing the client to pursue voluntary departure instead of protection.[114] In another case, Ms. Bischoff witnessed IJ Ruhle stating that, because of his own hearing loss, he would need respondents to speak loudly, and if they did not speak loudly enough, he would find "that they were not being cooperative in their claims for relief and may consider their claims abandoned."[115]

Court observers also have witnessed behavior from IJs that indicate prejudgment of cases. In one situation, IJ Ruhle brought the court observers to the front of the court room and shared his opinion that "there's really nothing going on right now in Latin America" that would provide

a ground for which people would qualify for asylum.[116] In another case, IJ Ruhle quickly flipped through a client's file and stated something similar to "Oh yeah, this case is not going to take long."[117] In another case, IJ Abbott actively discouraged a group of respondents from applying for asylum by stating that it was nearly impossible to succeed without a lawyer; and that they would be detained for at least half a year—causing many of the respondents to cry.[118]

C. Presumptive Denial of Bond

Other than having legal representation, an individual's ability to secure release from detention—either on a grant of parole or bond before an IJ—may be the single most determinative factor influencing whether an individual is able to succeed on the merits of his or her case. It is easier to locate and retain an attorney when not detained; according to a national study released in 2016, a mere 14 percent of detained individuals were represented by counsel, compared to approximately 66 percent of non-detained individuals, demonstrating how high the stakes are in bond hearings.[119] However, in the El Paso SPC Court, even where respondents are able to submit bond motions, many report that IJs deny bond as a matter of course or rely on improper factors to set bond. [120]

One practitioner appeared in front of IJ Ruhle for a bond hearing only to have the IJ indicate that "he had not read the bond motion." The IJ subsequently denied the bond "without considering the client's individual circumstances."[121] Court observers also witnessed IJ Abbott indicate that he views requests for release as inherently suspicious. At a hearing on October 25, 2017, IJ Abbott told a respondent that he thought she was "not serious about the process if she only wants to be released," after she asked if she could get bond because she had recently given birth prematurely.[122]

Another practitioner stated that IJ Abbott frequently denies bond without an individualized consideration of the bond packet if the respondent did not provide an initial claim of fear to the arresting CBP agents.[123] The same practitioner alleges that IJ Abbott on multiple occasions expressed his belief that "immigrants conspire with other detained persons . . . to fabricate a story of credible fear. Thus, if a respondent did not initially express fear upon apprehension, any subsequent claim of fear is automatically presumed dubious and fabricated," leading IJ Abbott to view the respondent as not credible and thus more likely to be a flight risk.[124]

The refusal to grant bond to any individual whose fear was not recorded by CBP has serious repercussions. In Ms. Bachan's declaration, she notes that IJ Abbott heavily relied on Form I-213, the Record of Deportable/Inadmissible Alien—the immigration equivalent of a police report—to deny bond, despite a comprehensive bond packet filled with evidence that contradicted the I-213.[125] Unable to accept the possibility of prolonged detention, her client elected to abandon a chance at asylum and accepted a deportation order.[126] In a similar case on October 31, 2018, court monitors observed a respondent in a MCH in front of IJ Tuckman abandon their asylum claim because they were previously denied bond, suggesting the respondent could not stand to be detained for any longer.[127]

D. Prohibiting Direct Examination by Counsel

Practitioners report that IJs in the El Paso SPC Court often prevent attorneys from eliciting testimony from their detained clients. Despite the law stating that respondents have the burden to demonstrate eligibility for relief, IJs in the El Paso SPC Court interrogate respondents without permitting attorneys to ask their clients questions to supplement the record.

Practitioners report that IJ Ruhle and IJ Abbott have at times actively prevented and discouraged counsel from "asking direct examination questions to clients on the stand."[128] Rather than permit respondents to present their own evidence, "both IJs conduct the majority of direct examination, limiting or discouraging oral testimony from respondents."[129] In many circumstances, both judges only accept written declarations and sharply limit spoken testimony from respondents.

In a March 2018 hearing which lasted at least three hours, IJ Abbott prohibited the practitioner from conducting any direct examination of the client, ignoring the practitioner's objections.[130] In this case, IJ Abbott permitted government counsel to cross-examine the respondent.[131] The practitioner stated that the prohibition on direct examination "made it significantly harder for me to build a record for any eventual appeal and undermined my ability to represent my client to the best of my abilities."[132]

Preventing counsel from conducting their own line of questioning impedes respondents from establishing a comprehensive record, which undermines the strength of subsequent appeals and makes it more difficult for respondents to satisfy their burden of credibility.

F. Interpretation and Language Access

The due process problems at the El Paso SPC Court also extend to language access and interpretation. Under the ICPM, the immigration court must provide interpreters at government expense, including interpretation during the MCH.[133] Unfortunately, the ICPM provisions are sometimes ignored or marginally satisfied in the El Paso SPC Court.

Appendix C contains a table with a collection of observations from October and November 2017 and November 2018 related to language access and interpretation issues. During this time frame, observers noted several issues, including:[134]

- Eight cases where interpretation was unavailable and the hearing was rescheduled, resulting in extended detention for respondents;
- Eight cases where interpretation was unavailable and the hearing proceeded, but was conducted in a language the respondent could not fully understand; and
- Five cases where the court provided incorrect interpretation (e.g., the interpreter spoke an entirely different language or a different dialect than the respondent) or there were technical difficulties associated with interpretation.

In one case, IJ Tuckman provided a Spanish-language interpreter to an indigenous language speaker.[135] In another, IJ Ruhle provided a Spanish-language interpreter for a Portuguese-speaking respondent.[136] In a third case, IJ Abbott conducted a portion of a hearing in Spanish before the IJ realized the respondent spoke Romanian.[137] In another case, IJ Abbott attempted to communicate with an indigenous Akatecco speaker in Spanish (no interpretation was available) and commented that "her Spanish was worse than his."[138] IJ Abbott also partially conducted a hearing in English before discovering that the respondent could only speak French.[139] On at least one occasion, IJ Abbott, in summarizing the removal process, only provided information in Spanish and English for a group of respondents, even though it was clear many of them did not speak either language.[140] In one case, observers noted that an attorney became extremely frustrated at the court interpreter over the quality of interpretation. The attorney feared that the quality of interpretation would negatively impact the respondent.[141]

Notably, issues involving indigenous language speakers are increasingly occurring in courts around the United States as well as El Paso.[142] Given the issues occurring in the El Paso SPC Court in just the few cases observed, this issue is of particular concern.

IV. Conclusion

The El Paso SPC Court, through the use of problematic standing orders and improper IJ conduct, systematically undermines the meaningful opportunity for a fair hearing. The consequences of these practices are not academic—as previously stated, between 2012 and 2017, IJ Ruhle's denial rate for asylum was an astonishing 95.5 percent; for IJ Abbott, that denial rate was 94.6 percent.[143] These denial rates represent some of the highest rates in the nation. In FY 2016 and FY 2017, judges in the El Paso SPC Court granted just *7 out of 225* cases, or 3.2 percent.[144]

These practices are having a devastating impact on the ability of respondents and their legal counsel appearing before the El Paso SPC Court to have a full and fair opportunity to present their cases. The numbers speak for themselves. IJs sitting in the El Paso SPC Court have jurisdiction over approximately 1,500 individuals detained in three facilities in the El Paso area, amounting to thousands of cases every year.

The practices in the El Paso SPC Court cannot be viewed as isolated instances. At a minimum, the court's extremely low grant rates are emblematic of inconsistent adjudication practices nationwide. Some courts grant less than 5 percent of cases, while grant rates in other courts exceed 60 percent.[145] The American Bar Association recently concluded that the systemwide "disparity of asylum grant rates and the fact that such case outcomes often depend on which immigration judge and court is adjudicating a case" call into question the "fundamental fairness of the system and implicate due process."[146] Uncorrected, these deficiencies will only fester and weaken the capacity of the courts to administer justice. For that reason, extensive

investigation and remedial steps must be taken not only at the El Paso SPC Court, but also at other courts where similar concerns have been observed.

V. Recommendations and Corrective Action

For the foregoing reasons, we recommend the following corrective and remedial actions:

A. EOIR Should Post All Standing Orders

We urge EOIR to make the standing orders publicly available. EOIR is statutorily required to post standing orders on its website pursuant to 5 U.S.C. §§ 552(a)(1)(A) and (B).[147]

B. EOIR Should Repeal and Prohibit Problematic Standing Orders

EOIR should conduct a thorough investigation regarding the use of these standing orders at the El Paso SPC Court and repeal and explicitly prohibit standing orders in immigration courts that:

- Require the complete submission of evidence in support of an application for relief at an unreasonable period of time *before* the individual merits hearing;
- Prohibit respondents from submitting supplementary evidence after submission of an initial application for relief;
- Establish an upper limit for the number of pages that may be filed as part of an initial application for relief; and
- Prohibit or discourage motions of telephonic appearances.

C. EOIR Must Provide Additional Training on Appropriate Conduct

EOIR must enforce the mandates of the Ethics and Professionalism Guide.[148] EOIR should direct IJs at the El Paso SPC Court to undergo additional in-person training on the Ethics and Professionalism Guide, addressing proper courtroom conduct and decorum, including acceptable commentary to counsel and respondents. Moreover, EOIR should mandate that IJs at El Paso SPC Court take training courses on implicit bias and cultural communication styles.

D. IJs Must Utilize Recording Equipment

EOIR should instruct all IJs and staff that the recording equipment must remain turned on whenever an IJ is present in the courtroom, including during bond proceedings, to ensure transparency and accountability for prejudicial statements made in hearings.

E. EOIR Must Reform the Complaint Process

EOIR should reform its existing complaint process[149] to promote independence and transparency. EOIR should take the following steps:

- Establish a new office in EOIR that would segregate the disciplinary function from other supervisory functions;

- Provide quarterly public access to detailed statistics and summary reporting of disciplinary actions; and
- Amend the complaint process to guarantee confidentiality of the complainant's identity to protect counsel, representatives, or clients from possible retaliation.

F. DOJ OPR/IG Must Investigate the El Paso SPC Court

DOJ OPR/IG should initiate investigations into the El Paso SPC Court regarding:

- Notably high rates of denials for relief by specific IJs;
- The extent and use of the standing orders discussed in this complaint;
- The impact of standing orders on respondents' ability to fully present their cases;
- The impact of standing orders on availability of counsel;
- Inappropriate judicial conduct and comments;
- Retaliation by IJs against individuals (and clients) who file complaints; and
- The availability and use of appropriate interpretation services in bond hearings, master calendar hearings and individual hearings.

G. DOJ OPR/IG Must Investigate Immigration Courts with Similar Problems

DOJ OPR/IG should initiate investigations into other immigration courts that:

- Demonstrate high rates of denials for relief;
- Use standing orders that infringe upon a respondent's ability to fully present their case;
- Use standing orders that impact access to counsel;
- Receive significant reports of inappropriate judicial conduct and comments; and
- Receive significant reports of retaliation by IJs against individuals who file complaints.

Thank you in advance for your time and consideration. We appreciate your prompt attention to these very serious matters and welcome the opportunity to discuss these issues with EOIR, OIG, and OPR. Please do not hesitate to contact us with any questions.

Kathryn Shepherd
National Advocacy Counsel
Immigration Justice Campaign
American Immigration Council
kshepherd@immcouncil.org
202.507.7511

Laura Lynch
Senior Policy Counsel
American Immigration Lawyers Association
llynch@aila.org
202-507-7627

Endnotes

[1] The Immigration Justice Campaign ("Justice Campaign") is a joint initiative between the American Immigration Council ("Council"), the American Immigration Lawyers Association ("AILA") and the American Immigrant Representation Project ("AIRP"). The Justice Campaign seeks to protect due process and ensure justice for detained immigrants by providing coordination, mentorship, training, and technical assistance to pro bono attorneys and accredited representatives in its broad network to serve some of the many thousands of detained individuals who would otherwise go unrepresented. For more information, visit https://www.immigrationjustice.us/.

[2] The complainant organizations focus this complaint on the detained docket heard by the El Paso SPC Court, which in 2017 completed approximately 1,500 cases of male and female individuals detained within the approximately 1,100 bed facility at the El Paso SPC Court, the West Texas Detention Center in Sierra Blanca, Texas, which holds approximately 450 beds for immigration purposes, and the Federal Satellite Low La Tuna facility located on Fort Bliss, which houses about 200 individuals for immigration purposes. There are currently four judges who handle the detained docket at the El Paso SPC Court: IJs Ruhle, Abbott, Pleters, and Tuckman.

[3] This complaint draws from substantial evidence, all of which may be found in the Appendix and online at http://americanimmigrationcouncil.org/sites/default/files/complaint_the_el_paso_immigration_court_fails_to_uphold_due_process_evidence.pdf. For a full methodology of these court observations, *see* Appendix D.

[4] Because some practitioners expressed a fear of retaliation if they came forward, this complaint utilizes both anonymous and non-anonymous declarations throughout.

[5] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook, https://www.justice.gov/eoir/statistical-year-book (data compiled from the FY 2013-2017 Statistics Yearbooks). Two "Institutional Hearing Program" courts located in state prisons in New York, which hear cases of inmates, granted zero of fifty applications over that period. *Id.* This is likely because individuals who have been convicted of a "particularly serious crime" are statutorily barred from asylum. The next-lowest grant rate for a standard non-IHP immigration court was the Atlanta Immigration Court, where judges granted asylum in 68 out of 1708 cases during the same time period. *Id.*

[6] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook: Fiscal Year 2017 28 (2018) *available at* https://www.justice.gov/eoir/page/file/1107056/download; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook: Fiscal Year 2016 K2 (2017) *available at* https://www.justice.gov/eoir/page/file/fysb16/download.

[7] Appendix B3, at ¶ 4.

[8] Appendix B1, ¶ 12; Appendix F, at 112.

[9] AILA has long documented the chronic and systemic problems within the Executive Office for Immigration Review, a component of the Department of Justice. AILA has called for "a complete structural overhaul" of the immigration court system and recommended that Congress "create an independent immigration court system in the form of an Article I court." *See* AILA Statement on Strengthening and Reforming America's Immigration Court System Hearing, AILA Doc. No. 18041646, April 18, 2018, available at: https://www.aila.org/advo-media/press-releases/2018/aila-statement-on-strengthening-and-reforming.

[10] In March 2019, the American Bar Association (ABA) released a comprehensive report on the U.S. immigration system, "2019 Update Report, *Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases"* and update to a previously issued 300-page report in 2010. Notably, the 2019 Update Report found, "In light of the fundamentally changed nature of the threat to the immigration court system, the overall conclusion of this Update Report… is that the current system is irredeemably dysfunctional and on the brink of collapse, and that the only way to resolve the serious systemic issues within the immigration court system is through transferring the immigration court functions to a newly-created Article I court." *available at*: https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

[11] **The complainant organizations have assigned names to the individual rules contained in the Standing Order related to Evidence for ease of reference.**
[12] *See* Appendices A1a, A2a, and A3a.
[13] *See* Appendix A1a.
[14] *See* Appendices A1a and A2a.
[15] *See* Appendices A1b, A2b, and A3b.
[16] *See* Appendices A1d(i), (ii), (iii).
[17] **Appendix A also includes a standing order from IJ Abbott relating to the filing of applications for Cancellation of Removal which contains similar language to the Evidence Standing Order. *See* Appendix A1C. The Cancellation of Removal Evidence Standing Order does not contain the 100-Page Limit on Evidence Rule or the Supplementary Evidence Rule, but does contain the Early Submission Rule.** *Id.*
[18] Procedurally, some of these standing orders are located in the same document while others are spread across individual orders. *See* generally, Appendix A1-A3.
[19] *Judge William L. Abbott Report*, TRAC Immigration (2017), https://trac.syr.edu/immigration/reports/judgereports/00051EPD/index.html.
[20] *See id.*; *see generally* Appendix B1.
[21] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Immigration Court Practice Manual (Aug. 2, 2018), *available at* https://www.justice.gov/eoir/page/file/1084851/download.
[22] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Operating Policies and Procedures Memorandum 08-03 (Amended): Application of the Immigration Court Practice Manual to Pending Cases 1 (2008), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2008/06/24/08-03.pdf.
[23] *AILA-EOIR Liaison Meeting Agenda Questions and Answers* 8, AILA, Oct. 21, 2008, *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/29/eoiraila102108.pdf (emphasis added).
[24] Meeting notes from a 2016 stakeholder meeting indicate that EOIR believes that IJs "should not be adopting their own local rules that affect groups or classes of respondents appearing before the court" and rejected calls to post standing orders online because "there are no 'local rules', and thus there is no need to post these rules or provide them accordingly." *See* EOIR Liaison Stakeholder Meeting Agenda, Unofficial AILA Notes (Nov. 11, 2016), on file with author.
[25] ***See*** **AILA,** ***EOIR Stakeholder Meeting Agenda Questions for April 5, 2017 Stakeholder Meeting*** **(2017),** ***available at*** https://www.aila.org/infonet/questions-submitted-to-eoir-04-05-17-meeting. **Although EOIR decided to cancel the stakeholder meeting, the questions had already been submitted to EOIR, putting them on notice.** https://www.justice.gov/sites/default/files/pages/attachments/2017/04/03/eoirstakeholdermtgcancelle_040517.pdf.
[26] 8 U.S.C. 1229(a)(b)(4).
[27] ***See*** **8 U.S.C. § 1158(b)(1)(B).**
[28] *See* Appendix A1a.
[29] *Id. (emphasis added).*
[30] Appendix B1, ¶ 7.
[31] *Id.* at ¶ 18.
[32] Appendix B3, ¶ 9.
[33] Appendix B1, ¶ 18.
[34] Appendix B7, ¶ 8.
[35] *See* Appendices A1a, A2a, and A3a.
[36] *See* Appendices A1a, A2a, and A3a; Appendix B1, 2 at ¶ 6.
[37] UTEP/Hope Institute Asylum Observatory. Master Calendar Hearing. IJ Pleters. Nov. 9, 2017.
[38] Appendix B3, ¶ 9.
[39] Appendix B5, ¶ 8.
[40] *See* Appendices A1a and A2a.
[41] *See* Appendices A1a and A2a.

[42] Appendix B1, ¶ 12, 13; Appendix F, 113
[43] Appendix B1, ¶ 12.
[44] *Id.*; Appendix F, 112.
[45] Appendix B1, ¶ 12, 13; Appendix F, 113.
[46] Appendix B1, at ¶ 12
[47] Appendix B3, at ¶ 9.
[48] Appendix B1, at ¶ 13; (stating that IJ Abbott declared that that "DHS is not subject to the pre-trial order").
[49] *See* 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362; 8 C.F.R. § 1292.5.
[50] 8 U.S.C. § 1229(B)(2)(a)(iv).
[51] 8 C.F.R. § 1003.25(c).
[52] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE 66-67, Immigration Court Practice Manual, (Aug. 2, 2018), *available at* https://www.justice.gov/eoir/page/file/1084851/download.
[53] While this complaint only identifies IJ Abbott as using the Telephonic Appearance Standing Order, an older version of the standing order is signed by IJ Abbott and former IJ Ruepke, and is titled an "Order of the Immigration Court." *See* Appendix A1d(ii). It indicates that "[s]ince 2007 the judges at [the El Paso SPC] have not routinely allowed the appearance of attorneys by telephone." *Id.* As a result, it is possible that other IJs in the El Paso SPC have adopted similar standing orders. In 2018, the Board of Immigration Appeals denied an appeal relating to the Telephonic Appearance Standing Order, without identifying the El Paso IJ involved. ***See Matter of Ferrera*, 2018 WL 2761463 (BIA March 15, 2018) (upholding denial of motion for telephonic appearance and declaring counsel's argument that she could not travel from New Jersey to El Paso "unavailing in view of the standing order" which indicated that such requests were "not routinely granted").** Court observers witnessed IJ Tuckman denying a motion for telephonic appearance on October 31, 2018, though it was unclear whether it was for failure to follow a standing order. *See* Chilton Tippin, UTEP/Hope Institute Asylum Observatory Master Calendar Hearing. IJ Tuckman. Oct. 31, 2018.
[54] Appendix A1d(i). A copy of an order for telephonic testimony denied by IJ Abbott that cites the rationale in the Telephonic Appearance Standing Order is produced at Appendix A1d(iii).
[55] Appendix A1d(i). The order goes on to note that the Court is "cognizant of the hardship this standing order may place upon a respondent who seeks to hire an attorney or representative from outside the El Paso metro area," and thus allows the submission of written pleadings where "counsel need not be present." *Id.*
[56] **Appendix B6, at ¶** 5.
[57] **Appendix B6, at ¶** 6.
[58] Appendix B2, at ¶ 2.
[59] *Id*. at ¶ 4.
[60] *Id.* A copy of IJ Abbott's denial of Ms. Bachan's telephonic motion is included in Appendix A1d(iii).
[61] *Id.*
[62] *Id*. at ¶ 10.
[63] *Id.* at ¶ 9.
[64] *Id.*
[65] *See* **8 U.S.C. § 1226(a).**
[66] *See* **8 C.F.R. § 1003.19(a); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (a noncitizen eligible for bond "must establish to the satisfaction of the Immigration Judge … that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.").**
[67] Appendix E, 45-46.
[68] **The excerpted content is also contained in IJ Abbott and IJ Pleters' Bond Hearing Standing Orders. *See* Appendices A1b, A2b.**
[69] *See* Appendices A1b, A2b, and A3b.
[70] Appendix B1, ¶ 22.
[71] *Ailing Justice: Texas* 8, Human Rights First (2018), *available at* http://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf.

[72] V. Edwards, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Nov. 9, 2017.
[73] V. Edwards, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Nov. 15, 2017.
[74] *Id.*
[75] Chilton Tippin, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Nov. 11, 2018.
[76] UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Ruhle. Nov. 29, 2017.
[77] Appendix B1, ¶ 22.
[78] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council, Sept. 28, 2016, *available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.
[79] Appendix B1, ¶ 19.
[80] Appendix B1, ¶ 21.
[81] Appendix B7, ¶ 5.
[82] Appendix B7, ¶ 6.
[83] *See* Executive Office for Immigration Review, *Ethics and Professionalism Guide for Immigration Judges* 1 (2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf
[84] Appendix B1, ¶ 2.
[85] *Matter of Exame*, 18 I.&N. 303, 306 (BIA 1982).
[86] Ethics and Professionalism Guide for Immigration Judges, supra note 83 at 3; *see also* 5 C.F.R. § 2635.101 (provisions under the Standards of Ethical Conduct for Employees of the Executive Branch).
[87] Appendix B1, ¶ 12; Appendix F 112.
[88] Appendix B1, ¶ 14. Appendix F, 113.
[89] V. Edwards, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Nov. 15, 2017
[90] Appendix B5, ¶ 4.
[91] V. Edwards, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Nov. 15, 2017.
[92] Appendix B1, ¶ 27.
[93] UTEP/Hope Institute Asylum Observatory. MCH. IJ Abbott. Oct. 25, 2017.
[94] Appendix B1, ¶ 29.
[95] Appendix B4, ¶ 2.
[96] *Id*.
[97] Appendix B3, ¶ 3.
[98] Appendix B3, ¶ 4.
[99] Kimberly Antuna, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Ruhle. Oct. 30, 2018.
[100] UTEP/Hope Institute Asylum Observatory. MCH. IJ Ruhle. Nov. 29, 2017.
[101] For more information about the EOIR complaint process, *see* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Complaints Regarding EOIR Adjudicators (Nov. 30, 2018), https://www.justice.gov/eoir/complaints-regarding-eoir-adjudicators.
[102] Appendix B1, at ¶ 2.
[103] Appendix B4, at ¶ 1.
[104] Appendix B3, at ¶ 14.
[105] Appendix B1, at ¶ 14; Appendix F, 113.
[106] Appendix B4, at ¶ 3. IJ Abbott then upheld the Asylum Officer's original denial. However, when the supporting evidence was submitted to the Asylum Office along with a Request for Review, the Asylum Office reversed its previous decision and determined that the client *did* have a credible fear of persecution. *Id.*
[107] Appendix B2, at ¶¶ 6-8.
[108] Appendix B2, at ¶ 8.
[109] *Id.* at ¶ 8. CBP officers' practice of preparing boilerplate statements from noncitizens—including at times fabricating statements supposedly made by the immigrant—has been well-documented, both by governmental and non-governmental organizations. *See, e.g.*, U.S. Comm'n on Religious Freedom, *Barriers to Protection*, *The Treatment of Asylum Seekers in Expedited Removal* (2016) ("USCIRF found that [CBP apprehension records] often indicat[ed] that information was conveyed when in fact it was not and sometimes includ[ed] answers to

questions that never were asked"). Infamously, infants and toddlers supposedly told CBP officers that they had come to the United States "To look for work." *See, e.g.* Elise Foley, *Infants And Toddlers Are Coming To The U.S. To Work, According To Border Patrol*, Huff. Post, June 15, 2015, https://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html.

[110] Appendix B1, at ¶¶ 25-27.

[111] Appendix B1, at ¶ 27.

[112] Appendix B1, at ¶ 23.

[113] Appendix B3, at ¶ 3.

[114] *Id.* at ¶ 8.

[115] Appendix B3, at ¶5.

[116] Chilton Tippin, UTEP/Hope Institute Asylum Observatory Master Calendar Hearing. IJ Ruhle. Oct. 31, 2018.

[117] Appendix B5, at ¶ 5.

[118] UTEP/Hope Institute Asylum Observatory. MCH. IJ Abbott. Oct. 25, 2017.

[119] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council, Sept. 28, 2016, *available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[120] On October 30, 2018, IJ Abbott hinted that bond amount was dependent on country of origin, stating that some countries require a higher bond, but for the respondent's particular country, the "going rate" for bond was $7,500. Elisa Given, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Oct. 30, 2018. On November 29, 2017, IJ Ruhle denied bond to a respondent because he believed she was too poor and could not "survive with her current resources in this country." During that same hearing, IJ Ruhle, in defense of a high bond amount, states that it's the same amount the respondent paid the coyote to enter the country in the first place, indicating the respondent's ability to afford bond based on that metric. UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Ruhle. Nov. 29, 2017.

[121] Appendix B3, ¶ 6.

[122] UTEP/Hope Institute Asylum Observatory. MCH. IJ Abbott. Oct. 25, 2017.

[123] Appendix B1, ¶ 25.

[124] *Id.*

[125] Appendix B2, ¶¶ 7-9.

[126] *Id.*

[127] Chilton Tippin, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Abbott. Oct. 31, 2018.

[128] Appendix B3, at ¶ 11.

[129] *Id.*

[130] Appendix B1, at ¶ 16.

[131] *Id.*

[132] *Id.*

[133] *See* Immigration Court Practice Manual, *supra* note 52 at 70 ("The Immigration Court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing").

[134] Appendix C. Some cases appear in multiple categories.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Hope, UTEP/Hope Institute Asylum Observatory. Bond Hearing. IJ Ruhle. Nov. 29, 2017. This court observation was created on Nov. 29, 2017, and likely was for an observation that took place on or around this date.

[142] *See, e.g.*, Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, MARSHALL PROJECT, Mar. 20, 2019, https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation.

[143] *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2012-2017*, TRAC Immigration (2017), https://trac.syr.edu/immigration/reports/490/include/denialrates.html.
[144] *See* 2017 EOIR Statistics Yearbook, *supra* note 6 at 28; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, S*tatistics Yearbook: Fiscal Year 2016* K2 (2017), *available at* https://www.justice.gov/eoir/page/file/fysb16/download.
[145] *See, e.g.*, 2017 Statistics Yearbook, *supra* note 6 at 28.
[146] *See* American Bar Association Report, *supra* note 10 at UD 2-17 and UD 6-8.
[147] 5 U.S.C. §§ 552(a)(1)(A) and (B) require that an agency proactively disclose how "…the public may obtain information, make submittals or requests, or obtain decisions…," 5 U.S.C. §§ 552(a)(1)(A), or "statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available…." 5 U.S.C. §§ 552(a)(1)(B).
[148] Ethics and Professionalism Guide for Immigration Judges, *supra* note 83 at 3; *see also* 5 C.F.R. § 2635.101 (provisions under the Standards of Ethical Conduct for Employees of the Executive Branch).
[149] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, *Summary of OCIJ Procedure for Handling Complaints Concerning Immigration Judges* (2018), https://www.justice.gov/eoir/page/file/1039481/download.

STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITEE ON IMMIGRATION AND CITIZENSHIP

COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

January 29, 2020

Contact:
Jorge Loweree
Policy Director
JLoweree@immcouncil.org
Phone: 202-507-7543

1331 G Street NW,
Suite 200
Washington, D.C.
20005

The American Immigration Council ("Council") is a non-profit organization that has worked to increase public understanding of immigration law and policy—and the role of immigration in American society—for over 30 years. We write to thank the Subcommittee for scheduling this hearing to discuss the state of judicial independence and due process in U.S. immigration courts.

The nation's immigration courts are plagued by a systemic pattern of dysfunction and lack of meaningful oversight.[1] The Council has long been concerned with the deteriorating state of the immigration courts, and the ways in which these conditions have curtailed the due process rights of individuals in the system. In support of our mission of protecting due process and ensuring a fair day in court, on April 2, 2019, the Council and the American Immigration Lawyers Association ("AILA") jointly filed an administrative complaint on behalf of immigration practitioners and their detained clients who appear for immigration proceedings at the El Paso Service Processing Center immigration court ("El Paso SPC Court").[2] The court observations, declarations, and statistics contained within the complaint detail the use of capricious standing orders by Immigration Judges ("IJs") that undermine due process and diminish access to counsel; a culture of hostility and contempt by IJs towards immigrants; and the use of problematic court practices which undermine due process and a fair day in court for immigrants.

The data suggest that immigrants appearing in the El Paso SPC Court face some of the highest obstacles in the nation to due process and fair adjudication of claims for relief. IJs in the El Paso SPC Court granted only 31 out of 808 asylum applications (3.84 percent) decided on the merits between Fiscal Year (FY) 2013 and FY 2017, which makes the El Paso SPC Court the immigration court with the lowest asylum grant rate in the nation during this timeframe.[3] In FY 2016 and FY 2017 combined, IJs at the El Paso SPC Court granted just *seven* out of 225 cases (3.11 percent) that were decided on the merits.[4] The court's asylum grant rate is so low that one IJ referred to the El Paso SPC Court as "the

Bye-Bye Place."[5] As we detailed in the complaint, although the problems in the El Paso SPC Court are particularly egregious, they should not be viewed as isolated instances, but as symptomatic of recurring problems with adjudications throughout the system.

