



SANTA FE
DREAMERS
PROJECT



**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”**

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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).

A. The Attorney General has systematically eliminated due process in immigration court

Respondents in immigration proceedings must receive a full and fair hearing in line with constitutional due process and the case-by-case adjudication standards outlined in the INA.⁴ Yet the office of the Attorney General has long allowed immigration judges to violate noncitizens' due process rights in a systemic manner that undermines the integrity of the immigration court system in exchange for advancing the executive branch's policy and political goals.⁵

Judicial bias is pervasive and unchecked in many courtrooms, with judges engaging in aggressive, prejudiced, and unprofessional treatment of respondents rather than providing fair, neutral, and consistent adjudication.⁶ As experienced by immigration practitioners across the country, judicial bias manifests itself in many forms: bullying and harassment from the bench,⁷ unsupported negative credibility determinations,⁸ and xenophobic and prejudiced statements.⁹ In many cases, immigration judges appear to prejudge cases, relying on their own views of respondents' characteristics or claims instead of on governing law.¹⁰

In addition to permitting widespread bias, the Attorney General has allowed immigration courts to adopt unlawful local operating procedures that impede respondents' ability to apply for

⁴ See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”). The INA also establishes case-by-case adjudication standards that require the right to be represented by counsel at no cost to the government, the right to a reasonable opportunity to submit and examine evidence and cross-examine witnesses, the right to a full record of proceedings, and the right to an impartial decision based only on the record of proceedings. 8 U.S.C. §§ 1229a(b)(4)(A)–(C), (c)(1)(A).

⁵ See Alberto Gonzales and Patrick James Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016) (laying out roadmap that the current administration has followed, using the Attorney General's appellate authority to implement executive policy).

⁶ In addition to reports from immigration practitioners, a growing list of circuit court decisions has excoriated the EOIR for a pattern of clearly biased immigration court proceedings. See, e.g., *Wang v. Att'y Gen.*, 423 F.3d 260, 267–68 (3d Cir. 2005) (“[W]e have repeatedly sought to remind IJs of their duty to remain neutral and impartial when they conduct immigration hearings. . . . A disturbing pattern of IJ misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns.”); *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (“[T]he adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”).

⁷ Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 424 (2011) (collecting cases in which federal judges found immigration judges bullied, insulted, and mocked respondents, and positing that these immigration judges' “hostile attitudes reflect an anxiety about immigration and an underlying prejudice toward potential immigrants that is actually quite widespread”); Letter from Emory Law School and Southern Poverty Law Center, to Juan P. Osuna, Director, EOIR, Re: Observations of Atlanta Immigration Court (March 2, 2017), <https://perma.cc/56GH-LT6L>.

⁸ See Jeanette L. Schroeder, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 B.U. L. REV. 315, 326 (2017) (“[C]redibility determinations in asylum adjudications are often highly subjective. As a result, such determinations are particularly susceptible to immigration judges' subconscious cultural biases . . .”).

⁹ ABA Commission on Immigration, *2019 Update Report: Reforming the Immigration System* [hereinafter ABA Report], AM. BAR ASS'N, 2–19 (March 2019), <https://perma.cc/94TF-FXGV>.

¹⁰ See Marouf, *supra* note 7, at 438 (“intuitive cognitive shortcuts . . . can also lead to ‘severe and systematic errors.’”); Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 493–98 (2008).

asylum, present evidence, or raise particular legal claims.¹¹ Respondents’ rights to a fair hearing have also been consistently undermined by immigration judges’ unilateral docket changes, which either advance or delay cases with little or no notice to respondents and their attorneys.¹² These shortcomings are exacerbated by the failure of the Board of Immigration Appeals to fulfill its intended role of correcting errors—both legal and procedural, purposeful and accidental—made in the adjudication of immigration claims.¹³

The impact of this lack of due process is evident in the proliferation of “asylum-free zones” across the country.¹⁴ In these immigration courts, judges categorically deny asylum claims regardless of their merits—effectively suspending asylum law in entire jurisdictions. In FY2019, for example, both the El Paso and Atlanta immigration courts denied more than 96% of the asylum claims they decided.¹⁵ Nationwide, twenty-three immigration courts—nearly 40% of all immigration courts—were asylum-free zones that denied at least 85% of asylum claims.¹⁶

As we allege in our recent complaint, the office of the Attorney General has long been aware of the extraordinary rates of denials that persist in many immigration courts.¹⁷ Yet the Attorney General has taken no meaningful action to curb these systemic abuses. Instead, the Attorney General has seemingly rewarded judges with some of the highest denial rates by promoting them to positions on the Board of Immigration Appeals.¹⁸ In August 2019, the Attorney General appointed six sitting judges to the BIA; while the national average asylum denial rate among immigration judges over the last five years is 63.1%, five of the new BIA members denied over

¹¹ While EOIR’s Immigration Court Practice Manual recognizes “the discretion of Immigration Judges to act in accordance with law and regulation,” sub-regulatory rules may not unlawfully prejudice a noncitizen’s case. Immigration Court Practice Manual, EOIR (Dec. 2016), <https://perma.cc/ND96-MW9B>; see also 8 C.F.R. § 1003.40 (allowing immigration courts to “establish local operating procedures” provided that “[s]uch operating procedure(s) shall not be inconsistent with [federal regulations]”).

¹² Innovation Law Lab and the Southern Poverty Law Center, *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool*, 14–15 (June 2019), <https://innovationlawlab.org/reports/the-attorney-generals-judges/>.

¹³ *Id.* at 17.

¹⁴ See John Washington, *These Jurisdictions Have Become Asylum-Free Zones*, THE NATION, Jan. 18, 2017, <https://www.thenation.com/article/archive/these-jurisdictions-have-become-asylum-free-zones/>.

¹⁵ See TRAC Immigration, *Asylum Decisions* (data through Sept. 2019), <https://trac.syr.edu/phptools/immigration/asylum/> (accessed Nov. 4, 2019); see also Elise Foley, *Here’s Why Atlanta Is One Of The Worst Places To Be An Undocumented Immigrant*, HUFFPOST, May 25, 2016, https://www.huffpost.com/entry/deportation-raids-immigration-courts_n_574378d9e4b0613b512b0f37

¹⁶ See TRAC Immigration, *Asylum Decisions*, *supra* note 15 (based on statistics of courts that decided at least fifty asylum cases in FY2019).

¹⁷ See *Las Americas* Complaint, *supra* note 1, ¶¶ 100–03, citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7 (2008), <https://www.gao.gov/assets/290/281794.pdf> (identifying significant disparities in asylum outcomes across courts and analyzing the factors leading to the disparity); U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES (2016), <https://www.gao.gov/assets/690/680976.pdf> (observing continued disparities in the 2007–2014 period, despite having made concrete recommendations to EOIR in 2008).

¹⁸ U.S. Department of Justice, *Executive Office for Immigration Review Swears in Six New Board Members*, Aug. 23, 2019, <https://www.justice.gov/eoir/page/file/1197861/download>.

90% of their cases.¹⁹ Among the new members, Judge Earle Wilson denied over 96% of asylum applications,²⁰ and Judge William Cassidy denied 98.7%.²¹

At the same time, the Attorney General has undermined respondents' access to timely hearings by overseeing a skyrocketing backlog of over one million pending immigration court cases.²² Since 2010, the immigration court backlog has grown by 300%; under the current administration, it has nearly doubled.²³ The Attorney General's 2018 decision eliminating administrative closure also encouraged another 322,535 previously closed cases to be added back to the docket.²⁴ The Attorney General has exacerbated the backlog through "incessant docket shuffling in furtherance of various law enforcement 'priorities,'"²⁵ such as the 2017 "surge" of immigration judges to the border, which caused nearly 23,000 scheduled hearings to be postponed in a three-month period.²⁶ This mismanagement keeps thousands of respondents in a state of legal uncertainty, denying them the opportunity to have their cases heard when they are ripe for adjudication. In some courts, respondents must wait more than four years for their next hearing.²⁷ Such unreasonably long delays undermine due process, making legal representation more challenging to obtain and compromising respondents' ability to present witnesses and evidence.

¹⁹ See TRAC Immigration, *Judge Reports (2019)*, <https://trac.syr.edu/immigration/reports/judgereports/> (accessed Jan. 28, 2020). <https://trac.syr.edu/immigration/reports/judgereports/00132ATL/index.html> (accessed Jan. 28, 2020).

²⁰ TRAC Immigration, *Judge Reports: Judge Earle B. Wilson*, <https://trac.syr.edu/immigration/reports/judgereports/00132ATL/index.html> and <https://trac.syr.edu/immigration/reports/judgereports/00132ATD/index.html> (accessed Jan. 28, 2020).

²¹ TRAC Immigration, *Judge Reports: Judge William A. Cassidy*, <https://trac.syr.edu/immigration/reports/judgereports/00004ATD/index.html> (accessed Jan. 28, 2020).

²² See *Las Americas* Complaint, *supra* note 1, ¶¶ 104–16; TRAC Immigration, *Immigration Court Backlog Tool* (data through Dec. 2019), https://trac.syr.edu/phptools/immigration/court_backlog/ (accessed Jan. 28, 2020).

²³ See *Immigration Court Backlog Tool*, *supra* note 22; TRAC Immigration, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/> (reporting backlog as of September 30, 2019).

²⁴ See *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Crushing Immigration Judge Caseloads*, *supra* note 23.

²⁵ 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" 3 (Apr. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

²⁶ See National Immigrant Justice Center, *Department of Justice Executive Office for Immigration Review (EOIR) responses to NIJC Freedom of Information Act (FOIA) requests regarding the immigration "surge courts"* (March–May 2017), <https://immigrantjustice.org/immigration-surge-courts>; Human Rights First, *Tilted Justice: Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts*, 15 (Oct. 2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>.

²⁷ As of the end of September 2019, the average projected total wait time for cases in the Denver Immigration Court was 4.29 years (1566 days). The average projected total wait time for cases in the Arlington Immigration Court was 4.40 years (1607 days). TRAC Immigration, *Crushing Immigration Judge Caseloads* ("These statistics are merely projected figures for the average wait time based on the court's hearing schedule as of the end of September. Over half of these cases are waiting for their master calendar hearing - somewhat like an arraignment were this a criminal court. Thus, these projected wait times do not include further delays required to schedule any individual merit hearings after these initial master calendar hearings are held.").

B. The executive branch has eliminated judicial independence and weaponized the immigration courts against noncitizens seeking asylum

Under President Trump, the executive branch has eliminated judicial independence and weaponized the courts against individuals seeking asylum through both the implementation of enforcement-oriented performance metrics (hereafter, “Enforcement Metrics”) and through the creation of a fast-paced docket specifically for family units, the “FAMU docket.” As alleged in our lawsuit, with these two policies, the courts have transformed judges into deportation enforcers.²⁸

The Enforcement Metrics require immigration judges to comply with certain performance benchmarks, including case completion quotas that require them to decide approximately three cases per day, to receive a satisfactory performance rating. Immigration judges therefore have a direct pecuniary interest in the outcome of each case they adjudicate as their performance evaluations depend on rapid decisions and case closures. This administration’s directive, telegraphed through public statements²⁹ and certified decisions that make it exponentially more time-efficient to deny asylum cases than to grant them,³⁰ conveys a strong preference for rapid asylum case denial and removal from the United States.

The Enforcement Metrics have three components: a Case Completion Quota, a Remand Rate, and Speed-Related Adjudication Benchmarks. The Case Completion Quota requires immigration judges to complete 700 cases each year, equivalent to about three case completions every business day. The Remand Rate requires immigration judges to have fewer than fifteen percent of their decisions reversed on appeal. The Speed-Related Adjudication Benchmarks (1) constrain the amount of time an immigration judge may spend on a matter and (2) impose categorical timeframes on bond cases, individual asylum hearings, and credible and reasonable fear reviews without regard to whether a particular case is ready for adjudication. To remind judges of these obligations and to achieve compliance, the administration has installed a “dashboard” on the judges’ computers showing red, yellow or green to indicate whether the judge is on track to meet the benchmarks. Taken together, the dashboard, Enforcement Metrics, and disparaging statements from this administration influence the adjudication of individual asylum cases and create a constitutionally intolerable risk of actual bias in the immigration courts.³¹

On the specialized accelerated FAMU docket, built primarily for Central American families applying for asylum, families have fewer procedural rights and their cases are stigmatized from the beginning. As of January 13, 2020, there were over 118,000 cases on the FAMU docket in

²⁸ See *Las Americas* Complaint, *supra* note 1, ¶¶ 117–20.

²⁹ *Trump on Asylum Seekers: ‘It’s a Scam, It’s a Hoax’*, DAILY BEAST (Apr. 5, 2019), <https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax> (last accessed Jan. 28, 2020) (quoting President Trump’s statement that “[asylum]’s a scam. Okay? It’s a scam. It’s a hoax . . . So, our system is full. We’re not taking them anymore.”).

³⁰ See, e.g., *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (overruling a case that established that certain victims of domestic violence constituted a particular social group for the purpose of establishing asylum eligibility).

³¹ See, e.g., *Matter of L-A-B-R-*, 27 I&N Dec. 405, 415 (A.G. 2018) (expressly holding that judges should consider “concerns of administrative efficiency” when evaluating motions to continue).

the ten cities where it had been implemented.³² In cases subject to the FAMU Directive, immigration judges are hamstrung by mandatory timelines. Immigration courts in the ten pilot cities must schedule an initial hearing within 30 days of the filing of the Notice to Appear, schedule an evidentiary (or “merits”) hearing within six months of the filing of the Notice to Appear, and complete the case with a written or oral decision within 365 days of the filing of the Notice to Appear. An immigration judge may authorize only a single continuance of no more than 45 days in a FAMU-designated case, regardless of the facts or circumstances of the individual case. In no other type of case is such a limitation imposed on immigration judges’ ability to exercise discretion by granting a continuance. In conjunction with the Administration’s public condemnation of Central American families at the border—such as its refrain that “an overwhelming majority of cases don’t qualify for relief”³³—and repeated instructions to immigration judges that they are law enforcement officers, the “FAMU” or similar designation indicates to an immigration judge that the case must be hastened through the system with little regard for individualized facts or circumstances. The FAMU docket thus stigmatizes cases of recently arrived families, undermining the fairness of their proceedings.

Taken together, these two policies represent a deliberate effort by this administration to use immigration judges to systematize the denial of asylum claims by nullifying asylum law and speeding up immigration court proceedings for certain asylum seekers. As one former immigration judge noted, she has developed “grave concerns, based on what [she has] seen in court recently, that [new immigration judges] have been appropriately trained to be judges in a professionalized, [truly independent] immigration court.”³⁴ Another former immigration judge has explained that “there isn’t even any attempt at a proper training. The whole indoctrination is you’re not judges, you’re really enforcement. You’re really a branch of DHS in robes.”³⁵

C. Systemic due process violations and lack of judicial independence harm asylum seekers and undermine their attorneys’ ability to provide meaningful legal representation

This administration has particularly targeted asylum seekers and radically changed both procedural and substantive rules governing asylum adjudication. For the past thirty years, the United States has positioned itself as a world leader in protecting refugees and asylum seekers.³⁶ In the past three

³² Executive Office for Immigration Review, “Family Unit” Data for Selected Courts (last updated Oct. 28, 2019), <https://www.justice.gov/eoir/page/file/1187416/download> (last accessed Jan. 24, 2020) (providing court data from the ten cities of Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, Miami, New Orleans, New York City, and San Francisco).

³³ In August 2019, Immigration and Customs Enforcement said in a statement that the goal of the FAMU policy is to “disincentivize families—where an overwhelming majority of cases don’t qualify for relief, but instead end with removal orders—from making the treacherous journey to the United States.” Amy Taxin, *Trump administration pushes to speed up migrant family cases*, Associated Press (Aug. 3, 2019), <https://www.apnews.com/1e3d49caa25940a88de13306af0ead78>.

³⁴ *The Attorney General’s Judges*, *supra* note 12, at 18 (quoting former immigration judge Rebecca Jamil).

³⁵ *Id.* (quoting former immigration judge and BIA chairman Paul Schmidt).

³⁶ While the United States had resettled more refugees than all other countries *combined* for the past thirty years, in 2018, Canada resettled more than the U.S. as the U.S. slashed refugee admission numbers to historic lows. Noah Lanard, *The United States Is No Longer the World Leader in Resettling Refugees*, MOTHER JONES, Jan. 23, 2019, <https://www.motherjones.com/politics/2019/01/the-united-states-is-no-longer-the-world-leader-in-resettling-refugees/>.

years, however, this administration has sought to slam the door on those most vulnerable, with the Attorneys General painting a picture of refugees as would-be terrorists and the asylum system as being “subject to rampant abuse and fraud.”³⁷ In 2018, at a ceremony inducting new immigration judges, then-Attorney General Sessions reminded new judges that their role is to implement the Attorney General’s will and that immigration lawyers subvert his will by “work[ing] every day—like water seeping through an earthen dam—to get around the plain words of the INA to advance their clients’ interests.”³⁸ And at last year’s induction ceremony, the Deputy Attorney General admonished new judges that “you are a member of the executive branch. You follow lawful instructions from the Attorney General, and you share a duty to enforce the law.”³⁹

Under this administration, the Attorney General has used his appellate authority to implement this enforcement function by attempting to foreclose asylum to most people fleeing violence. In *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General overturned a precedent which allowed survivors of domestic violence to claim asylum protection, stating in dicta that generally “claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” Similarly, in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), the Attorney General issued a precedent seeking to end asylum for those who are harmed or threatened because of their family relationships. While family membership had been a bedrock protected characteristic under asylum law, the Attorney General has now said that in “the ordinary case, a family group will not meet that standard.” *L-E-A-*, 27 I&N Dec. at 586. In both cases, the Attorney General issued sweeping decisions, defying the regulations which only give him authority to do so when cases are pending before the Board of Immigration Appeals.⁴⁰

At the same time, the Attorney General and the Board of Immigration Appeals, which answers to him, issued two decisions which dramatically limit asylum seekers’ due process rights before the court. In *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), the Board of Immigration Appeals held that asylum seekers must clearly articulate the contours of their “particular social group” before the immigration court and cannot offer a different framing on appeal. Many immigration judges have interpreted this decision to require asylum seekers to articulate their particular social group at master calendar hearings, and some immigration judges will not even schedule individual hearings if they determine that this statement does not establish a viable claim. Limiting access to full hearings appears to be the Attorney General’s intent. In *Matter of E-F-H-*

³⁷ Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, Oct. 12, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

³⁸ Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR), Sep. 10, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

³⁹ Deputy Attorney General Rod J. Rosenstein Delivers Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges, Mar. 15, 2019, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly>.

⁴⁰ 8 CFR § 1003.1(h) states the circumstances under which “the Board *shall* refer cases to the Attorney General for review of its decision.” (Emphasis added.) There is no authority in the regulations for the Attorney General to decide a case that is not referred by the Board. In *Matter of A-B-*, immigration judge V. Stuart Couch, now a BIA member, had defied the Board’s explicit instructions in refusing to grant the respondent a new hearing. See *The Attorney General’s Judges*, *supra* note 12, at 4 (describing the irregularities in the self-certification of *Matter of A-B-*). *Matter of L-E-A-* was not even pending before the Board when the Attorney General issued his decision; the Board had remanded the case to the immigration judge.

L-, 27 I&N Dec. 226 (A.G. 2018), the Attorney General vacated a BIA precedent which required immigration judges to allow testimony in immigration court.⁴¹ Taken together, these cases open the door for judges to deny cases without ever giving asylum seekers an opportunity to fully explain the details of the harm they fled and fear on return to their home countries.

During this administration, the Attorney General and BIA have issued 14 decisions affecting asylum—every one of which has gone against asylum seekers. DOJ has also issued an interim final rule which allows the Director of the Executive Office for Immigration Review to issue decisions, including precedential decisions, on his own, on any appeal that has been pending for more than 180 days.⁴² This regulation creates a “mini-Attorney General,” vesting a single individual with the authority to create precedent for immigration judges throughout the country.

D. To correct the injustices of the current immigration court system, Congress should act to adopt an Article I system that incorporates key elements of court reform

The elimination of judicial independence from our nation’s immigration court system has deprived individuals in removal proceedings of full and fair hearings in which their due process rights are protected and their cases are impartially adjudicated on their merits. These violations require an immediate response—which is why we asked the courts to intervene. In our lawsuit, we demand that members of the executive branch be required to uphold their constitutional and statutory duties to oversee a fair, functioning immigration court system.⁴³

Yet other structural issues that have caused such systemic failures in the immigration courts also demand institutional reform. Congress has an essential role to play in this reform, which must include safeguards that insulate decision-makers from political pressures and mechanisms to protect against due process violations. Effective legislative reform should encompass not only the creation of an independent Article I court, but also the implementation of additional procedures to hold immigration judges accountable and maintain the rule of law.

1. Congress should convert the immigration court system to an Article I court that is structurally independent of political influences

For the reasons explained above, the immigration courts have never functioned as a fair forum for impartial adjudication and will fail to do so as long as the Attorney General retains unilateral control over the system. The best legislative solution is therefore to sever the immigration courts from executive control, converting them to a new Article I immigration court system with trial and appellate divisions. Indeed, stakeholders and immigration court experts agree that an Article I immigration court is the best long-term solution to the system’s current failures.⁴⁴ There is also

⁴¹ See *The Attorney General’s Judges*, *supra* note 12, at 25–26.

⁴² 8 CFR §1003.8(ii); 84 Fed. Reg. 44537 (Aug. 26, 2019) *et seq.*

⁴³ See *Las Americas* Complaint, *supra* note 1, at 62–63.

⁴⁴ See, e.g., ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, AM. BAR ASS’N. (2010), <https://perma.cc/59LM-4MFW> (“We . . . continue to recommend an Article I court system for the entire immigration judiciary and now view it as much superior to an independent agency in the Executive Branch.”); AILA Policy Brief, *Restoring Integrity and Independence to America’s Immigration Courts* (Sept. 2018) (“In order to protect and advance America’s core values of fairness and equality, the immigration court must be restructured

precedent for the creation of Article I courts as a solution to concerns regarding judicial independence. All three existing Article I courts—the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the U.S. Court of Appeals for the Armed Forces—originated as components of executive agencies that were later converted by Congress to their current structure.

Congress should also provide for effective appellate review of immigration judges’ decisions to ensure fair outcomes and set clear legal standards. As former immigration judge and BIA chairman Paul Schmidt has explained, an independent system needs “a real appellate body that acts like an appellate court, not a rubberstamp for the Attorney General.”⁴⁵ Indeed, just last week, the U.S. Court of Appeals for the Seventh Circuit found itself called upon 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.”⁴⁶ To provide an effective structure for appellate review, Congress should require that all decisions of the BIA be made by multimember panels and issued in fully reasoned written opinions addressing all material arguments. To ensure that BIA members, like immigration judges, are insulated from political pressure, Congress should also implement a transparent merits-selection process and some form of tenure or for-cause removal for all BIA members.

2. To ensure lasting reform, Congress must incorporate additional mechanisms for accountability

Comprehensive immigration court reform by Congress must include merits-based appointment of judges; tenure and protection from removal without cause; and internal accountability mechanisms to protect the rule of law.

Immigration judges in an Article I court system should be selected through a transparent process with rigorous criteria to ensure the bench has a robust understanding of immigration law and is well-suited to fairly adjudicate cases. Qualifications should include legal expertise and cultural sensitivity, judicial temperament, and care in judging the credibility of respondents and witnesses, particularly of trauma survivors. Political appointees should not make hiring decisions.⁴⁷ Changes should also be made to the judicial recruitment process to decrease the overrepresentation of former DHS attorneys.⁴⁸ And the public should be informed about the appointment process through disclosure of the specific hiring criteria.⁴⁹

outside of the control of DOJ, in the form of an independent Article I court.”); Statement of Judge A. Ashley Tabaddor, *supra* note 25, at 1–13 (same); *Congress Should Establish an Article I Immigration Court*, Federal Bar Association, <https://perma.cc/AD39-29VJ> (same).

⁴⁵ *The Attorney General’s Judges*, *supra* note 12, at 27.

⁴⁶ *Baez-Sanchez v. Barr*, No. 19-1642, 2020 WL 370536, at *2 (7th Cir. Jan. 23, 2020).

⁴⁷ See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 451-452 (2007) (“When political officials make hiring decisions, the temptation to prize ideological and partisan political preferences over judicial aptitude and temperament becomes clear.”).

⁴⁸ See ABA Report, *supra* note 9, at 2–18; Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, APPLESEED, 20-22 (2012).

⁴⁹ The American Bar Association recently reported that “DOJ and EOIR have declined to share the new hiring criteria with stakeholders[.]” ABA Report, *supra* note 9, at 2-19 (discussing the “utter lack of transparency” in the

To further protect their independence and neutrality, immigration judges should also enjoy some form of tenure and be removable only for good cause. The Constitution and the Administrative Procedure Act clearly recognize the importance of tenure guarantees in protecting judges' ability to adjudicate fairly and impartially.⁵⁰ For instance, administrative law judges (ALJs) who adjudicate cases in other federal agencies often serve fixed terms and can be removed or disciplined only for "good cause" after an evidentiary hearing before the Merit Systems Protection Board.⁵¹ Such protections allow ALJs to adjudicate according to their professional judgment without fear of retaliation.

In addition to procedural reforms that help ensure a full and fair hearing for noncitizens in removal proceedings,⁵² an Article I immigration court system needs transparent and robust mechanisms to foster public confidence and hold judges accountable for misconduct. Immigration judges should be regularly evaluated using judicial model performance reviews, rather than numerical performance metrics or the federal employee review system.⁵³

For the foregoing reasons, we urge this Committee to swiftly pursue comprehensive immigration court reform. By moving the immigration courts outside the control of the executive branch, Congress can ensure that the court system operates with the independence and respect for due process that our laws and tradition of justice require.

We thank this Committee for your engagement on this pressing issue and for the opportunity to submit this statement.

current hiring regime). The ABA has also recommended greater public input and participation in the immigration judge hiring process. *Id.* at 2-31.

⁵⁰ U.S. CONST. art. III, § 1; 5 U.S.C. § 7521.

⁵¹ *See generally* 10 U.S.C. § 942(c); 26 U.S.C. § 7443(f); 28 U.S.C. § 176; 38 U.S.C. § 7253(f).

⁵² *See, e.g.*, ABA Report, *supra* note 9, at 2-29 to 2-33 (including, for example, recommendations for prehearing conferences and limitations on hearings by videoconference); Charles Roth & Raia Stoicheva, *Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court*, NATIONAL IMMIGRANT JUSTICE CENTER, 2 (Oct. 2014), <https://perma.cc/26YW-3U5V>.

⁵³ *See* ABA Report, *supra* note 9, at 2-30; *Judicial Performance Evaluation: How It Works*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, <https://perma.cc/LB3X-LYMA> (explaining best practices for judicial evaluation).

EXHIBIT 1:

Innovation Law Lab and the Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 2019).

THE ATTORNEY GENERAL'S JUDGES

HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL



**INNOVATION
LAW LAB**



**SPLC
Southern Poverty
Law Center**

SPECIAL REPORT // JUNE 2019

The nation's immigration courts have been dysfunctional since their inception. Today, the system has effectively collapsed. The attorneys general appointed by President Trump have used their authority over the immigration courts to weaponize them against asylum seekers and immigrants of color in support of Trump's anti-immigrant policies. This report examines the system's collapse and explains why it cannot be salvaged in its current form.

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About Innovation Law Lab

Innovation Law Lab is a nonprofit organization dedicated to upholding the rights of immigrants and refugees. By bringing technology to the fight for justice, we empower lawyers and volunteers to scale their impact and provide effective representation in detention and in hostile judicial jurisdictions across the country.

For more information about

INNOVATION LAW LAB

www.innovationlawlab.org



About the Southern Poverty Law Center

The Southern Poverty Law Center, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 and dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.

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EXECUTIVE SUMMARY

Since its creation, the contemporary immigration court system has been perpetually afflicted by dysfunction. Today, under the Trump administration, the immigration court system—a system whose important work is vital for our nation’s collective prosperity—has effectively collapsed.

This report explains how the collapse came to be and why the immigration court system cannot be salvaged in its current form. Decades of experience incontrovertibly demonstrate that the immigration courts have never worked and will never work to, as Chief Justice John Roberts says, “do equal right” to those who appear before them.

The immigration courts will never work because the structure of the immigration system is fundamentally flawed. Under the Immigration and Nationality Act, the attorney general of the United States is required to craft a functioning immigration court system: a system that provides genuine case-by-case adjudications by impartial judges who apply existing law to the evidence on the record following a full and fair hearing. Yet every attorney general has failed to do so.

Despite the life-or-death stakes of many immigration cases, the immigration court system that persists today is plagued by decades of neglect and official acquiescence to bias. These trends have created a system where case outcomes have less to do with the rule of law than with the luck of the draw. And under the Trump administration, the attorneys general have gone even further by seeking to actively weaponize the immigration court system against asylum seekers and immigrants of color.

Overwhelming evidence shows that the Office of the Attorney General has long allowed immigration judges to violate noncitizens’ rights in a systemic, pervasive manner that undermines the integrity of the court system. In speaking with immigration practitioners across the country, the authors of this report have heard first-hand accounts of how the attorney general’s unitary power shapes adjudication practices that are biased, inconsistent, and driven by politics: Judges fail to apply binding legal standards, make decisions based on illegally invented rules, engage in abusive treatment of noncitizens and their counsel, and even decide cases before holding hearings.

No one in the unitary system holds these judges accountable. The normal check in an effective judicial system—the appeals process—fails to ensure uniformity and accountability because it is equally infected by the politicized influence of the attorney general.

At the same time, attorneys general have abused their power by allowing enforcement priorities to usurp a court process that is supposed to be impartial and fair. Under the

Trump administration, immigration judges are viewed as the attorney general’s proxies for enforcing deportations—not as independent case-by-case adjudicators.

Over the past two years, the attorneys general have plainly encouraged biased decision-making, including by fomenting judges’ distrust of asylum seekers and their attorneys. The attorneys general have interfered with immigration judges’ control of their courtrooms by reassigning case dockets to align with enforcement priorities and attacking crucial case management tools. And in contravention of every known norm respecting impartiality, the attorneys general have pitted immigration judges against due process by threatening to punish—and even fire—judges for failing to meet enforcement-driven case quotas.

The Trump administration’s manipulation of the immigration courts has irreparably undermined any remaining legitimacy of an immigration court system controlled by the attorney general. This report recommends that, in order to achieve a fair and functioning judicial system, immigration adjudication be moved outside the attorney general’s control into a truly independent Article I immigration court that includes merits-based appointments, tenure guarantees, and effective mechanisms of internal accountability and appellate oversight.

Only by removing the immigration courts from the dangerous control of the executive branch can a fair, independent adjudication system be created—a system in which judges truly “do equal right” to every individual who appears before them.

REFORMS NEEDED IN U.S. IMMIGRATION COURTS

- Create an independent Article I court outside the attorney general’s control
- Ensure reform driven by guiding principles:
 - Transparent, merits-based appointment
 - Tenure and protection from removal without cause
 - Internal accountability mechanisms
 - Functioning appellate system

“TO DO EQUAL RIGHT”

When Reynaldo Castro-Tum was ordered deported on July 26, 2018, the record of proceedings—the official record of what takes place in a U.S. immigration court—appeared deceptively normal: A judge heard the case and, based on the record, issued a ruling.¹ That is what judges in courts throughout the United States do every single day. In the federal court system, as in state court systems, judges strive to do “their level best to do equal right to those appearing before them,” as Chief Justice John Roberts has said.²

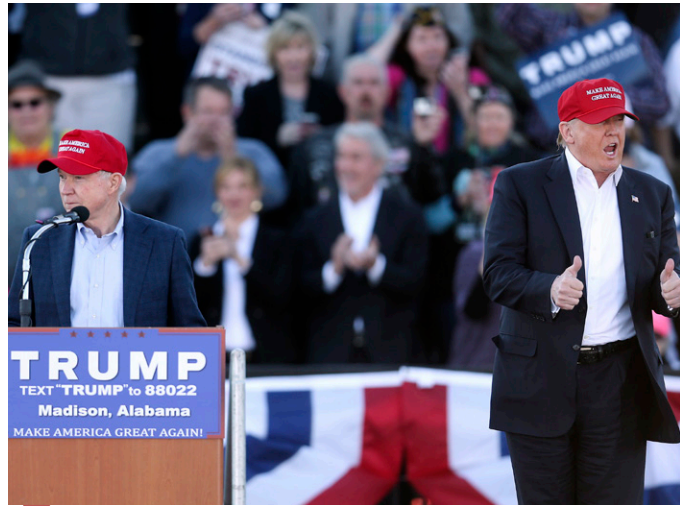
That, though, is not what happened.

What the official record of proceedings hides, this report reveals: Castro-Tum, like so many others in immigration court proceedings, was a victim of the attorney general’s weaponization of the immigration court system as a mechanism for deportation, not fair adjudication.³

If the measure of a judicial system turns on its ability to fairly apply law to facts—that is, to do “equal right to those appearing” before the court—then the U.S. immigration court system has failed. For decades, attorneys general have neglected the immigration court system and manipulated it for political ends, resulting in a weakened institution plagued by dysfunction. Since 2017, the attorneys general of the Trump administration have gone even further in usurping power by unlawfully exploiting the statute and regulations in order to weaponize the immigration courts to achieve maximum removals irrespective of fairness.