The El Paso SPC Court's extremely low grant rates are emblematic of inconsistent adjudication practices nationwide. Some courts grant less than 5 percent of asylum cases, while grant rates in other courts exceed 60 percent.[6] As advocates have long pointed out, other "asylum free zones" exist in immigration courts around the country.[7] The American Bar Association recently concluded that the systemwide "disparity of asylum grant rates and the fact that such case outcomes often depend on which immigration judge and court is adjudicating a case" call into question the "fundamental fairness of the system and implicate due process."[8]

Beyond the dismal asylum grant rate, there are numerous examples of questionable practices and unprofessional conduct by IJs in the El Paso SPC Court, such as:

- An arbitrary 100-page limit on evidence for applications for asylum, withholding of removal, or protection under the Convention Against Torture, which forces applicants to exclude necessary evidence.
- A prohibition on supplementing previously submitted relief applications, including with evidence which was unobtainable at the time of filing.
- Telling court observers that "There's really nothing going on right now in Latin America" that would provide grounds for asylum.
- Openly calling a mentally ill respondent "crazy" and mocking him.
- Pre-adjudicating cases, including telling respondents at their initial hearings that they weren't going to win asylum before any application had been submitted, which encourages them to abandon their cases.
- Perpetuating a culture of fear among practitioners appearing at the El Paso SPC Court that if they complain about IJ misbehavior, IJs will punish their clients.

Uncorrected, these deficiencies will only fester and weaken the capacity of the courts to administer justice. For that reason, we called for extensive investigation and remedial steps to be taken not only at the El Paso SPC Court, but also at other courts where similar concerns have been observed. These remedial steps include the reinforcement of the prohibition on standing orders, providing additional training on appropriate conduct, reforming the complaint process to prevent retaliation against whistleblowers, and investigating the culture of denials at the El Paso SPC Court.

We ask that the Subcommittee enter the complaint into the record and direct the Executive Office for Immigration Review ("EOIR") to address these endemic problems in the El Paso SPC Court and other courts through corrective action. In December, we submitted a subsequent request to the agency seeking information as to whether any corrective actions had been taken.[9] A meaningful EOIR investigation may not be enough, however, to ensure that future court proceedings are conducted in a fair and efficient manner.

The concerns raised in the complaint regarding the El Paso SPC Court—and other immigration courts around the country—illustrate the weakness of an immigration court system overseen by the same executive branch department responsible for prosecuting people for violations of immigration law. The Council believes that American values of fundamental fairness and due process require a

meaningful commitment to the rule of law, impartiality, and providing vulnerable people with greater access to a fair day in court.

We thank you for the opportunity to submit this statement, and for the Subcommittee's efforts to engage in a thoughtful conversation about the state of judicial independence and due process in our immigration courts.

---

[1] AILA has long documented the chronic and systemic problems within the Executive Office for Immigration Review, a component of the Department of Justice. *See* AILA Statement on Strengthening and Reforming America's Immigration Court System Hearing, AILA Doc. No. 18041646, April 18, 2018, *available at* https://www.aila.org/advo-media/press-releases/2018/aila-statement-on-strengthening-and-reforming.

[2] American Immigration Council & AILA, "Re: Administrative Complaint Regarding El Paso Service Processing Center Immigration Court Judges," April 3, 2019, *available at* https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_how_the_el_paso_immigration_court_fails_to_uphold_due_process.pdf.

[3] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook, *available at* https://www.justice.gov/eoir/statistical-year-book (data compiled from the FY 2013-2017 Statistics Yearbooks).

[4] *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook: Fiscal Year 2017 28 (2018) *available at* https://www.justice.gov/eoir/page/file/1107056/download; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, Statistics Yearbook: Fiscal Year 2016 K2 (2017) *available at* https://www.justice.gov/eoir/page/file/fysb16/download.

[5] Appendix B3, El Paso SPC Complaint, at ¶ 4.

[6] *See, e.g.*, 2017 Statistics Yearbook.

[7] John Washington, "These Jurisdictions Have Become 'Asylum Free Zones,'" The Nation, January 18, 2017, *available at* https://www.thenation.com/article/archive/these-jurisdictions-have-become-asylum-free-zones/.

[8] American Bar Association, "2019 Update Report, Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases," March 2019, UD 2-17, UD 6-8, *available at* https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

[9] American Immigration Council & AILA, "Re: Administrative Complaint Regarding El Paso Service Processing Center Immigration Court Judges," December 2, 2019, *available at* https://www.americanimmigrationcouncil.org/sites/default/files/complaint_how_the_el_paso_immigration_court_fails_to_uphold_due_process_supplement.pdf.

CENTER FOR
Gender & Refugee
STUDIES

Protecting Refugees • Advancing Human Rights

STATEMENT FOR THE RECORD

On

Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts

Subcommittee on Immigration and Citizenship

January 29, 2020

By the Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies (CGRS) welcomes the opportunity to submit a statement for the record for this important hearing regarding the state of independence and due process within U.S. Immigration Courts. While CGRS has many concerns about U.S. Immigration Courts' lack of due process and judicial independence, we have limited this statement to our particular concern with the misuse of the Attorney General's certification process as a means to achieve political goals, resulting in denial of due process to asylum-seekers inconsistent with longstanding U.S. law, and failure to abide by our international treaty obligations.

CGRS was founded in 1999 by Karen Musalo following her groundbreaking legal victory in *Matter of Kasinga*[1] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[2] produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with immigrant, refugee, LGBTQ, children's, and women's rights networks. Since our founding, we have also engaged in international human rights work to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect.

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the *bona fide* asylum claims of those fleeing persecution, with a special focus on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law.

CGRS is troubled that former Attorney General Jeff Sessions used the self-certification process to reverse decades of established asylum law in order to accomplish the Administration's impermissible goal of

[1] 21 I&N Dec. 357 (BIA 1996).
[2] *See, e.g., Innovation Law Lab v. McAleenan,* 924 F.3d 503 (9th Cir. 2019); No.3:19-cv-00807-RS (D.N.Cal.) (pending); *Damus v. McAleenan*; No. 1:18-cv-00578-JEB (D.D.C.) (pending); *see also Damus v. Nielsen*, No. 18-578, 313 F.Supp.3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr,* 344 F.Supp.3d 96 (D.D.C. Dec. 18, 2018), *appeal docketed*, No. 195013 (D.C.Cir. Jan. 30, 2019)); and *Matter of A-B,* 27 I&N Dec. 316 (A.G. 2018).

deterring asylum seekers and expediting their deportation, aimed in particular at women fleeing domestic violence in Central America. In so doing, Sessions overturned a grant of asylum to our client, Ms. A.B., in *Matter of A-B-* (A.G. 2018), following what he himself recognized was an irregular procedure by which the immigration judge defied the Board of Immigration Appeals' (BIA) instruction to grant asylum and instead brought the case to the Attorney General's attention. This is an overt example of the lack of independence of the Immigration Court system that has led to both violations of U.S. and international refugee law and denials of due process for domestic violence survivors and other seeking safety and protection in the United States.

Matter of A-B-

In 2018, Sessions exercised what was formerly a rarely used power of his office to self-certify an approved asylum appeal in *Matter of A-B-*. In doing so, he unraveled decades of legal precedent protecting women from domestic violence.[3] Our client, Ms. A.B., had credibly testified that she had endured 15 years of abuse by her husband including beatings, rapes, and specific, detailed threats on her life. She had fled to different parts of El Salvador, divorced her husband, and twice taken out restraining orders against him, yet her husband continued to track her down and abuse and threaten to kill her without consequence.

While the immigration judge denied her claim, the BIA found that protection was warranted based on established legal precedent and the horrific violence Ms. A.B. had endured. In June 2018, Sessions reversed the BIA's grant of asylum to Ms. A.B., vacated the previously controlling BIA precedent decision in *Matter of A-R-C-G-* (BIA 2014), and effectively attempted to slam the door in the face of women seeking protection from domestic violence.

***Matter of A-B-* Found Unlawful as Applied to Credible Fear Screenings**

In December 2018, the D.C. district court granted a nationwide injunction requested by CGRS and co-counsel which blocked the application of the legal standards articulated in *Matter of A-B-* in credible fear interviews, the initial screening process for asylum seekers in expedited removal. In *Grace v. Whitaker*,[4] the federal district court found *Matter of A-B-*'s standards to be **inconsistent with existing legal precedents and Congressional intent behind the enactment of the Refugee Act of 1980,** which was to bring the U.S. into compliance with its international treaty obligations. The injunction remains in effect, prohibiting asylum officers from using the *Matter of A-B-* standards in the credible fear process, although the government has appealed the decision, which remains pending at the D.C. Circuit.

Matter of A-B-* has resulted too often in a *categorical prejudgment of asylum claims

While the use of Sessions' *Matter of A-B-* ruling is currently enjoined in credible fear screenings, it continues to be applied in asylum decisions on the merits, leading to widely disparate outcomes that have resulted in domestic violence survivors being deported to persecution or death.[5] Both the Department of Homeland Security in its training of asylum officers and the Department of Justice in its guidance to immigration judges and the BIA have instructed that *Matter of A-B-* must be used in

---

[3] *See, e.g.,* Blaine Bookey, *Gender-based Asylum Post-Matter of A-R-C-G-: Evolving Standards of the Law*, 1 SOUTHWESTERN J. INT'L L. 22 (2016); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARVARD INT'L REV. (2014).

[4] *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

[5] *See* Kate Jastram and Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT'L L. 48 (2020).

adjudicating asylum claims on their merits. As a result, many adjudicators summarily and categorically foreclose protection in these cases as a "matter of law" because they involve domestic violence, "instead of considering individual facts and fair application of law to those individual facts."[6]

Immigration Judges have been reported:[7]

- pretermitting or threatening to pretermit cases based on the case "type."
- discouraging respondents from requesting relief.
- successfully convincing asylum-seekers that their claims will inevitably fail, so it is in their best interest to give up without looking for an attorney and instead take voluntary departure orders.
- issuing removal orders without holding merits hearings; one judge writes denial orders before a hearing has been completed.

This prejudgment and lack of individualized determination has led to a complete failure of due process for asylum seekers and of an opportunity to fully and fairly litigate their claims, in particular those from Central America, many of whom are fleeing domestic violence. In fact, following the issuance of *Matter of A-B-*, asylum grant rates for individuals from El Salvador, Guatemala, and Honduras fell to an average of 15 percent compared to a 24 percent grant rate in the year prior to the decision.[8] All other countries saw virtually no change in grant rates during that time frame.

There is no doubt that this was the Trump Administration's desired result. Attorney General Sessions' goal was to deter any foreign national from coming to the U.S. border, without regard for U.S. obligations found in the 1951 Convention Relating to the Status of Refugees, whose provisions are binding on the U.S. through our ratification of its 1967 Protocol. In fact, the same day that he announced the *Matter of A-B-* decision, he expounded on the virtues of the "zero tolerance" policy which left children separated from their parents and prosecuted thousands of genuine asylum-seekers.[9]

Recommendations for Congress

Congress passed the Refugee Protection Act of 1980 to bring the U.S. into compliance with its international treaty obligations as a party to the Refugee Protocol. Accordingly, interpretation of or changes to U.S. asylum law should comport with United Nations High Commissioner for Refugees (UNHCR) guidelines and principles. While a nation has the sovereign right to decide who can enter and remain in its territory, these policies must be consistent with treaty obligations. In this case, UNHCR guidance and international law reflect that domestic violence can form the basis of asylum protection when all other elements of the refugee definition are met, as they were in Ms. A.B.'s case. **On this basis, CGRS requests that Congress adhere to UNHCR guidelines and principles to solve the issues created by the *Matter of A-B-* decision and do the following:**

---

[6] See "The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool," June 29, 2019 available at https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool.

[7] *Id.*

[8] According to data from the Syracuse University Transactional Records Access Clearinghouse (TRAC) Asylum Decision tool, available at https://trac.syr.edu/phptools/immigration/asylum/.

[9] https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history.

Define the "particular social group" category for asylum and "on account of " requirement: Excessively restrictive interpretations of the particular social group ground for asylum, and the "nexus" or "on account of" language in the refugee definition, found in the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) have led to erroneous results in U.S. asylum jurisprudence. Simple legislative amendments included in the Refugee Protection Act of 2019, H.R. 5210, will clarify the particular social group definition and the requirements for establishing nexus in line with international law. [10] These clarifications would prevent continuing confusion and wasted resources due to legally flawed new interpretations, such as those in *Matter of A-B-*, which result in numerous appeals and remands in the already overburdened immigration court system.

Rescind or defund *Matter of A-B-*: As District Judge Emmet Sullivan concluded in *Grace*, *Matter of A-B-* is inconsistent with Congressional intent. Moreover, the consequences of continuing to implement *Matter of A-B-* are a matter of life and death for domestic violence survivors. Accordingly, Congress should direct the Department of Justice to rescind the decision or appropriators should use their power to instruct the Departments of Justice and Homeland Security that they may not use appropriated funds to implement it.

[10] *See* Jastram and Maitra, n. 5 above.

2533 W. Third Street, Suite 101
Los Angeles, California 90057
213.353.1335
1.888.624.4752
www.chirla.org

January 29, 2020

The Honorable Zoe Lofgren
Chair of the Subcommittee on Immigration and Citizenship
U.S. House of Representatives
1401 Longworth House Office Building
Washington, D.C. 20515

The Honorable Ken Buck
Ranking Member of the Subcommittee on Immigration and Citizenship
U.S. House of Representatives
2455 Rayburn House Office Building
Washington, D.C. 20515

RE: "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts." Hearing Before the Subcommittee on Immigration & Citizenship on January 30, 2020

Dear Chair Lofgren, Ranking Member Buck, and Members of the Subcommittee on Immigration and Citizenship,

On behalf of the Coalition for Humane Immigrant Rights (CHIRLA), the largest immigrant rights organization in the state of California, I write to express our concerns related to the current state of the immigration court system. This system is already fundamentally flawed and it has now been infested by various policies that further undermine immigrants' right to due process and distort immigration law. The courts lack judicial independence, which has enabled the current administration, has politicize them and undermine their virtue.

Currently, the Attorney General oversees the Department of Justice (DOJ), and within the DOJ exists the Executive Office for Immigration Review (EOIR), which is responsible for adjudicating all immigration-related cases in the United States. Additionally, the Board of Immigration Appeals is

CHIRLA
Coalition for Humane Immigrant Rights

responsible for hearing appeals from immigration courts and is part of EOIR. The sole purpose of EOIR is to conduct quasi-judicial "removal" proceedings to determine whether an individual is deportable. Immigration judges (IJ) are employed through the DOJ and are not part of the judicial branch as defined by Article 3 of the Constitution.

There are currently sixty-four courts throughout the nation and their IJs vary widely in their rulings. This means, more so than in federal court, that the luck of the draw decides whether a person gets to stay in this country or not. CHIRLA is located near the Los Angeles immigration court, whose IJs deny some 71% of asylum claims. This is certainly less than the 91% denial rate in another high volume court like Houston, but it is far higher than in the San Francisco court to our north with a 30% rate.[1] While many factors can explain this variance, particularly the extremely negative impact of not having access to legal counsel, there can be no doubt those directives from the upper echelons at DOJ play a significant role.[2]

Given the current court structure and the Administration's anti-immigrant agenda, it is deeply concerning that, the system has no firewalls and is being directly influenced by President Trump and his staff who share his bigotry. Trump weaponized the immigration courts by first appointing Jeff Sessions and then William Barr, both of whom have clearly used them to advance Trump's anti-immigrant agenda. Further, the system is tainted by current hiring practices and the adoption of policies that undermine the ability for judges to perform their roles with neutrality.

Attorneys General Sessions and Barr have been busy packing the immigration courts with former law enforcement officials, a practice which undermines the traditional balance in the immigration judge corps. [3] Building on that, they have also promoted the most hardline IJs to the BIA in order to ensure that anti-immigrant precedents will rule across the country.[4] However, when the many flawed BIA rulings are appealed to the federal courts, it then creates a patchwork of immigration law that the

[1] https://trac.syr.edu/whatsnew/email.200113.html.
[2] https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html.
[3] https://www.theregreview.org/2019/02/14/powell-how-sessions-reshaped-americas-immigration-court-system/.
[4] https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php.

Supreme Court is traditionally reluctant to address. This potentially raises serious equal protection and other constitutional issues.

The IJs are then being saddled with various policies such as quotas to complete a certain number of cases or face dismissal. This simply accelerates a flawed process and places it onto the assembly line justice conveyor belt. As of October 1, 2018, the Attorney General has encouraged a biased decision making, going as far as gaining control of judges' immigration court rooms by reassigning case dockets to align with the administration enforcement priorities and in some cases, threatening to punish, or fire, judges for failing to meet enforcement driven case quotes. This then prompts judges to rush through cases to protect their jobs. DOJ even went as far as adding new software to track the completion of judges cases. Most immigrants before the courts are not native English speakers and require translation as well as time to secure an immigration attorney and crucial evidence and other information. A quota places a huge additional hurdle on a deck already stacked against immigrants.

For the IJs who are trying to fulfill their mandate in an impartial manner, they face additional humiliation instigated by this Administration, such the attempted decertification of their union and having their decisions overturned unilaterally by the AG.[5]

The latter power is being used liberally by Trump's AGs, particularly to undermine the right of vulnerable groups to seek asylum.[6] Under the Immigration and Nationality Act, the AG has the authority to refer cases to themselves and reopen them after a decision has been issued for a new decision. During this administration, AGs Sessions and Barr have used this tool to certify 12 cases, and issued 10 decisions in three years, including:

- *In Matter of Castro-Tum* (2018), the AG limited the discretion of judges and the BIA to administratively close cases;[7]

[5] https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union;
[6] https://www.law360.com/articles/1237065/murdered-sisters-not-enough-to-win-asylum-11th-circ-says;.
[7] https://thinkimmigration.org/blog/2018/08/14/the-repercussions-of-how-the-administration-has-handled-matter-of-castro-tum/.

CHIRLA
Coalition for Humane Immigrant Rights

- *In Matter A - B* (2018), Sessions then certified the case to himself to overrule a well-established precedent and acted as a dog whistle to his judges to deny asylum to survivors of domestic violence and Central Americans fleeing gang violence;[8]
- *In Matter of L-E-A* (2019), AG Barr effectively denied that family relations can result in persecution, rejecting them as a basis to receive asylum.[9]

The American Bar Association (ABA) issued a report in October 2019 noting that the immigration court system is facing an existential crisis and is on the brink of collapse. The current number of cases pending before the courts has skyrocketed, creating increased wait times for scheduled hearings. When Trump took office in January 2017, the backlog of cases was at 542,411. That number has since increased to 1,089,696 by December 2019.[10] An estimated average wait period for a hearing is 704 days, which used to be (X under Obama). Additionally, there are 322,535 pending cases that have not yet been placed on an active docket, resulting in a de facto backlog of over 1.3 million cases.

In conclusion, immigration courts should operate independently from the Executive similarly to the U.S. Tax Court, which falls under Article I of the Constitution. CHIRLA urges Congress to address the failings of our immigration court system and establish an independent immigration court.

Sincerely,

Angelica Salas
Executive Director, CHIRLA

[8] https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b.
[9] https://thehill.com/opinion/judiciary/455565-ag-barr-ruling-puts-asylum-seekers-at-deadly-risk.
[10] https://trac.syr.edu/phptools/immigration/court_backlog/

PROJECT ON GOVERNMENT OVERSIGHT

Statement for the Record
The Constitution Project at the Project On Government Oversight
before the House Committee on the Judiciary
Subcommittee on Immigration and Citizenship
on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"
January 29, 2020

The Supreme Court has held that the fundamental requirements of procedural due process include notice of the government's proposed action, an opportunity for a fair hearing before an impartial decision-maker, the right to present evidence and confront the government's evidence, and the right to be represented by counsel.[1] The immigration court system has a long history of imperfectly meeting these requirements, even though the due process clause of the Constitution applies to removal proceedings. There is a mismatch between the courts' limited resources, their large and growing caseload, and the potentially devastating consequences of deportation decisions. These chronic problems have been compounded by a series of recent policy changes that have drastically curtailed immigration courts' independence and immigrants' rights to seek relief from deportation. This statement will focus on those recent changes.

New Limits on Court Independence and Impartiality

Immigration judges and members of the Board of Immigration Appeals are Department of Justice employees. The attorney general can direct those judges in how to manage their courtrooms and dockets; discipline or terminate judges for poor performance; and overturn immigration court precedents. The last two U.S. attorneys general, Jeff Sessions and William Barr, used these tools repeatedly to restrict immigrants' rights and to incentivize immigration judges to order as many deportations as possible. The attorneys general took actions including:

- Imposing case-completion quotas that require judges to decide at least 700 cases per year in order to receive satisfactory performance evaluations.[2]
- Limiting judges' authority to administratively close or terminate cases,[3] causing a major growth in the backlog of pending cases.[4]

---

[1] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 542 (1985); Ward v. Village of Monroeville, *409 U.S. 57, 61-62* (1972); *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972).
[2] Joel Rose, "Justice Department Rolls Out Quotas for Immigration Judges," National Public Radio, April 3, 2018. https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges
[3] Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); Romero v. Barr, 937 F.3d 282, 294 (4th Cir. 2019) (finding that *Matter of Castro-Tum* was wrongly decided).
[4] Priscilla Alvarez, "Immigration court backlog exceeds 1 million cases, data group says," CNN, September 18, 2019. https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html; Julia Preston and Andrew R. Calderon, "How Trump Broke the Immigration Courts," *POLITICO Magazine*, July 16, 2019. https://www.politico.com/magazine/story/2019/07/16/trump-ice-raids-immigration-courts-arent-ready-227359

- Ordering judges to prioritize certain categories of cases, leading to cancellation or double or triple booking of scheduled hearings in other cases.[5]
- Repeatedly overturning Board of Immigration Appeals precedents in order to narrow procedural protections for asylum seekers and eligibility for asylum.[6]

These actions have coincided with a series of public statements by President Donald Trump denouncing asylum seekers as perpetrating a "scam" and a "hoax" in order to "invade" the United States, and the immigration court system as a "ridiculous" obstacle to summary deportation.[7]

The cumulative effect, in the words of former immigration judge John Richardson, has been "the relegation of [judges] to the status of 'action officers' who deport as many people as possible as soon as possible with only token due process."[8] Richardson and several other former immigration judges have told news reporters that they resigned or retired as a result of these changes.[9]

Increases in Immigration Detention

For over a decade, The Constitution Project has recommended that the government limit the use of immigration detention to ensure that people receive due process of law in deportation proceedings, including access to counsel, access to interpretation, and the ability to obtain and submit corroborating evidence.[10] Unfortunately, the Department of Homeland Security (DHS)

---

[5] Amy Taxin "Trump administration pushes to speed up migrant family cases," Associated Press, August 3, 2019. https://apnews.com/1e3d49caa25940a88de13306af0ead78; Kate Brumback, Deepthi Hajela, and Amy Taxin, "AP visits immigration courts across US, finds nonstop chaos," Associated Press, January 19, 2020. https://apnews.com/7851364613cf0afbf67cf7930949f7d3

[6] Matter of E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018); Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019), Matter of L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019).

[7] White House, "Remarks by President Trump in Roundtable on Immigration and Border Security," April 5, 2019. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-immigration-border-security-calexico-california/; Colby Itkowitz, "Trump: Congress needs to 'get rid of the whole asylum system,'" *Washington Post*, April 5, 2019. https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html; White House, "Remarks by President Trump Before a Working Lunch with Heads of the Baltic States," April 3, 2018. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-working-lunch-heads-baltic-states/; President Donald Trump (@realdonaldtrump), "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came," Twitter, June 24, 2018. https://twitter.com/realDonaldTrump/status/1010900865602019329

[8] Hamed Aleaziz, "Being An Immigration Judge Was Their Dream. Under Trump. It Became Untenable," *BuzzFeed News*, February 13, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump

[9] Hamed Aleaziz, "Being An Immigration Judge Was Their Dream. Under Trump. It Became Untenable," *BuzzFeed News*, February 13, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump; Priscilla Alvarez. "Immigration judges quit in response to administration policies," CNN, December 17, 2019. https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html

[10] The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* (2009), 2, 6. https://archive.constitutionproject.org/pdf/359.pdf The

has done the opposite and has drastically increased the use of immigration detention. The average daily population of people in Immigration and Customs Enforcement (ICE) detention rose to a record high of over 55,000 last year, with most held in remote rural areas where access to counsel was particularly limited.[11] Federal courts found that in many parts of the country, ICE had unlawfully stopped releasing asylum seekers on parole over the last several years.[12]

In recent months the total detention population has dropped, primarily as a result of the administration's increasingly successful efforts to prevent asylum seekers and other migrants from entering the United States through Mexico. Even so, as of this month, ICE was detaining over 40,000 people on an average day, including 9,000 asylum seekers whom asylum officers or immigration judges had found to have a credible fear of persecution.[13]

The "Migrant Protection Protocols"

In January 2019, DHS started the "migrant protection protocols," a misnomer for a program that requires asylum seekers and other migrants to wait in Mexico while their cases make their way through the immigration court system.[14] Forcing migrants to wait in Mexico violates federal law and the United States' international legal obligations not to return people to persecution or torture.[15] Ordering them deported without a meaningful opportunity to present their claims for asylum, as many immigration courts have done, violates the Constitution's due process clause.

According to statistics compiled by the Transactional Records Access Clearinghouse, DHS returned 59,241 people to Mexico under this program from January to December 2019.[16] This included thousands of families with children. As of September 2019, 16,000 children under 18 had been returned, 4,300 of whom were younger than five years old.[17]

Once returned to Mexico, families often have no safe place to live. Shelters in border cities are at capacity, and migrants lose their places when they come to the United States to ask for asylum or

---

Constitution Project, *The Use and Abuse of Immigration Authority As a Counterterrorism Tool* (2008), 12. https://archive.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf

[11] Yuki Noguchi, "Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar," National Public Radio, August 15, 2019. https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks

[12] Damus v. Nielsen, 313 F.Supp.3d 317 (D.D.C. 2018); Heredia Mons v. McAleenan, Civ. No. 19-1593 (JEB), 2019 WL 4225322 (D.D.C. September 5, 2019).

[13] "Detention Statistics, ICE Currently Detained Population," Immigration and Customs Enforcement, last modified January 18, 2020. https://www.documentcloud.org/documents/6704914-Detention-Management-ICE-Screenshot-1-28-2020.html

[14] Department of Homeland Security, "Migrant Protection Protocols," Press Release, January 24, 2019. https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols

[15] Audio of Proceedings Before 9th Circuit, *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Circuit, October 1, 2019). https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034446

[16] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[17] Kristina Cooke, Mica Rosenberg, and Reade Levinson, "Exclusive: U.S. migrant policy sends thousands of children, including babies, back to Mexico," Reuters, October 11, 2019. https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1

attend court hearings, leaving them homeless. They are also frequent targets for kidnapping, extortion, and violence.[18]

A human rights group has compiled hundreds of reports on attacks against migrants returned to Mexico, including cases of murder, forced disappearance, rape, and torture. The group says it believes that "our count is only the tip of the iceberg, as the overwhelming majority of returned people have not spoken with human rights investigators or journalists."[19] The danger is particularly acute for the over 26,000 people who have been returned under the migrant protection protocols to Nuevo Laredo and Matamoros in Tamaulipas state, an area for which the State Department has issued a travel advisory, warning Americans not to travel there "due to crime and kidnapping. … Heavily armed members of criminal groups often patrol areas of the state in marked and unmarked vehicles and operate with impunity particularly along the border region."[20]

In addition to the dangers and hardships they face, migrants whose cases are being heard under migrant protection protocols are not receiving proper notice or a meaningful court hearing, in violation of the Constitution's due process clause.

- The U.S. government is legally required to include the immigrants' physical address on court notices so they can receive updates about their cases. Instead, the Notices to Appear issued to migrants before they are returned to Mexico contain false, incomplete, or obviously inadequate addresses. In several cases, "Facebook" was listed as a migrant's address.[21]
- In other cases, DHS has returned people to Mexico even after an immigration judge granted them asylum. In order to get Mexico to take them back, DHS issued Notices to Appear falsely stating that there is an additional immigration court hearing scheduled.[22]

---

[18] *This American Life*, "The Out Crowd," NPR, November 15, 2019. https://www.thisamericanlife.org/688/the-out-crowd; Maria Verza, "Migrants stuck in lawless limbo within sight of America," Associated Press, November 15, 2019. https://apnews.com/3752fd080525419fbe9352901b50e0ba; John Washington, "The US Is Making a Mockery of Its Asylum Obligations," *The Nation*, July 3, 2019. https://www.thenation.com/article/archive/immigration-mexico-trump-asylum/

[19] Human Rights First, *A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico*, January 2020. https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf

[20] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/; "Mexico Travel Advisory," Department of State, last modified December 17, 2019. https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html

[21] Adolfo Flores, "Border Patrol Agents Are Writing 'Facebook' As A Street Address For Asylum-Seekers Forced To Wait In Mexico," *BuzzFeed News*, September 26, 2019. https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico; Debbie Nathan, "U.S. Border Officials Use Fake Addresses, Dangerous Conditions, and Mass Trials to Discourage Asylum Seekers," *Intercept*, October 4, 2019. https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/

[22] Gustavo Solis, "CBP agents wrote fake court dates on paperwork to send migrants back to Mexico, records show," *San Diego Union Tribune*, November 7, 2019. https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud; Hamed Aleaziz, "US Border Officials Are Issuing Fake Court Notices To Keep Out Immigrants Who Have Won Asylum," *BuzzFeed News*,

- U.S. law gives migrants the right to be represented by an attorney during deportation hearings (though not a right to government-appointed counsel).[23] But U.S. attorneys are reluctant to take cases in Mexico given the expense and danger of traveling to border cities, the lack of confidential meeting spaces for clients who lack housing, and uncertainty about whether they are legally authorized to practice law in Mexico.[24] Statistics show that only a small percentage of individuals returned to Mexico are represented by counsel in their immigration court hearings.[25] The Justice Department has also restricted volunteer lawyers from providing "know your rights" presentations or speaking to unrepresented migrants before court.[26]
- The United States requires asylum applications and supporting documents to be filed in English, with a certified translation attached to all documents originally written in another language,[27] but it is extremely difficult for migrants to access translation services in Mexico, particularly for speakers of indigenous languages.
- Migrants are supposed to be screened for fear of return to Mexico before being placed in the migrant protection protocol program, but the asylum officers who conduct these screenings have described the process as being designed to return people to Mexico regardless of the dangers they face.[28]
- Over 20,000 people placed in the migrant protection protocol program have been given *in absentia* deportation orders after failing to appear at a scheduled court hearing.[29] There is no plausible way for an immigration court to determine that asylum seekers' absence was voluntary given the lack of adequate notice; the dangerous conditions they face in Mexico; their lack of access to shelter, medical care, and other basic necessities of life; and the fact that they may have been sent hundreds or thousands of miles away from the ports of entry where they are instructed to report. (Because of these factors, judges at the San Diego immigration court have frequently terminated migrant protection protocol cases rather than ordering deportation *in absentia*, an action that provides little immediate assistance to families stranded in Mexico but does protect them from the harsh legal

---

December 10, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigrants-asylum-turned-away-us-border

[23] 8 U.S.C. § 1229a(b)(4)(A) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) ("[A]liens have a due process right to obtain counsel of their choice at their own expense.")