Take the case of A-B-: In July 2014, A-B- sought refuge at the southern border of the United States from decades of domestic abuse in El Salvador. Unprotected by the Salvadoran authorities and unable to otherwise escape her persecutor, she fled to the United States to seek asylum. A-B- had no idea that her escape from one ordeal would lead to the beginning of another. In December 2015, her asylum claim was denied by an immigration judge with a long history of bias against claims involving domestic violence.⁴

After what should have been a successful appeal, the judge denied the case yet again on remand. The denial exemplified the immigration appellate process’s failure: The Board of Immigration Appeals once again issued a decision that the judge chose to ignore. Then-Attorney General Jeff Sessions subsequently took advantage of the situation by “certifying” the case to himself—that is, he used his controversial regulatory power to take over the case. He published a political decision that overruled well-established precedent



The attorney general’s authority over the immigration courts has subjected the courts to intense political pressure. After the 2016 election, Jeff Sessions, left, who campaigned for Donald Trump and backed his anti-immigrant platform, oversaw the courts as attorney general.

and acted as a dog whistle to his “judges” to categorically deny asylum to survivors of domestic violence and Central Americans fleeing gang violence.⁵

Castro-Tum and A-B- are, sadly, not unique. Immigration courts routinely hand down such politicized deportation decisions. Today, more than 800,000 cases are pending in our nation’s immigration courts.⁶ Many involve vulnerable individuals who fled violence in their home countries and seek refuge in the United States. U.S. law, incorporating international treaty commitments, makes asylum available to applicants who have a well-founded fear of persecution on account of one of five protected grounds: race, religion, national origin, political opinion, and membership in a particular social group. For these individuals, the outcome of their cases can be a matter of life or death.

One of the core responsibilities of the Executive Office for Immigration Review, an administrative court system under the control of the attorney general, is to decide asylum claims. While EOIR was intended to provide a fair and independent adjudication process, this vision has never materialized. In speaking with immigration attorneys across the country, the authors of this report have heard first-hand accounts of how the attorney general’s unitary power shapes adjudication practices that are biased, inconsistent, and driven by politics.

Attorneys tell of judges who fail to apply binding legal standards and make decisions based on illegally invented rules. They report abusive treatment of noncitizens and counsel alike, describing judges who routinely belittle and retraumatize survivors of persecution and scream at their attorneys without cause or justification. And they recount experiences with judges who decide cases before holding a hearing, who “prosecute from the bench” and are “faithful to the government, but not faithful to the law.”⁷ No one in the

unitary system holds these judges accountable. The normal check in an effective judicial system—the appeals process—is equally infected by the influence of the attorney general.

Many, such as the American Bar Association Commission on Immigration, have predicted the collapse of immigration court system.⁸ No reform initiatives undertaken thus far have mattered—because none of them have addressed the underlying structural problem caused by the attorney general’s control. Judicial independence is the hallmark of modern adjudication systems that adhere to the rule of law.⁹ By law, the attorney general has a constitutional and statutory obligation to create an immigration court system that works fairly and uniformly.¹⁰

Instead, attorneys general have long neglected this duty to ensure that immigration judges act fairly and independently and have repeatedly manipulated the courts for political ends.

This report describes how unitary attorney general control over the immigration court system—including proceedings before immigration judges and the BIA—has caused irreparable systemwide failure. The report begins by examining the origins of the immigration court system, including the principles on which it was based and the problems its creation intended to solve. Next, the report describes the attorney general’s leadership responsibility over the immigration court system, deriving from his constitutional and statutory duty to create a court system that actually works: a system that is fair.

The report then elaborates on the attorney general’s failure to make the courts work, both by neglecting to ensure the lawful operation of EOIR and by abusing his power in order to manipulate and ultimately weaponize the court system toward enforcement-oriented ends. It concludes by echoing other respected organizations’ recommendations that, to achieve a fair and functioning judicial system, immigration adjudication must be moved outside the attorney general’s control into a truly independent Article I immigration court that includes merits-based appointments, tenure guarantees, and effective mechanisms of internal accountability and appellate oversight.¹¹

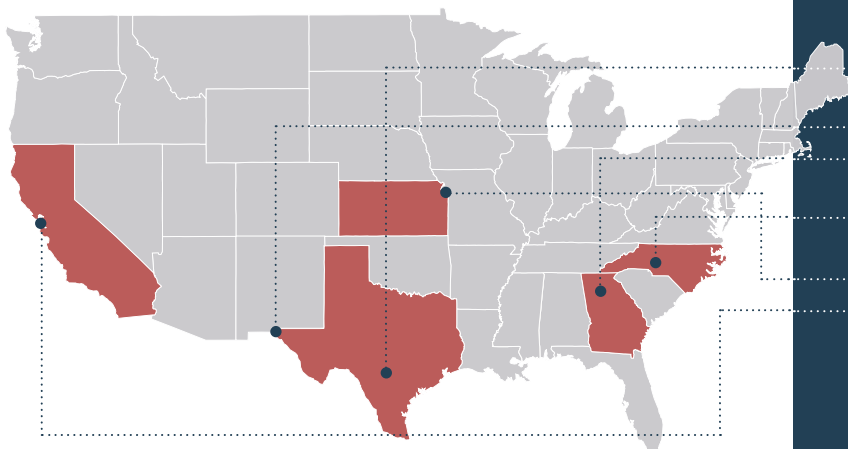
KEY OBSERVATIONS FROM ATTORNEY FOCUS GROUPS

Much of this report draws directly from the experiences of attorneys currently practicing in immigration courts across the country. In April 2019, the authors held focus groups with immigration attorneys in El Paso and San Antonio, Texas; Atlanta, Georgia; Kansas City, Missouri; Charlotte, North Carolina; and San Francisco, California. We also circulated an online survey to elicit experiences from attorneys working in Lumpkin and Ocilla, Georgia, and Alexandria, Louisiana.

The 46 attorneys in our discussions had experience representing both detained and non-detained clients in asylum cases before a wide range of judges. Some attorneys had been practicing for over a decade; others had only recently begun to appear in immigration courts.

In each focus group, we asked attorneys for their experiences, impressions, beliefs, and stories from immigration court. Their feedback was invaluable to crafting this report. Attorneys highlighted not only the extreme dysfunction of the immigration court system, but also the abusive and unlawful behavior of many judges. They also described how the Trump administration’s weaponization of the immigration courts has impeded attorneys’ ability to zealously represent their clients, with devastating impacts on their clients’ lives.

What was clear from our focus groups is that “rogue” immigration judges have become the norm—and the integrity of the current immigration court system has been irreparably damaged by the attorney general’s unitary control.



FOCUS GROUP LOCATIONS & COMMENTS

San Antonio — *Immigration judges have “no respect for due process – ever. It just doesn’t exist.”*

El Paso — *“It’s not the rule of law; it’s the rule by law.”*

Atlanta — *“[T]hese [immigration judges] don’t seem to care to have a judicial approach to what they’re doing.”*

Charlotte — *“It’s a deportation machine. They don’t want to grant relief, they want to deny and deport.”*

Kansas City — *“It’s immigration roulette.”*

San Francisco — *The immigration courts are “more stacked than ever against respondents and attorneys.”*

In the immigration court system, an outcome often has less to do with the rule of law than with the luck of the draw.

THE ORIGINS OF THE CONTEMPORARY IMMIGRATION COURT SYSTEM

Since its creation, the contemporary immigration court system—in one form or another—has been perpetually afflicted by dysfunction.¹² With the 1952 enactment of the Immigration and Nationality Act, Congress in plain terms tasked the attorney general of the United States to craft a functioning immigration court system. Since then, different attorneys general have tried to fulfill this mandate, but all of them have failed.¹³

As we explain below, the first experiment that embedded the immigration courts inside the prosecutorial and investigative system resulted in Congressional hearings describing “gross abuse[s] of authority,” obstruction, and “crippling” problems.¹⁴ In 1983, the attorney general tried again, creating the Executive Office for Immigration Review, an agency entirely dependent on the attorney general and independent from some, but not all, of the immigration prosecutorial and investigative functions. That system persists today despite decades of neglect and official acquiescence to bias and a court system where an outcome often has less to do with the rule of law than with the luck of the draw.

To be clear: below the level of the attorney general—who is statutorily responsible for making the immigration court system work—there are many hard-working, conscientious judges, administrators, clerks, and analysts. Yet evidence shows that within an increasingly weaponized court structure, these individuals must struggle against the system in their attempt to do right to all who appear before them.¹⁵ Despite the personal efforts of these adjudicators and court personnel, the structure of the immigration courts remains fundamentally and irreparably flawed.

Immigration Courts Inside the INS

Under the Immigration and Nationality Act of 1952, the Immigration and Naturalization Service (INS) was an agency within the Department of Justice (DOJ) that was charged with enforcing, implementing, and adjudicating claims under the immigration laws.¹⁶ INS employees known as “special inquiry officers” reviewed and decided deportation cases.¹⁷

Although these officers were given the title of “immigration judge” in 1973, they continued to be supervised by and dependent on INS enforcement personnel for office space, hearing facilities, support staff, supplies, and other critical resources.¹⁸ According to a prominent early immigration appellate judge, many of these enforcement personnel were hostile to the immigration court system, viewing immigration judges “as pushy intruders whose demands in the name of due process only obstruct the Service mission.”¹⁹

The tension between the enforcement and adjudicative functions within the INS raised serious concerns about the independence of immigration judges. Judges’ attempts to conduct fair immigration hearings that afforded respondents a meaningful opportunity to be heard directly conflicted with the priorities of their INS colleagues and supervisors, who sought to increase and streamline deportations.²⁰

Immigration judges reported that INS officials regularly interfered with their operations. As one immigration judge later wrote to the Select Commission on Immigration and Refugee Policy, “[f]air and impartial hearings are not possible when one of the parties in each case controls the court system,” explaining that “[t]he strong desire [of enforcement personnel] to influence the judges directly or indirectly is repugnantly clear.”²¹

This problematic adjudication structure became further strained in the late 1970s, when the INS began processing applications for asylum from Cuban and Haitian nationals arriving in the United States.²² The immigration judges’ lack of independence from the INS’ enforcement arm was

manifested in clearly biased decisions against Haitian asylum seekers.²³ Dale Swartz, a founding member of the National Forum on Immigration and Refugee Policy, testified before Congress about the issue.

“[T]he intended goal of the INS was to deny asylum to all Haitians, and the method to accomplish this end resulted in the wholesale disregard of due process guarantees . . . Their asylum claims were prejudged, their rights to a hearing given second priority to the need for accelerated processing . . . Those denials were not case by case adjudication, but an intentional, class-wide summary denial.”²⁴

By the early 1980s, there was widespread consensus that “crippling problems” in the immigration court system required structural change.²⁵ Following extensive investigation, the Select Commission on Immigration and Refugee Policy issued a report in 1981 describing widespread “weaknesses in the hearing and review process in exclusion and deportation cases.”²⁶ The report identified many barriers to fair, efficient, and independent adjudication at the immigration court level.²⁷

In the ensuing months and years, Congress continued to hold hearings on the state of the immigration court system. Scores of government officials, immigration practitioners,²⁸ and expert stakeholders gave testimony describing pervasive problems, including due process violations, severe case backlogs, and improper enforcement pressures on immigration judges.²⁹

Immigration Courts Inside the Department of Justice

The Executive Office for Immigration Review was created in 1983. From the beginning, the EOIR was intended to provide a fair and independent adjudication structure for immigration proceedings. Its development was a reaction to widespread critiques that the pre-existing system was under-resourced, overburdened, violative of procedural rights, and embedded in an enforcement-driven context. However, despite broad agreement on the need for systemic reform, Congress did not pass legislation to improve the immigration court structure.

Instead, the attorney general created the Executive Office for Immigration Review by regulation.³⁰ This new agency encompassed both the immigration courts and the administrative appellate body, the Board of Immigration Appeals.³¹ The reorganization was intended to “place similar quasi-judicial functions within a single organization and . . . result in a more effective and efficient operation of the Department [of Justice]’s immigration judicial review programs.”³²

Despite their title, immigration judges are not “judges” as they are known in state or federal courts. Their authority does not derive from Article III of the U.S. Constitution, which established the judicial branch. Immigration judges are not even “administrative law judges,” whose authority derives from Article I of the Constitution and who conduct proceedings under the Administrative Procedure Act.

The attorney general’s control over the Executive Office for Immigration Review has undermined its independence by exposing immigration judges to prosecutorial and political pressures.

Instead, immigration judges are “administrative judges” who, according to the Department of Justice, are “non-supervisory career attorneys employed by” the attorney general.³³ Importantly, immigration judges “shall be subject to such supervision and shall perform such duties as the Attorney General shall proscribe” and “act as the Attorney General’s delegates.”³⁴ In effect, immigration judges are the attorney general’s attorneys who decide immigration claims of individuals the government is trying to deport.³⁵

Within EOIR is the Board of Immigration Appeals (BIA), the appellate body for the immigration courts. The members of the BIA are also “attorneys appointed by the Attorney General to act as the Attorney General’s delegates.”³⁶ Board members are governed not only by law and regulations, but also by “decisions of the Attorney General.”³⁷ All decisions of the board are subject to review by the attorney general.³⁸ The board may issue decisions by a single member; the single member may even issue a “summary dismissal” or “affirmance without opinion” wherein the board member is not required to provide any reasoning for the decision.³⁹ Only in limited circumstances are cases assigned to a three-member panel or scheduled for oral argument.⁴⁰

By moving immigration judges out of the INS, the creation of the Executive Office of Immigration Review was also intended to increase judicial independence and remove the appearance of prosecutorial bias.⁴¹ These goals, however, remain unfulfilled. From the outset, the attorney general’s control over the EOIR has undermined its independence by exposing immigration judges to prosecutorial and political pressures.⁴² The Department of Justice is, after all, the nation’s leading prosecutor and law enforcement agency. It is not, by its very nature, a judicial agency. By keeping the immigration adjudication function inside the Department of Justice, the attorney general kept the EOIR under his unitary control.

FEDERAL COURT CRITIQUES OF IMMIGRATION ADJUDICATION

Federal courts reviewing EOIR decisions have long denounced the agency’s ability to deliver impartial adjudications. In the words of the now-retired Seventh Circuit Judge Richard Posner, “the adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”⁴³

A growing list of circuit court decisions has excoriated the EOIR for a pattern of clearly biased immigration judge proceedings rubber-stamped by the Board of Immigration Appeals.⁴⁴ Many of these decisions highlight the same problems that practitioners have identified as issues that make their jobs almost unbearable.

AGGRESSIVE AND UNPROFESSIONAL TREATMENT OF RESPONDENTS

- “The case now before us exemplifies the ‘severe wound . . . inflicted’ when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again, under the ‘bullying’ nature of the immigration judge’s questioning, a petitioner was ground to bits.”⁴⁵
- “[The immigration judge] repeatedly addressed him in an argumentative, sarcastic, impolite, and overly hostile manner that went beyond fact-finding and questioning.”⁴⁶
- “The concluding portions of the hearing further demonstrated the [immigration judge’s] continuing hostility towards the obviously distraught [respondent] and his abusive treatment of her throughout the hearing. He had succeeded in returning her to the condition which [she had] overcome after repeated therapy sessions, breaking down and dissociating.”⁴⁷

ABANDONMENT OF THE NEUTRAL FACT-FINDER ROLE

- “Throughout the hearing, [the immigration judge] badgered [the respondent] with loaded, pejorative questions and effectively abandoned her role as a neutral fact finder.”⁴⁸
- “Both the decision issued by the [immigration judge] and her conduct of the hearing demonstrate that the [immigration judge] did not conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes in the petitioner’s story.”⁴⁹
- “[W]e are sorely disappointed that the [immigration judge] here chose to attack [the respondent’s] moral character rather than conduct a fair and impartial inquiry into his asylum claims. The tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding.”⁵⁰
- “[W]e are left wondering how the [immigration judge] reached the conclusions she has drawn. Her opinion consists . . . of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with [the respondent’s] testimony.”⁵¹

PRESENCE OF IMPROPER EXTRA-LEGAL BIAS

- “The [immigration judge’s] reliance on impermissible stereotypes taints his credibility determination as a whole, and thus prevents us from conducting any fair assessment of this record.”⁵²
- “The [immigration judge’s] homosexual stereotyping likewise precludes meaningful review in this case. The [immigration judge’s] reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that [the respondent] would not be identified as a homosexual.”⁵³
- “The immigration judge . . . erred, however, in denying [respondent’s] application for [Convention Against Torture] relief, ironically exhibiting some of the same misconceptions about the transgender community that [the respondent] faced in her home country. The [immigration judge] failed to recognize the difference between gender identity and sexual orientation, refusing to allow the use of female pronouns because she considered [the respondent] to be ‘still male,’ even though [she] dresses as a woman, takes female hormones, and has identified as woman for over a decade.”⁵⁴
- “The Due Process Clause cannot tolerate a situation where a supposedly neutral fact finder interjects herself into the proceedings to the extent of assuming the role of opposing counsel and taking over cross-examination for the government.”⁵⁵

“[The immigration judge] repeatedly addressed him in an argumentative, sarcastic, impolite, and overly hostile manner that went beyond fact-finding and questioning.”

The Attorney General Must Make the Immigration Courts Work

Congress entrusted the attorney general with the important responsibility of making the immigration court system work. Our nation needs a working immigration court system because its responsibilities are vital to our national interests. Every day, the immigration court system is tasked with accomplishing important work that has a profound impact on immigrants and citizens alike: granting green cards, protecting persons fleeing persecution, evaluating hardship claims, and, in appropriate circumstances, authorizing removal. The U.S. Constitution requires that immigration courts do their work fairly.

The attorney general's responsibilities are outlined in INA §§ 101(b)(4) and 103.⁵⁶ These statutory provisions require him to ensure that the immigration court system provides genuine case-by-case adjudications by impartial judges who apply existing law to the evidence on the record following a full and fair hearing. INA § 103(g)(2) directs the attorney general to “perform such other acts as the Attorney General determines to be necessary for carrying out this section.” Such “other acts” must include overseeing and enforcing the constitutional, statutory, and regulatory requirements of due process and fundamental fairness in the immigration court system.

The attorney general must ensure genuine case-by-case adjudication where each person appearing before the immigration courts has a meaningful opportunity to present his or her claim and have it adjudicated by an impartial immigration judge in a manner that comports with due process.⁵⁷ When the immigration court system consistently and systematically manifests both of these crucial characteristics, it serves our national interest. Without these two features, the immigration court system cannot function in the way that Congress intended and the Constitution requires.

A full and fair hearing: It is well established that “[i]n immigration proceedings, the Fifth Amendment entitles [noncitizens] to due process of law.”⁵⁸ Our “traditional standards of fundamental fairness” include the “rights and privileges” specifically prescribed by the Immigration and Nationality Act, including the right to counsel at no expense to the government and the right to a “reasonable opportunity” to examine and present evidence and witnesses.⁵⁹ These principles are reflected in regulations intended “to assist in the expeditious, fair, and proper resolution” of immigration matters by immigration judges.⁶⁰

Impartial immigration judges: “Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label.”⁶¹ In a working immigration court system, immigration judges would serve as impartial adjudicators fairly applying law to facts in each case before them.⁶² Accordingly, federal regulations direct that “[i]n all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the [INA] and regulations.”⁶³



Migrants fleeing Central America and parts of southern Mexico traveled nearly a month before arriving in Tijuana, Mexico, where they were placed in shelters. The migrants, pictured here in 2018, planned to ask the U.S. immigration courts for asylum after presenting themselves at the U.S. port of entry at San Ysidro, California. The immigration courts have widely varying rates of denial for asylum claims. PHOTOGRAPHY BY TODD BIGELOW

The INA also directs that in removal proceedings, “[t]he determination of the immigration judge shall be based only on the evidence produced at the hearing.”⁶⁴ Regulations further direct immigration judges to “exercise their independent judgment and discretion” in deciding individual cases, “subject to the applicable governing standards.”⁶⁵ In order to do so, immigration judges must have the freedom to decide cases based exclusively on available facts and existing law. These basic principles are severely at odds with the prospect that an immigration judge could be influenced by the threat of retaliation for issuing a decision displeasing to the attorney general.⁶⁶

BEYOND THE COURTROOM

ADDITIONAL OBSTACLES TO ASSERTING RIGHTS

Outside the courtroom, there are many external obstacles that undermine fairness in the immigration court system. The two most prevalent obstacles are the lack of legal representation and the unnecessary use of mass detention.

A hollow “right” to counsel: Despite the high stakes involved and the adversarial nature of immigration court proceedings, there is no constitutional right to appointed counsel in removal proceedings, as exists in the criminal context.⁶⁷ Respondents may hire an attorney at their own expense,⁶⁸ but in practice this right is hollow for the hundreds of thousands of respondents, including children, who brave removal proceedings *pro se* because they cannot find or afford a lawyer.⁶⁹

U.S. immigration law is notoriously complicated, rivaling the tax code in its density and complexity.⁷⁰ Yet at least one immigration judge has publicized the view that it is possible to teach immigration law to toddlers⁷¹—raising questions about the degree to which immigration judges are able to gauge whether respondents even understand the nature of the proceedings against them or the availability of relief to which they may be entitled.

In reality, muddling through without a lawyer simply leaves respondents unable to access legal relief for which they might be eligible. Having an attorney is “almost a necessity” for winning asylum; in fiscal year 2016, asylum denial rates were 90 percent for unrepresented respondents compared to just 48 percent for respondents with representation.⁷²

Detention: Every year, hundreds of thousands of respondents fight their cases from immigration jails.⁷³ Detention makes it exponentially more difficult to prepare for immigration court. From jail, respondents are less able to collect evidence needed to support fact-intensive applications for relief because they cannot leave the facility, have little or no internet access, are limited in their ability to send and receive mail, and are charged exorbitant rates to make phone calls.⁷⁴ Conditions in detention centers—largely operated by for-profit companies—are often so deplorable they force respondents to abandon winning claims in exchange for their freedom.⁷⁵

Detention also compounds problems accessing counsel. Finding an attorney while detained is especially difficult because of the remote location of detention facilities⁷⁶ and the impossibility of earning enough money in detention to pay a lawyer.⁷⁷ For the fraction of detained respondents with counsel,⁷⁸ having an attorney may do less good than it does for other respondents. The difficulty of accessing detained clients due to long visitation wait times, a low number of confidential visitation rooms, recorded and monitored phone lines, and other unnecessary bureaucratic red tape is well-documented.⁷⁹ The rapid pace of immigration court’s “detained” dockets also gives attorneys considerably less time to prepare a case.⁸⁰

FROM A NEGLECTED COURT TO A WEAPONIZED COURT

After decades of neglect and abuse by prior attorneys general, the Trump administration is weaponizing the immigration court system against asylum seekers and immigrants of color. There is no doubt that the immigration court system is in a state of legal and moral collapse, unable to consistently provide fair and equal treatment to the individuals who appear before it. Prior attorneys general have failed to adequately adhere to the rule of law by allowing pervasive bias and unlawful procedures to take root.

At the same time, attorneys general have abused their power by allowing enforcement priorities to usurp an adjudicatory process that is supposed to be impartial and fair. This enforcement focus has reached a new level under the Trump administration, as the attorneys general have actively sought to turn the immigration court system into a weapon of deterrence and deportation.

The Chronic Neglect of the Immigration Court System Overwhelming evidence shows that the office of attorney general has long allowed immigration judges to violate noncitizens’ rights in a systemic, pervasive manner that undermines the integrity of the court system. Judicial bias is rampant within the immigration court system, with immigration judges across the country failing to provide fair, neutral, and consistent adjudication. Radical variations in case outcomes across the country demonstrate that courts are failing to apply immigration law in an impartial and uniform way.⁸¹

Some immigration judges have created courtroom-specific sub-regulatory rules, unsupported by any legal authority, that function to deprive respondents of their due process rights.⁸² Judges also violate respondents’ procedural rights through unilateral docket changes and unprofessional



People line up to cross into the U.S. to begin the process of applying for asylum near the San Ysidro port of entry in Tijuana, Mexico. They will enter an immigration court system that has failed to apply immigration law in an impartial and uniform manner.

behavior. These shortcomings are exacerbated by the failure of the administrative appeals process to fulfill its intended role of correcting errors—both legal and procedural, purposeful and accidental—made by immigration judges.

Set against the fair and impartial ideal, the attorneys general have failed to correct clearly violative behavior by immigration judges. Without checks and balances in place to ensure that the system functions properly, biased decision-making has become the norm in immigration courts nationwide.

The attorney general has tolerated bias in the immigration courts

Despite the requirement of an impartial adjudicator described earlier in this report, complaints of biased decision-making have surfaced regularly since the founding of the contemporary immigration court system. The litany of reports over the years demonstrates that all too often, judges' conscious and implicit biases—based on factors including race, gender, class, a respondent's marital or parental status, or the judge's personal feelings about immigrants⁸³—color their views of respondents' claims and may determine case outcomes. Even absent conscious bias, institutional directives and structural pressures prevent judges from fully considering the law and facts of each case and instead encourage bias in the form of categorical prejudgment of cases.⁸⁴

In the early 1980s, the newly formed immigration courts faced immediate critique for their biased treatment of asylum seekers from Haiti and Central America. Advocates

for Haitian refugees in the early 1980s expressed concerns about bias against their clients; one attorney characterized the immigration court as “not so impartial a tribunal as one might hope and expect to find” in the United States.⁸⁵

And in 1985, advocacy groups filed a class action lawsuit alleging, among other things, nationality-based discrimination in the application of asylum laws resulting in disproportionately low asylum grant rates for asylum seekers fleeing civil war in El Salvador and Guatemala.⁸⁶ After extensive discovery, the government agreed to a settlement allowing class members an opportunity to submit new applications for asylum and receive de novo—or new—adjudication of their claims.⁸⁷ The settlement agreement announces, tellingly, that the same legal standard for asylum must apply to people of all nationalities and that foreign policy considerations should have no bearing on the determination of whether an asylum applicant has met that standard.⁸⁸

Studies show that by the late 1980s, the EOIR was already failing to deliver fair and uniform treatment of asylum claims in other contexts. The first empirical study of immigration court proceedings found that the asylum adjudication system was still based on ad hoc rules and standards, and that the decision-making process continued to be influenced by improper considerations, including social class, cultural factors, ideological preferences and political judgments.⁸⁹

Based on a two-year study of one immigration court, the researchers reported that “although extensive documentation exists of human rights abuses and high levels of politically

motivated violence in Guatemala, Haiti, and El Salvador . . . no Guatemalan or Haitian applicant and only one Salvadoran was granted asylum during the study period.”⁹⁰ The study also found that immigration judges approached asylum claims with “presumptive skepticism” and often questioned respondents the way a government attorney would on cross-examination, rather than conducting proceedings in a fair and neutral manner.⁹¹

Today, our immigration courts are infected by the same bias that was rampant in the 1980s. Immigration judge bias manifests itself in the form of bullying and harassment from the bench,⁹² unsupported negative credibility determinations,⁹³ and xenophobic and prejudiced statements.⁹⁴ Some expressions of bias are made off the record, making it particularly hard to hold judges accountable.⁹⁵ Some immigration judges also appear to prejudice cases, relying on their own views of the respondents’ characteristics or the type of claim instead of on governing law.⁹⁶

The continued presence of bias is vividly demonstrated by the huge variation in asylum grant rates across the country. Asylum case outcomes are “highly dependent upon the identity of the judge assigned.”⁹⁷ The tremendous disparities in asylum grant rates across judges “show the amount of leeway immigration judges have and the impact their biases can have if left unchecked.”⁹⁸ In 2017, immigration judges granted asylum at rates ranging from 97 percent to 0 percent.⁹⁹ These discrepancies persisted both between jurisdictions and within courts in a single jurisdiction.¹⁰⁰ Such variation has been documented for at least a decade, evidencing immigration judges’ failure to determine case outcomes through the impartial, uniform application of immigration law.¹⁰¹

Although judges’ dockets vary in the types of cases they are assigned, the huge range and regional patterns of disparate grant rates merit close scrutiny. Today, “asylum-free zones” like Atlanta, Georgia; Charlotte, North Carolina; and El Paso, Texas—where immigration judges deny asylum applications at rates much higher than in other jurisdictions—are further evidence of a system that allows judicial bias to reign unchecked.¹⁰²

Our focus group discussions with immigration practitioners highlighted the failure of attorneys general to address rampant bias in the courtroom. Attorneys reported that some judges’ decisions are shaped by their “perceptions of people’s home country, and their own personal perceptions of what might motivate someone”—such as the misconceived notion that “all young men from El Salvador are here to work.”¹⁰³

One practitioner described a judge who believes that a respondent could not be homosexual if he or she had a child with a person of the opposite sex.¹⁰⁴ Judges have

also made prejudicial comments to respondents who use preferred gender pronouns that do not correspond with the judges’ preconceived impressions of the respondents’ gender identities.¹⁰⁵ Attorneys also reported that some judges discriminate based on ethnicity or country of origin, such as by displaying anti-Latinx bias on the record or making broad statements that they “don’t believe any Chinese asylum claims.”¹⁰⁶ Judicial bias against Central American respondents surfaced particularly frequently in focus group discussions.¹⁰⁷

Legal practitioners also drew attention to the presence of judicial bias against attorneys.¹⁰⁸ For example, attorneys of color reported being asked if they were the client or “treated like the neighbor who came to help out.”¹⁰⁹ Others indicated that some judges are “snippy” with attorneys of color or attorneys with accents.¹¹⁰

Female attorneys reported that certain judges interrupted them more frequently, telling them to “calm down,” and commenting on their clothing in court.¹¹¹ In one case, a lawyer was told she was granted a stipulation “because [her] perfume smelled good.”¹¹² Focus group members also reported that female attorneys have faced sexual harassment from judges on the Atlanta bench.¹¹³

Our focus groups also revealed a strong consensus among practitioners that immigration judges favored the government’s position. Judges are described as “prosecuting from the bench,” “forgetting they’re not [Department of Homeland Security],” and “always do[ing] what the government says.”¹¹⁴ Practitioners spoke of judges as “doing dirty work for the government” and “being faithful to bias to the government, but not faithful to the law.”¹¹⁵

One attorney explained that judges “always look at [the law] from an enforcement perspective . . . in the light most negative to the respondent.”¹¹⁶ Another practitioner spoke of “the fallacy that there is separation between the EOIR and Immigration and Customs Enforcement,” stating that “it’s laughable that [immigration judges] then go and pretend to have some sort of judicial independence.”¹¹⁷ In some cases, practitioners feel that judges “do all the work for government attorneys” in making the government’s case.¹¹⁸

Judges’ perceived bias is also manifested through preferential treatment of government attorneys. In San Francisco, attorneys noted that DHS attorneys were given favorable treatment, such as being allowed to turn in documents late or being aided by judges during a hearing when they had forgotten a legal standard.¹¹⁹ In another court, an attorney witnessed a *pro se* case in which last-minute evidence provided by the government was admitted by the court, although the respondent did not even receive access to the evidence until after the hearing.¹²⁰

Asylum case outcomes are highly dependent upon the identity of the judge assigned.

The attorney general permits judges to enact sub-regulatory and arbitrary rules, creating disuniformity and impeding fair adjudication

As explained earlier, respondents in immigration proceedings must receive a full and fair hearing in line with constitutional due process and related statutory and regulatory rights. However, many immigration judges have adopted individualized “sub-regulatory” rules that often impede a respondent’s ability to apply for asylum, present evidence, or raise particular legal claims.¹²¹ Unlike standing orders in a district court, these sub-regulatory rules are generally not published or made available to attorneys or respondents. While some judges hand out copies of these rules in an ad hoc manner, others merely apply them as a matter of course. These rules often have no basis in the statute or regulations and generally serve only to impose unnecessary burdens on respondents.

Filing asylum applications: Under the INA, a respondent may file an asylum application that is complete and in compliance with the instructions that accompany the required form.¹²² However, practitioners from around the country report that immigration judges often impose additional requirements and reject applications that fail to comply with them. For example, attorneys in multiple courts spoke of judges requiring handwritten declarations from respondents, to minimize “interference” by attorneys.¹²³ In Charlotte, at least one judge requires unrepresented respondents to submit multiple copies of their asylum applications, accompanied by personal declarations.¹²⁴

Other judges require respondents to specify in writing a limited number of “particular social groups” on which their claims are based—which often requires familiarity with asylum law and court precedent—precluding the subsequent development of different legal strategies in consultation with counsel.¹²⁵ Judges also limit respondents’ ability to present their cases by requiring asylum applications to be filed on short time frames—for example, within a week of a respondent’s master calendar hearing.¹²⁶ These restrictions have particularly harsh implications for unrepresented respondents and for respondents who cannot write in English.