[24] Priscilla Alvarez, "Immigration lawyers struggle to navigate return-to-Mexico policy," CNN, March 31, 2019. https://www.cnn.com/2019/03/30/politics/immigration-lawyers-remain-in-mexico/index.html

[25] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[26] Priscilla Alvarez, "Immigration lawyers struggle to navigate return-to-Mexico policy," CNN, March 31, 2019. https://www.cnn.com/2019/03/30/politics/immigration-lawyers-remain-in-mexico/index.html

[27] Human Rights First, *Orders From Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, October 2019. https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf

[28] Molly O'Toole, "Asylum officers rebel against Trump policies they say are immoral and illegal," *Los Angeles Times*, November 15, 2019. https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal

[29] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

consequences of a deportation order.[30] Judges at other courts have terminated very few cases.[31])

- Many migrant protection protocol hearings are now being held at tent "courts" where hearings are conducted entirely by video-conference. Public access to the tent courts is either severely curtailed or non-existent.[32]

The Constitution Project at POGO is heartened by this committee's recent announcement of an investigation into migrant protection protocols. We suggest that the investigation include requests for or, if necessary, subpoenas of communications from the Department of Homeland Security and the Justice Department to immigration judges on how to implement migrant protection protocols, particularly with respect to issues of inadequate or fraudulent Notices to Appear, *in absentia* removal orders, and the operations of the newly created tent courts. More generally, we suggest that the committee attempt to confidentially interview current and former immigration judges in order to gain a full understanding of the pressures they are facing.

---

[30] Alicia A. Caldwell, "Judges Quietly Disrupt Trump Immigration Policy in San Diego," *Wall Street Journal*, November 28, 2019. https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400

[31] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[32] Adolfo Flores, "Immigration 'Tent Courts' Aren't Allowing Full Access To The Public, Attorneys Say," *BuzzFeed News*, January 13, 2020. https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access

FLORENCE
IMMIGRANT
& REFUGEE
RIGHTS PROJECT

January 28, 2020

Statement to the House Judiciary Committee
"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts."

The Fast-Tracking of Detained Unaccompanied Children to Deportation

The Florence Immigrant and Refugee Rights Project's mission is to provide pro bono legal and social services to detained men, women, and children facing removal proceedings. In our role as a designated legal service provider that works with unaccompanied minors in Arizona, we provide Know Your Rights presentations, legal screenings, and legal referrals once children reunify. We also provide representation for unaccompanied children who have no sponsor and are detained in Arizona.

If a child is in Arizona when their Notice To Appear (NTA) is filed, the Florence Project appears in EOIR as "Friend of the Court" to assist the Phoenix Immigration Court with the special needs of the detained children's docket. The majority of detained children will only briefly appear in Phoenix EOIR because they are in the process of being reunified to live with family in another state. As Friend of the Court, we provide information to the court about the child's reunification case and the timeline necessary to placed that child in the least restrictive setting so that the child can begin the removal process once they are with family and settled in the community.

For any child that does not have a sponsor, the Florence Project meets with the child, enters into an attorney-client agreement and provide srepresentation for this child while they are detained in Arizona. Our clients are resilient children who have fled abuse, trafficking and persecution in their countries of origin.

In October 2019, the Department of Homeland Security and EOIR began a pilot program to fast-track the deportation of detained unrepresented unaccompanied children in Phoenix, Arizona. This pilot program is an attack on the long-standing processes and well-established body of law and guidance that protect unaccompanied alien children's fundamental due process rights. The pilot program strips detained unaccompanied children of those protections and asks them to defend themselves alone in a courtroom against seasoned government prosecutors. This results in removal orders before a child can exercise her right to be placed in least restrictive setting, an essential protection guaranteed under federal law.

Unaccompanied Children Before EOIR Prior to October 2019

Prior to October 2019, EOIR managed the detained unaccompanied children docket with safeguards in place that aimed to respect due process, the Flores Settlement, and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). The TVPRA provides unaccompanied children with the right to be placed in non-expedited 240

removal proceedings, and with further specific safeguards within that process. The TVPRA and Flores Settlement Agreement mandate that unaccompanied children be placed in the "least restrictive setting" and released from ORR custody as soon as a safe sponsor has been identified. Other Executive Office of Immigration Review Operating Procedures Memoranda provide guidance to immigration judges regarding child friendly practices involving unaccompanied children and the facilitation of pro bono legal services and encouragement of appropriate requests for continuances in the context of pro bono representation, particularly in the context of minor respondents.

Based on the law, DHS agreed that the Notice of Appear (NTA) for a child was filed 60 days after their arrival in an ORR shelter. This allowed for the sponsor of the child to move through the ORR custody and reunify with a sponsor in the "least restrictive setting." Once reunified, the child's NTA was filed in the venue near their sponsor.

After 60 days, if the unaccompanied child was still detained and in reunification process, the Florence Project as Friend of the Court assisted the child by notifying the Court that the child was still in ORR custody completing the reunification process. EOIR did not allow an unrepresented child to enter pleadings under 8 CFR 1240.10(c). DHS agreed to these continuances and EOIR granted continuances accordingly. The majority of children reunify outside of the jurisdiction of Arizona where ORR first detains them, and therefore such an approach is resource saving measure for the court deemed appropriate for ease of court administration until this point.

Unaccompanied Children in EOIR after October 2019

As of October 2019, DHS has been filing the NTA within days of the child's arrival with the Phoenix Immigration Court. EOIR has permitted children exposed to trauma and abuse to be subjected to rapid proceedings that undermine current law and protections. Within three months, EOIR created over fourteen dockets fully dedicated to rapidly moving over 300 children's legal cases without considering their special needs and protections. In those proceedings, advocates witnessed the following:

- Just last Thursday, January 23rd, 2020, a 16 year old indigenous Kiche-speaking boy from Guatemala set to reunify in two weeks, and asked to enter pleadings without an attorney ultimately ordered removed. Bypassing 8 CFR 1240.10(c), and pushing this case forward without considering due process, the Court ordered this unrepresented child removed.

- A 10 year old girl whose mother is deceased, whose father abandoned her, and who fled to the United States with her 3 sisters—two of whom are detained with her in the same facility. She began to cry when the judge asked her where her parents were at this moment. Since she is set to reunify, so it is unclear why DHS and EOIR are eager to further traumatize this child by bringing her to a Court that will not ultimately hear her case.

- DHS filed an NTA in the Phoenix Immigration Court on 10/18/2019 even though the child had reunified with his sponsor 9 days earlier and was no longer

FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT

in Phoenix, Arizona. The Court noted that there may not be jurisdiction vested given the child had left the area more than a week earlier prior to the NTA being filed. In the unbridled rush to proceed with these cases, this pilot project merely creates more procedural inefficiency for EOIR.

- An indigenous Ixil-speaking boy from Guatemala appeared in EOIR and had to communicate in barely understandable Spanish because there was no Ixil interpreter. He repeated over and over *"Quemado mi casa, quemado mi casa"*— they burnt my house. In the rush to move this child through proceedings, the Court did not pause to reset the hearing in the child's indigenous language but rather offered a very short continuance that did not address the underlying need for the child to communicate fully with the Court in his language. The child was forced to relive a serious trauma and try and express himself in language that he did not understand.

The Florence Project believes that this pilot program is meant to remove children rapidly and quietly. In its ultimate manifestation, the pilot program pushes children into court faster than they have been required in the past, overwhelms the resources of the Florence Project in order to undermine its ability provide meaningful representation, and creates a veneer of due process without any of the actual protections.

If you require any additional information, please contact me.

Sincerely,

Golden McCarthy, Esq.
Deputy Director
The Florence Immigrant and Refugee Rights Project

human rights *first*

Statement for the Record

House of Representatives Committee on the Judiciary, Subcommittee on Immigration and Citizenship

Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts

January 29, 2020

Human Rights First applauds the House Judiciary Committee for holding a hearing on the Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.

Since 1978, Human Rights First has worked to protect and promote fundamental human rights. We have long advocated for fair and timely asylum procedures and U.S. compliance with international refugee and human rights law, in addition to providing pro bono legal representation – in partnership with many of the nation's leading law firms - to asylum seekers in U.S. asylum and immigration court proceedings. Over the years, we have issued a series of reports on the immigration courts, warning of the negative impact of delays and backlogs on asylum seekers and calling for fair and timely adjudications.

The Trump Administration has grossly mismanaged the immigration courts and weaponized them to deny asylum to refugees, thwart due process, and influence decision-making in individual cases. The administration's assault on the immigration courts has confirmed that the immigration court system itself is fatally flawed.

Since January 2017, the administration has eliminated safeguards against politicized hiring, repeatedly encouraged immigration judges to deny asylum by falsely painting asylum cases as meritless and fraudulent, pushed immigration judges to rush through cases through the use of case quotas and other changes, and launched secret hearings at "immigration adjudication centers" where judges conduct hearings closed to the public by remote video-conferencing.

In addition, former Attorney General (AG) Jeff Sessions and current Attorney General William Barr have used – and abused - the Attorney General's "certification" power – which allows attorneys general to issue their own precedent-setting rulings in individual cases – to issue a barrage of decisions that attempt to deny asylum to many refugees and undermine due process in the immigration courts. For example, through a highly flawed ruling in Matter of A-B-, former AG Sessions attempted to change U.S. asylum law to deny asylum to many victims of persecution perpetrated by violent criminal organizations or domestic violence abusers. In Matter of L-E-A, AG Barr attempted to block members of persecuted family groups from

receiving asylum protection. Through a decision in Matter of E-F-H-L-, the Attorney General opened the door for immigration judges to potentially deny asylum without full evidentiary hearings.

Over the last year, the Trump administration has forced asylum seekers to "wait" in Mexico for their immigration court hearings under a policy it has absurdly dubbed the "Migrant Protection Protocols" (MPP), turning them back to some of the most notoriously dangerous parts of Mexico and making it impossible for the overwhelming majority of them to find a U.S. lawyer to represent them in their immigration court hearings. Attorneys, legal monitors, and a former immigration judge have monitored these hearings on behalf of Human Rights First. We have documented how asylum seekers are often kidnapped and attacked on their way to, and from, U.S. immigration courts, explained how this policy violates U.S. law and treaty obligations, and identified the many nearly insurmountable barriers to legal representation in MPP immigration court proceedings and the secretive MPP "tent courts."

In a statement issued earlier today, the Roundtable of Former Immigration Judges explained that:

> This administration has systematically attacked due process in the immigration court system through new rules, memoranda, and policies. However, the largest assault to due process is the Migrant Protection Protocols (MPP) program. MPP prevents access to the court, to counsel, and to resources refugees need to effectively present their cases. The limitations on due process in MPP are not incidental to the program, they are intentional.
>
> In addition to the elimination of due process in MPP, the government is putting vulnerable refugees in grave danger. Refugees are forced to wait in dangerous border towns in Mexico without any protection or resources. As with the elimination of due process, the state created danger generated by MPP is intentional. It is part of the government's attempt to eliminate access to asylum.

It should be no surprise, in light of these and other Trump administration actions, that the rate at which immigration judges grant asylum has plummeted under the Trump administration.

Over many years, chronic underfunding of the immigration courts helped create a massive backlog, a growing problem that was recognized in 2006 and 2007 as Human Rights First has detailed in its prior reports. Other factors contributed to the growth of cases, including the bottleneck created by lack of sufficient judges and staff, the "sequestration" freeze in hiring, and a subsequent increase in the number of people seeking asylum due to displacement stemming from human rights abuses and conditions in Central America, Venezuela, and other places.

Instead of effectively addressing challenges relating to the immigration courts, the Trump administration imposed policies that exacerbated the backlog and used it as a pretext for

advancing policies that block access to asylum and undermine justice, as Human Rights First explained in an October 2017 report. A July 2019 study issued by the Marshall Project detailed how Trump administration policies and practices led to even greater delays and backlogs in the courts "making it harder for judges to move cases efficiently, extending processing times and compounding a nationwide backlog that has grown by 68 percent under President Trump" as of the time of the study. Due to these delays, asylum seekers often wait years for their immigration court hearings, leaving them separated from their families and unable to rebuild their lives in safety.

The immigration courts must be totally overhauled, transformed, and upgraded in order to ensure due process, judicial independence, and fair and timely hearings. Congress has a critical role to play in this transformation, as would an executive branch committed to due process and fairness. Key recommendations for Congress include:

1. **Make the immigration courts independent Article I courts.** The American Bar Association (ABA) and other legal groups have recommended that the courts be made independent of the Department of Justice (DOJ) and transformed into Article I courts, a recommendation that the ABA has explained in detail in its most recent report. This reform would secure due process and judicial independence and prevent political appointees from continuing to improperly influence the courts' decisions in asylum and other cases. It would also eliminate an Attorney General's ability to issue his or her own decisions to essentially re-write asylum law and overturn court decisions.

2. **Pass the Refugee Protection Act to restore access to asylum.** Congress should pass the Refugee Protection Act, legislation restoring access to asylum and refugee protection, and overturning Trump Administration rulings to prevent refugees from receiving asylum in the United States—including former Attorney General Sessions' ruling, through the certification process, to deny protection to women who have fled domestic violence and families escaping from deadly criminal organizations where their governments fail or refuse to protect from such persecution.

3. **Launch a major legal representation and legal information initiative.** Congress should launch a major legal representation initiative that provides support for legal counsel for asylum seekers and immigrants in immigration court proceedings – including children and those with mental health issues. Legal representation will make the courts more efficient, helping to ensure that eligible refugees receive protection at the earliest stages of the process. Moreover, statistical studies have repeatedly confirmed that asylum seekers represented by counsel overwhelmingly appear for their immigration court hearings. Legal representation is also a more fiscally prudent expenditure than detention. Congress should also expand funding for legal information and institute universal legal orientation presentations (LOPs)—including for families released from DHS/Customs and Border

Protection (CBP) custody—to explain appearance obligations, the legal system, and how to secure counsel.

4. **Defund the Migration Protection Protocols and its secretive tent courts.** Congress should refuse to fund MPP and its flawed tent courts.

5. **Press for the End of Other Policies that Undermine Independent Adjudication and Fairness**. Through its oversight authority, Congress should:

   - Urge political appointees leading the immigration courts – and DOJ, where the immigration courts are currently housed - to stop painting asylum claims pending before the immigration courts as false and/or lacking in merit;
   - Press DOJ to halt the politicization of immigration judge hiring and to implement safeguards against politicized hiring, including by restoring the role of career professionals in final hiring decisions;
   - Urge an end to policies that pressure judges to deny asylum cases – including case quotas and rushed rocket-dockets; and
   - Press DOJ to end its use of "immigration adjudication centers" that are closed to the public and unfair and technically deficient video-conference hearings.

6. **Increase immigration court interpreters, staff and judges.** Congress should provide funds to support an increase in immigration court interpreters (including those who speak indigenous dialects to assure accurate hearings and prevent continued adjournments), court support staff and – with reforms to eliminate politicized hiring – immigration judges selected through fair and objective hiring. Along with the other reforms outlined above, Congress must ensure funding to support necessary staff levels in order to reduce backlogs and ensure fairness and timely asylum and immigration court adjudications.

HUMAN RIGHTS INITIATIVE OF NORTH TEXAS

Statement of the Human Rights Initiative of North Texas
Submitted to the House Judiciary Subcommittee on Immigration and Citizenship

Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

Contact: Kali Cohn
Community Education & Advocacy Director
kcohn@hrionline.org, 214-855-0520 x4338

As a Texas-based immigration law non-profit serving survivors of human rights abuses from all across the world, the Human Rights Initiative of North Texas sees the real life consequences of the crisis in our immigration courts every day.

For twenty years, we have worked to help our courageous and resilient clients forge a path to safety, freedom, and opportunity. We represent asylum seekers making their case before immigration judges: people who have escaped horrifying abuse in their home countries for speaking up against government corruption, for practicing their faith, and for living their authentic lives. We also represent children who have been abused, abandoned, or neglected by one or both of their parents: kids who have no one to protect them or provide for them in their home countries and who need to find safety here in the U.S.

We rigorously screen potential clients to ensure they qualify for relief under our laws and have sufficient, credible evidence to prove their claims. For our clients, the immigration courts should be a respite. But increasingly, immigration courts have become yet another obstacle in our clients' journey to safety.

We submit this statement to you as immigration practitioners in Texas, based on the observations our lawyers have made practicing before immigration court. We loudly echo the observations of our fellow immigration lawyers across the country: current EOIR policies and practices undermine due process and create significant barriers to a fair day in court.

Extreme Pressures to Close Cases Are Compromising Fair Adjudication of Cases
Over the past three years, immigration judges have come under a tremendous pressure to close cases: the Attorney General has subjected judges to case closing quotas, while limiting their ability to hold off on decisions about deportation while someone's immigration application is pending before USCIS and limiting their ability to put cases on hold while other agencies or courts are handling issues material to the case. These policy decisions have had a dramatic impact on the way immigration courts are operating, seriously affecting the rights of people appearing in court.

Increasingly, we have seen immigration judges make *sua sponte* attempts to rule on issues outside of their jurisdiction. Instead of continuing or administratively closing a case while those issues are adjudicated (and while the underlying applications for relief remain pending), they are raising substantive issues within the sole purview of USCIS or a state court, deciding those issues, and entering removal orders. Although it may seem counterintuitive, it's to be expected: doing so allows immigration judges to close cases and move the needle closer to their 700 required closures per year. So long as someone has an attorney, a case like this won't remain closed: it's an abuse of discretion to rule on issues over which the court lacks jurisdiction, and the Board of Immigration Appeals will send the case back. But from a practical standpoint, that means that pro bono legal service providers like HRI are spending unnecessary time filing appeals when they could be serving other clients; it means that people with private attorneys are paying unnecessary money to achieve a just outcome; and it means that people without attorneys—the vast majority of people in immigration court—are stuck without recourse.

Over the past three years, we've also watched as the judges reduce time in court available for hearings. The Dallas Immigration Court has significantly increased the number of hearings docketed for a master calendar session. There is no longer time during master calendar hearings, which are initial hearings similar to arraignments in criminal courts, for presentation of evidence and information that could affect the scheduling out of cases—ultimately creating inefficiencies down the road.

Merits hearings have also been affected. Four years ago, an asylum seeker would have a full day to present her case; today, the Dallas Immigration Court is scheduling merits hearings for an hour and half. Respondents and advocates simply cannot present a meaningful asylum case-in-chief in that time. The compressed scheduling either means that people don't get their fair time in court—another appealable issue with the same impacts we've already described—or merits hearings scheduled later in the day must be rescheduled, oftentimes years later. For the people awaiting their day in court, it is justice yet again delayed.

Delayed justice has real and serious impacts. Many of our asylum clients, for example, are forced to flee from their homes without their families and cannot be reunified until after their relief is granted. The emotional toll of waiting for relief—sometimes while their family members live their days in hiding—can be nearly unbearable.

Political Priorities of the Administration Are Impacting Court Dockets
In addition to the overt efforts by the Administration to change case outcomes through Attorney General case certification and limit who can access immigration court within the United States,

we've also observed quieter effects of the political environment on the system. In our observation, master calendar and merits hearings are being scheduled much more quickly for Central American respondents than respondents from other parts of the world. In the asylum context, this appears particularly true for Central American respondents alleging persecution based on a particular social group.

Disparate scheduling has two unjust effects: for Central American people with expedited schedules, there is less time to find representation, gather necessary evidence, and present a case. And for the people from the rest of the world, there are unnecessary years of waiting for relief, during which time they must navigate the challenges of living in the United States without status.

The Current Immigration Court Structure Cannot Provide the Fair Day in Court That Due Process Requires

Our current immigration court structure is fundamentally flawed. As a judicial body, the immigration court should be a neutral arbiter of justice—an independent, third-party that can fairly weigh a respondent's case. But the design of the system forbids it: our immigration courts are merely an arm of the Attorney General, the chief enforcer in the system. The practical realities that we are observing are a natural consequence of that design.

We join together with the American Bar Association, the American Immigration Lawyers Association, and legal organizations across the country in calling for an independent immigration court.

Statement for the Record by Kids in Need of Defense (KIND)

"Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

House Judiciary Subcommittee on Immigration and Citizenship

January 29, 2019

Kids in Need of Defense (KIND) is the leading national organization working to ensure that no child faces immigration court alone. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 50,000 attorneys, paralegals, and law students on pro bono representation, and formed partnerships with 644 corporations, law firms, law schools, and bar associations. KIND also helps children who are returning to their home countries to do so safely and to reintegrate into their home communities. In addition, we seek to change law and policy to improve the protection of unaccompanied children in the United States and to build a stronger regional protection framework throughout Central America and Mexico.

Through our work, KIND has observed how the Trump administration's sweeping restriction of judicial independence and due process in the immigration court system has impaired vital legal protections for unaccompanied children. Leveraging structural defects in that system—not least its vulnerability to the political influence of the Department of Justice (DOJ)—the administration has pushed through a host of policy changes and rulings that undermine the fairness and impartiality of proceedings while also decreasing their efficiency.

Some of these shifts have expressly targeted unaccompanied children. A 2017 Executive Office for Immigration Review (EOIR) memorandum, for instance, advised that immigration judges may reject the Department of Homeland Security's (DHS) determination of a child's "unaccompanied alien child" status[1] and thereby strip the due process safeguards that status provides. That same year, EOIR weakened longstanding guidelines for accommodating the unique developmental needs of children during proceedings.[2]

Many other, broader changes in court policy have had particularly damaging consequences for unaccompanied children. Those changes include the 2018 imposition of draconian case completion

[1] Federal law defines an "unaccompanied alien child" as a child under the age of 18 who has no lawful immigration status and for whom there is no parent or legal guardian in the United States, or no parent or legal guardian available to provide care and custody. 6 U.S.C. 279(g)(2).

[2] Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download.

quotas on immigration judges,[3] coupled with restrictions on the use of docket management tools like continuances and administrative closure. The resulting pressure to rush through cases often deprives unaccompanied children of opportunities to secure essential legal representation and to obtain humanitarian protection. Most troubling, these shifts have led to nonsensical outcomes in which USCIS has approved children's applications for humanitarian protection, yet as those children waited for the visas associated with that relief to become available, judges knowingly ordered them removed from the United States.

Judges should not have to render decisions with life-or-death consequences for unaccompanied children based on this or any administration's political interference. The rulings of immigration courts should reflect fair and impartial application of law and faithful observance of due process and Congressional intent. To achieve this standard, KIND urges Congress to transfer the immigration courts out of the executive branch altogether. The establishment of an independent Article 1 immigration court system—in which judges have the discretion and independence they need to manage and decide cases and to uphold due process of law—would help ensure that all unaccompanied children receive a fair day in court.

Structural defects in the current immigration court system

Structural defects in the current immigration court system frustrate due process and judicial independence. EOIR and the immigration courts operate within the executive branch, leaving them subject to the political interference of the administration in power. The courts' specific residence in the Department of Justice means that the Attorney General functions as both chief prosecutor and lead judge, an irreconcilable conflict of interest that risks the pursuit of policy priorities at the expense of fundamental fairness. Compounding these problems, immigration judges are in the Attorney General's employ and classified as government attorneys, an arrangement giving DOJ far-reaching control over judges' case management, court location, and employment status.

Taken together, these infirmities allow the executive branch to drive new policies and rulings that advance its agenda while weakening due process and limiting the ability of judges to reach fair and impartial decisions. Addressed below are a series of measures taken by the Trump administration with precisely those effects.

Express rollbacks of unaccompanied children's due process protections

In recent years, EOIR has carried out a series of harmful changes directed explicitly at unaccompanied children. In September 2017, EOIR's General Counsel issued a memorandum advising that immigration judges are not bound by DHS' prior determinations that children meet the statutory definition of an "unaccompanied alien child" and may terminate their unaccompanied status.[4] Additionally, in the October 2018 *Matter of M-A-C-O* decision, EOIR's Board of

[3] Memorandum from EOIR Director to All of Judges, Immigration Judge Performance Metrics (March 30, 2018), available at http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf. Earlier that year, EOIR also announced performance goals for immigration courts. See Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measures, Jan. 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.

[4] Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied

Immigration Appeals (BIA) held that immigration judges have initial jurisdiction over the asylum cases of unaccompanied children who turned 18 before filing their asylum applications.[5]

These changes weaken key procedural protections for unaccompanied children enshrined in the Homeland Security Act of 2002 and Trafficking Victims Protection Reauthorization Act (TVPRA). Those laws provide for an unaccompanied child's right to have her asylum case first heard in a non-adversarial setting before a trained U.S. Citizenship and Immigration Services (USCIS) asylum officer,[6] as well as to an exemption from the one-year filing deadline that generally applies to asylum applications.[7] Such protections, like DHS' initial determination of who meets the definition of an "unaccompanied alien child," have been interpreted to attach for the duration of a child's immigration proceedings, as children are still required to attend and participate in their own complex immigration cases even after they turn 18 or are reunified with a parent.

Redeterminations of a child's unaccompanied status, together with restrictions on that child's access to USCIS asylum adjudications, not only create confusion for children, attorneys, and adjudicators, they also expose children to more adversarial and less child-appropriate processes. In so doing, they contravene the specific intent of Congress to ensure particularly vulnerable children can meaningfully access humanitarian protections that help ensure they are not returned to harm.

What is more, these changes compound the administrative demands on an already overburdened system. Applications for legal relief may be duplicated or transferred between different departments and agencies as redeterminations occur, creating additional paperwork and unnecessary delays. These results undermine, not enhance, the efficiency of our immigration courts and the faithful administration of our immigration laws.

Making matters worse, in December 2017 EOIR issued a memorandum titled "Guidelines for Immigration Court Cases Involving Juveniles" that further impairs due process protections for unaccompanied children.[8] This memorandum replaced and weakened longstanding guidelines that directed the use of child-friendly practices, such as child-sensitive questioning techniques, to improve the ability of children to attend and meaningfully participate in immigration proceedings that may determine their safety and future. Specifically, the new guidance, while referencing the potentially complicated and sensitive nature of children's cases, restricts judges' discretion to consider children's best interests in creating child-appropriate courtroom environments and advances a skeptical tone toward claims by unaccompanied children.

The guidelines also dilute measures designed to address the unique developmental needs of children, including by removing language related to the use of telephone conferences and narrowing children's opportunities to gain familiarity with hearing environments before they are required to deliver painful and difficult testimony in support of their legal claims. These changes

---

Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPRA.pdf.

[5] 27 I & N Dec. 477 (BIA 2018).

[6] 8 U.S.C. 1158(b)(3)(C); INA 208(b)(3)(C).

[7] INA 208(a)(2)(E).

[8] Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download.

run counter to the TVPRA, which was enacted in recognition of a "special obligation to ensure that these children are treated humanely and fairly."[9] Indeed, the modified guidelines heighten the risk that children will have to present their claims in an intimidating or even hostile court setting, which could lead to their cases being inadequately considered and their return to danger in the countries they fled despite their eligibility for legal protection. Unfortunately, over half of unaccompanied children in removal proceedings—tens of thousands of them—are unrepresented by counsel,[10] making accommodations all the more critical to a vulnerable population that more often that not must navigate this complex legal process alone.

Draconian case completion quotas and restrictions on docket management tools

DOJ's implementation of stringent case completion requirements, along with limitations placed on judges' use of docket management tools, has severely curtailed judicial independence and undermined unaccompanied children's access to relief and counsel. In March 2018, DOJ announced new metrics for immigration judges[11] that compel hurried and incomplete consideration of legal cases with life-or-death implications. These metrics, which took effect October 1, 2018, factor the number of cases an immigration judge completes in a fiscal year into the judges' annual performance review. By linking individual judges' job evaluations to the rapid completion of cases, the performance metrics act as a disincentive to scheduling accommodations that may be critical to unaccompanied children's cases for legal protection.

Decisions issued that same year by then-Attorney General Jeff Sessions further restricted use of two of those accommodations—continuances and administrative closure—which judges have historically employed to pause court proceedings in the interests of justice. In *Matter of Castro-Tum,* Attorney General Sessions ruled that immigration judges and the Board do not have general authority to administratively close cases and instead have such authority only when "a previous regulation or settlement agreement has expressly conferred it."[12] In *Matter of L-A-B-R,* the Attorney General similarly restricted judges' use of continuances, allowing the exercise of that docket management tool "only for good cause shown."[13]

In combination, these restrictions on immigration judges' discretion to manage their own case dockets and proceedings have significantly limited unaccompanied children's access to humanitarian protection and produced nonsensical legal outcomes that place children's lives at risk. Forms of relief such as Special Immigrant Juvenile Status (SIJ) require children to appear before USCIS or state family courts. These proceedings, which occur in different fora and according to schedules beyond the control of unaccompanied children or EOIR, are imperative to

---

[9] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).
[10] KIND, "Fact Sheet," https://supportkind.org/resources/kind-fact-sheet/.
[11] Memorandum from EOIR Director to All of Judges, Immigration Judge Performance Metrics (March 30, 2018), available at http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf. Earlier that year, EOIR also announced performance goals for immigration courts. *See* Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measures, Jan. 17, 2018, https://www.justice.gov/eoir/page/file/1026721/download.
[12] 27 I&N Dec. 271, 283 (A.G. 2018). In *Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019), the Fourth Circuit Court of Appeals vacated *Matter of Castro-Tum* in that circuit and affirmed the importance of the use of administrative closure.
[13] 27 I&N Dec. 405 (A.G. 2018).

accessing SIJ and other forms of humanitarian protection.[14] In the past, judges often granted continuances or administrative closure to allow other fora to complete their determinations. Now, judges are increasingly denying motions for these accommodations, effectively depriving children of an opportunity to have their claims for relief fully and fairly considered, while violating express provisions of the TVPRA prescribing specific substantive and procedural protections for unaccompanied children. Indeed, judges have gone so far as to issue removal orders for children when USCIS has approved such applications but visa numbers are not yet available, *despite USCIS's determination that it is not in the child's best interest to return to her home country.* These senseless orders, which are a direct result of the administration's interference in judges' docket management practices, violate due process and threaten children's safety.

In addition, the new policy measures have significantly elevated barriers to children's access to representation. Docket management tools such as continuances and administrative closure enable judges to temporarily postpone hearings to afford children an adequate opportunity to secure and establish trust in counsel who can evaluate and prepare their cases and help ensure due process. Such counsel can mean the difference between life and death; indeed, non-detained immigrants without representation are five times less likely than their represented counterparts to win relief,[15] and often face the prospect of return to countries where their safety is in jeopardy. The reduced availability of these critical tools, then, makes it more difficult for unaccompanied children to acquire representation and demonstrate eligibility for relief. As a consequence, this vulnerable population faces an elevated risk of return to harm.