Such judicially imposed requirements for filing an asylum application can greatly restrict a noncitizen’s ability to present his or her case. Many asylum seekers are unrepresented and traumatized by the experiences that prompted them to flee. These factors often make it difficult, if not impossible, to fully describe the experiences underlying their asylum claims. However, if asylum seekers provide an incomplete account of their claims at the outset of a case, they may unknowingly undermine their credibility or risk having their claims rejected.¹²⁷

Restricting evidence: Even after an asylum application has been accepted, respondents in certain jurisdictions routinely confront sub-regulatory rules that limit their right to a “reasonable opportunity . . . to present evidence” in support of their cases.¹²⁸ Attorneys reported numerous

experiences with individual hearings being scheduled in fewer than 45 days—a practice which is unlawful for nondetained cases.¹²⁹

Judges in multiple courts fail to comply with regulations for the submission of evidence, in some cases imposing a submission deadline three or six months in advance of a respondent’s hearing—rather than the 15 days dictated by the courts’ own procedures manual.¹³⁰ These ad hoc deadlines cause many problems, including preventing asylum applicants from introducing evidence of rapidly developing changes in country conditions or critical documents received from another country after the deadline.

Even when evidence is submitted, practitioners note that it is often not properly considered. One judge reportedly refused to consider evidence because it was “too graphic.”¹³¹ Another practitioner reported submitting evidence to the court, only to have the judge subsequently say the court had never received the documentation.¹³²

In a different case, a judge lost a respondent’s entire file and made the respondent’s attorneys recreate it.¹³³ One practitioner also explained that judges may weigh evidence inconsistently, giving little to no consideration to a respondent’s supporting declarations while giving full weight to any police report, even if presented with conflicting evidence.¹³⁴ Judges may also interfere with interpretation. In one case, a judge challenged an interpreter’s word choice, effectively talking the interpreter out of the persecutory language that directly supported the respondent’s claim.¹³⁵

Limiting testimony: Attorneys also report judges placing numerous limitations on testimony by experts or other witnesses, which can be crucial to establish a respondent’s credibility or the country conditions underlying his or her asylum claim.¹³⁶ Some judges cut off witnesses, citing time constraints.¹³⁷ Others require a written statement from witnesses, but do not allow in-person witness testimony.¹³⁸

Attorneys also report that many immigration judges undermine their ability to call expert witnesses.¹³⁹ For example, some judges broadly prohibit telephonic

Attorneys reported numerous experiences with individual hearings being scheduled in fewer than 45 days — a practice which is unlawful for nondetained cases.

testimony by expert witnesses, who may be at universities, research institutions, or private firms throughout the country.¹⁴⁰ This limitation prevents respondents from presenting key evidence in the case.¹⁴¹

Judges also limit respondent testimony and attorney involvement in problematic ways. Attorneys in El Paso spoke of intense pressure from judges to forego direct examination of their clients. As one practitioner explained, “there is a lot of pressure to buckle, because you are also relying on [the judge’s] subjective views.”¹⁴² Other judges forbid direct examination entirely if the respondent has submitted a written declaration to the court.¹⁴³ Some judges call clients to testify and examine them from the bench before permitting them to present their stories through direct examination.

As one attorney explained, the judges “basically create their own narrative with self-serving yes or no questions—something that fits the judge’s preconception and has no basis in your client’s actual story.”¹⁴⁴ Another described judges asking questions to damage the case: “They aren’t looking to get the full story, they just want something to hang their denial on.”¹⁴⁵ Other judges refuse to allow whole categories of testimony because they “don’t need to hear about” certain topics.¹⁴⁶ By curtailing the right to present evidence, such sub-regulatory and arbitrary rules limit respondents’ ability to fully develop their legal claims.

The attorney general permits immigration judges to engage in unilateral docket changes that undermine respondents’ right to a fair hearing

Respondents’ rights to a fair hearing have also been consistently undermined by immigration judges’ unilateral docket changes. In many courts, immigration judges reschedule cases—either advancing or delaying—with little or no notice to respondents and their attorneys. These trends have impeded asylum seekers from adequately presenting their cases and interfered with their right to counsel.

Attorneys report a huge amount of uncertainty in case scheduling. Practitioners describe judges’ case docketing as “exasperating and ridiculous,”¹⁴⁷ with procedures that can feel “like a guessing game.”¹⁴⁸ Practitioners recounted

having hearings unexpectedly rescheduled on the day they were supposed to take place and waiting by the phone for five hours for a telephonic hearing.¹⁴⁹ One attorney reported that practitioners cannot rely on the court’s hearing schedule, as cases are often taken off the calendar the day before the hearing.¹⁵⁰

Other judges have called attorneys the day before a hearing to tell them that the hearing would be held hours earlier in the day.¹⁵¹ One attorney described driving a long distance for a merits hearing that was then canceled, without notice, because the judge had a doctor’s appointment.¹⁵² Another described arriving for a scheduled hearing only to be told that the judge was “finished hearing cases” for the morning.¹⁵³

Practitioners also report that some judges often move forward merits hearing dates without adequate notice to respondents or their counsel.¹⁵⁴ One attorney indicated that virtually none of the children on the El Paso juvenile docket in late 2018 ever got notice of their hearings.¹⁵⁵ Another spoke of being in court and finding out that she had another hearing of which she had never received notice.¹⁵⁶ Even when the court claims notices have been mailed, they are often not received; one attorney said this happens to her clients at least 20 times a year.¹⁵⁷

Lack of notice limits respondents’ time to gather evidence and impedes their ability to fully prepare for their hearings.¹⁵⁸ Docket changes may also interfere with witnesses’ ability to testify. One attorney recounted an experience when a witness from El Salvador flew in to give testimony; when the hearing was arbitrarily rescheduled, the testimony was lost because the respondent could not pay for the witness to fly back.¹⁵⁹

In many cases, attorneys report an inability to prepare for or even attend a client’s hearing due to schedule changes.¹⁶⁰ Attorneys recount that judges have held individual hearings without counsel present, or have effectively forced attorneys to appear telephonically rather than in person due to last-minute rescheduling.¹⁶¹ In addition to undermining attorneys’ ability to effectively represent their clients, such rescheduling leaves attorneys unable to manage their caseloads and resources, making them reluctant to take new cases when the timing of current cases is so unpredictable.¹⁶²

“[The immigration judges] aren’t looking to get the full story, they just want something to hang their denial on.”

Practitioners also indicated that some scheduling restrictions appear to reflect judges’ predetermination of respondents’ claims. Attorneys report that judges schedule cases based on the perceived strength of a case, prioritizing cases they think will not be granted—and at times even writing “weak” on the scheduling order itself.¹⁶³ Even when a judge does not explicitly deny in advance, one practitioner explained that “obviously” the judge intends to deny when merits hearings are scheduled a scant 30 minutes apart.¹⁶⁴

Some judges also show little willingness to accommodate the health and safety of individuals in their courtrooms. When heavy snow hit Charlotte, making travel unsafe, one attorney was told by the court administrator to stay home as a safety precaution; when she did, the court issued an in absentia removal order in her client’s case.¹⁶⁵

The attorney general has failed to address unprofessional conduct on the immigration bench

The immigration court system is plagued by a lack of professionalism on the part of many immigration judges. Plainly, no court system can be said to work fairly when unprofessional conduct by the judges is tolerated. Practitioners report judges who fail to adequately understand and apply the law, as well as judges who routinely demonstrate a temperament inappropriate to their adjudicatory role. The attorneys general have tolerated this unprofessionalism at a systemic level by failing to create a transparent mechanism that promotes accountability for such misconduct.¹⁶⁶

Legal incompetence and manipulation: While many practitioners surveyed characterized immigration judges as “smart” and “competent,”¹⁶⁷ some shared experiences with judges who fail to understand or apply appropriate legal standards. Some attorneys spoke about “teaching” judges about the law and seeing recurring legal errors in judicial decisions, while others described immigration judges who fail to stay up to date on relevant case law.¹⁶⁸

Another practitioner observed that “some of the judges really don’t understand the evidentiary rules.”¹⁶⁹ One judge told counsel that “I don’t like objections” and “the Federal Rules of Evidence don’t apply, so I can basically do whatever I



People line up outside a U.S. immigration office with numerous courtrooms in San Francisco.

want.”¹⁷⁰ Other judges know the law but fail to follow it. One attorney in San Antonio described experiences with a judge who stated, on the record, that “I recognize that this [decision] is contrary to the statute.”¹⁷¹ Another in Kansas City spoke of judges “choosing to ignore Supreme Court precedent.”¹⁷²

Varying levels of familiarity with immigration law and procedure may also contribute to an acknowledged lack of uniformity in immigration judges’ application of the law. Attorneys said that the same particular social groups that are recognized in courts like Arlington and Baltimore are being routinely rejected in Charlotte.¹⁷³ Practitioners across focus groups reported that judges “do not apply the same standards, and it does affect the outcome of cases.”¹⁷⁴ Attorneys reported that even judges within the same court may have highly inconsistent standards for the level of evidence required to support claims for relief.¹⁷⁵ Practitioners speculated that this lack of uniformity was sometimes due to factors such as the judges’ biases about a certain country of origin or regarding

IN FOCUS GROUPS, IMMIGRATION PRACTITIONERS DESCRIBED JUDGES AS...

“CAUSTIC”

“CREEPY”

“EVIL”

“LIKE A POISONOUS SPIDER”

“HOSTILE”

“NASTY”

“VERY PETTY”

“NEEDLESSLY ABUSIVE AND PATRONIZING”

“SOCIOPATH”

“RIPS [CLIENTS] TO SHREDS”

particular attorneys, but often there was “no rhyme or reason” behind the discrepancies.¹⁷⁶ One San Francisco attorney described how judges applied standards differently based on “hot topics” in the news.¹⁷⁷

Among judges who were knowledgeable and competent in immigration law, practitioners noted that many manipulated it in a biased manner, stating that “the application of the law is tilted” and that judges “know how to use law against you.”¹⁷⁸ One Charlotte attorney explained that judges “are up to date on the law and then interpret it in a way to deny as many cases as possible . . . They are knowledgeable about the law but they are not issuing decisions in accordance with the law.”¹⁷⁹

Lack of judicial temperament: Although the EOIR’s own ethical guidelines direct that immigration judges “should be patient, dignified, and courteous, and should act in a professional manner,”¹⁸⁰ practitioners across focus groups described judges acting “in a manner that is not befitting a judge.”¹⁸¹ Attorneys in multiple courts also noted differences between judges presiding over detained versus non-detained dockets, with some commenting that judges on detained dockets were more “vicious” and had more “antagonism” than judges on non-detained dockets.¹⁸²

Many attorneys shared experiences of judges’ aggressive outbursts. Attorneys described how judges have yelled at and insulted expert witnesses.¹⁸³ Some judges were reported to be “very abusive” to respondents, even when speaking through an interpreter.¹⁸⁴ In one case, a judge threw an applicant’s asylum application (I-589) on the ground for a perceived lack of

detail, announcing that “let the record show I threw the I-589 on the ground.”¹⁸⁵ A San Antonio attorney recounted a judge becoming so irate about an attorney speaking on the record at a credible fear review that he stormed out of the courtroom.¹⁸⁶ An Atlanta judge was described as “veins popping, slamming [his] chair, slamming files, [and] screaming.”¹⁸⁷

Attorneys spoke at length about the abuse immigration judges inflict upon the respondents, witnesses, and counsel in their courtrooms. Attorneys described both themselves and their clients as “terrified” of some judges.¹⁸⁸ In our focus groups, judges were described as “caustic,” “creepy,” “evil,” “like a poisonous spider,” “hostile,” “nasty,” “very petty,” “needlessly abusive and patronizing,” a “sociopath,” and someone who “rips [clients] to shreds.”¹⁸⁹ Another described “lots of incidents of a judge just saying bizarre and inappropriate stuff [and] sometimes just directly being a jerk.”¹⁹⁰

Practitioners also described how judges routinely demean and belittle the respondents who appear before them. Attorneys indicated that judges “talk down to respondents” and are “so patronizing and so condescending.”¹⁹¹ One attorney recounted an asylum case in which the judge told her client, who had never received formal schooling, that the client could not proceed with testimony “if we’re not going to use proper pronouns.”¹⁹² Another attorney reported that a judge’s hostile treatment of her client “really freaked [the client] out,” causing him not to want to discuss his asylum claim based on his sexual orientation.¹⁹³

Some judges cut respondents off harshly, snap their fingers for more rapid replies, or ask “Are you finished yet?”¹⁹⁴ Others display a jarring lack of interest in the cases before them. One judge in Charlotte was described as “spend[ing] the majority of the individual [merits hearing] on the phone, you can see her scrolling. Then if she misses something she blames the respondent for confusing her.”¹⁹⁵ Another judge regularly closes his eyes and leans back during respondents’ testimony, giving the impression of being asleep.¹⁹⁶

Attorneys also spoke about judges re-traumatizing clients in court. Some judges are highly dismissive of much of the trauma that comes before them. One judge summarized intense testimony of repeated sexual violence as sounding “admittedly awkward;” another characterized an attempted rapist as a “rejected suitor.”¹⁹⁷ In another case, the judge dismissed abuse to a Central American woman, claiming “this doesn’t happen.”¹⁹⁸

Recounting a judge’s intimidation of a client with documented psychological trauma and physical and sexual abuse, one attorney recalled that “[the judge was] yelling at the client . . . she was about to lose it because of how the judge was treating her.”¹⁹⁹ Another attorney similarly reported a judge’s “extremely abusive” treatment of her client on the stand while she was testifying about traumatic sexual assault; the judge’s behavior was so destructive that it caused the attorney to withdraw from immigration practice for a period of time.²⁰⁰

The Board of Immigration Appeals has failed as an administrative appellate body

The Board of Immigration Appeals was created by the attorney general in 1940 and consolidated into the EOIR in 1983.²⁰¹ As an administrative appeals body with jurisdiction to review all removal orders issued by immigration judges,²⁰² the BIA is supposed to “provide clear and uniform guidance ... on the proper interpretation and administration of the [INA] and its implementing regulations.”²⁰³ However, the BIA has done nothing meaningful to create uniformity in immigration adjudication or to hold judges accountable for deviations from the rule of law.

The failure of the BIA is evident everywhere one looks. In addition to the unchecked abuses and ineptitudes of many immigration judges, the failure of the appellate system is vividly illustrated by appalling discrepancies in case outcomes, both within and between courts.²⁰⁴ These disparities underscore the reality that the BIA is neither developing a helpful body of case law nor engaging in sufficient error correction to guide immigration judges in rendering more uniform decisions.²⁰⁵ Indeed, the BIA itself has issued conflicting decisions on the same legal question on the same day.²⁰⁶

The BIA’s dysfunction has created a culture in which immigration judges are “really unregulated” and allowed “to just flap the handle and do things that aren’t right under the law.”²⁰⁷ The BIA’s effective abdication of its appellate role also fosters a court system where, according to attorneys surveyed, judges act like “I’m God” in the courtroom and are “untouchable.”²⁰⁸

The BIA’s ability to engage in its core function of uniformly and fairly administering the immigration laws is also impaired by the attorney general’s control over its structure and members. The attorney general has made it very clear that BIA members are merely “attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.”²⁰⁹

Structurally, the BIA’s independence in adjudication is illusory because, by regulation, its members are subordinate to the attorney general.²¹⁰ For example, in 2002, then-Attorney General John Ashcroft intentionally reorganized the BIA by “reassigning” BIA members with whom he ideologically disagreed.²¹¹ The message he sent was clear: “rule against the government at your personal peril.”²¹² Separately, and just as problematically, the attorney general exerts control over BIA members by giving them personal stakes in the outcome of cases through individual performance reviews.²¹³

Through the EOIR director, the attorney general also exerts control over all of the cases that any BIA member reviews in his or her adjudicatory capacity.²¹⁴ This case assignment power creates the potential for ideological assignments and, as the case of Castro-Tum suggests, the EOIR director has not hesitated to use the case assignment power to rig outcomes.²¹⁵ Manipulation of case assignments can deprive an individual of the right to a fair hearing and contravenes basic principles of

due process. While the regulations state that the EOIR director cannot “direct the result of an adjudication” that limitation is largely meaningless because the regulation also provides that “nothing in this part shall be construed to limit the authority of the Director” to assign and reassign cases—that is, to manipulate the docket to predetermine case outcomes.²¹⁶

The attorney general has also weakened the BIA’s legitimacy by adopting policies that encourage BIA members to use shortcuts in rendering decisions.²¹⁷ Rather than being required to produce well-reasoned decisions, regulations adopted in 2002 permit BIA members to issue “summary affirmances” that essentially uphold an immigration judge’s decision with a single sentence.²¹⁸ In announcing these reforms, then-Attorney General John Ashcroft explained that the board “needed a complete overhaul” as it “had become a bottleneck in the system, undermining the enforcement of our country’s immigration laws” and encouraging “unscrupulous lawyers to file frivolous appeals.”²¹⁹

One byproduct of such streamlining has been to decrease “the quality of [immigration] decision-making at the administrative level” writ large.²²⁰ Additional streamlining reforms, which would further undermine the integrity of BIA adjudications, have recently been proposed by Attorney General William Barr.²²¹



Former Attorney General John Ashcroft, left, reorganized the Board of Immigration Appeals in 2002 by “reassigning” BIA members with whom he disagreed.

The Weaponization of the Immigration Court System

Decades of intentional, disruptive neglect of the immigration court system were not enough for the Trump administration. In President Trump's view, immigration judges would get in the way of deporting the maximum number of noncitizens.²²² The Trump administration needed weapons to wield against asylum-seekers and other noncitizens.²²³ And so, beginning with President Trump's inauguration, the Trump administration has been successfully converting the immigration courts into such weapons.²²⁴ The administration's ultimate goal is for the immigration courts to become enforcers of deportation.

While the attorneys general of the Trump administration are certainly not the first to attempt this weaponization strategy, the intensity and zealotry of this administration's efforts are unmatched in the EOIR's history. The intent is clear not only from public statements of the attorneys general and other members of the administration, but also from the multiple steps already taken to transform the system into a weapon of deportation and deterrence.²²⁵

This weaponization has taken many forms, including the recasting of judges as enforcement officers; the encouragement of bias against asylum seekers and their counsel; the imposition of case quotas, which destroy impartiality by threatening judges' job security; the politicization of immigration judge hiring and firing; and the aggressive use of the certification power to eliminate important docket management tools and encourage the prejudgment of cases.

The attorney general has attempted to transform immigration judges into deportation enforcers

Under the Trump administration, immigration judges are viewed as the attorney general's tools for enforcing deportations, not as independent case-by-case adjudicators. Over the past two years, the attorneys general have plainly encouraged, rather than discouraged, biased decision-making. As one former immigration judge has described, the Trump attorneys general "have had no interest whatsoever in fairness, impartiality, and due process. Their only interest has been in producing more removal orders and jiggering the system to do that . . . I don't even think there's a pretense of due process anymore."²²⁶

The attorney general has directed judges to enforce an agenda of deterrence and deportation

Under the Trump administration, the attorney general has abused his power by instructing new judges to decide their cases in ways that further the Department of Justice's enforcement and deterrence goals, prioritizing speed over fair case-by-case adjudication.²²⁷

In speeches to new immigration judges in 2018, Attorney General Sessions underscored the DOJ's "firm goal...to end the lawlessness that now exists in our immigration

"There isn't even any attempt at a proper training. The whole indoctrination is you're not judges, you're really enforcement."

system,"²²⁸ stating that "our goal is not to just prosecute more but to deter and end illegality."²²⁹ Emphasizing that "[c]ases must be moved to conclusion," he called on judges to consider their "disposition rates," and keep in mind that "[v]olume is critical."²³⁰ No guidance was given on the importance of developing the facts of a case or staying current on developments in the law.

Enforcement priorities have been emphasized directly in judges' training sessions. In describing the judges' 2018 annual training conference, one former immigration judge explained that "[t]he entire conference was profoundly disturbing. Do things as fast as possible. There was an overarching theme of disbelieving aliens and their claims and how to remove people faster."²³¹

One former immigration judge has noted her "grave concerns, based on what I've seen in court recently, that [new immigration judges] have been appropriately trained to be judges in a professionalized, [truly independent] immigration court."²³² Another explained that "there isn't even any attempt at a proper training. The whole indoctrination is you're not judges, you're really enforcement. You're really a branch of DHS in robes."²³³

The attorney general's instructions have also endorsed and promoted judicial bias against asylum seekers. Attorneys indicate that many judges have an attitude that "we have to stop this influx of migrants."²³⁴ As one attorney put it, judges "are in line with this whole enemy at the gates mentality and paranoia, in line with everything that is happening at the southern border."²³⁵ One attorney heard a judge say, off the record, that "the asylum seekers on the border are an invasion. You can't deny that they are like an invading army, and we have to sort out who is who."²³⁶ As another practitioner explained, even if judges "may not think of themselves as a deportation 'machine,' [they believe] that everybody who is stuck in the machine deserves to be there."²³⁷

While attorneys said that many judges were already demonstrating this bias before 2017,²³⁸ they explained that these judges have been "empowered" and "fully emboldened because of what Trump champions."²³⁹ One practitioner stated that while "tendencies toward bias were always there," judges now "have more license to act on them and not worry about repercussions."²⁴⁰ These biases directly undermine respondents' rights to fair hearings and impartial adjudicators.



The attorney general has manipulated judicial dockets to achieve his enforcement priorities

The Trump administration’s attorneys general have interfered with immigration judges’ control of their courtrooms by reassigning case dockets to align with their enforcement priorities. Here the administration has followed the example of prior attorneys general: In 2014, in response to increasing arrivals of unaccompanied minors at the U.S.-Mexico border, the DOJ created what was called the “rocket docket,” moving newly arriving minor and family cases to the top of judges’ dockets, despite objections by immigration judges.²⁴¹

These priorities were revised by the Trump administration in January 2017 to target detained noncitizens, certain unaccompanied children, and noncitizens released from prolonged detention for unfairly expedited hearings.²⁴² Most recently, an expedited “family unit” docket has been created for some courts, which fast-tracks the asylum cases of newly arrived families in the United States without consideration of due process.²⁴³ Immigration judges now give respondents mere weeks to find attorneys, collect evidence, prepare witnesses and testimony, and submit such other materials as may be required by judges’ sub-regulatory rules.

The attorney general’s manipulation of immigration court dockets has been interpreted by immigration judges themselves as an enforcement-driven interference with their jurisdiction. As Dana Leigh Marks, a San Francisco immigration judge, has explained:

The “deployment” of judges to the border—just the word feels inappropriate to a lot of judges. It does imply a military force, and while we are related to immigration law

Ashley Tabaddor, a federal immigration judge in Los Angeles who serves as the president of the National Association of Immigration Judges, speaks during an event at the National Press Club in Washington on the pressures on judges and the federal immigration court system.

*enforcement, we are supposed to be neutral adjudicators. We want to be the most efficient and effective in deciding the cases in front of us, and there shouldn’t be any kind of feeling that there is a political basis for influencing how those decisions are made.*²⁴⁴

National Association of Immigration Judges President Ashley Tabaddor has similarly described how “constant docket shuffling” is one of the products of the use of the EOIR “as an extension of a law enforcement agency’s priorities.”²⁴⁵ Particularly when combined with the attorney general’s recent imposition of case quotas as mentioned earlier, docket shuffling has exacerbated enforcement-driven pressures on immigration judges.

Enforcement-driven docket shifts undermine judges’ ability to manage their own caseloads effectively.²⁴⁶ The EOIR has acknowledged that priority dockets “did not produce significant results” in effectively navigating cases through immigration court.²⁴⁷ Instead, docket manipulation has exacerbated an already huge backlog in immigration court cases.

When judges are redirected to hear new dockets, their existing case dockets—which may already include thousands of cases—are seriously disrupted.²⁴⁸ Calendar shifts due to expedited priority cases can cause pre-scheduled cases to be “kicked” months or years into the future. For example, when the Trump administration detailed immigration judges



Cuban migrants in Ciudad Juarez, Mexico, wait in line to be processed as asylum seekers in the U.S.

throughout the country to courts along the U.S.-Mexico border in 2017, more than 20,000 cases were delayed in the immigration courts they left behind.²⁴⁹

Docket shuffling thus contributes to a growing backlog of cases, in which the average immigration case now takes more than two years to complete.²⁵⁰ This shuffling also has a severe impact on respondents. According to one attorney in San Antonio:

I had last year a client who had been detained . . . close to a year when his merits hearing was bumped because they sent the judge to a non-detained docket in El Paso. His hearing was bumped [from] April to July, then bumped again . . . My client was suicidal when I told him that case was moved from April to July . . . I canceled [a major family vacation] to make the July date, then the judge just rescheduled.²⁵¹

As another attorney explained, “arbitrary prioritizations wreak havoc on case management,” giving so-called “priority” cases inadequate time to prepare while further extending the backlog for pending cases that may have been waiting for years.²⁵²

As Tabaddor, the NAIJ president, has explained, even adding new judges would not help solve the docketing crisis.

[The EOIR is] not run like a court; the necessary structure and infrastructure that’s supposed to be in place hasn’t been put in place. So we have judges who don’t have sufficient support staff. We have judges who don’t have courtrooms. We have incidents, in certain situations, that we don’t have in-person interpreters allowed to us because of the, frankly, the mismanagement of the court’s budget.²⁵³

Former immigration judges have echoed this sentiment, noting that “even on the X’s and O’s level, you have this stunning incompetence and inability to run a judicial system just from the technical standpoint—they can’t hire, they can’t plan, they can’t train, they can’t get the resources out there.”²⁵⁴ This lack of resources also directly impacts judges’ ability to fairly decide cases, as judges are forced to take on greater administrative responsibilities, reducing their available time to review evidence and deliberate upon cases.²⁵⁵

The attorney general incites prejudice against asylum seekers and their attorneys

The attorney general has encouraged judicial bias by fomenting distrust of asylum seekers and their attorneys. In speeches to the EOIR, then-Attorney General Sessions characterized, without evidence, the asylum system as “currently subject to rampant abuse and fraud” and “overloaded with fake claims,” stating that “the vast majority of the current asylum claims are not valid.”²⁵⁶ He described the credible fear process as “an easy ticket to illegal entry into the United States.”²⁵⁷

Sessions also specifically attacked the credibility of immigrants’ counsel, labeling them as “dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum.”²⁵⁸ He warned new immigration judges of “good lawyers” who “work every day—like water seeping through an earthen dam—to get around the plain words of the INA to advance their clients’ interests.”²⁵⁹

Practitioners report that such blanket prejudgment of asylum claims has been disastrously effective: Immigration judges have adopted an inherent, pervasive distrust of asylum-seeking respondents. Attorneys describe how some judges “disbelieve everything” that comes before them in asylum hearings.²⁶⁰ One judge, without any record evidence, told an attorney in a bond hearing that a client had to have a strong claim “because a lot of them are lying, they’re just lying.”²⁶¹

In another case, after a client testified that her husband’s severe physical abuse had caused her to miscarry a child, the judge commented that “essentially he couldn’t even be sure that the Respondent had been pregnant.”²⁶² Other judges consider a client “a liar and evasive” if she has faced any type of trauma, claiming that a truly traumatized individual “would have had years of therapy.”²⁶³

Judges’ distrust also extends to respondents’ attorneys. Judges in some courts regularly question attorneys’ integrity,

falsely accusing them of lying in court.²⁶⁴ In some cases, judges have filed or threatened to file unwarranted complaints against attorneys who attempt to zealously represent their clients.²⁶⁵ Attorneys also reported that judges, without any apparent basis, have questioned their judgment and qualifications in court, even going so far as to call one attorney's supervisor in open court.²⁶⁶ Some judges insult attorneys in front of their clients, undermining the clients' trust.²⁶⁷

Judges' hostility towards attorneys directly impacts the quality of representation as well as clients' case outcomes. Attorneys report that they have "nightmares" about certain judges, or "can't sleep for a week because of the pressure and hostility" they know they will face in certain courtrooms.²⁶⁸ As one practitioner explained, "A lot of judges, their goal is to break down the attorney-client relationship so the client doesn't want the attorney anymore or gives up the case."²⁶⁹ Other practitioners reported that certain judges prejudge cases based on who is representing a client.²⁷⁰ In addition, some judges use scheduling and docketing to retaliate against specific attorneys.²⁷¹

Former immigration judges have noted how poor treatment by judges "demoralizes" private attorneys,²⁷² explaining that "morale in the private bar is bone zero because the judges are rude, they will not listen—they just want to move the meat. And it's just a totally broken system."²⁷³

The attorney general categorically encourages deportations by giving an immigration judge a personal stake in every case outcome

In contravention of every known norm respecting impartiality, the attorney general has pitted immigration judges against due process by threatening to punish the judge—including through termination—for failing to adhere to enforcement-driven case quotas. As of Oct. 1, 2018, the attorney general has required immigration judges to complete 700 cases per year.²⁷⁴ Immigration judges who fail to meet case quotas and performance standards risk facing disciplinary action including termination.

The pressure of case quotas can feel ever-present to an immigration judge. Logging into their computers each morning, a performance dashboard appears. This dashboard uses red, yellow, and green to reflect compliance with performance goals, and acts as "a constant reminder for judges . . . of how much the administration places emphasis on numbers; on quantity rather than quality."²⁷⁵

Tying immigration judges' employment to numerical performance measures presents an unheard-of conflict because it gives judges a personal stake in case outcomes and encourages them to push cases through quickly without sufficient attention.²⁷⁶ As Tabaddor, the NAIJ president and immigration judge, has noted, this personal stake is in conflict with the principle that "a judge [should] be completely divorced from the interests of the parties over whom he or she is presiding."²⁷⁷

Congress has recognized the threat that such performance evaluations pose to judicial independence by exempting administrative law judges (ALJs) from performance appraisals and ratings.²⁷⁸ Case quotas are also contrary to recommendations made in a report commissioned by the EOIR itself.²⁷⁹ The NAIJ has warned that the imposition of numerical case completion quotas on immigration judges "could be the death knell for judicial independence."²⁸⁰ As one attorney said, quotas are "trying to break the courts."²⁸¹

Case quotas also prioritize speed over other adjudicatory concerns—including fairness.²⁸² As one former immigration judge explained, "to tie all of that to performance evaluations is just highly inappropriate in a judicial setting . . . [I]t encourages quick slapdash justice."²⁸³ Practitioners' experiences suggest that many judges are attempting to meet the attorney general's new standards by adopting methods that infringe upon noncitizens' rights to full and fair hearings.²⁸⁴ Before 2017, merits hearings were regularly scheduled for three-hour blocks, with judges hearing one case in the morning and another in the afternoon. Some courts are now scheduling three times that many.²⁸⁵ As one practitioner explained, this scheduling "necessarily means that you won't have time to present your full case."²⁸⁶ One practitioner explained the impression that the judges seem to use overbooking to rush hearings, in order to cover for a "lack of desire to conduct hearings fairly."²⁸⁷ Former immigration judge John Richardson described the outcome of the quotas as a "law enforcement assembly line":

*Due process is nothing. It's an assembly line. They come down a belt, you've got a big stamp, you stamp them on the forehead that says "deport," and away they go. The problem is you don't have time to grant relief and have a hearing . . . There's no due process. There is no judging. It's just a law enforcement assembly line, quite frankly.*²⁸⁸

Even for judges attempting to uphold due process, case quotas' heightened pressure increases the risk that implicit bias will play a larger role in their decisions; research has shown that under the stress of unmanageable caseloads, immigration judges tend to base their decisions on instincts rather than reasoned legal analysis and the facts of each case.²⁸⁹

To meet the quota system, many courts are now using "stacked" dockets, in which multiple merits hearings are scheduled for the same timeslot.²⁹⁰ Attorneys describe arriving at court for a long-awaited merits hearings only to find that the hearing time has been triple-booked, resorting to

“A lot of judges, their goal is to break down the attorney-client relationship so the client doesn't want the attorney anymore or gives up the case.”

“rock, paper, scissors” with fellow attorneys to determine their order of appearance in court.²⁹¹ Attorneys may be forced to wait for hours, or a case may not be heard at all on a given day, requiring respondents, attorneys, and witnesses to come back for the next hearing.²⁹² As one attorney explained, “[it] feels like a huge waste of resources and time when you have a whole family there, especially when they’ve traveled great distances.”²⁹³

Delays also place attorneys and clients in an “impossible” position, as available evidence and testimony may weaken over a period of years.²⁹⁴ As a former immigration judge explained:

[T]he more cases get shuffled off, the harder they get to try because circumstances change, country conditions change. Witnesses disappear. Lawyers change. So a case that could have been done fairly straightforwardly a year after it was filed, eight years after it’s filed that’s a whole different ballgame.”²⁹⁵

Judges’ publicly expressed views of case quotas vary widely—in Atlanta, for example, judges range from talking about the numbers “all the time, like the whole thing is a game,” to getting “instantly angry” if an attorney suggests any actions are due to case completion quotas.²⁹⁶ Yet attorneys across courts report that judges are aware of and concerned about their completion statistics.²⁹⁷ Practitioners explained that some “cases are moving incredibly fast and clients are unable to prepare,”²⁹⁸ and “cases move so quickly it’s hard to put a substantive case together.”²⁹⁹

Even longtime judges, who were initially disdainful of the new directives, seem to be changing their behavior to comply with them.³⁰⁰ Attorneys report that judges who push back against the direction of the attorney general have done so to their “peril,” having been “worn down” by pressures to fall in line with the Trump administration’s policies.³⁰¹ Former immigration judges report that their colleagues who are still on the bench are “scared for their jobs.”³⁰² They emphasize that the administration has “sent the message that this is serious; that if you don’t meet the quotas, you really are going to be out of a job.”³⁰³

In at least one instance, the attorney general’s emphasis on case closure has resulted in direct interference with a judge’s docket. In *Matter of Castro-Tum*, Judge Steven Morley attempted to delay issuing a ruling to ensure that the respondent, who had entered the United States as an unaccompanied minor, had notice of his hearing. In response, the EOIR leadership reassigned the case to a supervisory immigration judge, who traveled from Virginia to Philadelphia to conduct a single hearing.³⁰⁴ She ordered the respondent removed in absentia without inquiring further into the due process concerns raised by Judge Morley and an attorney appearing as friend of the court.³⁰⁵ The EOIR also unlawfully removed 26 additional cases from Judge Morley’s docket without explanation; all 26 cases involved the due process rights of juvenile respondents.³⁰⁶

Roughly three-fourths of immigration judges hired by the Trump administration have prosecutorial experience, and many previously worked for ICE as trial attorneys who represented the government in removal proceedings.