By limiting children's access to counsel and foreclosing avenues to relief before USCIS, the policy changes cited also make immigration courts less efficient. Attorneys enhance efficiency by, among other actions, identifying children's grounds of eligibility for relief—or, conversely, helping them understand when they may lack such eligibility—and enabling immigration judges to spend less time explaining to children the court's processes. Similarly, continuances and administrative closure can improve efficiency by allowing immigration judges to pause certain cases pending adjudications outside the court system, thereby conserving court resources. USCIS case approval in such instances often enables the termination of court proceedings and consequent reduction of the court backlog. It comes as no surprise, then, that changes introduced under the Trump administration to curb judicial independence have contributed to that backlog's growth. Indeed, from FY 17 to the present, the backlog has ballooned from over 600,000 cases to nearly 1.1 million.[16]

Misuse of case certification authority

The protection claims of unaccompanied children often relate to sexual and gender-based violence, gang violence, and/or harm suffered due to a child's membership in her family unit. Under the Trump administration, such claims—along with others common to this vulnerable population—have come under direct attack, making unaccompanied children's access to relief an outsize target.

---

[14] Other applications for humanitarian relief often filed by unaccompanied children in removal proceedings and adjudicated by USCIS include U visas for victims of crimes and T visas for trafficking survivors.
[15] American Immigration Council, "Access to Counsel in Immigration Court" (Sep. 26, 2018); https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.
[16] TRAC, "Immigration Court Backlog Tool" (Accessed Jan. 27, 2020); https://trac.syr.edu/phptools/immigration/court_backlog/.

In particular, Attorneys General have used their authority to certify immigration court cases for review and to issue binding rulings on them—an authority intended to ensure the fair administration and interpretation of our immigration laws—to instead undermine the viability of asylum claims like those above. Certified cases including *Matter of A-B-* and *Matter of L-E-A-* illustrate this misuse and underscore the danger of housing the immigration court system within the executive branch.

In March 2018, Attorney General Jeff Sessions certified to himself *Matter of A-B-*, a case in which the BIA had overturned an immigration judge's denial of asylum on the basis of severe domestic violence by the applicant's ex-husband. Three months later, the Attorney General issued his opinion in the case and held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[17] The ruling overlooks the widespread and severe sexual- and gender-based violence and gang violence that is driving children to flee their homes and countries in search of safety. While legally defective in numerous respects, the decision nonetheless elevated barriers to relief for many unaccompanied children facing danger.

Subsequently, in July 2019, Attorney General William Bar issued a decision in the certified case *Matter of L-E-A-*.[18] This opinion, rooted in flawed legal analysis, appears designed to limit grants of asylum due to a well-founded fear of persecution based on an individual's membership in a family unit. Among other infirmities, the decision fails to properly reflect evidence, noted by KIND and other amici in a March 2019 brief, that Congress intended to allow children to assert family-based asylum claims.[19]

The previous year, in *Matter of E-F-H-L-*—another case certified for review—Attorney General Sessions vacated the BIA's prior ruling finding that individuals applying for asylum are entitled to an evidentiary merits hearing on their application.[20] The Attorney General's decision, issued years after that Board precedent, threatens to result in immigration judges' summary rejection of asylum cases based on written applications alone, without oral testimony from the applicant.

Such rejections would impede due process in cases with the highest of stakes. Many applicants for asylum do not have attorneys to assist them in navigating complex immigration laws and must prepare their applications on their own, frequently in a language with which they have only limited familiarity. Consequently, their applications may insufficiently reflect the extent of the persecution they fear or experienced. Evidentiary hearings in immigration court allow asylum seekers to explain the facts and circumstances giving rise to their claims and to clarify any misunderstandings or confusion before the judge renders a decision.

Enhanced political control over key immigration court cases

In addition to its misuse of the certification process, the Trump administration has adopted a range of measures that enhance political control over key cases in the immigration court system. An interim final rule issued by EOIR in August 2019 exemplifies this effort.[21] The rule authorizes

---

[17] *Matter of A-B-*, at 320.
[18] 27 I&N Dec. 581 (A.G. 2019)
[19] Brief for KIND, et al. as Amici Curiae, *Matter of L-E-A-*, 27 I.&N. Dec. 40 (BIA 2017), 27 I.&N. Dec. 494 (A.G. 2018).
[20] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).
[21] 84 Fed. Reg. 44537 (Aug. 26, 2019).

EOIR to short-circuit the appellate process by allowing a political appointee to unilaterally decide important legal issues instead of the BIA. Specifically, when a case assigned to a single Board member has remained pending for longer than 90 days, or if one assigned to a three-member panel has remained pending more than 180 days, the EOIR Director may now take up the case personally and issue a decision. This drastic shift strengthens DOJ's top-down authority over binding immigration rulings, including rulings with consequences for unaccompanied children. In so doing, it raises the likelihood that political influence rather than the fair administration of justice will dictate critical case outcomes affecting this vulnerable population.

Likewise, the composition of the BIA itself increasingly reflects the political influence of the Trump administration. Around August 2019, DOJ named six new members to the Board, four of them to seats that DOJ added the prior year.[22] Averaged together, these six BIA judges had an asylum denial rate of 90.7 percent as lower-court immigration judges—dramatically higher than the national average of 57.6 percent.[23] The creation of these seats and selection of these judges—who significantly shift the composition of the Board—appear to advance the administration's political aims rather than judicial principles of fairness and impartiality.

"Tent Courts"

In September 2019, EOIR began conducting hearings in "tent courts" that present severe barriers to due process.[24] These facilities, located in Laredo and Brownsville, Texas, act as makeshift courtrooms for asylum seekers—including families with children—who have been placed by DHS into the "Remain in Mexico," or so-called Migrant Protection Protocols (MPP), program. Under MPP, over 59,000 asylum seekers, including at least 16,000 children, have been forced by the U.S. government to wait in dangerous conditions in Mexico pending their hearings in the United States.[25] As of September, nearly 98% of returned asylum seekers lacked counsel, leaving all too many families without essential representation during tent court proceedings.[26] Those proceedings rely exclusively on video teleconferencing,[27] through which immigration judges sitting in distant immigration courts preside over the facilities' proceedings, raising additional due process concerns that have long attended this technology.

It bears emphasis that MPP has resulted in numerous family separations, compelling hundreds of vulnerable children to seek protection alone.[28] Such foreseeable consequences of this misguided

---

[22] Tal Kopan, "AG William Barr promotes immigration judges with high asylum denial rates," San Francisco Chronicle (Aug. 23, 2019); https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php#.

[23] *Id.*

[24] AILA Policy Brief, "Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent" (Jan. 20, 2020); https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful.

[25] Human Rights First, "A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico" (Jan. 2020); https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf.

[26] ABA, "ABA counsel testifies about concerns with Remain in Mexico immigration policy" (Nov. 19, 2019); https://www.americanbar.org/news/abanews/aba-news-archives/2019/11/aba-counsel-testifies-about-concerns-with-remain-in-mexico-immig/.

[27] *Id.*

[28] Priscilla Alvarez, "At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US" (Jan. 24, 2020); https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html.

program make unaccompanied children's access to counsel and protection all the more imperative. Further, it remains critical that children of families subject to MPP receive individual screenings, as they may have independent protection claims qualifying them for relief.

Recommendations

To help ensure full observance in removal proceedings of the due process rights of unaccompanied children and others, and to foster independence, fairness, and impartiality in judicial decision-making, KIND recommends the following two actions:

(1) ***Establishment of an independent Article I immigration court system.*** Decisions reached by immigration judges can hold life or death consequences for unaccompanied children. It is critical that these judges have the time, discretion, tools, and independence necessary to fully and fairly consider the cases before them—free from political interference. To this end, KIND recommends that Congress create an independent immigration court under Article I of the Constitution. An independent court would advance due process and access to justice, helping ensure that all unaccompanied children receive a fair day in court.

(2) ***Before and after establishment of an independent court system, ensure that immigration judges have discretion to manage their own case dockets and proceedings.*** Recent decisions by the Attorney General have curtailed the discretion of immigration judges to issue continuances or administratively close cases on their dockets—important tools that judges may use to temporarily halt proceedings to afford individuals the time needed to secure legal counsel or to await adjudication of applications for relief by other courts or agencies. Discretion to use these tools is particularly critical in the case of unaccompanied children, whose applications for asylum or SIJ status are adjudicated by USCIS, rather than immigration judges. Absent discretion to manage their cases, judges may be forced to order children and others appearing before them deported, despite their need for protection and eligibility for relief.

THE HMA LAW FIRM PLLC
PROTECT · PERSEVERE · PROSPER

Hassan M. Ahmad
Sharifa Abbasi
Humza Kazmi (MD)
8133 Leesburg Pike, Suite 801
Vienna, VA 22182

T: 703.964.0245
F: 703.997.8556
hma@hmalegal.com
www.hmalegal.com

Of Counsel
Omar Baloch (NC)

January 28, 2020 **VIA E-MAIL**
Vienna, VA, USA

RE: Testimony for House Judiciary Committee

To the Honorable, the Members of the Judiciary Committee of the U.S. House of Representatives:

My name is Hassan Ahmad. I am a licensed attorney and have practiced immigration law for over 16 years, much of it before the Executive Office for Immigration Review.

You may hear much today about the crisis in the immigration "courts" being caused by a crushing backlog, or a large number of people crossing the border, or presidential action or inaction.

These are red herrings. The root of the crisis is that the Executive Office for Immigration Review does not afford aliens due process of law, and *must* be shifted to an Article I court.

Take it from someone in the trenches: Immigration "court" isn't court. Immigration judges have been transformed into little more than deportation commissioners. The prosecuting Immigration & Customs Enforcement (ICE) attorneys are supposed to seek justice, not deportation for the sake of deportation. But ICE attorneys show up to court without the file with disturbing regularity, and my clients are then blamed for lengthy delays. When ICE attorneys completely ignore mandates to submit documents at least 15 days prior to a hearing, they face no sanction. If I were to miss such a deadline, I would face not only the wrath of the Court, but that of the Bar. But immigration court judges would never sanction attorneys from a sibling agency.

The right to tell one's story freely and fully is sacrosanct and must be zealously guarded. It is a core part of justice. All attempts to take away those rights – whether by denying meaningful access to counsel, burdening counsel with delays, moving clients to squalid conditions in a detention facility or refugee camp outside the United States, or holding court in a tent – all cut against this core.

Immigration courts are variously considered civil or criminal – whichever option will cut against the non-citizen. My clients are in jail with criminal defendants, but don't get the constitutional protections afforded those defendants. Deportation may be a death sentence, but my clients don't even get the due process of traffic court.

Justice is not dispensed by quota. It requires stable procedures, not fiat and the whim of the Attorney

General.

In 2018, former Attorney General Jeff Sessions certified a case, *Matter of Castro-Tum*, to himself. The case was intended to strip immigration judges of "administrative closure," the tool to control their own docket and operate efficiently. A colleague of mine stepped in and filed a friend-of-the-court brief to represent the alien, who was missing and unable to represent himself. When a hearing was finally scheduled, Sessions's Department of Justice abruptly removed the assigned immigration judge from the case, then (without telling the original judge) installed another judge from a different court who then denied the case. Such cherry picking to achieve a desired end goal flies in the face of fundamental fairness.

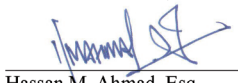
And once again today, we are forced to hear the perspective of the Center for Immigration Studies (CIS), a group that wouldn't have formed but for the white nationalism of Dr. John Tanton. Dr. Tanton was a eugenicist who believed the United States could not maintain its national identity without a large "Euro-American" majority. CIS has been in close contact with White House immigration czar Stephen Miller. CIS is not a neutral opposing voice, it is a white nationalist voice. In the future, CIS (and its sister organizations, the Federation for American Immigration Reform, NumbersUSA, and the Immigation Reform Law Institute) should not be invited to provide testimony before this Committee.

I used to appear before CIS fellow Andrew Arthur when he was an immigration judge in York, PA. He is a perfect example of what's been wrong with the immigration system. His clear anti-immigrant bias and commitment to Tanton's ideology render his past decisions and current testimony before this Committee suspect at best.

The true crisis in immigration courts is the increasing pressure on judges to curtail testimony and evidence, and to deny cases, coupled with changes in administrative law tailored to increase difficulty and bring immigration to a halt. Such a crisis cannot be fixed through draconian cuts that would further strip away due process. It must be resolved through provision of due process and the rule of law – and the first step is shifting immigration courts to the judiciary, where they belong.

Respectfully,

THE HMA LAW FIRM, PLLC



Hassan M. Ahmad, Esq.

CC:

NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Statement from the National Immigrant Justice Center

House Committee on the Judiciary
Subcommittee on Immigration and Citizenship
Hearing: Courts in Crisis—
The State of Judicial Independence and Due Process in U.S. Immigration Courts
January 29, 2020

Chairman Nadler, Chairwoman Lofgren, Ranking Member Buck, and Members of the Subcommittee:

Nearly a century ago, the Supreme Court of the United States described deportation as a deprivation of liberty that "may result … in loss of both property and life, or of all that makes life worth living."[1] Today, the gravity of an immigration judge's decision to order deportation is no less weighty, determining whether an asylum seeker will be returned to the hands of her persecutor or whether a decades-long American resident will be torn from his family. Yet these cases are heard in a broken court system frequently described by the immigration judges themselves as "death penalty cases in a traffic court setting."[2]

The immigration court system's dysfunction is largely due to its position within the Department of Justice (DOJ), where it is vulnerable to the political whims of the executive. In recent years, the Trump administration has explicitly attempted to subvert the mission of the immigration court system, trading the safeguarding of due process for the politically driven pursuit of increasing deportations and throwing up roadblocks for those seeking to access protection. At the National Immigrant Justice Center (NIJC),[3] we witness the severe harms that follow, including sham hearings, erroneous deportations, and pervasive family separations.

The administration's enforcement-oriented approach to what should be an impartial and fair system of adjudications has resulted in a court system unable to meaningfully effectuate justice. The immigration courts are, as the American Bar Association's Commission on

---

[1] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
[2] Bryan Schatz, *Mother Jones*, "Our Immigration Courts Aren't Ready to Handle Millions of Deportations," Mar. 31, 2017, https://www.motherjones.com/politics/2017/03/immigration-court-deportations-trump-asylum/.
[3] NIJC is a non-governmental organization (NGO) dedicated to safeguarding the due process rights of noncitizens. We are unique among immigrant advocacy groups in that our advocacy and impact litigation are informed by the direct representation we provide to approximately 10,000 clients annually. Through our offices in Chicago, Indiana, San Diego, and Washington D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, NIJC provides legal counsel to immigrants, refugees, unaccompanied children, and survivors of human trafficking.

Immigration recently stated, "irredeemably dysfunctional and on the brink of collapse."[4] Transformational change is necessary to ensure respect for basic human and civil rights in the United States immigration courts.

NIJC applauds this Subcommittee's consideration of the due process crisis within the immigration court system. We continue to call for an independent immigration court system that is removed from the Department of Justice; until that benchmark is reached, we call on Subcommittee members to engage in robust oversight of DOJ to reverse its unacceptable incursions on the court system's integrity. This statement: 1) provides a brief overview of the historical vulnerability of the Executive Office for Immigration Review (EOIR) to political sway; 2) outlines the current administration's attacks on the fairness and independence of the immigration court system; and 3) provides a brief set of principles that must be fulfilled to ensure fairness in the system.

I. The Executive Office for Immigration Review: a brief history of political sway

The Executive Office for Immigration Review (EOIR) is a component of the Department of Justice that includes the immigration courts and their appellate body, the Board of Immigration Appeals (BIA). Unlike other judicial bodies, the immigration courts and the BIA lack meaningful independence from the executive because immigration judges and BIA members are appointed by the Attorney General.[5]

History has shown EOIR to be particularly vulnerable to improper political pressures and sway. In 2003, five members of the BIA were dismissed in what is now widely considered a politically motivated "purge" of left-leaning BIA members orchestrated by Attorney General John Ashcroft's leadership team.[6] Only a few years later, in 2008, the DOJ Office of the Inspector General found that high ranking officials under Attorney General Alberto Gonzales "committed misconduct, by considering political and ideological affiliations in soliciting and selecting [immigration judges]."[7]

---

[4] American Bar Association Commission on Immigration, *2019 Update: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (Mar. 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

[5] 8 U.S.C. § 1101(b)(4); 8 CFR 1003.1(a)(1).

[6] *See* Ricardo Alonso-Zaldivar and Jonathan Peterson, *Los Angeles Times*, "5 on Immigration Board Asked to Leave; Critics Call It a 'Purge,'" Mar. 12, 2003, http://articles.latimes.com/2003/mar/12/nation/na-immig12.

[7] *See* Eric Lichtblau, *The New York Times*, "Report Faults Aides in Hiring at Justice Department," July 29, 2008, https://www.nytimes.com/2008/07/29/washington/29justice.html; U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring by Monica*

The past decade has hardly been kinder, as judges have been repeatedly forced to rearrange their dockets by executive branch officials driven by political expediency and anti-immigrant rhetoric.[8] As New York City Immigration Judge Amiena Khan recently put it, "It is just a cumbersome, huge system, and yet administration upon administration comes in here and tries to use the system for their own purposes…"[9] The immigration court system today is extremely fragile, crippled by a backlog of over a million cases[10] and unacceptable disparities in decision making.[11] The deck is stacked against immigrants, who frequently speak to judges through interpreters, more often than not representing themselves in the face of a maze of complex laws,[12] and often in the immediate aftermath of having survived torture or severe persecution.

II. Weaponizing the courts: the Trump administration's efforts to convert the immigration court system into an enforcement machine

When the current administration came into office, the immigration court system already stood on the brink of chaos, unable to bear additional layers of incompetence and political machinations. And yet, over the past three years the White House, Department of Justice and Department of Homeland Security have acted in concert to deliver an astonishing array of policies and procedures further destabilizing the immigration courts and doggedly orienting case outcomes toward removal. Immigrants appearing without counsel and immigration attorneys

---

Goodling and Other Staff in the Office of the Attorney General (July 28, 2008), https://oig.justice.gov/special/s0807/final.pdf.

[8] *See* Hon. Paul Wickham Schmidt, *The Federal Lawyer*, "Immigration Courts: Reclaiming the Vision," May 2017, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/May/Features/Immigration-Courts-Reclaiming-the-Vision.aspx?FT=.pdf; *see also* United States Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 2017), https://www.gao.gov/assets/690/685022.pdf.

[9] Kate Brumback, Deepti Hajela and Amy Taxin, *Associated Press*, "AP Visits Immigration Courts Across US, Finds Nonstop Chaos," Jan. 19, 2020, https://apnews.com/7851364613cf0afbf67cf7930949f7d3.

[10] As of January 2020, the immigration courts are backlogged by 1,089,696 cases. *See* TRAC, Immigration Court Backlog Tool, last accessed Jan. 23, 2020, http://trac.syr.edu/phptools/immigration/court_backlog/.

[11] A recent study showed that the particular judge assigned to an individual seeking asylum changes his or her odds of receiving asylum by over 56 percentage points. In the New York City immigration court, for example, the rate by which individual judges grant asylum varies from 41% to 97.8%. Compare this variance to the Atlanta court, where the grant rate spans 29.2% to 2.3%. *See* TRAC, "Asylum Outcome Increasingly Depends on Judge Assigned," Dec. 2, 2016, https://trac.syr.edu/immigration/reports/590. Immigration judges in Atlanta have been accused of overt bias against asylum seekers. *See* Christie Thompson, *The Marshall Project*, "America's Toughest Immigration Court," Dec. 12, 2016.

[12] Nationally fewer than 40% of immigrants are able to obtain representation in their immigration court proceedings. Ingrid Eagly and Steven Shafer, *American Immigration Council*, "Access to Counsel in Immigration Court," Sept. 28, 2016, https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

alike struggle to navigate a system the Associated Press's recent investigation found to constitute "nonstop chaos."[13]

What does immigration court look like today, in early 2020? Immigrants regularly receive notices to appear in court on dates or times when court is not in session.[14] Asylum seekers are released from custody without their asylum paperwork and are unable to obtain copies from the court without filing a request under the Freedom of Information Act.[15] Immigrants are routinely forced to defend against a government prosecutor without being oriented as to how to get their documents translated or even file the paperwork necessary to bring a case.[16] Young children are, as the Associated Press describes, "everywhere…," forced to "sit on the floor or stand or cry in cramped courtrooms."[17] The success of an immigrant's case is most often determined not by the merits of their claim to relief but by a series of random factors including the assigned judge and location of the court; in some courts immigration judges grant close to zero percent of asylum applications brought before them.[18] NIJC attorney Ashley Huebner recently told the Associated Press: "Attorneys are spending so much time on work that is effectively meaningless…. It's unnecessary, bureaucratic red tape gone crazy."[19]

This "nonstop chaos" is not accidental or coincidental; it is the result of a series of policies intentionally put in place by the administration to destabilize the immigration court system and make it next to impossible for immigrants within the system to access due process protections and justice.

In the fall of 2018, the Department of Justice began implementing a disastrous system of quotas on the immigration courts, requiring judges to complete at least 700 cases per year while meeting other numerical goals.[20] Prior to its implementation, civil rights advocates and immigration judges themselves voiced fierce resistance to the plan.[21] Ashley Tabaddor, an immigration judge and President of the National Association of Immigration Judges, referred to

---

[13] Brumback, "Nonstop chaos," *supra* n. 9.
[14] Sophia Tareen, *Associated Press*, "Lawyers: Immigration court system is 'red tape gone crazy,'" Jan. 19, 2020, https://apnews.com/b8e7f7148b2d104ca21c1e41fff70d23.
[15] *Id.*
[16] *Id.*
[17] Brumback, "Nonstop chaos," *supra* n. 9.
[18] John Washington, *The Nation*, "These jurisdictions have become asylum free zones," Jan. 18, 2017, https://www.thenation.com/article/archive/these-jurisdictions-have-become-asylum-free-zones/.
[19] Tareen, "Immigration ocurt system," *supra* n. 14.
[20] *See* Betsy Woodruff, *The Daily Beast*, "New Quotas for Immigration Judges are 'Incredibly Concerning,' Critics Warn," Apr. 2, 2018, https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn?source=articles&via=rss.
[21] National Association of Immigration Judges, "Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges," Oct. 1, 2017, http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration.

the plan as "a recipe for disaster," noting that it would impact the perception of the integrity of the court;[22] former immigration judge Bruce Einhorn, who served as an immigration judge from 1990 to 2007, referred to the plan as an "affront to judicial independence and the due process of law."[23] These fears have been more than borne out. Ilyce Shugall, who resigned from her position as an immigration judge as a matter of conscience in March 2019, describes: "My colleagues and I felt the impact of the case quotas on our ability to render correct and well-reasoned decisions.… [J]udges were forced to schedule at least two cases in one time slot … regardless of whether it was possible to hear two cases in such a short time frame or whether this would allow a judge to consider fully the merits of each case."[24] The imposition of case quotas heightens already urgent concerns among immigrants and their attorneys that cases will be rushed through the immigration court system as judges respond to concerns about job security instead of due process protections.

Amidst the scrambling of dockets and pressure cooker atmosphere for immigration judges, the Department of Justice is also taking aggressive steps to undermine rights through the manipulation of the immigration law itself. The Attorney General possesses the authority to refer cases of the Board of Immigration Appeals to himself for review; historically the practice has been sparingly used.[25] Long criticized as an unusual and potentially dangerous grant of judicial authority to the executive branch, this authority has become a weapon in the hands of Attorney Generals Sessions and Barr. The Trump administration is on track to issue more certifications than any administration in recent history, massively curtailing the rights of asylum seekers and immigrants through a trove of decisions that collectively: undermine the ability of immigration judges' to manage their own dockets, cruelly attack the ability of survivors of domestic- and gang-related violence to obtain asylum protections, and impose new barriers for immigrants previously involved in the criminal legal system to seek a second chance in immigration court.[26]

---

[22] *Id.*
[23] Bruce Einhorn, *Washington Post*, "Jeff Sessions wants to bribe immigration judges to do his bidding," Apr. 5, 2018, https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html.
[24] Ilyce Shugall, *Los Angeles Times*, "Why I resigned as an immigration judge," Aug. 3, 2019, https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies.
[25] Lisa Riordan Seville and Adiel Kaplan, *NBC News*, "AG Barr using unique power to block migrants from U.S., reshape immigration law," July 31, 2019, https://www.nbcnews.com/politics/immigration/ag-barr-using-unique-power-block-migrants-u-s-reshape-n1036276.
[26] *See, e.g.*, Liz Vinson, Southern Poverty Law Center, "U.S. Attorney General Tips the Scales in Immigration Court, Leaving One Man Fighting for His Freedom – and His Life," Dec. 2019, https://www.splcenter.org/attention-on-detention/us-attorney-general-tips-scales-immigration-court-leaving-one-man-fighting; Dara Lind, *Vox*, "Jeff Sessions is exerting unprecedented control over immigration courts—by ruling on cases himself," May 14, 2018, https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling. This list is non-exhaustive.

The relentless stream of policies unleashed by the White House and Department of Homeland Security to obstruct access to asylum on the southern border is another factor contributing to the destabilization and steady erosion of even the veneer of due process rights in the immigration court system. The implementation of the so-called "Migrant Protection Protocols," or Return-to-Mexico program, has forced thousands of asylum seekers to wait in Mexico in often-life threatening conditions during the months or years it takes for their asylum cases to be heard.[27] Layering harm upon harm, the administration has constructed temporary court facilities for cases adjudicated through MPP to be heard.[28] In these sham court facilities, judges in brick-and-mortar courts in cities throughout the United States adjudicate asylum cases by video. The systematic rights abuses in these courts have been well documented, ranging from systems effectively precluding asylum seekers from accessing counsel to a failure by the administration to allow even basic transparency to journalists and legal observers attempting to bear witness to the proceedings therein.[29] As Aaron Reichlin-Melnick of the American Immigration Council explains, "The goal of MPP is to create a system which fools casual observers into thinking a process exists—while making success near-impossible and harm so pervasive that sensible people give up."[30]

Amidst this chaos and dysfunction of the immigration court system, the deck is stacked against immigrants, many of whom frequently speak to judges through interpreters, more often than not representing themselves in the face of a maze of complex laws. Due process and civil rights protections are in fact so elusive in today's immigration court systems that some immigration judges have chosen to resign out of ethical concerns. Ilyce Shugall explained her choice to resign as follows: "I felt like as more and more policies were coming down, it was making it harder and harder to effectively hear cases in the way that I felt was appropriate and in compliance with the state regulations and Constitution."[31]

III. Principles for reform

In considering proposals for immigration court reform, NIJC encourages members of Congress to prioritize the following principles:

---

[27] Human Rights First, *A Year of Horrors: the Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico* (Jan. 2020), https://www.humanrightsfirst.org/sites/default/files/AYearofHorrors-MPP.pdf.
[28] Adolfo Flores, *Buzzfeed News*, "Immigration 'Tent Courts' Aren't Allowing Full Access To The Public, Attorneys Say," Jan. 13, 2020, https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access.
[29] *Id.*
[30] Zachary Mueller, *America's Voice*, "Immigration 101: What is 'Remain in Mexico', or the Migration Protection Protocols (MPP)?," Nov. 15, 2019, https://americasvoice.org/blog/remain-in-mexico-mpp/.
[31] Priscilla Alvarez, *CNN*, "Immigration Judges Quit in Response to Administration Policies," Dec. 27, 2019, https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html.

- Ensure judicial independence by removing the immigration court system from the Department of Justice.
- Give immigration judges true authority over their courtrooms by removing categorical bars to relief and ensuring that all immigrants have the opportunity to have a fair day in court.
- Promote judicial transparency at the trial court and appellate levels.
- Grant the appellate body the scope of review necessary for the fair administration of justice.
- Restore fairness to immigration adjudication by providing the jurisdiction necessary for the trial court and appellate body to ensure fairness and due process for everyone seeking immigration relief.
- Restore strong judicial review at the federal court level.
- Ensure that all individuals appearing before the immigration court have access to counsel by providing for the availability of appointed counsel for all immigrants facing removal.

These principles reflect the dire need for judicial independence and functional management of a court system that is in tragic disarray. NIJC calls on members of Congress to engage in robust oversight of DOJ and EOIR to protect the impartiality of the immigration court system in the face of clear evidence of the administration's efforts to conscript it into furthering an agenda of mass deportations.

Statement for the Record

U.S. House of Representatives Committee on the Judiciary - Subcommittee on Immigration and Citizenship

Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, law enforcement, veterans and business constituencies in communities across the country. Leveraging our policy, advocacy and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

Introduction

The Forum appreciates the opportunity to provide its views on the U.S. immigration court system run by the Executive Office for Immigration Review (EOIR), which is part of the U.S. Department of Justice (DOJ). The United States is a nation of laws with strong border security and established legal immigration processes. A functioning, efficient U.S. immigration court system is essential for the administration of justice. Yet, as the subcommittee noted in the title of this hearing, the system is truly in "crisis."

Immigration courts are under-resourced and overworked.[1] Facing shortfalls in immigration judges and support staff, as well as limited space, immigration courts lack capacity to keep up with growing caseloads. In recent years, immigration court backlogs have increased dramatically, exceeding 1,000,000 cases in fiscal year (FY) 2019, according to Syracuse University's Transactional Records Access Clearinghouse (TRAC).[2] Immigration judges often face pressure to spend the vast majority of their time on the

[1] American Bar Association, "Executive Summary of the 2019 Update Report: Reforming the Immigration System," March 2019 at pp. UD ES-18 – ES-21, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

[2] TRAC Immigration, "Backlog of Pending Cases in Immigration Courts as of December 2020," https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

bench, leaving minimal time available for necessary administrative work to review cases and filings.[3] While EOIR is taking steps to move to electronic filing,[4] the immigration court system overwhelmingly runs on paper, remaining decades behind the times.

At the same time, the immigration court system has seen additional strains – new case quotas that encourage assembly-line justice, new guidance limiting the ability of immigration judges to manage their dockets, and top-down attorney general's decisions that cut off relief from deserving claimants.

The Forum believes that Congress can and must reform the immigration court system to reduce backlogs, improve due process, and preserve judicial independence. The Forum supports increasing funding to EOIR, including dedicated funding for additional immigration judges and support personnel, improving facilities, and modernizing the case filing system. We also support ensuring that immigration judges have the ability to set aside administrative time to allow themselves the opportunity to review cases and filings. Affording immigration judges the ability to set aside administrative time, as well returning discretion to them to allow them to manage their dockets and use their expertise to rule on cases, supports due process and increased efficiency. Finally, the Forum supports legislation to make the immigration court system independent, separating EOIR from DOJ so that life-altering legal cases can be decided by judges, not politics.

Increasing Resources and Empowering Judges to Reduce the Backlog

The case backlog in the immigration court system is the product of decisions by Congress and the last several administrations, which have ramped up federal immigration enforcement without corresponding increases to the capacity of the federal immigration courts. The shortage of immigration judges and the general under-resourcing of the immigration courts is well-documented.[5]

The enormous and growing backlogs have dramatic impacts on the function and efficiency of the immigration court system. Because of lengthy delays, immigrants with meritorious claims regularly wait years before receiving their day in court to obtain the relief to which they are entitled. And those without legitimate claims are often able to remain in the United States for extended periods before their cases are resolved.

Immigration court case backlogs are fundamentally a resource issue – too many cases for too few judges. After years of underfunding, Congress and the Trump administration – to their credit – have begun to authorize and hire additional immigration judges, an investment that eventually will help reduce backlogs. Adding immigration judges – along

[3] Id. at UD ES-19.

[4] United States Department of Justice – Executive Office for Immigration Review, "EOIR Launches Electronic Filing Pilot Program," July 19, 2018, https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program.

[5] American Immigration Council, "Empty Benches: Underfunding of Immigration Courts Undermines Justice," Fact Sheet, June 17, 2016, https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice.

with needed support staff and facilities space – will reduce stress on overloaded dockets, while affording immigration judges with flexibility to devote more of their calendar to needed administrative time to review cases and filings. At the same time, Congress should provide needed funding to allow EOIR to make its filing system fully electronic, providing needed efficiency gains that further help tackle the growing backlog.

The Forum also supports empowering immigration judges to use their expertise and discretion to decrease backlogs. By restoring power to immigration judges to manage their dockets and close low-priority cases through the use of administrative closure to decrease backlogs, we believe that judges can work to reduce their growing case backlogs. However, DOJ has attempted to limit administrative closure in recent years, leading to the reopening of tens of thousands of otherwise low-priority cases.[6] The Forum favors reversing these policies and empowering immigration judges to use administrative closure and other tools to better manage their dockets. By returning discretion to immigration judges to utilize administrative closure, tens of thousands of immigration cases can be eliminated from EOIR's backlog. We also support examining whether immigration judges should be given additional authority to streamline proceedings through procedural authorities that federal court judges have, such as being able to make rulings on pleadings.

While we support the efforts above to reduce the immigration court backlog, the Forum does not support actions that would undermine due process and judicial independence. Setting case closure goals for immigration judges is appropriate. A quota-driven approach to evaluating the performance of immigration judges, however, could place undue pressure on judges to favor speed over due process. Quotas incentivize summary consideration of cases rather than encouraging a full hearing of claims potentially undermining due process for individuals facing deportation or seeking relief in the immigration courts. Also, such an approach threatens the independence of immigration judges who want to devote adequate time and consideration to complex cases.

Creating an Independent Immigration Court System

Several recent administration policies have limited the authority of immigration judges and created roadblocks to individuals obtaining relief in immigration court.

Over the past three years, a series of attorney general's opinions established new precedents that restricted access to asylum and undercut the level of discretion afforded to immigration judges.[7]

---

[6] *See* Aaron Reichlin-Melnick, American Immigration Council, "Already Facing a Backlog, Sessions Aims to Add 350,000 Cases to Immigration Courts," Jan. 16, 2018, http://immigrationimpact.com/2018/01/16/backlog-sessions-aims-add-cases-immigration-courts/.

[7] *See* Dara Lind, "Jeff Sessions is exerting unprecedented control over immigration courts — by ruling on cases himself," Vox.com, May 21, 2018, https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling.

In August 2019, newly promulgated Trump administration rules[8] made significant changes to EOIR, including giving the director of the EOIR – a political appointee – the power to decide backlogged immigration appeals. The policy also increased the authority of EOIR's Office of Policy, providing it the ability to oversee the development and implementation of regulations. The new policy also transfers certain duties relating to case adjudication from EOIR's General Counsel to the Office of Policy, while placing the Office of Legal Access Programs under the management of Office of Policy. These changes have the effect of centralizing EOIR policy-making authority and implementation to political actors within the Office of Policy.

The Forum has expressed concern that these changes threaten to politicize the adjudication of immigration cases, undercutting immigration judges and undermining the rights of litigants in the immigration court system. Accordingly, the Forum supports Congress creating a fully independent immigration court system that would not be subject to intervention by political actors.[9]

Moving EOIR out from under DOJ oversight would let immigration judges set precedents and manage their caseloads. It would prevent politicized decision-making and promote stability in immigration court policies and decisions. The Forum believes significant benefits would arise from empowering immigration judges in this manner, and urges Congress to take steps to create an independent immigration court system.

Conclusion

With case backlogs at crisis levels and immigration judges facing growing restrictions on their ability to manage their caseloads and set precedents, the National Immigration Forum urges Congress to act. The Forum supports additional resources for the immigration court system – including funding for more judges and support staff as well as for electronic filing. The Forum also supports providing immigration judges with increased administrative time to work on cases and empowering immigration judges generally – providing them the tools to manage their dockets and reduce caseloads in a manner consistent with due process, including utilizing administrative closure.

At the same time, the Forum has opposed recent changes that undermined the independence of the immigration courts. Going forward, the Forum supports efforts to create an independent immigration court system that would help depoliticize the immigration courts and promote judicial discretion. Taking these steps will help alleviate the crisis in our immigration courts, and begin to restore the American public's faith in our immigration system.

---

[8] Richard Gonzales, "DOJ Increases Power of Agency Running Immigration Court System," NPR.org, Aug. 23, 2019, https://www.npr.org/2019/08/23/753912351/doj-increases-power-of-agency-running-immigration-court-system.
[9] National Immigration Forum, "Judges, Not Politics, Should Control Immigration Courts," Aug. 26, 2019, https://immigrationforum.org/article/judges-not-politics-should-control-immigration-courts/.

CONTACT
POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

WRITTEN TESTIMONY RESPECTFULLY SUBMITTED BY THE IMMIGRATION AND NATIONALITY LAW COMMITTEE[1] AND THE TASK FORCE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES[2]

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP

JANUARY 29, 2020
2141 RAYBURN HOUSE OFFICE BUILDING

COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS

The New York City Bar Association (City Bar) is pleased to provide this written testimony urging the House to address the crisis in the U.S. immigration courts. The City Bar, with over 24,000 members, has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice. In furtherance of that mission, we have consistently advocated for access to counsel and for fundamental due process rights in adjudications. The City Bar has expressed its growing concerns over the past three years through reports and op-eds critical of changes to immigration court processes that have undermined due process. We would like to submit these reports for the record of these proceedings.

On April 18, 2018, the City Bar submitted testimony to the U.S. Senate in a hearing similar to today's hearing, titled, *Strengthening & Reforming America's Immigration Court System*.[3] In

[1] The Immigration and Nationality Law Committee is comprised of former and current government employees, immigration law scholars, and immigration attorneys from the private and non-profit sectors. This testimony is based upon committee members' expertise and experience counseling clients and consolidates previous statements made by the City Bar.

[2] The mission of the Task Force for the Independence of Lawyers and Judges is to foster the independence of lawyers and judges in their professional activities in the United States and abroad. The Task Force applies the United Nations Basic Principles on the Roles of Lawyers to increase awareness in the legal community and the public at large about the importance of the independence of lawyers and judges to the maintenance of the rule of law in civil society.

[3] New York City Bar Association *Strengthening & Reforming America's Immigration Court System—Testimony*, Apr. 18, 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/strengthening-and-reforming-americas-immigration-court-system-testimony. All City Bar reports cited herein are attached. (All links cited in this testimony were last checked on January 27, 2020).

that testimony, we raised concerns about judicial performance quotas; decreasing access to counsel; and procedural changes in immigration court that stripped immigration judges of the ability to control their own dockets. Since the date of that hearing, almost two years ago, the state of the immigration courts has only gotten worse as immigration has become an increasingly polarizing political issue.

On April 4, 2018, the City Bar president and Chair of the Immigration and Nationality Law Committee spoke out against judicial performance quotas, publishing a piece on the topic in the New York Law Journal.[4] In the piece the City Bar expressed concern that tying individual judges' performance evaluations to case completion goals creates an incentive for judges to deny meritorious cases or rush them along without giving litigants adequate time to develop the record in their proceedings. The following week, the City Bar released a report decrying the judicial performance quotas, calling them "neither efficient nor just."[5]

Since then, the pressure on immigration judges has only increased. The National Association of Immigration Judges has been a powerful voice against changes to immigration court processes that restrict the independence of judges. Following the association's critiques of new policies restricting their independence, the Department of Justice has sought to decertify the union. Since judges are not permitted to speak about court-related matters in their own capacity, decertifying the union would essentially silence the one organization that can represent the perspectives of immigration judges concerning changes to court processes. On September 30, 2019, the City Bar President and Chair of the Immigration and Nationality Law Committee wrote an op-ed on the issue in the New York Law Journal, pointing out the stakes for immigration court litigants in the decertification case if the critical voices of judges are not represented.[6]

In October 2019, the Department of Justice issued an interim final regulation that changed the structure of the Executive Office for Immigration Review (EOIR). The City Bar submitted comments opposing this rule on October 23, 2019,[7] raising concerns that, for the first time, EOIR was establishing an Office of Policy within the adjudications branch, seemingly politicizing EOIR whose primary function should be case-by-case adjudications in removal proceedings. Additionally, the City Bar expressed concern that EOIR was eliminating the Office of Legal

---

[4] John S. Kiernan and Victoria Neilson, Case Completion Quotas for Immigration Judges Will Erode Fundamental Rights, Apr. 4, 2018, New York Law Journal, https://www.law.com/newyorklawjournal/2018/04/04/case-completion-quotas-for-immigration-judges-will-erode-fundamental-rights/?slreturn=20200024133636.

[5] New York City Bar Association, *Quotas in Immigration Courts Would Be Neither Efficient Nor Just*, Apr. 10, 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/quotas-in-immigration-courts-would-be-neither-efficient-nor-just

[6] Roger Juan Maldonado and Victoria Neilson, Department of Justice Seeks to Silence Immigration Judges' Union, Sep. 30, 2019, New York Law Journal, https://www.law.com/newyorklawjournal/2019/09/30/department-of-justice-seeks-to-silence-immigration-judges-union/

[7] New York City Bar Association, *Opposition to Interim Rule and Subsequent Organizational Changes to EOIR*, Oct. 23, 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-interim-rule-and-subsequent-organizational-changes-to-eoir-letter.

Access Programs and moving its functions, including expanding access to counsel for noncitizens, within the new Office of Policy.

The City Bar believes that every noncitizen deserves due process and a fair immigration court hearing. The backlog of immigration court cases now exceeds one million,[8] meaning that many noncitizens have to wait years for a hearing, during which time they are often living in uncertainty and separated from family members. The answer to this crisis is not to impose quotas or to take measures that will curtail the voices of judges who express concern about due process. Instead, the immigration court system should be truly independent, and not part of the Department of Justice, where it can be vulnerable to politicization as part of the executive branch.

For many noncitizens, the decision the immigration judge makes will determine whether or not the person is sent back to a country where they fear harm or whether they are separated from family members. Immigration courts adjudicate decisions of extraordinary significance. The City Bar urges the House to continue to monitor the crisis in the courts, to restore sensible docket management tools to judges, to remove performance quotas, and, ultimately, to pass legislation which would make the immigration courts truly independent.

Thank you for your consideration.

Respectfully submitted,

Immigration and Nationality Law Committee
Victoria Neilson, Chair

Task Force on the Independence of Lawyers and Judges
Christopher Pioch, Co-Chair
Jessenia Vazcones-Yagual, Co-Chair

[8] Priscilla Alvarez, Immigration Court Backlog Exceeds 1 Million Cases, Date Group Says, CNN, Sep. 18, 2019, https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html.

CONTACT
POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

WRITTEN TESTIMONY RESPECTFULLY SUBMITTED BY
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE[1] AND
THE TASK FORCE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES[2]

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION
APRIL 18, 2018
DIRKSEN SENATE OFFICE BUILDING 226
PRESIDING: CHAIRMAN CORNYN

STRENGTHENING AND REFORMING AMERICA'S IMMIGRATION COURT SYSTEM

The New York City Bar Association (City Bar) is pleased to provide this written testimony urging the Senate to continue its oversight of changes being made to the immigration court system and to ensure that non-citizens receive due process in these proceedings. The City Bar is deeply concerned with recent changes that the Department of Justice (DOJ) has announced in immigration court procedures that will likely have the effect of speeding up the deportation process without providing adequate assurances that immigrants will have a fair day in court. These concerns are exacerbated by the DOJ's recent move to curtail know your rights presentations and screenings in detention facilities and at non-detained immigration courts.

The City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice. With over 24,000 members, the City Bar is an important voice in the legal profession in New York City and beyond. The City Bar has consistently advocated for access to counsel and for fundamental due process rights in adjudications. We acknowledge that the immigration court backlogs[3] should be addressed by DOJ, however, as discussed at the end of our testimony, there are common-sense

[1] The Immigration and Nationality Law Committee is comprised of former and current government employees, immigration law scholars, and immigration attorneys from the private and non-profit sectors. This testimony is based upon committee members' expertise and experience counseling clients and consolidates previous statements made by the City Bar.

[2] The mission of the Task Force for the Independence of Lawyers and Judges is to foster the independence of lawyers and judges in their professional activities in the United States and abroad. The Task Force applies the United Nations Basic Principles on the Roles of Lawyers to increase awareness in the legal community and the public at large about the importance of the independence of lawyers and judges to the maintenance of the rule of law in civil society.

[3] Immigration Court backlogs currently number more than 640,000 cases. Transactional Records Access Clearinghouse (TRAC) of Syracuse University, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/. (All websites last visited April 17, 2018.)

means to decrease the backlogs which will not undermine due process and fairness in immigration court.

Judicial Quotas

The City Bar has recently updated a report condemning any correlation between case completion quotas and performance reviews for immigration court judges.[4] In that report the City Bar made several key points which we will reiterate here. First, the quotas are strongly opposed by immigration court judges themselves.[5] Immigration judges, like all independent adjudicators, should be able to manage their courtrooms and their dockets according to their needs and independent judgment. Tying the "efficiency" of a judge's decision making to his or her raises and career trajectory, at a minimum, gives the appearance of a potential conflict of interest.

Second, the quotas themselves set almost impossibly high numbers. The new policy, set to go into effect on October 1, 2018, will require judges to complete 700 cases per year. This quota translates into each judge hearing testimony and rendering decisions in almost three cases per day, five days per week, 52 weeks per year. Furthermore, the new policy will require judges to resolve 85% of cases within ten days of hearing testimony, and requires judges to complete 95% of individual hearings on the day that the hearing begins. Courts have described immigration law as "labyrinthine" in its complexity.[6] Setting strict time limits on completing nearly all cases, restricting the ability of respondents or DHS to call necessary experts and develop the record, and discouraging continuances,[7] in the name of "efficiency" is simply incompatible with due process. It is apparent that one of the only ways judges could meet these numbers would be to encourage respondents to accept removal orders without applying for relief. It is difficult to imagine how an immigration judge could adequately explain the immigration process and elicit testimony in cases where respondents do not have counsel.

Third, if non-citizens are unable to obtain justice in immigration court, they will likely appeal their cases to the Board of Immigration Appeals and to the circuit courts. When Attorney General John Ashcroft cut the number of BIA members and short-circuited due process at the appellate body by allowing single members to rubberstamp removal orders, appeals to the federal

---

[4] Immigration and Nationality Law Committee, "Quotas in Immigration Courts Would Be Neither Efficient nor Just," (revised and reissued April 2018)

http://s3.amazonaws.com/documents.nycbar.org/files/2017296-QuotasImmigrationCourt_IMMNAT_12.7.17.pdf

[5] Maria Sacchetti, *Immigration judges say proposed quotas from Justice Dept. threaten independence*, The Washington Post, Oct. 12, 2017, https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aee1-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.3d2d4f665dd1; President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, Oct. 8, 2017, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/ (outlining need for "performance metrics").

[6] *Lok v. Immigration & Naturalization Serv*., 548 F.2d 37, 38 (2d Cir. 1977).

[7] EOIR Operating Policies and Procedures Memorandum 17-01: Continuances, dated July 31, 2017, https://www.justice.gov/eoir/file/oppm17-01/download

circuit courts skyrocketed.[8] It is inevitable that if non-citizens are not given full hearings in their cases, or if immigration judges are forced to rush decisions without fully considering legal arguments, the non-citizens will pursue appeals. These appeals often last many years, so, rather than lead to the expeditious resolution of cases, attacks on due process at the trial court level will lead to further delays in case resolution.

Fourth, and perhaps most importantly, immigration courts adjudicate decisions of extraordinary significance. The U.S. Supreme Court has recognized the importance of deportation proceedings to those defending them, calling the "severity of deportation—'the equivalent of banishment or exile.'"[9] As a matter of justice and fairness, anyone facing such an important adjudication should have his or her case heard by a judge whose sole interest in the case is determining the correct result under the law, and not by a judge who is watching the clock. The stakes in these proceedings are simply too high for non-citizens to have their hearings rushed artificially without regard to their individual dynamics.

Cancellation of Legal Orientation Program

At the same time that judges are being called upon to complete a larger number of cases, in less time, and with fewer continuances, the DOJ has announced that it is cancelling a successful program that has assisted unrepresented immigrants in understanding immigration proceedings before they appear before an immigration judge. The Legal Orientation Program (LOP) has provided funding for non-profit attorneys to explain the immigration court process to detained immigrants in detention facilities. The vast majority of these detained immigrants have no meaningful access to counsel as there are not enough pro bono attorneys to provide free representation and the detainees often cannot afford private counsel. Even for those who could pay, many detention facilities are simply too remote for private counsel to regularly provide representation.

Through the LOP program, immigrants are given a basic orientation to immigration court proceedings, and potentially available relief. In some settings, immigrants also receive one-on-one consultations so they can better understand whether there is a form of relief for which they may be eligible or whether it would be more beneficial to quickly accept a removal order to gain release from detention. Additionally, LOP funding has allowed non-profit providers to screen immigrants at non-detained courthouses, again helping to orient immigrants and refer them to counsel.

The DOJ itself has lauded the positive effects of this program, stating on its website:

> Experience has shown that the LOP has had positive effects on the immigration court process: detained individuals make wiser, more informed, decisions and are more likely to obtain representation; non-profit organizations reach a wider audience of people with

[8] *See* John R.B. Palmer et al., Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. IMMIGR. L.J. 1 (2005) 94.

[9] *Padilla v. Kentucky*, 559 U.S. 356, 373, (2010).

> minimal resources; and, cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention.[10]

Likewise immigration judges have supported the program because the better informed the immigrant respondents are before appearing in court, the less time the immigration judge must spend explaining basic concepts, freeing up valuable judicial bench time to focus on actual adjudications.[11] Given the DOJ's renewed focus on reducing immigration court backlogs, removing access to counsel for tens of thousands of immigrants will only increase the time each judge need to spend on each case.

More importantly, lack of access to counsel will undoubtedly result in less due process in these proceedings. In addition to the legal complexity of immigration law, respondents in these proceedings face unique challenges. Non-citizens who must navigate the immigration court system: a) are primarily not native English speakers; b) may come from countries with vastly different legal systems (or no functioning legal system at all); c) may have been severely traumatized before leaving their country or on their journey to the United States; and d) may be in remote locations with no access to counsel. It is clearly unreasonable to expect anyone to present a coherent, well-argued case under such circumstances.

Recent and Anticipated Changes to Immigration Law

The attorney general oversees the immigration courts and the Board of Immigration Appeals (BIA). In this capacity, he has the authority to review and interpret immigration law in his own precedential decisions. While in past administrations, attorneys general have used this authority sparingly, Attorney General Jeff Sessions has referred himself several cases, which taken together, paint a troubling picture of further restrictions on due process in the immigration courts.

The Attorney General will soon issue precedential decisions in two cases that will have an immediate effect on immigration court procedure and on the ability of immigration judges to exercise judicial independence. In January 2018, Attorney General Sessions referred himself *Matter of Castro-Tum*,[12] a case in which he will determine whether immigration judges have the authority to exercise discretion over their own dockets and administratively close cases. If the Attorney General issues a precedential decision stripping immigration judges of this authority, their ability to manage their dockets and prioritize cases will be eviscerated. Judges will be forced to issue decisions in cases where removal would clearly be an unjust result because they would no longer have the authority to mark a case off-calendar to wait for a change in the respondent's personal circumstances (such as the availability of a visa) or in the interest of justice, such as to

---

[10] DOJ, Legal Orientation Program, (Updated November 16, 2016) https://www.justice.gov/eoir/legal-orientation-program.

[11] Immigration judges union spokesperson, Dana Marks explained, "When someone has had a legal orientation program, they're more familiar with what their possibilities are, and we generally can ask a few targeted questions and narrow issues much more effectively." Kate Morrisey, "Legal orientation for detained immigrants will lose federal funding in May," San Diego Union Tribute (Apr. 11, 2018) http://www.sandiegouniontribune.com/news/immigration/sd-me-legal-orientation-20180411-story.html.

[12] *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018).

prevent a U.S. citizen child from entering the foster care system if his or her parent would be removed.

Compounding the City Bar's concerns with the Attorney General's restriction of judicial independence is another case he referred to himself last month, *Matter of L-A-B-R-*.[13] In this case, again, the Attorney General will issue a decision which will dictate how immigration judges manage their dockets. In *L-A-B-R-*, the Attorney General asks under what circumstances judges have the authority to grant continuances in immigration court to await "adjudications of collateral matters from other authorities."[14] Of course, when the Department of Homeland Security was established in 2002 - bifurcating immigration functions which all used to fall within the Department of Justice - certain adjudications were delegated to the sole jurisdiction of a DHS sub-agency, the United States Citizenship and Immigration Services (USCIS). Thus, for example, USCIS has sole jurisdiction to adjudicate "petitions for alien relatives," (the first part of an application for lawful permanent residence); petitions for special immigrants (including those seeking special immigrant juvenile status and self-petitioners under the Violence against Women Act); applications for cooperating crime victims (U visas); and applications for individuals who have been trafficked (T visas.) If the Attorney General issues a precedent decision restricting an immigration judge's authority to grant continuances, the judge will cease to be an independent adjudicator and will instead become part of the prosecution, being required to order removal in spite of the fact that the respondent has an avenue to permanent status in the United States.

In addition to decisions on these procedures which the Attorney General will soon issue, he has also just withdrawn a precedential decision which required immigration judges to hold evidentiary hearings in all cases where a respondent is seeking asylum.[15] Although there is earlier precedent which should still require judges to take testimony in these cases,[16] City Bar members have already heard of instances in other jurisdictions where immigration judges have issued a "Notice of Intent to Issue Decision Without an Evidentiary Hearing."[17] In an immigration system in which large numbers of respondents appear without representation,[18] it is essential that immigration judges allow non-citizens to apply for whatever relief may be available and that the immigration judge ensure that the record is fully developed in each case.

---

[13] *Matter of L-A-B-R-*, 27 I & N Dec. 245 (A.G. 2018).

[14] *Id.*

[15] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

[16] "In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself." *Matter of Fefe*, 20 I & N Dec. 116, 118 (BIA. 1989).

[17] "Notice of Intent to Issue Decision Without an Evidentiary Hearing," (Mar. 27, 2018), on file with Immigration and Nationality Law Committee.

[18] For immigrants who have never been detained, representation rates in 2017 were at approximately 70%. For those who were or had been detained, the rates dropped to approximately 30%. TRAC Immigration, Who Is Represented in Immigration Court? http://trac.syr.edu/immigration/reports/485/

City Bar Recommendations for Improving Immigration Court Processes

The City Bar agrees that the federal government has an inherent interest in ensuring that the immigration courts operate efficiently and supports efforts to reduce backlogs. However, due process for those in proceedings must continue to be the primary concern of the Department of Justice, and "efficiency" can never be a substitute for fundamental rights.

Rather than curtail access to counsel, reduce non-citizens' abilities to seek relief, and handcuff the ability of immigration judges to give cases the time and consideration they deserve, the City Bar makes the following suggestions to improve the immigration court system:

- Restore the LOP program. The LOP program is inexpensive and has been considered a success by the DOJ as well as advocates. Funding for the program should be restored and expanded.

- Rescind the memorandum that would tie judicial performance reviews to case completion quotas. Judges must be able to exercise independence and should never feel that they must decide a case without fully developing the record or risk losing their job or potential pay raises.

- Restore prosecutorial discretion to DHS attorneys and ensure that immigration judges continue to have the authority to administratively close cases and grant continuances as required in the interest of justice.

- Hire more immigration judges, ensuring that new hires continue to have the necessary immigration law experience and judicial temperament.

- Hire judicial law clerks for each immigration judge. Unlike other federal judicial positions, immigration judges are not each assigned a law clerk. Thus, judges must use valuable time reviewing case records, drafting decisions, and performing legal research that could more efficiently be delegated to a law clerk. Having high quality, individual law clerks assigned to each judge would free up more time for the judges to spend hearing cases.

- Pass legislation that would establish immigration courts as independent Article 1 courts. The stakes in immigration court proceedings could not be higher for respondents. At the same time, the immigration judges must apply increasingly complex law to facts, which may take many hours of testimony to fully develop. This important judicial process should be fully independent of the political whims of the administration which holds political power.

- Establish a right to counsel for non-citizens facing deportation. Current law allows non-citizens the right to counsel at no government expense, however, too many non-citizens are forced to face experienced prosecutors on their own with no access to counsel and little understanding of the American legal system.

***

The City Bar thanks the Senate for holding hearings on this important subject and hopes that the Senate will continue to provide oversight on these issues that are central not only to ensuring that non-citizens receive due process, but to ensuring that our federal adjudication system remains fair and impartial.

Thank you for your consideration.

April 17, 2018

Immigration and Nationality Law Committee
Victoria Neilson, Chair

Task Force for the Independence of Lawyers and Judges
William August Wilson, III, Chair

NEW YORK CITY BAR

REPORT BY THE IMMIGRATION AND NATIONALITY LAW COMMITTEE

QUOTAS IN IMMIGRATION COURTS WOULD BE NEITHER EFFICIENT NOR JUST

On April 2, 2018, James McHenry, the director of the immigration courts, issued a memo to all immigration judges that accompanied an updated policy that ties the performance evaluation of immigration judges to case completion quotas. This plan had been previously strongly opposed by immigration judges.[1] In December 2017, following news of this potential shift, the New York City Bar Association (City Bar) issued a report firmly opposing the proposed shift because of its potential to erode due process in immigration court. The American Bar Association President, Hilarie Bass, likewise issued a statement warning that such quotas threaten "to subvert justice."[2] Not only are such quotas a threat to judicial independence in an area of law where stakes are extremely high, quotas will likely further exacerbate the backlog they are meant to remedy.

The implication that the immigration court backlog of more than 640,000 cases – more than 85,000 in New York alone – is somehow the result of judicial inefficiency is belied by the reality of an immigration judge's work.[3] Immigration judges contend with caseloads that sometimes exceed 2,000 respondents each. In New York, attorneys and immigrants regularly cram into courtrooms and overflow into hallways as judges work diligently to cope with an ever-increasing workload. Judges should not be required to further shave time off of each case, rather judges need more resources, such as dedicated law clerks.

The new policy, set to go into effect on October 1, 2018, will require judges to complete 700 cases per year. This quota translates into each judge hearing testimony and rendering decisions in almost three cases per day, five days per week, 52 weeks per year. Furthermore, the

---

[1] Maria Sacchetti, *Immigration judges say proposed quotas from Justice Dept. threaten independence*, The Washington Post, Oct. 12, 2017, https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aee1-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.3d2d4f665dd1; President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, Oct. 8, 2017, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/ (outlining need for "performance metrics")(all sites last visited April 5, 2018).

[2] Statement of ABA President Hilarie Bass Re: Mandatory case completion quotas for immigration judges, American Bar Association, Oct. 16, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement_of_abapre1.html.

[3] Transactional Records Access Clearinghouse (TRAC) of Syracuse University, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (accessed Nov. 15, 2017, 9:37 PM).

new policy will require judges to resolve 85% of cases within ten days of hearing the decision, and requires judges to complete 95% of individual hearings on the day that the hearing begins.

On July 31, 2017, Chief Immigration Judge MaryBeth Keller issued a memo on the circumstances under which immigration judges should grant continuances in cases.[4] While the memo allowed for judges to maintain discretion in granting continuances, it also emphasized the need for greater "efficiency," discouraging multiple continuances particularly for attorney preparation. However, more complicated cases may require substantial evidence and legal arguments to determine whether an immigrant even belongs in court proceedings prior to reaching the merits of any applications.[5] In many cases, attorneys have to invest substantial time before the case can even be fully assessed and a final hearing can be scheduled. For example, if the Department of Homeland Security wants to remove someone from the United States for a misdemeanor committed thirty years ago, the attorneys may have to spend substantial time waiting for records keepers to produce decades-old court transcripts to be sure exactly what happened so long ago.

Immigration cases vary dramatically in complexity. On rare occasions, a case may be resolved in a single, short hearing. The complexity of immigration law often requires judges to proceed with caution and continuances. It is a field rife with unsettled law, and parties are slowed down by language barriers; overseas witnesses and evidence; applications pending before other government agencies; a mix of local, state, federal, and foreign law; respondents struggling with symptoms of trauma; and a shortage of affordable legal counsel. Rushing cases will often mean depriving parties of due process.

To make matters worse, these quotas will be unlikely to save any time. Cases sloppily rushed through courts will result in a dramatic increase in motions to reopen and appeals, drawing cases out longer than if they had simply been diligently resolved in the first instance. The immigration court backlog has been growing for years as a symptom of an immigration system that all sides agree is broken. Forcing cases through this broken system faster will only compound existing problems and endanger the lives of people with genuine claims.

Rather than impose arbitrary quotas on judges, hampering their ability to exercise control and independent judgment in their courtrooms, the City Bar recommends that Congress establish immigration court as a truly independent adjudicative Article I court. As long as the court remains within the executive branch, it will never be truly independent of political pressures exerted by the executive. The City Bar further urges the federal government to invest resources in providing counsel to vulnerable immigrants to clarify and narrow legal issues in each case. There are many steps the director of the immigration court could take to improve efficiency

[4] "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017, https://www.justice.gov/eoir/file/oppm17-01/download.