The attorney general’s office has undermined the EOIR’s legitimacy and neutrality through politicized hiring and firing

The attorney general’s office has abused its supervisory authority by unlawfully politicizing the hiring and firing of EOIR personnel. Given the importance of expert knowledge in a specialized court system, selecting adjudicators based on ideology—rather than relevant knowledge or adjudicatory skills—undermines the integrity of the entire system. Merits-based appointments are especially critical in the immigration court system, where the relevant law is notoriously complex.³⁰⁷ Selecting administrative judges based on political considerations is also illegal.³⁰⁸

Nevertheless, under the Trump administration, the Department of Justice has faced serious allegations of illegally blocking the hiring of EOIR adjudicators based on political bias.³⁰⁹ While the Trump administration is not the first to exploit the appointment process, as this report notes, the impact of its weaponized hiring may be the most widespread. In spring 2018, members of Congress expressed concern that offers to multiple candidates for immigration judge and BIA positions had allegedly been withdrawn or delayed due to improper consideration of their perceived political or ideological views.³¹⁰

The DOJ has also reportedly changed the qualifications for immigration judges to favor individuals with law enforcement experience.³¹¹ This revision has led to a consistent overrepresentation of individuals with immigration enforcement experience among immigration judges and BIA members.³¹² Roughly three-fourths of immigration judges hired by the Trump administration have prosecutorial experience, and many previously worked for ICE as trial attorneys who represented the government in removal proceedings.³¹³

Former immigration judges described the system as being filled with “all these prosecutors who have been trained to just [give] assembly-line justice,”³¹⁴ noting that “anybody other than somebody with a government background has basically been shut out of the 21st century immigration judiciary.”³¹⁵ Attorneys also report that this past employment is an important factor undermining many judges’ impartiality.³¹⁶ One practitioner said that former trial attorneys still act like prosecutors from the bench—“they don’t purport to be neutral.”³¹⁷

In addition to directly abusing powers of appointment and removal, the attorney general's increasingly enforcement-oriented directives have pushed many judges to resign or retire early. As NAIJ President Tabaddor has explained, "[t]he job has become exceedingly more difficult as the court has veered even farther away from being administered as a court rather than a law enforcement bureaucracy."³¹⁸

Attorneys also have the sense that some judges feel offended, insulted, and undermined by their treatment under the current administration, feeling discomfort about "being demoted to roles of clerks."³¹⁹ When long-time Phoenix Immigration Judge John Richardson retired in September 2018, he stated that "[t]he timing of my retirement was a direct result of the draconian policies of the Administration, [including] 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."³²⁰

Another immigration judge reported that immigration adjudication "has become so emotionally brutal and exhausting that many people I know are leaving or talking about finding an exit strategy. Morale has never, ever been lower."³²¹ Former immigration judge Laura Ramirez, who retired from the San Francisco court in December 2018, has explained that this trend jeopardizes EOIR's integrity.³²²

*For the system of justice, there's these highly qualified, fair, thoughtful people who are being squeezed out of the system for political reasons, basically . . . The system can't be fair if good people ... are pushed out.*³²³

"There's these highly qualified, fair, thoughtful people who are being squeezed out of the system for political reasons, basically ... The system can't be fair if good people ... are pushed out."

A HISTORY OF POLITICIZED HIRING IN IMMIGRATION COURTS

The Trump administration is not the first administration that has abused its power by injecting political priorities into the selection process for immigration judges and BIA members. The history of political hirings and firings under the Bush administration highlights the opportunity that the attorney general's broad powers of appointment, removal, and reassignment create for political manipulation and weaponization.

In 2008, a Department of Justice investigation found that various Bush-era DOJ officials "violated Department policy and federal law by considering political or ideological affiliations in selecting candidates for the BIA."³²⁴ This politicized hiring process was in place for nearly three years, from the spring of 2004 until a lawsuit over discriminatory hiring practices led to the suspension of immigration judge appointments in December 2006.³²⁵

This wave of politicized hiring was immediately preceded by a period of "selective downsizing," in which then-Attorney General John Ashcroft used his authority over personnel to remove BIA members whose decisions were most favorable to noncitizens.³²⁶ Ashcroft's firing of the more immigrant-friendly board members had no basis in the general criteria announced in his downsizing plan and appeared to many observers to be politically motivated.

Indeed, Ashcroft's actions led to a greater backlog of cases at the board,³²⁷ and had a "severely chilling effect" on the BIA's decision-making, as board members were pressured to align their decisions with the attorney general's priorities or potentially face removal from their posts.³²⁸

While the Trump administration's weaponization of politicized hiring may have reached a new level, this legacy of politicized appointments reveals the EOIR's vulnerability to manipulation for political ends.

The attorney general's office has used its certification power to encourage prejudgment of cases and undermine due process

The attorney general's office has abused its controversial certification power in ways that further jeopardize asylum seekers' access to a fair hearing. Federal law grants the attorney general broad authority to review and unilaterally reverse BIA decisions on his or her own initiative.³²⁹ This "certification" process results in precedential decisions that are binding on both immigration judges and the BIA.

While agency head review is not uncommon throughout the executive branch, particular concerns have been raised about conflicts of interest in the immigration context, where the nation's chief law enforcement officer is able to override a specialized adjudicator's decisions in cases in which the government is a party.³³⁰

Controversially, attorneys general have also interpreted the certification process to be unconstrained by due process concerns, such as requirements of a fair hearing, that otherwise apply throughout the EOIR's adjudicatory process.³³¹

The attorney general's vast certification powers have also been critiqued for being "vulnerable to politically driven decisionmaking" and driven by a prosecutorial agenda.³³² Attorneys general across administrations have selected and decided certified cases based on political preferences rather than to promote uniform application of the law.³³³ As Tabaddor, the NAIJ president, has noted:

*[The attorney general's certification power turns immigration courts into] basically a veneer for a courtroom . . . [T]he Attorney General ha[s] the ability to step in on any one of the cases and take a case and use that case as a mechanism to extend whatever law enforcement policies the executive branch is following at that point. So when you have a court system that allows a prosecutor to engage in this type of super veto power and insert himself or herself into the proceedings, that is highly problematic.*³³⁴

Under the Trump administration, the certification power has arguably been used as one of the most powerful tools to implement the administration's pro-deportation agenda. Former immigration judges characterize the use of the certification power by the Trump attorneys general as an attempt "to try to really force the judges into doing exactly what they want them to do" in service of their weaponization goal.³³⁵ Carol King, a former immigration judge, explained the issue:

The problem with the certification power goes deeper than individual administrations. Having one person at

*the helm that can, with a stroke of a pen, undue decades of painstakingly considered legal development based on political or policy considerations is inherently problematic. But now we're seeing it being used to deliberately undermine the immigration court system itself, which was developed over time to provide a due process for determining who is allowed to stay in our country. That has always been the danger and now we're seeing an administration weaponize this aspect of our immigration court system to undermine the system of due process that has been developed.*³³⁶

In discussing a recent certified decision, one attorney stated: "It's a great way to terrorize people by using a false reading of the law, for as long as you can get away with it."³³⁷

In furtherance of their weaponization agenda, the Trump attorneys general have strategically certified cases to channel immigration judges toward denying asylum claims. These certifications include decisions that undermine individualized determination of cases and limit immigration judges' adjudicatory tools.

The attorney general's office has issued precedent encouraging the categorical prejudgment of asylum claims

In 2018, then-Attorney General Jeff Sessions published a self-referred decision in *Matter of A-B-* in which he authorized and encouraged his immigration judges to categorically deny asylum claims based on the "type" of case, instead of considering individual facts and fair application of law to those individual facts.³³⁸

This precedent was set despite the existing requirement that an applicant must establish the prerequisites for an asylum claim and show that she is a "refugee" within the meaning of the INA.³³⁹ The INA has long been interpreted to protect women fleeing a range of gender-based harms.³⁴⁰ Individuals have also successfully brought claims relating to gang violence in a range of contexts, and under multiple protected grounds—under case-by-case adjudication.³⁴¹

There has never been a categorical bar against such claims, nor a blanket rule that all claims involving domestic violence are valid. Rather, each case has traditionally been assessed on its merits, measured against the same general standards applicable to all claims. Reaching beyond the facts of the case before him, Sessions held that few claims pertaining to domestic or gang violence perpetrated by nongovernmental actors would qualify for asylum³⁴²—an attempt to set forth a new policy that would make the vast majority of claims related to domestic violence or gang violence fail "in practice."³⁴³



In addition to overturning well-settled case law, *Matter of A-B-* disrupted a long-term consensus between the government and immigration advocates that domestic violence, in certain circumstances, is an appropriate basis for granting asylum. Paul Schmidt, a former immigration judge and BIA member, described how, “after a 17-year struggle to finally get [domestic violence cases] right, for Sessions to come along and basically undo the consensus—it’s totally outrageous and inappropriate.”³⁴⁴

Jeffrey Chase, another former immigration judge, further explained that while the Bush administration had backed away from issuing a similar decision, based on pushback from conservative women’s groups, “the difference is Sessions absolutely didn’t care. Not only Sessions, but any A.G. in this administration—they feel that just because they don’t like it, it doesn’t matter that the sides are in agreement, that there’s no issue in dispute, that it’s settled law.”³⁴⁵

Instigated or encouraged by the attorney general’s guidance in *Matter of A-B-*, attorneys report that judges have begun to “prepermit” (deny prior to a merits hearing) or threaten to prepermit cases, based on the case “type.”³⁴⁶ Even when cases are not explicitly prepermitted, many judges actively discourage respondents from requesting relief.

Judges in multiple courts attempt to convince respondents at master calendar hearings that their claims will inevitably fail, so it is in their best interest to give up without finding attorneys and take voluntary departure orders.³⁴⁷ In many cases, these warnings lead unrepresented respondents to give up their claims at an early stage in proceedings.³⁴⁸

An attorney in El Paso recounted that a judge tells asylum seekers: “This is the bye-bye place. Ninety-nine percent of you are going to fail. You’re not going to succeed. So think about this when you decide whether you want to ask for counsel.”³⁴⁹

Even when claims progress to a merits hearing, they are regularly prejudged. Former judges point out that “lawyers have to push the boulder all the way up the hill on every single case now,”³⁵⁰ which reduces their capacity to take on others. And while creative lawyers can still win domestic violence and gang cases, “the problem is the unrepresented people, it’s like shooting fish in a barrel”³⁵¹ for a judge to deny their cases. As former immigration judge Rebecca Jamil noted:

*I know that there are many conservative courts that are essentially doing six to eight A-B- cases in a slot and saying “this is an A-B- case” and not allowing testimony and just plowing through. And it’s horrifying to me . . . It blows my mind what a denial of due process that is, and a denial of reality in so many of these countries.*³⁵²

Jamil also reports that new judges are being improperly trained that “cases like *Matter of A-B-* should be applied like a statute” in order to categorically deny asylum eligibility to respondents.³⁵³

With courts emboldened by the letter and spirit of *Matter of A-B-*, practitioners describe “types of cases that [judges] have

“[B]efore you even walk into court, your case has already been denied.”

predetermined should not win.”³⁵⁴ As one attorney explained: “[B]efore you even walk into court, your case has already been denied.”³⁵⁵ Another practitioner recounted a judge telling her: “I haven’t had a chance to look at the evidence but I’m already going to tell you we aren’t going to grant this.”³⁵⁶

Charlotte attorneys report that at least one judge simply issues removal orders without holding merits hearings, sometimes contacting the attorney the night before to say that there is no need to come to court as he plans to deny the case.³⁵⁷ Other attorneys described judges who write denial orders before a hearing has been completed.³⁵⁸

The attorney general’s office has undermined due process by depriving judges of important docket management tools

Under the Trump administration, the attorney general has also used his certification power to significantly limit judges’ access to adjudicatory tools. In each of these strategic certifications, the attorney general issued decisions that limit judges’ independence to manage their dockets and reduce respondents’ access to due process protections. In 2018, Sessions’ decision in *Matter of Castro-Tum* overruled decades of immigration court practice by eliminating immigration judges’ discretionary authority to suspend immigration proceedings through administrative closure.³⁵⁹

His subsequent ruling in *Matter of S-O-G- & F-D-B-* similarly abolished immigration judges’ discretionary ability to terminate or dismiss removal proceedings. Before these decisions, judges had used these adjudicatory tools to manage their dockets without foreclosing respondents’ eligibility for immigration relief—for example, by suspending removal cases in which respondents were waiting for another type of immigration application to be processed by United States Citizenship and Immigration Services, the immigration benefits branch of DHS.³⁶⁰

The attorney general’s decision in *Matter of L-A-B-R-* also severely limited judges’ discretion to grant continuances, restricting an important mechanism for providing respondents with adequate time to find counsel and gather evidence.³⁶¹ And in *Matter of E-F-H-L-*, Sessions reopened and vacated a decision that had required immigration

judges to hold an evidentiary hearing before ruling on a respondent's asylum claim, discarding important precedent that had clearly precluded judges from pretermining asylum claims without a full hearing.³⁶²

The courts have felt acutely the impact of decisions removing tools such as administrative closure and continuances.³⁶³ As one former judge explained, "It's absurd. They've basically taken the few things that worked in the system and disabled them so they don't work anymore."³⁶⁴ Another judge described how he had used administrative closure to suspend thousands of cases that had other pending resolutions, such as family-based visa petitions. When administrative closure was eliminated, those cases were all re-calendared and "it was just an absolute nightmare—it clogged the system."³⁶⁵

Practitioners report that judges are now consistently denying continuances in courts across the country.³⁶⁶ As one practitioner explained: "Judges have panic in their eyes when you ask for a continuance."³⁶⁷ In Charlotte, judges cite "concerns for administrative efficiency" and their "heavy docket of pending cases" in ruling to deny continuances.³⁶⁸

Requests for continuances to find counsel are granted

very inconsistently, depending on the judge.³⁶⁹ Even judges who selectively grant continuances may "keep a tally" of continuances in a case, regardless of whether the extensions are at the request of the client and his attorney or for another reason.³⁷⁰ Some judges also set attorneys up for failure; one judge denied a respondent's continuance request due to the lack of certain evidence, after having previously told the respondent's attorney the same evidence was not necessary.³⁷¹

The denial of continuances can adversely impact respondents' ability to present their claims for relief. One attorney described the "destructive" impact of L-A-B-R—in the Atlanta court, where there has been a "noticeable increase" in respondents accepting voluntary departure and removal orders due to a lack of continuances to find representation and prepare their cases.³⁷²

Another attorney recounted an instance when a judge had refused a continuance despite realizing that the interpreter was speaking the wrong dialect; the subsequent appeal cited at least 27 times when the court could not understand what the respondent said.³⁷³ Attorneys also report having to work especially hard at every continuance request, which takes time away from their preparation of clients' merits cases.³⁷⁴

RECOMMENDATIONS

The immigration court system has failed to fulfill the constitutional and statutory promise of fair and impartial case-by-case adjudication for noncitizens in removal proceedings largely because the attorney general's unitary control has always bent the system toward enforcement and away from fair adjudication. This unitary control has enabled the weaponization of the court system under the Trump administration. It also undermines the ability of immigration judges to undertake independent adjudications and to provide full and fair hearings, and simultaneously fails to hold judges accountable for due process violations.

Effective reform to address the attorney general's abuse of power must include safeguards to insulate immigration judges from political pressures as well as mechanisms to curb and correct procedural injustices.