[5] Not only must judges make threshold determinations about whether non-citizens may be removable, in many instances, U.S. citizens are wrongly placed in removal proceedings. *See* Lise Olsen, *Hundreds of American citizens end up in deportation proceedings each year, immigration data shows,* Houston Chronicle, July 30, 2017, http://www.houstonchronicle.com/news/houston-texas/houston/article/Hundreds-of-citizens-end-up-in-deportation-11719324.php.

without sacrificing due process, such as improving technology and requiring opposing counsel to engage in pre-trial conferences before the cases are scheduled for merits hearings.[6]

Quotas misconstrue the role of the judiciary. The mission of the Executive Office for Immigration Review "is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."[7] These principles call for not merely speed but also accuracy. For these reasons, the City Bar strongly urges the administration to rescind its memo ordering numerical quotas for immigration judges. Quotas threaten due process to the people in removal proceedings and judicial independence.

Immigration and Nationality Law Committee
Victoria Neilson, Chair

Updated and Reissued April 2018

[6] *See* "Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court," National Immigrant Justice Center, Oct. 2014, https://immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf.

[7] U.S. Dep't of Justice, Executive Office for Immigration Review, EOIR Mission, https://www.justice.gov/eoir.

COMMITTEE ON
IMMIGRATION & NATIONALITY LAW

VICTORIA F. NEILSON
CHAIR
42 W. 44TH STREET
NEW YORK, NY 10036
Phone: (917) 499-8869
Vickie.neilson@gmail.com

October 23, 2019

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Submitted via www.regulations.gov

Re: RIN No. 1125-AA85 or EOIR Docket No. 18-0502, Comments in Response to the Interim Rule Reorganizing the Executive Office for Immigration Review

Dear Assistant Director Alder Reid:

On behalf of the New York City Bar Association ("City Bar"), we are writing in response to the Justice Department's Interim Rule ("Interim Rule") that became effective on August 26, 2019 and changes the organization of the Executive Office for Immigration Review ("EOIR").

The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The City Bar's Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff members of legal services organizations providing immigration assistance, private immigration attorneys, staff members of local prosecutor's offices, staff members of immigrant advocacy organizations, academics, and law students. Many of our Committee members work for DOJ-recognized organizations that employ DOJ-accredited representatives.

The City Bar opposes the Interim Rule because it improperly politicizes EOIR's adjudicative function and appears to marginalize the crucial role of the Office of Legal Access Programs ("OLAP"). Specifically, we oppose the establishment of the Office of Policy as an official component of EOIR, the transfer of OLAP to this Office of Policy, and the delegation of authority from the Attorney General to the Director of EOIR, allowing him or her to adjudicate certain Board of Immigration Appeals ("BIA") cases. The City Bar has expressed concern previously about the potential for politicizing the adjudicative process in immigration court and

has called for the establishment of an independent Article 1 court.[1] Recognizing that such a change would require legislative action, we respectfully request that the Interim Rule be rescinded.

I. WE OPPOSE THE FORMALIZATION OF THE OFFICE OF POLICY UNDER EOIR.

The City Bar opposes formalizing the Office of Policy as part of EOIR and making it permanent via regulation. As an initial matter, having an Office of Policy within EOIR is highly problematic because the mission of EOIR is to adjudicate individual cases, not to make policy. Our concern is compounded by the fact that the Trump administration created the Office of Policy in 2017 and, prior to and following its creation, has repeatedly expressed animosity towards immigrants in public statements.[2] As an administrative court, EOIR should be dedicated to the fair application of the law on an individual, case-by-case basis. Placing the Office of Policy on an equal level with this essential adjudicative function politicizes EOIR and threatens judicial independence within the immigration system. An Office of Policy has no place within EOIR.

II. WE OPPOSE MOVING OLAP UNDER THE OFFICE OF POLICY.

OLAP serves the important function of increasing access to legal counsel in immigration proceedings for low-income immigrants. This is a critical role because deportation devastates individual immigrants, families and communities, yet there is no right to government-appointed counsel in immigration court. When noncitizens are forced to represent themselves in removal proceedings, the chance of a favorable outcome declines dramatically.[3] Unrepresented noncitizens in removal proceedings must oppose highly trained attorneys arguing for the government. They lack guidance about how to present their case and are not connected with tools to manage trauma that may have led to their decision to enter the United States. Detained noncitizens in removal proceedings face even worse odds of success without representation and, for many, an OLAP coordinated know your rights presentation is their only contact with a legal professional.[4] OLAP also benefits EOIR and the Department of Homeland Security because noncitizens who know their rights and can access quality representation contribute to efficiency of adjudications, saving immigration judges valuable time on the bench during which they would otherwise be explaining basic processes.

---

[1] New York City Bar Association, Written Testimony Respectfully Submitted By The Immigration And Nationality Law Committee And The Task Force For The Independence Of Lawyers And Judges to the Senate Judiciary Committee Subcommittee On Border Security And Immigration, Apr. 18, 2018, https://s3.amazonaws.com/documents.nycbar.org/files/2017367-Senate_Testimony_Imm_Court_Quotas.pdf. (All links in this report were last visited on October 23, 2019.)

[2] *See, e.g.*, *Here's Donald Trump's Presidential Announcement Speech*, Time (June 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/; Jefferson B. Sessions III, Att'y General, *Attorney General Sessions Delivers Remarks on Sanctuary Jurisdictions* (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions; *'Angel Families,' Trump Aides Rally Against Illegal Immigrant Crime*, Fox News (Sept. 7, 2018) https://www.foxnews.com/politics/angel-families-trump-aides-rally-against-illegal-immigrant-crime.

[3] Steering Comm. Of the N.Y. Immigrant Representation Study Report, *Accessing Justice the Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo Law Review 357, 363-64 (2011).

[4] *See id.*

We are concerned that the shift of OLAP under the Office of Policy signals an erosion of OLAP's commitment to "improve the efficiency of immigration court hearings by increasing access to information and raising the level of representation for individuals appearing before the immigration courts and BIA." The Trump administration – which created the Office of Policy – has openly attacked immigration lawyers and indicated an intention to end know your rights presentations for detained noncitizens.[5] In light of these actions which conflict with OLAP's mission, the Office of Policy is a concerning location to house OLAP. OLAP should be returned to a separate office within EOIR.

III. WE WOULD OPPOSE ANY CHANGES THAT THREATEN THE ABILITY OF THE RECOGNITION AND ACCREDITATION PROGRAM TO HELP ADDRESS THE REPRESENTATION CRISIS.

The Department of Justice's Recognition and Accreditation (R&A) Program, a key component of OLAP, "aims to increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice."[6] There are currently 1,077,155 pending removal cases nationwide.[7] There are not enough immigration attorneys to address the need for representation in these proceedings. Accredited representatives help to provide competent representation to those who would otherwise not be able to afford representation, thereby protecting the due process rights of noncitizens as well as increasing the efficiency of the immigration court system.

Many legal services organizations that provide immigration assistance employ partially and fully DOJ- accredited representatives and depend upon these legal professionals' help to meet the extremely high demand for immigration legal services. Immigration law is notoriously complex and difficult to navigate. Indeed, the forms required by United States Citizenship and Immigration Services ("USCIS") to apply for affirmative immigration benefits grow ever longer as more detailed information is required and inquiries into the immigration history of applicants become more searching. Likewise, defending noncitizens from removal grows ever more challenging as new policies and legal decisions attempting to limit availability of asylum are issued.[8] Noncitizens should not have to face such a high-stakes, complicated system without the assistance of a legal representative. If the R&A Program is altered or deprioritized because of its new location under the Office of Policy, many low-income immigrant families will have to face

---

[5] *See* Justice News, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review. https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review; Vanessa Romo, *Justice Department Will Pause A Legal Advice Program For Detained Immigrants*, NPR (Apr. 12, 2018, 6:33 PM), https://www.npr.org/sections/thetwo-way/2018/04/12/601642556/justice-department-will-pause-a-legal-advice-program-for-detained-immigrants.

[6] *Recognition & Accreditation (R&A) Program*, DEP'T OF JUSTICE, https://www.justice.gov/eoir/recognition-and-accreditation-program (last accessed October 23, 2019).

[7] Transaction Records Access Clearinghouse, Syracuse University, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

[8] *See, e.g.*, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. 208, 10003, 1208) (barring migrants at the southern border of the United States from eligibility for asylum if the migrants passed through a third country en route to the United States without applying for asylum in that third country and being denied).

these processes alone and would therefore have their chance of a favorable outcome severely diminished.

IV. WE OPPOSE THE DIRECTOR OF EOIR BEING GRANTED THE POWER TO ISSUE PRECEDENTIAL DECISIONS.

We believe that vesting the EOIR Director with the power to issue precedential decisions threatens the independence of immigration judges and BIA members. BIA members are career government employees with extensive knowledge of and experience in immigration law. Currently, pursuant to regulation, three BIA members must adjudicate a case in order to issue a precedential decision. This process places value on careful thought and deliberation and allows for multiple perspectives to inform precedential decisions. It is entirely appropriate because precedential decisions have tremendous impact – they are binding on every immigration judge and Department of Homeland Security officer throughout the country.

We have several grave concerns about the Interim Rule which instead values swift adjudication over careful deliberation and would enable the EOIR Director, acting alone, to assign a case to him or herself and issue a precedential decision within 14 days if the BIA members have not reached a final decision in 90 days for detained cases or 180 days for non-detained cases. First, a single, unconfirmed political appointee should not hold this much power in an adjudicative process that is intended to be fair and impartial. Indeed, the National Association of Immigration Judges has publicly stated its strong opposition to the rule, specifically focusing on the problematic combination of adjudication and policy-making within the EOIR Director role.[9] A panel of three BIA members should continue to be required for precedential decisions. Second, this rule will put pressure on BIA members to complete cases quickly even though immigration cases before the BIA are extremely complex and their impact on noncitizens' lives is profound. BIA members need the ability to fully analyze the complex issues that each case presents without being cabined by one-size-fits-all time limits. Third, this prioritization of swift adjudication over careful consideration will also impact the independence and autonomy of immigration judges. Indeed, immigration judges already face quotas that impinge on their ability to fully and fairly adjudicate cases and this rule will exacerbate those pressures.[10] The Interim Rule should be rescinded and precedential decisions should be made by a panel of three BIA members.

---

[9] Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ), Statement by Immigration Judges Union on Major Change Announced to Immigration Courts ("By collapsing the policymaking role with the adjudication role into a single individual, the Director of EOIR, an unconfirmed political appointee, the Immigration Court system has effectively been dismantled.") https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Speaks_on_Major_Change_Announced_to_the_Immigration_Court_System.pdf.

[10] Written testimony of Ashley Tabaddor, President of NAIJ, before the Senate Subcommittee on Border Security and Immigration, May 8, 2019, *At the Breaking Point: The Humanitarian and Security Crisis at our Southern Border* (stating that noncitizens "deserve to stand before an independent court and an impartial judge who is not placed in a conflict of interest position of honoring her oath of office or risking her source of livelihood") https://www.naij-usa.org/images/uploads/publications/NAIJ_Written_Testimony_Before_Senate_Subcommittee%2C_May_2019.pdf

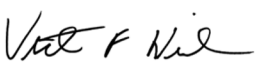
V. EOIR'S REORGANIZATION THROUGH AN INTERIM RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

Where no urgent need exists to implement regulations quickly, the Administrative Procedure Act requires regulations to go through a Notice of Public Rule-Making ("NPRM") process, which allows the public to comment, and requires the agency to respond substantively to the comments. This process should have been followed with respect to the Interim Rule. EOIR asserts that these regulations do not need to pass through the usual notice and comment processes because they do not affect the general public. We disagree. As set forth above, these changes will have a profound and far-reaching impact on organizations providing immigration legal services and on the lives of immigrant families and communities. There is no justification for accelerating the implementation of this regulation and the public should have been heard prior to EOIR making these significant changes.

VI. CONCLUSION

For the above stated reasons, the City Bar opposes the Interim Rule because it weakens the independence of the immigration courts and the BIA and marginalizes access to counsel for low-income immigrants. Thank you for the opportunity to submit these comments. We appreciate your consideration.

Respectfully submitted,



Victoria Neilson
Chair, Immigration and Nationality Law Committee

The New York Legal Assistance Group (NYLAG) respectfully submits this testimony for the Subcommittee on Immigration and Citizenship's consideration at the January 29, 2020 hearing, "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.

NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address the urgent legal needs of our clients with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG provides free legal services to low-income New Yorkers in a number of areas of civil law, including immigration law. NYLAG's Immigrant Protection Unit provides free legal services -- affecting over 30,000 immigrants in 2018 alone -- specifically to low-income immigrants who are defending against removal in the immigration courts.

As advocates before the Executive Office for Immigration Review ("EOIR"), NYLAG attorneys have noticed alarming trends towards the erosion of the independence of immigration judges in making even the most routine decisions, resulting in widespread due process violations for those in removal proceedings. Indeed, immigration judges have openly stated during hearings in which NYLAG attorneys have appeared for immigrant respondents that they no longer have the authority to make even the most basic docket management decisions.

For example, immigration judges have stated, and EOIR has issued policy documents confirming, that certain "family units" in removal proceedings must have their cases adjudicated within one year of filing of the Notice to Appear ("NTA"), with sets forth the charges against the immigrant in removal proceedings.[1] This is the case regardless of whether the Department of Homeland Security ("DHS") timely filed the NTA with EOIR. This is also the case regardless of whether the immigrant facing removal has found an attorney who needs additional time to prepare the case, or expects to obtain evidence to support the case but will not receive that evidence until after the one year mark. This policy, mandated by the Executive branch, has had deleterious effects on immigrants, immigration judges, and legal service providers like NYLAG. First, this policy fundamentally restricts the ability of immigration judges to make decisions about the management of the cases on their own docket, with the effect of making it more difficult for immigration judges to provide a fair hearing to the respondents defending before them. Second, this policy infringes upon the basic due process rights of immigrants in removal, making it often virtually impossible to obtain counsel and gather the evidence necessary to win a case in a timely manner. Finally, this policy makes it harder for free legal services providers like NYLAG to represent cases in this posture, further compounding the due process violations faced by families on the accelerated docket.

By way of example, NYLAG's clients, the "Ramirez" family were placed on the accelerated family unit docket. NYLAG accepted their case approximately two months before their trial, which had been scheduled less than six months after their prior master calendar hearing. NYLAG moved to continue on the grounds that we had recently been retained and needed additional time to gather evidence and develop arguments, particularly in this case where two members of the family had factually and legally distinct asylum claims. Despite the rationale

[1] Executive Office for Immigration Review, "Case Priorities and Immigration Court Performance Measures," Jan. 17, 2018; Executive Office for Immigration Review, "Tracking and Expedition of 'Family Unit' Cases," Nov. 16, 2018.

provided, the immigration judge did not feel she had the authority to continue the case. **[What was the upshot? What happened to the clients in this case? We did our best but did not have the time to gather evidence from abroad that might have ultimately helped support their burden on the case?]**

Immigration judges have also stated, and EOIR has issued precedential case law confirming, that they no longer have the ability to make routine docket management decisions that can be made by independent judges in other courts throughout the country and across federal, state and administrative systems. For example, immigration judges can no longer terminate a case in the interest of justice. In the past, immigration judges were able to decide to terminate a case so as to allow an immigrant respondent to pursue collateral relief from the United States Citizenship and Immigration Services ("USCIS"), or to avoid grave injustices, for example the removal of an infant or incapacitated immigrant, or the removal of a terminally ill immigrant. They are now prohibited from doing so.

Moreover, beyond simply lacking the authority to terminate cases in the interest of justice, immigration judges have now also been prohibited by EOIR from "administratively closing" cases, which is the EOIR term of art for taking a case off a judge's docket. Even where there is no reason to proceed on a case for an unpredictable amount of time, for example because the immigrant respondent is awaiting a decision from USCIS on a pending application, immigration judges are required to continue the case to another date, thereby wasting their own time in conducting another hearing for the sole purpose of scheduling a new hearing, wasting the resources of legal services providers such as NYLAG, and causing increasingly longer delays for hearings.

NYLAG's client "Alex" typifies this problem. With NYLAG's assistance, Alex filed a petition with USCIS as a Special Immigrant Juvenile based on domestic abuse he suffered in his home country at the hands of his father. NYLAG requested his case be taken off the immigration court calendar, either through a move to a status docket or administrative closure. However, the immigration judge stated that she lacked authority to move the case off her calendar. Instead, she scheduled the case for another appearance. Based on current processing times for this type of petition before USCIS, it is likely that the petition will remain unajudicated at the next hearing. Nevertheless, Alex, a NYLAG attorney, a DHS attorney, and the immigration judge will all be forced to spend their time discussing the case without making any progress towards its resolution.

Finally, and perhaps most egregiously of all, is the continuing erosion of the authority of immigration judges to continue cases at all. The Department of Justice, including the Attorney General himself, have issued precedential decisions slowly mandating that immigration judges proceed to trial on cases even where the case against an immigrant respondent may become moot as a result of a USCIS decision in the future, thereby spending hours of their time hearing a matter that could have been, and should have been, resolved through other means.[2] For example, many of NYLAG's clients have submitted petitions to USCIS for U Nonimmigrant Status. The waiting period for a resolution of such a petition is currently in the range of five years. A removal order is waivable through a petition for U Nonimmigrant Status. However, recent EOIR

[2] *See, e.g., Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

precedent now requires immigration judges to schedule trials and hear and decide cases where their final decision may very well be found to be waived in a matter of years.[3]

It should be further noted that while much of the recent EOIR policy restricting judicial independence allows for exceptions to be made if DHS consents, EOIR well knows that DHS attorneys have also recently lost much of their discretion to join in motions with immigrant respondents, so the stated exceptions to the rules are unusual at best, and specious at worst. Moreover, they still fail to allow immigration judges any autonomy whatsoever, instead requiring them to make the decision recommended by the prosecuting agency.

The current EOIR system has been politicized to such an extent that immigration courts are now being used to promote the executive branch's stated policy goal of deporting as many immigrants as possible, even where Congress has legislated avenues that would permit immigrants to remain in the United States and in contravention of the most basic of due process rights. As such, NYLAG strongly recommends that the Subcommittee take whatever steps it deems appropriate to correct the path of the EOIR away from a political tool, and into a judicial body wherein adjudicators have the independent authority to manage their dockets and provide fair hearings to the immigrants.

[3] *See Matter of MAYEN,* 27 I&N Dec. 755 (BIA 2020).

Statement for the Record

Yael Schacher, Senior U.S. Advocate

Refugees International

House Judiciary Committee

Subcommittee on Immigration and Citizenship

"Courts in Crisis:
The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

Thank for you for the opportunity to submit this written statement for this important hearing today.

Refugees International is a non-governmental organization that advocates for lifesaving assistance and protection for displaced people and promotes solutions to displacement crises. We conduct fact-finding missions to research and report on the circumstances of displaced populations. Refugees International does not accept government or United Nations funding, which helps ensure that our advocacy is impartial and independent.

Over the last year, Refugees International's Senior U.S. Advocate has observed numerous ways in which policies put in place by the Department of Homeland Security (DHS) and the Department of Justice (DOJ) influence the immigration courts to the detriment of those seeking protection. One of our key concerns is that those seeking humanitarian protection have access to due process and that asylum seekers receive fair adjudication of their claims. The immigration courts, part of the executive branch and increasingly manipulated by the administration, are currently falling far short. For the system to best serve those seeking protection, the hiring of judges must not be politicized; judges from diverse professional backgrounds must have the ability to adjudicate cases independently, at a fair pace, and according to uniform principles and rules of law.

DHS and DOJ policies that alter immigration court procedures to the detriment of those seeking protection should be reversed. In research for an extensive report on T visas, Refugees International's Senior U.S. Advocate found that trafficking victims had been deported while appeals of their visa applications were pending before United States Citizenship and Immigration Service. This was a direct result of DHS's enforcement priorities and the limits placed by the DOJ on the ability of immigration judges to continue or suspend cases awaiting adjudication by other agencies.

Individual asylum hearings in immigration court should not be delayed or dictated by detention policies. A French-speaking Ghanaian man who fled severe persecution in his home country and was eventually granted asylum was cruelly imprisoned for more than a year in a

south Texas detention center as he was ineligible for a bond hearing with an immigration judge. While detained at the remote prison, he could only infrequently meet with his attorney, who was required to talk to him through a glass partition that made translation difficult. His detention was prolonged because his individual merits court hearing was delayed because of a quarantine in a different part of the prison from his and despite the fact that the judge appeared via video teleconference. The vast majority of asylum seekers on detained dockets have their hearings conducted via video, which can impede fair credibility determinations, effective translation, and the ability to examine and present evidence and witnesses.

The Attorney General should not issue decisions that include broad generalizations and dicta that impede case by case adjudication of asylum claims and upend asylum standards determined by Board of Immigration Appeals and Federal Courts. A Honduran woman was the victim of brutal domestic violence at the hands of her husband who was affiliated with a powerful gang in Honduras. Though she had reported the abuse to the police twice and had moved to different parts of the country to escape, her partner followed her and continued to threaten to kill her even after she fled to Mexico. She asked for asylum at a California port of entry last year and was placed in the Remain in Mexico program. Because she is stuck in Mexico and because of the limits placed by the Attorney General on domestic violence related asylum claims, her chances of winning asylum are steep. This is exacerbated by the fact that her case is being decided by a new judge who supports the administration's limits on asylum.

DHS should not dictate the pace of asylum adjudication in the immigration courts, the role that judges play in assessing claims of persecution, or the ability of asylum seekers to have access to counsel. Immigration judges in San Antonio and Harlingen hearing Remain in Mexico cases are handling proceedings according to the dictates of DHS. They adhere to a speeded up timeline: taking pleadings at the first hearing regardless of whether the asylum seeker has counsel, requiring that asylum applications and supporting documentation be submitted within a month of the first hearing, and refusing to remove anyone from the Remain in Mexico program. At one master calendar hearing, a judge in Harlingen left the courtroom while the attorney for DHS and the officer in the Brownsville tent court determined who would be referred to an interview with an asylum officer about their fear of return to Mexico. The judge told the asylum seekers that it was not her role to listen to their expression of fear, and that instead they should tell DHS. In the "tent courts" run by Custom and Border Protection at Laredo and Brownville, attorneys cannot provide the vast majority of asylum seekers in the Remain in Mexico program who appear pro se with any know your rights or legal orientation.

Experienced judges should not be removed without cause and inexperienced judges should not be promoted. A Remain in Mexico case involving an indigenous language speaker was assigned to a recently appointed assistant chief immigration judge with no immigration law background who dismissed numerous procedural problems involving faulty notices and access to translation in the case. Summarily denying all of the motions of the asylum seeker's attorney, the judge then continued the case because the DHS attorney did not have any access to his files in the case and had not reviewed the record of previous hearings.

The U.S. immigration court system must be made independent to ensure due process and a fair day in court. In the long term, Congress should consider a structural overhaul of the immigration

court system so that those seeking protection have a true chance to achieve justice. Right now, it should request copies of all instructions regarding the adjudication of Remain in Mexico cases by immigration judges and changes to the qualification requirements and hiring criteria for judges.

Statement of the Round Table of Former Immigration Judges

Submitted to the House Judiciary Subcommittee on Immigration and Citizenship

Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

This statement for the record is submitted by former Immigration Judges and former Appellate Immigration Judges of the Board of Immigration Appeals (BIA). Members of our group were appointed to the bench and served under different administrations of both parties over the past four decades. Drawing on our many years of collective experience, we are intimately familiar with the workings, history, and development of the immigration court from the 1980s up to present.

The purpose of the immigration courts is to act as a neutral check on executive overreach in the enforcement of our immigration laws. In their detached and learned interpretation of the laws and regulations, Immigration Judges exist to correct overzealous bureaucrats and policy makers when they overstep the bounds of reasonable interpretation and the requirements of due process.

Unfortunately, no Attorney General has ever created an impartial immigration court system because the immigration courts have always been housed inside the U.S. Department of Justice, subject to the nation's chief enforcement officer, the Attorney General. Due in large part to the efforts of their union, the National Association of Immigration Judges, (NAIJ), the Immigration Judge corps managed to maintain decision making independence even when faced with increased caseloads and political pressures.

We are extremely disturbed by this administration's systemic and unprecedented efforts to undermine Immigration Judges' independence and neutrality. Such efforts have proceeded seamlessly through three different Attorneys General. Even Matthew Whitaker, acting as a caretaker and with no prior immigration law background, managed in his brief time in charge to certify two cases to himself, one of which was a decision of the BIA which had denied asylum and created a difficult standard for those seeking asylum based on their family ties, in order to make such standard even more daunting.

The three Attorneys Generals have together abused their certification power to circumvent the intent of Congress by rewriting our nation's immigration laws. In

some of their decisions, the Attorneys General have eliminated precedent decision and then imposed requirements that necessitate much more attorney preparation, longer hearings, and more exacting decisions from the Immigration Judges themselves in order to grant relief where such relief is due. The disingenuous assertion for doing so was that the parties had stipulated to certain facts and findings without evidence, when in fact the parties had done so - as in all judicial settings - because the evidence in support of such facts and findings was overwhelming and there is no need to burden the court system by presenting them in each case. At the same time, the Department of Justice has greatly expedited the hearings of those who are often most vulnerable, while requiring a growing number of asylum-seekers to either wait in Mexico in a state of homelessness, with little access to counsel or ability to be able to gather evidence; or to alternatively be detained in horrific conditions in remote detention facilities, all with little to no access to counsel.[1] The administration has increasingly denied observers access to Remain in Mexico hearings.[2] In particular, a member of our group was asked to leave a Remain in Mexico hearing where she was observing a case on the spurious claim that her note taking was distracting.[3]

In addition to cutting off access to the agency's more controversial classes of hearings, EOIR has also effectively ended the participation of Immigration Judges as speakers in legal conferences and at law schools, including as participants in moot court hearings.[4] The judges' own union, the NAIJ, has served as the sole voice of its members, publicly speaking out against policies that undermine its independence and impartiality, and in advocating for independent Article I court status. In response, the Department of Justice has sought to silence the NAIJ

---

[1] On January 24, 2019, the Department of Homeland Security (DHS) announced the Migration Protection Protocols (MPP), a policy also known as "Remain in Mexico," which requires individuals seeking asylum at our southern border to remain in Mexico while their U.S. removal proceedings are pending.

[2] Adolfo Flores, Immigration "Tent Courts" Aren't Allowing Full Access To The Public, Attorneys Say, (1/13/2020), https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access.

[3] The Round Table of Former Immigration Judges, Letter to Director McHenry and Chief Immigration Judge Santoro, (Dec. 10, 2019), https://immigrationcourtside.com/wp-content/uploads/2019/12/McHenry-letter_letterhead-1.pdf.

[4] The Knight First Amendment Institute, Knight Institute Calls on DOJ's Executive Office for Immigration Review to Suspend Policy Silencing Immigration Judges, (Jan. 6, 2020), https://knightcolumbia.org/content/knight-institute-calls-on-dojs-executive-office-for-immigration-review-to-suspend-policy-silencing-immigration-judges.

through a present effort to decertify on the same basis that was rejected previously this union that has been certified since 1979.[5]

The Attorneys General have also issued decisions stripping Immigration Judges of the judicial tools needed to properly execute their duties. Through precedent decisions by certification, then-Attorney General Jeff Sessions issued binding decisions stripping Immigration Judges of their long-standing ability to administratively close[6] or terminate[7] cases where appropriate or necessary, or even to continue hearings where due process requires.[8]

The above actions of Attorneys General, as well as the reshuffling of Immigration Judge dockets to assure that cases are heard based on the political priority of the day as opposed to due process concerns, has resulted in unprecedented, sky-rocketing backlogs.[9] The backlog has increased exponentially despite the dramatic increase in Immigration Judge appointments, most of which have favored individuals with enforcement backgrounds. Some have wondered if this is an attempt to implode the Immigration Court system, but whether it is intentional or not, this could be the ultimate effect.

EOIR's director is not a political appointee, yet he has acted as one by promulgating policies that undermine judicial independence. For example, he has created completion quotas that require Immigration Judges to choose between justice for those who appear before them and their own job security. The vast majority of other administrative judges - including Social Security Judges - are exempted from such quotas by statute, and the Immigration Judges were previously exempted by policy. Immigration Judges are told in their training that they are only DOJ attorneys and as employees of the Attorney General and the Department of Justice, they owe loyalty to the objectives of those they serve. Such quotas damage the public's confidence in the immigration court system by creating the perception of bias. Even in the law enforcement context, quotas are seen as harmful. For example, most states outlaw such quotas for traffic tickets issued by

---

[5] Eric Katz, The Justice Department says immigration law judges operate as managers, an argument the Federal Labor Relations Authority rejected in 2000, (Aug. 12, 2019), https://www.govexec.com/management/2019/08/trump-administration-looks-decertify-vocal-federal-employee-union/159112/.

[6] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)

[7] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)

[8] *Matter of L-A-B-R- et. Al.*, 27 I&N Dec. 405 (A.G. 2018)

[9] According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University the December 2019, backlog was 1,089,696. *See*, https://trac.syr.edu/phptools/immigration/court_backlog/

police officers. Pressuring Immigration Judges to adhere to the views of the enforcement officer and agency that employ them contradicts the Supreme Court's 1954 ruling to the contrary, in which it held that the BIA must decide cases according to its judges' "own understanding and conscience," and not those of the Attorney General.[10]

EOIR has taken additional actions to undermine the appearance of neutrality so necessary to a court system. The agency posted on its website a press release announcing a "return to the rule of law" based solely on an increase in the number of deportation orders issued by the courts.[11] More recently, the agency issued a "Myths vs. Facts" sheet[12] falsely claiming that noncitizens as a rule don't appear for their court hearings (whereas statistics compiled by TRAC indicate an appearance rate over 90%;[13] that asylum seekers' claims lack merit, and that attorneys don't really impact court outcomes. The members of this honorable committee are asked to try to imagine any other court issuing such a statement concerning those that appear before its judges, and to further imagine what the public response would be. Our Round Table was one of several groups that issued a statement strongly criticizing such action.[14]

Our group includes a significant number of former Immigration Judges who retired or otherwise left the bench sooner than intended due to the unconscionable policies of the present administration. Two amongst us took the highly unusual step of resigning after only two years on the bench. One of our members made a point of retiring after 28 years on the bench on the day before the oppressive completion quota system went into effect as a statement that he refused to work under such conditions.[15]

---

[10] *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

[11] https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics

[12] https://www.justice.gov/eoir/page/file/1161001/download

[13] *See*, https://trac.syr.edu/immigration/reports/562/.

[14] Round Table of Former Immigration Judges, EOIR "Myth vs. Fact" Memo, (May 13, 2019), https://www.aila.org/infonet/retired-ijs-and-former-members-of-the-bia-object; See also AILA Policy Brief: Facts About the State of Our Nation's Immigration Courts, (May 14, 2019), https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-facts-about-the-state-of-our.

[15] "Immigration Judges say they're ;leaving jobs because of Trump policies," *The Hill*, Feb. 13, 2019, https://thehill.com/latino/429940-immigration-judges-say-theyre-leaving-jobs-because-of-trump-policies

We acknowledge our former colleagues still on the bench who continue to afford due process and fairness in their decisions. Their increasing difficulty in doing so was illustrated by the highly-publicized case in which an Immigration Judge in Philadelphia, upon receiving a case remanded by the Attorney General, continued the hearing of a minor who did not appear for purposes of ensuring that the youth received proper notice of the hearing, as required by law. EOIR management immediately removed the case from the judge's docket, along with more than 80 other similar cases. The judge was most improperly chastised by his supervisor. Instead of assigning the case to another judge in the Philadelphia court, EOIR management sent one of its own to Philadelphia for the sole purpose of issuing an *in absentia* removal order against the youth.[16] What message did these actions send to the Immigration Judge corps (in particular, to those recently hired who may be removed without cause within two years of their appointments) about exercising independent judgment? We affirm that such action would have been unthinkable under any prior administration during the four decades in which we served.

Immigration Judges also depend on a fair review of their decision on administrative appeal to the BIA. We are sad to report that the Appellate Immigration Judges on the BIA have abdicated the independent understanding and conscience recognized 66 years ago by the Supreme Court. Last month, a judge sitting on the U.S. Court of Appeals for the Third Circuit stated in a concurring opinion of the court: "it is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring Quinteros' removal rather than as the neutral and fair tribunal it is expected to be. That criticism is harsh and I do not make it lightly."[17] And on January 23, 2020, a three Judge panel of the U.S. Court of Appeals for the Seventh Circuit suggested holding the BIA's judges in contempt of court, "with all the consequences that possibility entails."[18] What provoked such reaction was the BIA's decision to completely ignore a binding order of an Article III court because then-Attorney General Jeff Sessions in a footnote to a certified decision had expressed his disagreement with such decision. The Seventh Circuit stated that the Board's action "beggar's belief," adding that it has "never before encountered defiance of a remand order, and we hope never to see it again." But as long as the Attorney General holds the power to

---

[16] National Association of Immigration Judges, Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ, (Aug. 8, 2018), https://www.aila.org/infonet/naij-grievance-redress-removal.

[17] *Quinteros v. Att'y Gen.*, No. 18-3750 (3d Cir. Dec. 17, 2019).

[18] *Baez-Sanchez v. Barr*, No. 19-1642 (7th Cir. Jan. 23, 2020).

remove them and the Circuit Courts don't, the BIA will err on the side of job security.

With the BIA acting as the Attorney General's enforcer, Immigration Judges are increasingly concerned with whether U.S. Immigration Customs Enforcement (ICE) might appeal a grant of relief. One of the requirements specified in the immigration judges' performance quotas requires that not more than 15 percent of the immigration judges' decisions can be remanded or reversed on appeal by the BIA.

It is the role of Congress to write the immigration laws and that of the Attorney General to uphold them. This administration has sought to rewrite those laws in defiance of directives of the Supreme Court and the Courts of Appeal which demonstrates that it is time for Congress to remove the responsibility for creating a fair immigration court from the Attorney General. The administration has stymied the efforts of immigration judges to faithfully execute their sworn obligations to accord due process to everyone who appears before them and to decide every case on its own merits after a full and fair consideration of the evidence. Instead, EOIR has imposed unrealistic productivity mandates that place speed above all considerations of fairness.

For all of the above reasons, we hope that Congress will take steps towards removing the immigration courts and BIA from the Department of Justice and establishing an independent Article I Immigration Court. In the meantime, we hope that Congress will use the powers at its disposal to limit undue influence on the Immigration Judges; to protect the NAIJ union from decertification; and to call the BIA to account for its recent outrageous behavior.

We appreciate the opportunity to provide this statement for the record and look forward to engaging as Congress considers reforming the immigration court system.

Contact with questions or concerns: Jeffrey S. Chase, jeffchase99@gmail.com.

Sincerely,

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens (N.Y.) Wackenhut Immigration Courts, 1997-2013
Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012
Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark, and Elizabeth, NJ, 1994-2005
Hon. Teofilo Chapa, Immigration Judge, Miami, 1995-2018
Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007
Hon. George T. Chew, Immigration Judge, New York, 1995-2017
Hon. Joan Churchill, Immigration Judge, Arlington, VA 1980-2005
Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007
Hon. Cecelia M. Espenoza, Appellate Immigration Judge, BIA, 2000-2003
Hon. Noel Ferris, Immigration Judge, New York, 1994-2013
Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019
Hon. Jennie L. Giambastiani, Immigration Judge, Chicago, 2002-2019
Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013
Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004
Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018
Hon. Charles Honeyman, Immigration Judge, Philadelphia and New York, 1995-2020
Hon. Rebecca Jamil, Immigration Judge, San Francisco, 2016-2018
Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002
Hon. Carol King, Immigration Judge, San Francisco, 1995-2017
Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995-2018
Hon. Donn L. Livingston, Immigration Judge, Denver and New York, 1995-2018
Hon. Margaret McManus, Immigration Judge, New York, 1991-2018
Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017
Hon. Laura Ramirez, Immigration Judge, San Francisco, 1997-2018
Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018
Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002
Hon. Susan G. Roy, Immigration Judge, Newark, NJ 2008-2010
Hon. Paul W. Schmidt, Chair and Appellate Immigration Judge, Board of Immigration Appeals, and Immigration Judge, Arlington, VA 1995-2016
Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019
Hon. Denise Slavin, Immigration Judge, Miami, Krome, and Baltimore, 1995-2019
Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017
Hon. Gustavo D. Villageliu, Appellate Immigration Judge, BIA, 1995-2003
Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017
Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge, New York 1989-2016

YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS

www.theyoungcenter.org | info@theyoungcenter.org
Chicago, IL | Harlingen, TX | Houston, TX | Los Angeles, CA
New York, NY | Phoenix, AZ | San Antonio, TX | Washington, D.C.

IMMIGRATION HEARINGS BY VIDEO: A THREAT TO CHILDREN'S RIGHT TO FAIR PROCEEDINGS

UPDATED JANUARY 2020

Executive Summary: Children face many obstacles to a fair day in immigration court where they carry the burden to show that they are eligible for protection from deportation. There is no right to counsel free-of-charge for children, regardless of indigency, and thus an average of half of all children in immigration court proceedings do not have attorneys.[1] With few exceptions, children are subject to the same substantive and procedural requirements as adults. Only the most vulnerable children are appointed an independent Child Advocate to fight for their best interests.

Hearings-by-video, or video-teleconferences (VTCs), pose significant risks for children in adversarial immigration proceedings. In a VTC, an immigration judge sits in a courtroom along with the attorney representing the Department of Homeland Security (DHS). The child sits (often alone) in a room at a detention facility and watches their own court case over a TV screen. If the child has an attorney, that child's attorney must choose between attending court and speaking directly to the judge while losing the ability to consult confidentially with the child, or traveling to the child's detention center where the attorney can no longer engage directly with the judge or opposing counsel. Likewise, Child Advocates must choose between accompanying children at the facilities and helping them understand what is taking place on the TV screen or leaving the child to present their recommendations about the child's best interests—safety and well-being—directly to the judge.

In children's cases, VTCs directly undermine the protections in federal law that ensure children have a fair opportunity to be heard, including the opportunity to present their claims for protection in a manner that reflects their status as children.[2] VTCs diminish children's ability to convey their wishes and to engage in informed decision-making, deprive them of effective representation, and significantly undermine their substantive claims for protection. Most importantly, the use of VTCs prevents children's unique stories and status as children from being central to any decisions made regarding their future.

As the independent Child Advocate (best interests guardian *ad litem*) for vulnerable immigrant children, we recommend the immediate discontinuation of VTCs and urge the government to abandon all plans to expand the use of VTCs for children, including families in MPP proceedings.

THE THREE RISKS VTCS POSE FOR CHILDREN

#1: Children in VTCs often do not understand what is happening and cannot participate in their proceedings	#2: Children in VTCs cannot communicate effectively with their attorneys, child advocates or the immigration judge	#3: Children in VTCs are more likely to be returned to danger as a result of confusion and misunderstanding

YOUNG CENTER for IMMIGRANT CHILDREN'S RIGHTS

www.theyoungcenter.org | info@theyoungcenter.org
Chicago, IL | Harlingen, TX | Houston, TX | Los Angeles, CA
New York, NY | Phoenix, AZ | San Antonio, TX | Washington, D.C.

History of VTCs: When a hearing is conducted via VTC, the subject (respondent) of an immigration case appears before the court by video. These hearings were first authorized by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, in which Congress authorized the Department of Justice (DOJ) to hold immigration removal proceedings by video and made VTCs and in-person hearings interchangeable.[3] DOJ regulations then gave immigration judges complete discretion regarding the use of VTCs for not only master calendar but also merits hearings—where the ultimate decision about whether an applicant will be granted protection is made.[4]

Recent Expansion of VTCs for Children: DOJ primarily uses VTCs for detained adults, but VTCs are also used for children in custodial facilities run by the Office of Refugee Resettlement (ORR). DOJ has specifically stated that children's cases may be heard by VTC unless a case warrants an exception.[5] In support of these hearings, government officials claim that VTCs save time and money, expand access to counsel, and allow cases to be heard more efficiently.[6] However, studies have shown these hearings to be deeply flawed and problematic for the fair adjudication of adult claims.[7]

Until 2018, the use of VTCs in children's cases was exceptional and rare; but last year, the DOJ radically expanded the use of VTCs for children in government custody. Children's attorneys pushed back and insisted on having staff in both locations: one with the child and one in the courtroom. Not long after, DOJ ended this "experiment" with VTCs for children. However, Child Advocates and attorneys working with children continue to hear rumors that DOJ will implement the use of VTCs in children's cases. Most recently, VTCs have been used in the CBP "tent courts" at the border, for the people denied entry under the so-called "Migrant Protection Protocols," or MPP.[8] Nearly one third of the people returned to Mexico under this program are children.[9] When Young Center staff visited the Brownsville "tent court," they learned that CBP requires families with children to travel in the dead of night, without protection, and report at 3 or 4 AM for 8:30 hearings just meters from the border. Families wait for hours in freezing conditions before "appearing" before a remote court by video. They cannot see the government attorney arguing against them, and in some cases they cannot see the IJ or interpreter. In almost all cases, they appear without an attorney in these isolated border communities.[10]

The Young Center spoke with Child Advocates and attorneys who participated in these hearings across the country and identified three specific ways in which VTCs for detained children render proceedings unfair and increase the risk of unsafe outcomes.

1. VTCs DIMINISH CHILDREN'S ABILITY TO EXPRESS THEIR WISHES AND MAKE DECISIONS ABOUT WHAT THEY WANT

Consistent technical difficulties and the narrow visual and audio functionality of VTCs diminish children's ability to effectively express their wishes and make informed decisions. Technical glitches such as bad connections, bad audio, and pixelated screens make it difficult for children to understand and participate. A report commissioned by the DOJ acknowledged that VTCs raise due process concerns because of the poor video and sound quality.[11] It is also more difficult for children to hear and understand interpreters, who are located in the courtroom with the judge and not in the same room as the child. When a child has an attorney and that attorney is in the courtroom with the judge, children are reluctant to speak up and, for example, let their attorney know that they don't understand the interpreter.

YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS
www.theyoungcenter.org | info@theyoungcenter.org
Chicago, IL | Harlingen, TX | Houston, TX | Los Angeles, CA
New York, NY | Phoenix, AZ | San Antonio, TX | Washington, D.C.

The static position of the cameras means that the children often see only the judge, not the ICE trial attorney or their own attorney (if they have one). Judges frequently are unable to properly see and hear children when they try to make themselves heard. The court's continued use of a paper-based system, rather than electronic filing where everyone has access to records, also complicates proceedings by making it difficult to serve the child with court documents, particularly if the child's attorney is not in the same room as the judge or DHS trial attorney.

"There were a lot of glitches trying to exchange documents during the VTC hearing. The court tried to email the documents to the shelter, but the shelter could not open the encrypted document. In the end, the court had the documents driven five minutes down the road to the shelter. This made both the judge and the kids lose patience."
—Young Center Child Advocate

Many children find it difficult to understand immigration court proceedings, even in person, because they are interacting with government systems for the first time and are doing so in a different language. This is exacerbated for children appearing via VTC. VTCs require even higher cognitive engagement than in-person hearings and can quickly lead to fatigue, which in turn prevents children from understanding what's going on and effectively communicating with the court. As the report commissioned by the DOJ acknowledged, judges lose the ability to analyze children's nonverbal communications; gestures and facial expressions are lost over video.[12] Most importantly, children are unable to interact and develop a relationship with the immigration judge—the person charged with making decisions about their future.

2. VTCs DEPRIVE CHILDREN OF EFFECTIVE REPRESENTATION AND ADVOCACY

The use of VTCs means that the attorney is not sitting next to their client and as a result the child cannot communicate confidentially, depriving children of effective representation. Attorneys sometimes are forced to make a difficult decision between being with the child in the ORR facility and providing them with in-person support or being in court and able to be face to face with the judge and government attorney. If the child's attorney chooses to go to court, where they have the greatest opportunity to directly engage with and persuade the judge of the child's position, the attorney is unable to consult with their client. The alternative is to have members of the legal services team in both locations—a costly and resource-intensive alternative that doesn't resolve the child's difficulty in understanding that what is happening over a TV screen is, in fact, real.

"I was appointed as Child Advocate for a child with developmental delays—he was 16 with the developmental capacity of a 9-year-old. Even though an independent psychologist found that the child had limited capacity to understand his immigration proceedings, the child was scheduled for a VTC hearing. Doing a hearing by VTC would have compounded the child's confusion and heightened his vulnerability. We helped to ensure the VTC did not happen in his case."
—Young Center Child Advocate

Young Center Child Advocates face similar challenges: they must decide whether to be present with the child with whom they have developed a trusting relationship or in court to present their Best Interests Recommendation to the judge. Children have repeatedly expressed their desire to have their Child Advocate, with whom they've typically met each week for months, at their side. But Child Advocates, like the attorney-of-record, know that their recommendations are most persuasive when made in person and when they can engage directly with the judge and government attorney.

YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS
www.theyoungcenter.org | info@theyoungcenter.org
Chicago, IL | Harlingen, TX | Houston, TX | Los Angeles, CA
New York, NY | Phoenix, AZ | San Antonio, TX | Washington, D.C.

After the hearing, the child's attorney or Child Advocate cannot immediately debrief with the child, leaving a child in prolonged confusion and distress. Children who appear through VTCs usually can see only the judge and are unable to see their attorney or Child Advocate on the screen. These difficulties can lead children to lose trust in their attorneys and advocates, as they do not feel assured that their allies are on their side and adequately representing their wishes. Without that trust, it can be challenging for attorneys to represent the child's expressed interests and for Child Advocates to fight for the child's best interests.

3. THE USE OF VTCs PLACES CHILDREN AT RISK OF BEING SENT BACK TO DANGER

The procedural challenges inherent in VTCs have very concrete, substantive results: children are at risk of being sent back to situations of danger and persecution because their ability to present a case is impaired. A study found that immigrants appearing through VTCs are less likely to seek counsel, be granted relief, and less likely to seek voluntary departure, which means they would end up with removal orders.[13] The longer children have been in a facility, and without any hope that they will be able to present their case to a judge in person, the more likely it is that they will relinquish otherwise viable claims to legal relief that would allow them to remain safe in the United States. In contrast, children who have in-person court hearings are better able to understand their cases, receive the guidance of legal counsel, and seek relief.

Credibility is integral to a child's claim for protection from removal, especially because many children do not have the documentation to corroborate their story and must rely on the strength of their testimony. Because VTCs make it difficult for judges to read a child's body language and demeanor, they may be more likely to issue a negative credibility finding and deny children protections for which they are eligible. This risk of erroneous credibility findings increases when judges located in another part of the country adjudicate the case, since they cannot adequately see the child. Child Advocates witnessed multiple hearings with remote judges who usually worked only on adult immigration cases. Immigration judges have noted themselves that there is a benefit to being able to "just have a conversation in person" with a child during hearings.[14] Furthermore, federal courts have expressed concerns about VTCs and their negative impact on credibility determinations.[15]

> *"More than once, children would be watching the camera feed from the courtroom, when the video screen in front of the child went black. In response, children would stop talking and look around the room. But back in the courtroom, neither the Judges nor the DHS Trial Attorneys knew what had happened; their video feeds continued operating. They had no idea what was happening in the children's location and could not put the children's reactions (silence, confusion) into context."*
> *—Legal Services Provider*

VTCs can adversely affect a child's case even when used for master calendar hearings. Though these hearings are considered to be preliminary, children receive integral information about their rights and a plain language explanation of the charges against them. During these hearings, judges could dispose of a case, finding that a child does not have an avenue of legal relief. For the many children without an attorney or Child Advocate, there is a great risk that they might hastily waive their rights because they do not understand them or the gravity of the proceedings; they then might not seek counsel or make a claim for relief. This risk is substantially greater when a child appears by VTC. Further, immigration judges form a subconscious impression of the child that is curtailed by video during VTC master calendar

YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS
www.theyoungcenter.org | info@theyoungcenter.org
Chicago, IL | Harlingen, TX | Houston, TX | Los Angeles, CA
New York, NY | Phoenix, AZ | San Antonio, TX | Washington, D.C.

hearings, which can negatively affect every decision a judge makes regarding the child's case moving forward.

Ultimately, VTCs dehumanize children. Each child has a unique story to tell. Their stories are often traumatic, and children exhibit great courage when they speak about what happened to them. A child's presence in immigration court, in the same room as the decision maker, ensures that their humanity, their individuality, and their status as a child is front and center in their case.

Conclusion and Recommendations: The use of VTCs will mean children are rushed through proceedings and removed without due process. As of May 2019, the administration has made the increased use of VTCs a priority for its regulatory agenda,[16] and it has implemented VTCs in its "tent courts" at the border. A child's presence in court is integral to their right to be heard, which is guaranteed in our Constitution. Children's status as children makes their in-person appearance in court integral to their ability to understand and fully participate in hearings that were designed for adults and which are already difficult to navigate.

We therefore unreservedly recommend that **the Department of Justice discontinue the use for VTCs for all children's hearings, including under MPP, unless requested by the child's counsel.** In rare cases, a child's attorney may request a hearing by VTC—often to effectuate a child's return to home country in an emergency. In those exceptional cases, DOJ should permit VTCs after remedying the problems above.

For more information, please contact Young Center Policy Associate Miriam Abaya at mabaya@theyoungcenter.org or visit www.theyoungcenter.org.

---

[1] *Juveniles—Immigration Court Deportation Proceedings*, TRACIMMIGRATION, https://trac.syr.edu/phptools/immigration/juvenile/ (showing data from 2005 to 2019).
[2] *See* 8 U.S.C.A. § 1232 (d)(7)(B); 8 U.S.C. § 1158(b)(3)(C).
[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 (codified at 8 U.S.C. § 1229a(b)(2)(A)(iii) (2012)).
[4] 8 CFR §3.25(c) (1997).
[5] Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, DEPT. OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW (Sept. 16, 2004).
[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES, 51 (2017).
[7] *Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court*, THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO & CHICAGO APPLESEED FUND FOR JUSTICE (Aug. 2, 2005).
[8] *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUM. RTS. FIRST 12-15 (Oct. 2019), https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.
[9] Kristina Cooke, Mica Rosenberg, Reade Levinson, *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, REUTERS (Oct. 11, 2019), https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1.
[10] *See Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRAC (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587/ (noting that only 4 percent of immigrants in MPP have attorneys).
[11] *Legal Case Study: Summary Report*, DEPT. OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW 22 (Apr. 6. 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf.
[12] *Id.*
[13] Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN UNI. L. REV. 933, 961 (2015).
[14] *Id.* at 987.
[15] *See* Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002) ("More specifically, video conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor.").
[16] *Jurisdiction and Venue in Removal Proceedings*, OFF. OF INFO. & REG. AFF., OFF. OF MGMT. & BUDGET (Spring 2019), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1125-AA52.

STATEMENT OF INNOVATION LAW LAB, SOUTHERN POVERTY LAW CENTER, LAS AMERICAS IMMIGRANT ADVOCACY CENTER, SANTA FE DREAMERS PROJECT, AND CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC)

Submitted to the House Judiciary Committee

Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

January 29, 2020

Contacts:

Stephen Manning, Executive Director
Innovation Law Lab
PO Box 8382
Portland, OR 97207
Tel: (503) 922-3042
stephen@innovationlawlab.org
innovationlawlab.org

Melissa Crow, Senior Supervising Attorney
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Tel: (202) 355-4471
Melissa.Crow@splcenter.org
www.splcenter.org

Linda Corchado, Director of Legal Services
Las Americas Immigrant Advocacy Center
1500 E. Yandell Dr.
El Paso, TX 79902
Tel: (915) 544-5126
lindacorchado@las-americas.org
www.las-americas.org

Allegra Love, Executive Director
Santa Fe Dreamers Project
PO Box 8009
Santa Fe, NM 87504
Tel: (505) 490-2789
allegra@santafedreamersproject.org
www.santafedreamersproject.org

Michelle Mendez, Defending Vulnerable Populations Program Director
Victoria Neilson, Defending Vulnerable Populations Program Managing Attorney
Catholic Legal Immigration Network, Inc. (CLINIC)
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910
www.cliniclegal.org

The above organizations are nonprofits that work to defend immigrants' rights and provide meaningful legal services to individuals fleeing persecution and seeking refuge in the United States. Our experiences representing individuals in the immigration courts, which fall under the oversight of the Executive Office for Immigration Review, recently led us to file a lawsuit challenging the weaponization of the immigration court system to serve the executive branch's anti-immigrant agenda.[1] We submit this joint statement to share our understanding of the systemic failure of the immigration courts. We also attach as an exhibit a recent report published by Innovation Law Lab and the Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool.*

Under the Immigration and Nationality Act (INA), the Attorney General is required to establish and oversee a functioning immigration court system that upholds due process—namely, that guarantees genuine case-by-case adjudication by impartial judges who apply law to the evidence on the record after a full and fair hearing. Yet *every* Attorney General has failed to do so. Indeed, despite the life-or-death stakes of many immigration cases, the U.S. immigration court system is plagued by dysfunction, neglect, and official acquiescence to bias. And under the current administration, the executive branch has gone even further by actively weaponizing the immigration court system against asylum seekers and immigrants of color. Its actions have created a system in which due process rights are not, and cannot be, protected.[2]

These ongoing violations of due process required an immediate response, so we asked the federal courts to intervene and order that the executive branch fulfill its statutory and constitutional duties to oversee a fair and legitimate immigration court system. While the federal courts can and should act to ensure that immigration courts provide, at minimum, basic due process protections, creating a truly independent immigration court system requires a structural remedy provided by Congress. As we explain below, by removing the immigration courts from the executive branch entirely, Congress can ensure a fair immigration court system that is committed to the due process guarantees that the Constitution commands and the INA requires.[3]

---

[1] Complaint, *Las Americas v. Trump*, No. 3:19-cv-02051-SB (D. Or. Dec. 18, 2019), https://innovationlawlab.org/wp-content/uploads/2019/12/ECF-1-Las-Americas-v.-Trump-No.-19-cv-02051-SB-D.-Or..pdf. This complaint was filed on behalf of Las Americas Immigrant Advocacy Center; Asylum Seeker Advocacy Project; Catholic Legal Immigration Network, Inc.; Innovation Law Lab; Santa Fe Dreamers Project; and Southern Poverty Law Center.

[2] *See* Molly Hennessy-Fiske, *Immigration judges are quitting or retiring early because of Trump*, LOS ANGELES TIMES, Jan. 27, 2020, https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump?_amp=true&fbclid=IwAR3YjVqO-dfM6wp_3X5thwGdyE9Kw8ewWn7mKMLhmf8uUsNbUPBfB5Pu79w (interviewing immigration judges who "say it is impossible to work under the new system and still guarantee migrants their due process rights").

[3] Amit Jain, *Bureaucrats in Robes: Immigration 'Judges' and the Trappings of 'Courts,'* 33 GEO. IMMIGR. L. REV. 261 (2019) (explaining that the immigration court gives the appearance of being a judicial body but really is not, and as a result of its judicial "trappings" the federal court accords unwarranted deference in reviewing its decisions).

Ms. JAYAPAL. This concludes today's hearing. I would like to, once again, thank all of the witnesses for your compelling testimony and for participating in this hearing.

Without objection, all members will have 5 legislative days to submit additional written questions for the witness or additional materials for the record.

Without objection, the hearing is adjourned.

[Whereupon, at 11:03 a.m., the subcommittee was adjourned.]

APPENDIX

AFL-CIO

STATEMENT FOR THE RECORD

House Judiciary Subcommittee on Immigration and Citizenship
HEARING: THE STATE OF JUDICIAL INDEPENDENCE AND DUE PROCESS IN U.S. IMMIGRATION COURTS
Wednesday, January 29, 2020

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 unions that represents 12.5 million working men and women, including immigrants and those who adjudicate their cases in court. We strive to ensure that every person who works in this country receives decent pay, good benefits, safe working conditions, fair treatment, and full due process. Our members work in every state in the union, in every sector of the economy, and at all wage and skill levels. We represent working people of all immigration status, including undocumented workers, nonimmigrant visa beneficiaries, asylum seekers, legal permanent residents, refugees, and citizens. It is their needs and realities that inform our statement for this hearing.

Immigration judges work within the Executive Office of Immigration Review (EOIR) at the Department of Justice (DOJ) and are represented by the National Association of Immigration Judges, an affiliate of the International Federation of Professional and Technical Engineers, AFL-CIO. Cases heard in the immigration court system are civil cases, and judges interpret and apply existing laws regarding whether asylum-seekers or immigrant respondents should be ordered removed from the U.S. or granted protection from removal and allowed stay, and what the respondent's proper immigration status should be.

As individuals, immigration judges are limited from speaking out publicly, lobbying Congress, or providing feedback to DOJ on the performance of the Immigration Court. However, through their union, immigration judges speak independently of DOJ and advocate for NAIJ members' interests. The union's current priorities include enhancing resources for our severely under-resourced courts and increasing judicial independence through structural reform.

Throughout 2019, DOJ's implementation of its Migrant Protection Protocol (MPP) actions has resulted in EOIR reassigning immigration judges away from their home dockets, increased reliance on video teleconference hearings, and directing judges to hear MPP cases at an unsustainable rate – all of which serve to heighten the due process and judicial efficiency concerns that NAIJ has previously highlighted.

American Federation of Labor and Congress of Industrial Organizations
815 16th St., N.W. • Washington, D.C. 20006 • 202-637-5000 • www.aflcio.org

RICHARD L. TRUMKA, PRESIDENT
ELIZABETH H. SHULER, SECRETARY-TREASURER
TEFERE GEBRE, EXECUTIVE VICE PRESIDENT

In October 2019, the AFL-CIO coordinated a high-level labor delegation to El Paso and Ciudad Juárez to witness firsthand the impact of 'Remain in Mexico' and other punitive border policies. Delegates observed proceedings at the Immigration Court that serves an El Paso detention center. They witnessed first-hand the complex legal proceedings that migrants encounter while being detained, challenges to due process for migrants who appear in Immigration Court, and the criminalized nature of our current asylum-seeking process. Delegates were not permitted to observe a session in the court that hears cases from migrants forced to 'Remain in Mexico', illustrating a lack of transparency and accountability inherent in that policy.

Just weeks before our delegation, DOJ attacked the union rights of immigration judges by petitioning the Federal Labor Relations Authority (FLRA) to reclassify them as management officials. A similar attempt by DOJ to decertify the union in 2000 failed, when the FLRA decided that immigration judges do not act as managers. In the time since that ruling, immigration judges' authority has only diminished.

Indeed, DOJ's current union busting effort coincides with broader efforts to remove due process and resources from the immigration court and strip adjudication and docket scheduling authority from immigration judges. The NAIJ has long criticized the structural arrangements that house the immigration court within DOJ. The NAIJ joins the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association in calling for the immigration court to be made independent of DOJ in order to ensure due process, fairness, impartiality, and judicial independence.

DOJ's mismanagement and politicization of the immigration court system is unacceptable. Immigration judges have faced the imposition of quotas, deadlines and unrealistic hearing dockets that run contrary to judicial principles and treat courtrooms like assembly lines.

Administering a court system is incongruous with DOJ's role as a law enforcement agency. This inherent conflict of interest precludes the judicial independence of immigration judges and ultimately compromises due process of the parties appearing before the court.

The disparate missions of DOJ and the immigration court create an inherent conflict that hobbles the daily functioning of the system and contributes to the ballooning backlog of cases, which now number over one million. The solution to this problem is the establishment of an independent immigration court that operates outside of DOJ.

TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

Statement of the Tahirih Justice Center:

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
IMMIGRATION & CITIZENSHIP SUBCOMMITTEE:

Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts

January 29, 2020

The Tahirih Justice Center (Tahirih)[i] respectfully submits this statement to the United States (U.S.) House of Representatives Committee on the Judiciary, Immigration & Citizenship Subcommittee, as it considers *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.*

Tahirih is a national, nonpartisan advocacy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past 22 years. The women and girls we serve endure horrific abuses such as rape, domestic violence, forced marriage, honor crimes, and human trafficking. They are in dire need of humanitarian relief. As an organization dedicated to promoting safety and justice for our clients, Tahirih is deeply concerned about increasing bias and routine violations of due process in the immigration courts that unlawfully limit access to protection for survivors. **We respectfully urge Congress to pass legislation moving the immigration courts out of DOJ to restore fairness and ensure judicial independence and accountability.**

I. The Executive Office for Immigration (EOIR) is Inherently Vulnerable to Bias and Politicization

EOIR is an office within the US Department of Justice (DOJ) that encompasses both the immigration courts and the Board of Immigration Appeals (BIA). Nonetheless, DOJ, through the Attorney General (AG), also oversees the attorneys that prosecute immigration cases appealed from the BIA to the federal circuit courts. In this way, a stark conflict of interest is built into EOIR's structure. As a result, it is easily manipulated by the whims of those in power. Justice in immigration proceedings is elusive at best. Rather, EOIR has largely become a vehicle for the Administration to fast-track mass deportations even for the most vulnerable asylum seekers like our clients.[ii]

II. The Administration has Leveraged EOIR's Structural Vulnerabilities to Politicize the Courts, and Undermine Judicial Independence and Due Process for Immigrants in Proceedings

Over the past few years, the Administration has taken a variety of actions large and small to drastically limit access to humanitarian relief for immigrants including survivors of GBV. Due process has been virtually gutted, with the procedural safeguards that remain on the verge of extinction. The aptly named "asylum free zones"[iii] throughout the country are illustrative. Tahirih represents survivors in Atlanta, where the grant rate for asylum claims is less than 3%.[iv]

ATLANTA
230 Peachtree Street NW
Atlanta, GA 30303
Tel: 470-481-4700
Fax: 470-481-7400
Atlanta@tahirih.org

BALTIMORE
211 E. Lombard Street
Suite 307
Baltimore, MD 21202
Tel: 410-999-1900
Fax: 410-630-7539
Baltimore@tahirih.org

GREATER DC | NATIONAL
6402 Arlington Boulevard
Suite 300
Tel: 571-282-6161
Fax: 571-282-6162
TTY: 711
Falls Church, VA 22042
GreaterDC@tahirih.org
Justice@tahirih.org

HOUSTON
1717 St. James Place
Suite 450
Houston, TX 77056
Tel: 713-496-0100
Fax: 713-481-1793
Houston@tahirih.org

SAN FRANCISCO BAY AREA
881 Sneath Lane
Suite 115
San Bruno, CA 94066
Tel: 650-270-2100
Fax: 650-466-0006
SFBayArea@tahirih.org

tahirih.org

In addition, new EOIR hiring policies have given rise to numerous allegations of biased hiring based on political ideology.[v] The Administration has sought to terminate the Immigration Judges Union, to further weaken adjudicators' power and independence. And, when an immigration judge continued an important case last summer to maximize fairness of process, EOIR took the extraordinary step of removing the judge from the case.[vi]

1. The Politicization of the AG Certification Process

The AG has seized on his authority to remove specific cases from the courts. He has instead certified them to himself[vii] to ensure certain outcomes – namely, those that foreclose access to relief. Through this channel, the AG has:

- limited continuances, which hinders opportunities to secure counsel;[viii]
- limited "administrative closure" to promote removal of respondents before other applications for relief can be adjudicated;[ix]
- narrowed asylum eligibility for survivors of domestic violence and persecution based on a family-related particular social group;[x]
- restricted bond for asylum seekers,[xi] which, by prolonging incarceration, exacerbates trauma, delays survivors' healing, obstructs access to counsel and mental health services, and interferes with case preparation; and
- permitted judges to refuse to hold full asylum hearings with all relevant evidence.[xii]

a. The Impact of the AG's Decisions on Survivors of GBV

In *Matter of A-B-*,[xiii] the AG single-handedly sought to dismantle hard fought precedent centering survivors of domestic violence in the asylum analysis. Marginalizing the experience of survivors who have endured physical, sexual, and emotional torture - met with indifference or additional punishment from their own governments - has no place in our modern legal system.

The AG also punished survivors petitioning for relief through the longstanding bipartisan Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). These forms of relief include the U visa, T visa, and the VAWA "Self-petition" for lawful status. Per *Matter of Castro Tum*,[xiv] survivors with pending requests for this relief are now routinely denied motions to continue their cases while they await adjudication of their petitions by United States Citizenship & Immigration Services (USCIS). They are routinely and swiftly removed in the interim at great risk to their physical and emotional health and safety. Auxiliary services such as mental health counseling and shelters are often scarce in survivors' home countries. Tahirih client "Anna" was removed to her home country even after her U visa petition was *prima facie* approved by USCIS. Her abuser returned there as well, and her life is now in imminent danger.

2. The Politicization of Judicial Review through Rulemaking

EOIR issued rules in July and August 2019 which further politicize the immigration courts. The rules inappropriately shift influence over individual cases to the EOIR Director. In contrast to judges and BIA members, the Director is not a judge, with core functions being administrative in nature. These include communicating with Congress, the bar, and other stakeholders.[xv] Nothing about the Director's core competencies resembles the ability to render decisions in individual cases. Empowering this Director in this way sharply increases the risk of error, costly appeals, and most disturbingly, improper removal of vulnerable asylum seekers who have indeed met their burdens of proof.

a. The Impact of the August EOIR Interim Final Rule (IFR) on survivors of GBV

The August 2019 IFR codified policies that erode due process[xvi] in various ways. Among other measures, the rule imposed abbreviated timelines within which the Board of Immigration Appeals (BIA) must review appeals. If the BIA exceeds the timeframe, the EOIR Director can step in and issue a ruling.[xvii] True judicial independence demands that decisionmakers take whatever time is necessary to reach correct, just, and consistent results in each case before them. This expedited review process transforms EOIR from a judicial system into a political tool designed to prioritize speed at the expense of justice.[xviii] By contrast, to our knowledge, no United States federal court has previously been subject to arbitrary deadlines for a broad category of cases.[xix]

An assembly-line approach in the courts significantly harms survivors of GBV. Their cases are notoriously complex, insofar as they deviate from those reflecting a cis-male centered experience improperly presumed to be universal. Gender-based asylum claims often involve persecution inflicted by family members such as honor crimes, forced marriage, and domestic abuse. Judges frequently misconstrue or dismiss these forms of persecution as "personal" or "private" in nature that applicants can readily flee from internally, even where a government routinely refuses to protect survivors from these harms. Pervasive social stigmas around reporting GBV are also common, which further complicate survivors' ability to obtain objective corroboration for their claims. *Pro bono* attorneys spend nearly 300 hours during their first year representing Tahirih clients in proceedings. Thoughtful, informed, and careful judicial review in these cases is critical to ensuring compliance with our obligations under both US asylum law and the 1951 United Nations Convention and 1964 Protocol Relating to the Status of Refugees which prohibits *refoulement*.[xx] Yet, the IFR does exactly the opposite by fast-tracking even those cases warranting highly nuanced analyses and where an individual's life and freedom hangs in the balance. As survivors of GBV, Tahirih's clients are a highly vulnerable population. Not only do they face persecution, but when a non-state actor is the persecutor, it is often futile or even more dangerous to pursue government protection.[xxi] The IFR's expedited adjudication and review of cases poses an impermissible risk of "erroneous deprivation"[xxii] of life and liberty for survivors.

b. Competing Government Interests Should Not Prevail at the Expense of Due Process

While the government has a strong interest in reducing backlogs, which themselves lead to due process violations,[xxiii] fairness is the foundation of our legal system. It is not a bargaining chip. Increasing appropriations for EOIR in order to reduce the backlogs is an alternative, provided neutrality and fairness when hiring additional personnel is restored. Moreover, backlogs have not been caused by those seeking relief. Rather, they have been manufactured by the government itself. Most notably, the Attorney General unlawfully[xxiv] added "330,211 previously completed cases" to "the 'pending' rolls"[xxv] with the stroke of a pen by precluding immigration judges from administratively closing cases.[xxvi] EOIR is thus replacing one illegal fiat – that of restricting immigration judges' authority to manage their dockets – with another - restricting BIA members' authority to manage theirs.

Finally, the IFR timeline may reduce incarceration costs during the entire pendency of an individual's removal proceedings. However, the practice of detaining immigrants for that period is itself unconstitutional.[xxvii] Any justification along these lines improperly invokes one due process violation to justify another.

The IFR does provide an alternative when the BIA does not meet its deadlines: arrogating decision-making authority to an unqualified functionary – the EOIR Director - in violation of the Administrative Procedure Act.[xxviii] BIA members, dependent though they are on the AG, are judges and must be attorneys.

They have experience adjudicating cases and expertise in specific areas on immigration law. As noted above, it is highly inappropriate for a bureaucrat such as the EOIR Director to perform adjudicatory functions.[xxix]

3. Policy Guidance and Other Actions that Undermine Fairness

a. Fast-tracking Cases and the Impact on Survivors

In addition to the IFR's strict timelines for judicial review, EOIR also imposed performance metrics on immigration judges that directly link job evaluations to case completion rates.[xxx] Other efforts to arbitrarily force rapid decision-making include expediting Family Unit (FAMU) cases[xxxi] and pressure exerted on judges through a December 2017 AG memorandum.[xxxii]

Survivors of GBV in immigration proceedings need time to secure competent counsel as they navigate the complexities of the asylum process. As explained in detail above, their lives are at stake, yet the legal framework applied to their claims is inherently marginalizing. Once in progress, it is imperative that adjudicators conduct careful and thorough review of their cases. Truncating complex proceedings further compromises survivors' claims, and arbitrarily rushes attorneys – most often *pro bono* - through case preparation. Finally, the healing process for survivors is re-triggering, non-linear, and enduring. It can last for years or even a lifetime. Survivors need time to begin processing trauma so that they can meaningfully identify evidence, develop testimony, and otherwise prepare their cases.

b. Obstructing Legal Access and the Impact on Survivors

EOIR's Legal Orientation Program (LOP) has benefitted all relevant stakeholders since its inception. Respondents receiving legal orientations are empowered to make informed decisions about their cases, and in turn, judges can conduct proceedings with greater efficiency. However, DOJ attempted to scrap the program, and persists in maligning it despite strong data from EOIR itself demonstrating its benefits.[xxxiii] Survivors of GBV often do not know they are eligible for relief until receiving a legal rights presentation, as abusers notoriously mislead or withhold helpful information from them. For others, lack of accountability of abusers at home might lead to assumptions about what, if any, legal protections are available to them in the U.S. No legitimate interest can be served by limiting access to potentially life-saving information particularly when doing so has been shown to enhance judicial efficiency.

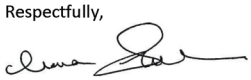
4. The Impact of Video Teleconferencing (VTC) on Survivors' Claims in Immigration Court

EOIR has been steadily expanding its longstanding use of VTC to immigration courts nationwide.[xxxiv] Yet, VTC prevents judges from directly assessing non-verbal forms of communication such as a respondent's body language or eye contact while testifying. A report, commissioned by EOIR itself, recommends limiting the use of VTC to hearings addressing procedural matters for this reason.[xxxv] VTC technical glitches are also commonplace and VTC reportedly causes further communication problems for those in need of language interpretation. Interacting with counsel via VTC is also challenging for respondents.[xxxvi] With no ability to observe a respondent in person, a judge is ill-equipped to accurately assess credibility particularly in cases involving GBV. Recounting horrific, sensitive details about rape and other violence is highly re-traumatizing in a regular court setting and even more so when VTC is used. Survivors must be truly seen and heard to have their claims fully and fairly evaluated.

III. Conclusion

Impartiality is the non-negotiable cornerstone of any judicial system. All who appear before our immigration courts deserve a meaningful opportunity to pursue the relief that Congress created for them. This includes a hearing where the ultimate decision is not a foregone conclusion. For survivors of GBV the stakes are extraordinarily high, with unimaginable violence awaiting them upon return home. That our immigration court system is structurally flawed has never been more apparent. To comply with our own domestic laws and international obligations, and ensure accountability, independence, and freedom from political influence, we urge Congress to remove the immigration courts from DOJ.

Respectfully,



Irena Sullivan
Senior Immigration Policy Counsel

---

[i] www.tahirih.org

[ii] ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (2010): https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report. authcheckdam.pdf; *See also* https://www.tahirih.org/wp-content/uploads/2019/10/Tahirih_EOIR-Comments.pdf

[iii] https://immigrationimpact.com/2016/12/20/asylum-free-zones/#.Xi-1qtPsbv8

[iv] http://trac.syr.edu/immigration/reports/590/

[v] https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=1425

[vi] Press Release, National Association of Immigration Judges, *Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts* (Aug. 8, 2018).

[vii] U.S.C. § 1103(g)(2) (West 2018).

[viii] *Matter of L-A-B-R-* et al., 27 I&N Dec. 405 (A.G. 2018).

[ix] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[x] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

[xi] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

[xii] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

[xiii] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

[xiv] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[xv] EOIR, Office of the Director, https://www.justice.gov/eoir/office-ofthe-director

[xvi] All immigrants in immigration proceedings are protected by the Due Process Clause of the Fifth Amendment. *See Plyler v. Doe*, 457 U.S. 202, 212 (1982), requiring "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *See Kaley v. United States*, 571 U.S. 320, 357 (2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (emphasis added).

[xvii] *See* 84 Fed. Reg. at 44,53940.

[xviii] Single members have 90 days to decide cases, three-member panels have 180 days. *See* 84 Fed. Reg. at 44,539.

[xix] Congress occasionally imposes timelines covering narrow classes of cases. *See, e.g.,* 28 U.S.C. § 1453(c)(2) (review of remand orders under the Class Action Fairness Act). As a legislative body, Congress is entitled to implement its priorities in this way.

[xx] https://www.unhcr.org/1951-refugee-convention.html

[xxi] *See, e.g.,* U.S. Dep't of State, Guatemala 2018 Human Rights Report 16 (2018) ("Guatemala Report"), https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf; U.S. Dep't of State, El Salvador 2018 Human Rights Report 16 (2018), https://www.state.gov/wpcontent/uploads/2019/03/EL-SALVADOR-2018.pdf; Amnesty International, Mexico 2017/2018, https://www.amnesty.org/en/countries/americas/mexico/report-mexico/;

U.S. Dep't of State, Haiti 2018 Human Rights Report 19-20 (2018), https://www.state.gov/wpcontent/uploads/2019/03/HAITI-2018.pdf; U.S. Dep't of State, Saudi Arabia 2018 Human Rights Report 44 (2018), https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf; U.S. Dep't of State, Kenya 2018 Human Rights Report 23 (2018), https://www.state.gov/wpcontent/uploads/2019/03/KENYA-2018.pdf.

[xxii] *Mathews*, 424 U.S. 319 at 334-35. The Supreme Court has repeatedly recognized that removal "may result in poverty, persecution, and even death" (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and of "life" or "all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is true of asylum seekers, who are, by definition, seeking protection from persecution. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

[xxiii] *See* http://www.tahirih.org/wp-content/uploads/2018/04/Tahirih-Statement-for-April-18-2018-Senate-Immigration-Subcomm-hearing-on-immigration-courts.pdf;https://www.tahirih.org/news/immigration-backlogs-keep-asylum-seekers-in-limbo/

[xxiv] Per the U.S. Court of Appeals for the Fourth Circuit, DOJ's own regulations expressly preclude this action by the Attorney General. *See Zuniga Romero v. Barr*, 4th Cir. No. 18-1850, Dkt. 50 (Aug. 29, 2019).

[xxv] TRAC, Immigration Court Backlog Surpasses One Million Cases: https://trac.syr.edu/immigration/reports/536

[xxvi] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[xxvii] *See,* e.g., Padilla v. ICE, ___ F.3d ___, 2019 U.S. Dist. LEXIS 110755 (W.D. Wash. July 2, 2019).

[xxviii] 8 C.F.R. § 1003.1(a)(1). As the IFR acknowledges, prior 8 C.F.R. § 1003.0(c) expressly prohibited the Director from deciding individual appeals. And where, as here, an agency knowingly makes a change to preexisting regulations, it must provide a reasoned, non-arbitrary explanation for that change. FCC v. Fox TV Stations, Inc., 566 U.S. 502 (2009). The IFR does not do so.

[xxix] https://www.tahirih.org/wp-content/uploads/2019/10/Tahirih_EOIR-Comments.pdf; The IFR further prevents the DOJ Office of General Counsel (OGC) from providing advice on cases. Like the transfer of power from BIA members to the Director, this transfers authority from expert professionals with deep institutional and substantive knowledge to political newcomers.

[xxx] https://www.justice.gov/eoir/page/file/1026721/download

[xxxi] https://www.justice.gov/eoir/page/file/1112036/download

[xxxii] https://www.justice.gov/eoir/file/1041196/download

[xxxiii] www.abajournal.com/news/article/doj_review_finds_immigrant_legal_education_program_ineffective_provider

[xxxiv] DOJ Backgrounder, *EOIR Strategic Caseload Reduction Plan*, (Dec. 5, 2017), *available at* https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction

[xxxv] https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf

[xxxvi] *See* https://gothamist.com/news/immigration-court-interpreters-say-video-teleconferencing-makes-it-difficult-to-do-their-jobs; *See also* https://gothamist.com/news/use-of-video-technology-surges-in-immigration-courts

Federal Bar Association

February 4, 2020

The Honorable Zoe Lofgren
Chair
Subcommittee on Immigration
and Citizenship
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Immigration
and Citizenship
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: January 29, 2020 Subcommittee Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

Dear Chair Lofgren and Ranking Member Buck:

We write in connection with the January 29, 2020 hearing of the Subcommittee on Immigration and Citizenship on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" and respectfully request that these comments be included in the hearing record.

The Federal Bar Association (FBA) is the foremost professional association of attorneys and judges engaged in the practice of law and administration of justice before the federal courts and federal administrative agencies. Over 19,000 members of the legal profession belong to the FBA through affiliation with nearly 100 local chapters around the country. The Immigration Law Section is one of 20 sections and divisions that focus on substantive areas of practice.

Since 2013 the FBA has called for the establishment of an Article I "United States Immigration Court" to replace the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) as the principal adjudicatory forum under title II of the Immigration and Nationality Act. With the aid of our Immigration Law Section, the FBA has drafted and shared with the members of the Judiciary Committee model legislation to create an Article I immigration court that would provide for more timely and effective adjudication of immigration matters.

We believe that a consensus is emerging that the current immigration court system is broken and deserves overhaul. As Congressman Buck noted at the January 29 hearing, immigration court caseload, backlog and morale problems deserve attention. One of the most visible signs of problems is the ever-growing case backlog and the enormous caseloads

that immigration judges carry on their dockets. Statistics from the Transactional Records Access Clearinghouse (TRAC) indicate that, as of December 2019, the backlog is over one million cases – and has been growing for decades. https://trac.syr.edu/phptools/immigration/court_backlog/. During the January 29 hearing, Representative Armstrong expressed his concern that a federal court organizational model may not represent the right approach because the federal courts face their own backlogs. Although TRAC statistics on immigration court workload do not reflect the same case weighting as applied by the Administrative Office of the U.S. Courts (AO) to the U.S. district courts, it is clear that the immigration courts face significantly greater caseloads than Article III district courts. The AO defines a vacancy on a federal district court as a "judicial emergency" when, among several conditions, weighted filings in that court are in excess of 600 cases per judgeship or weighted filings exceed 800 per active judge. In a comparison of immigration court and district court caseloads, the caseloads of the immigration courts are far heavier and burdensome. For example, the Immigration Court in Arlington, Virginia had a pending caseload of 52,980 cases, as of December 2019. https://trac.syr.edu/phptools/immigration/court_backlog/ With 17 immigration judges (without reference to senior status), the Arlington Immigration Court caseload is at four times the baseline of a federal district court "judicial emergency" caseload -- with over 3,100 cases per immigration judge. The Boston Immigration Court fares even worse – with 22 judges and 36,723 pending cases, yielding over 3,300 cases per immigration judge. Even if EOIR could fill all of the currently authorized immigration judge positions immediately, neither court would come close to reaching the caseload levels applied by the federal courts to identify vacancies that warrant emergency attention.

Additional reasons underscore the merits of an Article I court approach and the assurance of sufficient judicial authority and independence to administer justice. Currently, immigration judges are responsible for carrying out formal adjudications; yet, due to bureaucratic resistance within DOJ and DHS, they are deprived of the judicial authority – expressly conferred by Congress – to impose contempt sanctions upon noncompliant parties when necessary. They also lack independence to freely decide the matters before them and are measured negatively in their performance when the Attorney General disagrees with their decisions and remands the respective cases. The recent regulatory reorganization of EOIR, empowering the Director of EOIR – a political appointee – to adjudicate appeals from the immigration courts reflects an approach that introduces greater political influence into the adjudicatory process, not less. In addition, the FBA proposal for the creation of an independent Article I immigration court calls for Presidentially-nominated, Senate-confirmed appellate judges to replace the current Board of Immigration Appeals, consistent with the Appointments Clause of the Constitution. The appellate-level judges would follow a local merit-selection process to appoint immigration judges, a practice similar to that successfully used for decades to appoint bankruptcy judges and magistrate judges. At both appellate and trial levels, the proposed legislation would require the appointment of judges with relevant legal background and experience.

The FBA's model legislation would establish a specialized, independent Article I tribunal that provides distinct benefits. It would provide: fairness in the administration of the immigration laws; adjudication that is free of political influence; fixed terms for

immigration judges; and management of the operation of the courts themselves by their judges, in a manner similar to the operation of the federal courts. We believe these changes would ultimately lead to a court that operates with greater efficiency and cost-effectiveness, with decisions entitled to greater respect. An independent Article I Immigration Court would properly, and constitutionally, take its place beside other Article I courts established by Congress.

At the January 29 hearing, the Honorable Andrew R. Arthur testified that an independent Article I court would interfere with the Executive's foreign relations authority. We disagree. Establishment of an independent Article I court would not remove the ability of the Executive to make decisions in the immigration context that implicate foreign relations. Under the FBA model legislation, the Attorney General, the Secretary of State, and the Secretary of Homeland Security each would retain their decision-making authority over visa issuance, admissions into the United States, national security and related areas; the sole function removed from the Executive is the actual adjudication of removal cases. DHS would still retain the prosecutorial discretion to place a person in removal proceedings. The FBA model legislation provides the immigration court with no new jurisdictional authority; enforcement policy would remain with DHS. At most, the independent Article I immigration court would apply the law to the cases that DHS brings before it, and it would accord appropriate deference to the legal interpretations on which the Executive's enforcement actions are based.

The challenges of administering an effective immigration system are enormous. While we recognize that no structural alternative, including that of an Article I court, will single-handedly eliminate the trial-level case backlog, the transformation of immigration adjudication to an Article I court model would represent the same path that led to the establishment of the United States Tax Court and the United States Court of Appeals for Veterans Claims. Members of Congress – and this Subcommittee – may have strong opinions about whether our nation's immigration laws require overhaul and what that overhaul should entail. But specific steps toward reforming our immigration courts could proceed more immediately. We encourage the Subcommittee to actively consider legislative proposals that would establish an independent Article I immigration court, and we look forward to working with you in that endeavor.

Sincerely yours,

Christian K. Adams
National President

Mark J. Shmueli
Chair, Immigration Law Section

cc: Members of the Subcommittee on Immigration and Citizenship

Judith Bernstein-Baker, M.S.W., Esq,
P: [redacted]

February 4, 2020

Hon. Mary Gay Scanlon
By: E:Mail

Dear Rep: Scanlon:

Thank you for the opportunity to comment on the need for independent immigration courts to ensure fundamental fairness and comport with our international human rights responsibilities.

I am the retired executive director of a nonprofit organization that provided free or low cost immigration services at refugee resettlement to diverse populations in the Delaware Valley, Pennsylvania. I have been an immigration attorney for over 20 years. In my retirement, I do a considerable amount of pro bono representation, including deportation defense. I most recently visited Brownsville/Matamoros and interviewed 6 families/asylum seekers who are forced to remain in Mexico under the "Migrant Protection Protocols" and have their hearings heard in tent courts where Immigration Judges preside over video. I am appalled at the state of our immigration courts.

Our system of justice depends on decision-making based on the law, with a neutral arbiter, the Immigration Judge. Unfortunately, this is not the case with our immigration courts, especially under the current politicization of the law. Here are the issues I have observed:

1. **Inherent Structural Conflict**

Immigration Judges are part of the Department of Justice, in the Executive Branch. The attorneys who represent the Department of Homeland Security are also part of the Executive Branch. This sets up an inherent conflict of interest where one part of the executive apparatus is hearing a case, and another part is arguing the case. Under these circumstances there is tremendous pressure to defer to the Department of Homeland Security, rather than act as an independent decision maker. This conflict of interest is compounded during the federal appeal process. When a decision of the Board of Immigration Appeals is challenged by an immigrant in federal court, an attorney from the Department of Justice, Office of Immigration Litigation, handles the matter. At this point, then, an attorney from the Department of Justice is reviewing a decision from the Board of Immigration Appeals, another branch of the Department of Justice. Such a structure ensures a conflict of interest and undermines independent decision making.

2. **Abolishing Precedential Decisions and Disrespect of Article 3 Courts**

This structure has also resulted in a disrespect of our Article 3 Federal Courts. In the past two years, the Department of Justice has attempted to overrule prior Board of Immigration decisions, disregarding years of precedents and contrary decisions by our federal courts. The most recent example is *Matter of L-E-A*, which the Attorney General certified to himself, and then determined that families were rarely a social group. The decision is at odds with many circuit decisions that have found that families are indeed social groups.[1] Immigration Judges will feel bound by this decision unless there is contrary law in their circuit; it

[1] First Circuit— Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."); Aldana-Ramos v. Holder, 757 F.3d 9, 15 (1st Cir. 2014), as amended Aug. 8, 2014 (" It is well established in the law of this circuit that a nuclear family can constitute a particular social group. . . ."; "The law in this circuit and others is clear that family may be a particular social group simply by virtue of its kinship ties, without requiring anything more."). • Second

will result in costly additional federal litigation as well as inconsistent decisions in different circuits.

3. **Restricting Immigration Judges Decision-Making and Ability to Control Dockets**

Under new Department of Justice directives, Immigration Judges are not able to exercise discretion to continue, terminate, or administratively close cases when it is possible for immigrants to be granted lawful status or a visa by USCIS. For example, an immigrant victim of crime who has a pending U visa case, must wait years until the visa is available. Many are victims of horrendous crimes and are cooperating with the police. However, they now face removal before their U visa application can be adjudicated, despite the fact that these individuals bravely stepped forward to work with law enforcement. The lack of authority to continue, terminate or administratively close such cases, not only harms victims of interpersonal violence, but the entire community since it sends a message that cooperating with law enforcement will not protect you from removal. Other immigrants who were able to apply for a 601 Provisional waiver of unlawful presence while in the United States, and then return to their home country to apply for a visa and return to their families in a short amount of time, are denied this option because their cases are no longer administratively closed. That means in many cases, the immigrant must wait years in the home country, separated from their families, often to the great detriment of their spouses and especially their children. This has impacted many Pennsylvania families.

Case Example from Pennsylvania. A U.S. citizen filed a marriage petition for his wife, the mother of 3 children, who was in removal proceedings because an attorney, who was subsequently suspended from the practice of law, filed an asylum application for her. Because the Immigration Courts are no longer able to terminate or close cases, the couple was never able to move forward with filing of an I-601A "stateside waiver." If the case was administratively closed, she could remain with her family, get approval of the waiver, return to her home country, and seek to return on an immigrant visa. Instead, this mother is forced to remain in immigration court for the duration of her "cancellation of removal" case, which entails a higher legal standard than the 601A Waiver. There is a good chance this family will be needlessly separated for years because of the Attorney General's decision that Immigration Judges lack the authority to administratively close cases.

4. **Quotas and Rushed Decisions**

Judges are now held to strict quotas which result in pressure for them to rush through cases. This is a major problem for individuals in detention. Cases are rushed through, which do not give the immigrant or their representative time to gather evidence and produce witnesses. Under the Trump administration, almost

---

Circuit—Vanegas-Ramirez v. Holder, 768 F.3d 226, 237 (2d Cir. 2014) (recognizing that noncitizen's "membership in his family may, in fact, constitute a 'social-group basis of persecution' against him") (citing Vumi v. Gonzales, 502 F.3d 150, 155 (2d Cir. 2007)). • Third Circuit—S.E.R.L. v. Att'y Gen. U.S., 894 F.3d 535, 556 (3d Cir. 2018) ("Kinship, marital status, and domestic relationships can each be a defining characteristic of a particular social group, but that does not mean that adding two or more of those characteristics together necessarily establishes a cognizable particular social group."). 27 • Fourth Circuit— Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (finding family to be a "prototypical" PSG); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) ("[M]embership in a nuclear family qualifies as a protected ground for asylum purposes."). • Sixth Circuit— Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) ("[A] family is a 'particular social group' if it is recognizable as a distinctive subgroup of society."); Trujillo Diaz v. Sessions, 880 F.3d 244, 250 n.2 (6th Cir. 2018) (citing Al-Ghorbani). • Seventh Circuit— Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA. . . ."); Gonzalez Ruano v. Barr, 922 F.3d 346, 353 (7th Cir. 2019) ("We and other circuits have recognized that membership in a nuclear family can satisfy the social group requirement."). • Eighth Circuit— Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005) ("[P]etitioners correctly contend that a nuclear family can constitute a social group. . . . "); Aguinada–Lopez v. Lynch, 825 F.3d 407, 409 (8th Cir. 2016) (assuming petitioner's proposed family-based PSGs were cognizable and citing to Bernal-Rendon). • Ninth Circuit— Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding immediate family to be a "prototypical" PSG); Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (finding family to be a "quintessential" PSG). (reprinted from: Practice Pointer, Matter of L-E-A-, Catholic Legal Immigration Services, available at https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e)

no asylum seekers are released from detention, even after they've shown a credible fear of persecution. Under past administrations, 80-90% of those who demonstrated a credible fear were released. As a result, immigrants and their attorneys are often forced to limit what they present, and important evidence can be overlooked. These are high stakes cases, treated as if a decision regarding someone's well-being or even their life, can be made in 2 or 3 hours.

Many asylum seekers, who do not understand the process, are simply quickly deported in absentia.

Case Example from Pennsylvania: I recently worked on an asylum case of an illiterate man from Guatemala who thought the Immigration Court had his address because he was wearing an ankle bracelet and he gave ICE his new address in the new state where he resided after release from detention. He even tried to call the court with the assistance of an attorney on the EOIR hotline, which provides case status and hearing dates. The hotline reported there was no information about his case. A few weeks later, he was picked up by ICE who informed him that he was deported in absentia from the court that initially had his case, and he was re-detained with his 10 year daughter in Berks Family Shelter.

5. **Human Rights Violations at the Border**

The situation at the border is nothing short of "assembly line justice" and a travesty of international human rights. Although the "Migrant Protection Protocols" were created by the Department of Homeland Security, and not the Department of Justice, the Immigration Courts are acceding to the chaos and lack of due process created by the MPP program. I note that under MPP, individuals must show there is a "significant possibility" they will suffer persecution or torture in Mexico in order to pursue their case while in the United States. This legal standard is NOT the standard for asylum, which requires a well-founded fear of persecution that has been interpreted by the Supreme Court as a 10% chance of harm.

About 60,000 individuals are waiting in Mexico and can only come into the United States when their hearing is scheduled. Getting notice to applicants is chaotic. Mailing additional evidence for the case from Mexico to the courts is difficult, expensive, if not impossible to meet court imposed deadlines. It is estimated only 4% have attorneys.[2] The asylum seekers often don't speak English and do not know the first thing about how to put together an asylum application. As a result, individuals who face serious persecution may be returned home to great danger. I was personally at the border and interviewed a family whose son was targeted by gangs was deported by our government expeditiously and less than a year later, murdered in his family home by his persecutor, while his family was held hostage. Even worse, CBP and ICE officials are apprehending asylum seekers and sending them to new tent detention facilities in Donna Texas and near El Paso. These centers are shrouded in secrecy, and from what advocates gather, quickly interview the detainees, and deport most of them to the home country or Guatemala, if they passed through Guatemala, within 15 days. No lawyers, no judges, no process.

In sum, it is time to depoliticize our Immigration Court system and establish independent Article 1 courts that develop consistent precedents, adhere to the rule of law, and permit Judges to deliberate life and death matters in a neutral fashion.

Sincerely yours,

Judith Bernstein-Baker, M.S.W., Esq.

[2] https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access