The following recommendations offer a path to reform:

CREATE AN INDEPENDENT ARTICLE I COURT OUTSIDE THE ATTORNEY GENERAL'S CONTROL

Decades of experience plainly show that the attorney general is institutionally and systemically incapable of fairly administering the immigration court system. The immigration courts will almost certainly never work so long as the attorney general maintains unitary control. The best solution is thus to sever this executive control, transforming the immigration court system into a new Article I immigration court with trial and appellate divisions. Stakeholders and immigration court experts agree that an Article I immigration court is the best

long-term solution to the system's current failures.³⁷⁵

Notably, there is precedent for moving adjudication systems out of individual agencies and into separate Article I courts as a solution for concerns about judicial independence. All three existing Article I courts—the United States Tax Court, the United States Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces—originated as components of executive agencies, and all were converted to Article I courts by Congress.³⁷⁶

ENSURE REFORM DRIVEN BY GUIDING PRINCIPLES

To guarantee fair and impartial adjudication in the immigration court system, reform must be informed by the guiding principles of transparent, merits-based appointment of judges; tenure and protection from removal without cause; internal accountability mechanisms; and a functioning appellate system.

Although these reforms should be instituted through the formation of an Article I immigration court, immediate internal changes to the EOIR's current structure could improve fairness and independence while the agency remains under the control of the attorney general. These guiding principles are described in detail below:

Transparent, merits-based appointment

Immigration judges should be selected through a transparent process with more rigorous criteria to ensure the creation of a high-quality judge corps that has deep knowledge of immigration law and is well-suited to adjudicate removal cases fairly.

Important qualifications should include legal expertise as well as cultural sensitivity, respect for all parties, judicial temperament, and extreme care when judging credibility, particularly of trauma survivors.³⁷⁷ To better guarantee that the political ideology of a candidate is not considered in the hiring process, political appointees should not have the final say in hiring decisions.³⁷⁸ Changes should also be made to the judicial recruitment process to decrease the overrepresentation of former DHS attorneys.³⁷⁹ Finally, the public should be informed about the appointment process through disclosure of the specific hiring criteria.³⁸⁰

Tenure and protection from removal without cause

To further protect their independence and neutrality, immigration judges should enjoy some form of tenure and be removable only for good cause. In the absence of an Article I court, these objectives could be accomplished by making immigration judges into administrative law judges³⁸¹ or adopting a similar model for their appointment and removal within DOJ.

The Constitution and the Administrative Procedure Act clearly recognize the importance of tenure guarantees in protecting judges' ability to adjudicate fairly and impartially.³⁸² For example, administrative law judges (ALJs) who adjudicate cases in many other federal agencies serve fixed terms and can be removed or disciplined only for "good cause" after an evidentiary hearing before the Merit Systems Protection Board.³⁸³

These protections allow ALJs to adjudicate according to their professional judgment without fear of retaliation. At the same time, former immigration judge Paul Schmidt has pointed out that lack of lifetime tenure "should inspire people to be good judges so when reappointment time comes, there isn't a problem. People who are rude or don't know the law should be weeded out."³⁸⁴ Providing

greater job stability to immigration judges would also likely increase the stature of the position and attract more high-quality candidates.

Internal accountability mechanisms

In addition to implementing procedural reforms that help ensure a full and fair hearing for noncitizens in removal proceedings,³⁸⁵ the immigration court system needs transparent and robust mechanisms to foster public confidence and hold judges accountable for misconduct.

Although the EOIR has a system for filing and processing complaints against judges, attorneys report that the current structure is highly flawed. Despite serious critiques of the courts in which they practiced, very few attorneys in our focus groups had actually filed formal complaints against immigration judges. Practitioners cited not only a lack of time but also concerns that complaints were ineffective. Attorneys who had actually filed complaints echoed this sentiment, reporting that "nothing happened."³⁸⁶

Attorneys also expressed fear of retaliation by immigration judges, worrying that repercussions could be "disastrous."³⁸⁷ Some attorneys reported that certain judges had engaged in a "witch hunt" to try to discover which attorneys had made anonymous complaints against them.³⁸⁸

More effective accountability mechanisms are needed to ensure that misconduct is exposed and appropriately addressed.³⁸⁹ Immigration judges should also be regularly evaluated using judicial model performance reviews, rather than numerical performance metrics or the federal employee review system.³⁹⁰ Under this judicial model, performance evaluations of immigration judges would be publicly released and based on criteria like procedural fairness, demeanor, and knowledge.³⁹¹

Functioning appellate system

Effective appellate review of immigration judge decisions is crucial to help ensure fair outcomes at the trial level by correcting errors and elaborating clear legal standards for lower court judges.³⁹² As former immigration judge and BIA member Paul Schmidt has explained, an independent system needs "a real appellate body that acts like an appellate court, not a rubberstamp for the Attorney General."³⁹³

To that end, all BIA decisions should be made by multimember panels and issued in the form of fully reasoned written opinions that address all material arguments.³⁹⁴ Further, like immigration judges, BIA members should be insulated from political pressure through a transparent merits-selection process and some form of tenure or for-cause removal.³⁹⁵

The attorney general should not be empowered to rewrite immigration law for ideological ends through the certification process. These reforms would help create an appellate process that better serves to correct due process violations and promote consistent application of the law in immigration courtrooms.³⁹⁶

ENDNOTES

- 1 Matter of Castro-Tum, 27 I. & N. Dec. 271 (Att’y Gen. 2018).
- 2 Adam Liptak, Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge’, N.Y. Times (Nov. 21, 2018), <https://perma.cc/J7UD-PEQP>.
- 3 National Immigrant Justice Center, Policy Brief: The Weaponization of the Immigration Court System (April 2018), <https://perma.cc/28MQ-K7ED> (predicting the “weaponization” of the immigration courts); Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (explaining how the First Amendment has been “weaponized” against unions); Eric H. Holder, Jr., The Supreme Court Can’t Allow Trump to Weaponize the Census, Wash. Post (Apr. 25, 2019), <https://perma.cc/LEK2-YTTQ> (explaining how the Supreme Court may allow Trump to “weaponize” the census against Democrats and minority populations).
- 4 Matter of A-B-, 27 I. & N. Dec. 316, 321 (Att’y Gen. 2018). Tal Kopan, “Judge in case Sessions picked for immigrant domestic violence asylum review issued ‘clearly erroneous’ decisions, says appellate court,” CNN News (Apr. 28, 2018), <https://perma.cc/R3NH-EGYW>.
- 5 Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (holding, as applied to credible fear proceedings, that the Attorney General acted arbitrarily and capriciously in using Matter of A-B- to categorically reject asylum claims by subject matter, rather than engaging in case-by-case determination.); Michael Hirsh & Robbie Gramer, The Deadly Consequences of Dog-Whistle Politics, Foreign Policy (Oct. 27, 2018), <https://perma.cc/8PND-D45Y>.
- 6 Immigration Court Backlog Surpasses One Million Cases, TRAC Immigration (Nov. 6, 2018), <https://perma.cc/X6S2-FNHL>; This Immigration Judge Has a Fix for Immigration Courts, Slate (Apr. 25, 2019) [hereinafter This Immigration Judge Has a Fix], <https://perma.cc/ZEQ3-TNN8> (interview with immigration judge Ashley A. Tabaddor, President of the National Association of Immigration Judges, noting that the current backlog of over 850,000 cases does not include the hundreds of thousands more that the Attorney General wants to put back on the docket).
- 7 These perspectives were shared during facilitated focus groups with immigration practitioners in Atlanta and in El Paso, Texas. For more information about the focus groups and our methodology, see sidebar on page 5.
- 8 See, e.g., ABA Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, Am. Bar Ass’n. (2010) [hereinafter 2010 ABA Report], <https://perma.cc/59LM-4MFW>; ABA Commission on Immigration, 2019 Update Report: Reforming the Immigration System, Am. Bar Ass’n (March 2019) [hereinafter ABA Report], <https://perma.cc/94TF-FXGV>; TRAC Immigration, Immigration Courts: Still a Troubled Institution (June 2009), <https://perma.cc/NMT7-URLV>; Appleseed, Assembly Line Injustice: Blueprint to Reform American’s Immigration Courts (May 2009) [hereinafter Assembly Line Injustice], <https://perma.cc/M2Z2-AWS6>; AILA Policy Brief, Restoring Integrity and Independence to America’s Immigration Courts (Sept. 2018) [hereinafter AILA Restoring Integrity and Independence], AILA Doc. No. 18092834 (posted 3/20/2019); Nat’l Ass’n of Immigration Judges, Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges (Oct 2017), <https://perma.cc/MJ3A-Q7XT>; Dana Leigh Marks, Now is the Time to Reform the Immigration Courts, Int’l Affairs Forum (Winter 2016), <https://perma.cc/8WB7-H8D7>; Nat’l Ass’n of Immigration Judges, An Independent Immigration Court: An Idea Who Time has Come (Jan 2002), <https://perma.cc/3NLT-AP5N>; Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform 103–04 (2009); Select Comm’n on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest: Final Report and Recommendations 248–50 (1981) [hereinafter Select Comm’n Report]; NIJC, Policy Brief: The Weaponization of the Immigration Court System, supra note 3.
- 9 See The Federalist No. 78 (Alexander Hamilton) (explaining the importance of judicial independence in protecting the rule of law); In re Murchison, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”).
- 10 See U.S. Const. art. II, § 3; U.S. Const. amend. V; U.S. Const. art. I, § 8, cl. 4; Immigration and Nationality Act [hereinafter INA] §§ 101, 103; 8 U.S.C. §§ 1101, 1103; infra “The Attorney General Must Make the Immigration Courts Work” at page 9.
- 11 These recommendations, including the creation of an independent Article I immigration court, are in line with the conclusions of entities including the American Bar Association, the American Immigration Council, the American Immigration Lawyers Association, and the National Association of Immigration Judges. See, e.g., ABA Report, supra note 8; Administrative Complaint Regarding El Paso Service Center Immigration Court Judges, American Immigration Council and AILA (April 3, 2019) [hereinafter El Paso Administrative Complaint], <https://perma.cc/HWP8-CXHL>; Strengthening and Reforming America’s Immigration Court System: Hearing Before the Border Security and Immigration Subcommittee, 115th Cong. 1–13 (2018) [hereinafter Tabaddor, Strengthening & Reforming] (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges).
- 12 Under the Immigration Act of 1917, there was a constitutionally required version of deportation adjudication. See Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (holding that proceedings comporting with due process were required under the 1917 Act). These historical proceedings, though, were of a starkly different character for reasons including that they lacked a statutory basis as well as the type of procedure used. After the enactment of the Administrative Procedure Act in 1946 and subsequent litigation challenging the inadequacy of the historical deportation proceedings under the APA’s hearing requirements, Congress created the origins of the contemporary immigration court system with INA § 242(b) (1952). Marcelllo v. Bonds, 349 U.S. 302, 306–08 (1955).
- 13 Even before the Immigration and Nationality Act was enacted in 1952, the Attorney General wielded power over the immigration laws. In 1940, immigration functions were transferred from the Department of Labor to the Department of Justice to be administered under the “direction and supervision of the Attorney General.” See Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 14, 1940); see also Maurice A. Roberts, The Board of Immigration Appeals: A Critical Appraisal, 15 San Diego L. Rev. 29, 34 (1977). In directing this change, President Roosevelt affirmed that “[w]hile it is designed to afford more effective control over [noncitizens], this proposal does not reflect any intention to deprive them of their civil liberties or otherwise to impair their legal status.” Reorganization Plan, 5 Fed. Reg. 2223. President Roosevelt recognized that “much can be said for the retention of [immigration] functions in the Department of Labor during normal times,” but found it necessary within the context of World War II to more closely integrate immigration activities with federal law enforcement. *Id.*
- 14 Asylum Adjudication: Hearings Before the Subcomm. of Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th Cong. 32 (1981) (statement of Dale Swartz, Director of the Alien Rights Law Project, Lawyers’ Committee for Civil Rights Under Law); Transcript of Committee Hearings of the U.S. House of Representatives, Committee on the Judiciary, Markup S. 907 and H.R. 6514 (stenographic minutes) at 33 (Sep. 14, 1982) (statement of Rep. Fish, Member, H. Comm. on the Judiciary).
- 15 This sentiment was strongly supported by the authors’ roundtable discussion on April 19, 2019, with five former immigration judges [hereinafter IJ Roundtable]. Facilitated by UCLA Law Professor Ingrid Eagly, this ninety-minute discussion engaged former judges Jeffrey Chase, Rebecca Jamil, Carol King, John Richardson, and Paul Schmidt in a range of questions about their perspectives and experiences of EOIR’s evolution, both historically and under the control of the Trump Administration. See also Hon. Dana Leigh Marks, Reflections on a 40-Year Career as an Immigration Lawyer and Judge, Center for Migration Studies (Apr. 8, 2019), <https://perma.cc/2FU7-MMCD>.
- 16 INA §§ 101(a)(34), 103(a) (1952); Peter J. Levinson, Specialized Court for Immigration Hearings and Appeals, 56 Notre Dame L. Rev. 644, 644 n.1 (1981).
- 17 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat.163 (June 27, 1952).
- 18 38 Fed. Reg. 8,590 (Apr. 4, 1973) (providing that the terms “special inquiry officer” and “immigration judge” may be used interchangeably); Levinson, supra note 16, at 646.
- 19 Maurice A. Roberts, Proposed: A Specialized Statutory Immigration Court, 18 San Diego L. Rev. 1, 8–9 (1980); see also Levinson, supra note 16, at 646–647.
- 20 See Levinson, supra note 16, at 645–647; Select Comm’n Report, supra note 8, at 246–247. The Select Commission is a presidential-congressional commission with a mandate “to study and evaluate...existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate.” Act of Oct. 5, 1978, Pub. L. No. 95-412, § 4(c) 1978 (92 Stat.) 907, 909.

- 21 Levinson, *supra* note 16, at 647.
- 22 Former INS Commissioner Alan Nelson testified that asylum claims increased from roughly 3,700 in 1978 to over 50,000 in 1981. Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, 97th Cong. 576 (1981).
- 23 See, e.g., *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp 442, 519–23 (S.D. Fl. 1980) (finding that immigration judges systematically violated the due process rights of Haitian asylum-seekers as part of a discriminatory plan within INS to deny Haitians asylum).
- 24 Asylum Adjudication: Hearings Before the Subcomm. of Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th Cong. 36–38 (1981).
- 25 See, e.g., Levinson, *supra* note 16, at 644; Select Comm'n Report, *supra* note 8, at 248–250 (recommending an Article I Court); Roberts, *supra* note 19.
- 26 Select Comm'n Report, *supra* note 8, at 246.
- 27 *Id.* at 246–47.
- 28 The term “immigration practitioners” is used throughout this report to recognize that non-lawyers are allowed to practice within the immigration courts.
- 29 See, e.g., Select Comm'n Report, *supra* note 8, at 255–56 (statement of John Shattuck, Legislative Director, American Civil Liberties Union); *id.* at 293 (statement of Stanley Mailman, Association of Immigration and Nationality Lawyers); Asylum Adjudication: Hearings Before the Subcomm. of Immigration and Refugee Policy of the S. Comm. on the Judiciary, *supra* note 24, at 34–36 (statement of Dale Swartz, Founding Member, National Forum on Immigration and Refugee Policy); *id.* at 46–54 (statement of Ira Kurzban, Counsel, National Civil Liberties Committee and the Haitian Refugee Center, Inc.); Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, *supra* note 22, at 596 (testimony by Alan Nelson, Deputy Commissioner, Immigration and Naturalization Service); *id.* at 802–805 (testimony by David Hiller, Special Assistant to the Attorney General, Department of Justice); H.R. 6514 - Immigration Reform and Control Act of 1982: Hearing Before the H. Comm. on the Judiciary, 97th Cong. 63–65 (1982) (statement of Rep. McCollum); *id.* at 76 (statement of Rep. Frank).
- 30 48 Fed. Reg. 8,038 (Feb. 25, 1983) (to be codified at 8 C.F.R. Parts 1, 3, and 100).
- 31 Evolution of the U.S. Immigration Court System: Post-1983, Executive Office for Immigration Review, <https://perma.cc/F7BV-4AVX>.
- 32 8 Fed. Reg. 8,038, 8,039 (Feb. 25, 1983).
- 33 See Final Brief of Appellees (EOIR), ECF No. 156759 at 15, American Immigration Lawyers Ass'n v. Executive Office for Immigration Review, 830 F.3d 667 (C.A.D.C. filed on Dec. 3, 2015); INA § 101(b)(4), 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10. Immigration judges are not Administrative Law Judges (ALJs), whose positions are created by Congress and whose authority derives from Article I through the Administrative Procedures Act. ALJs are subject to oversight by the Office of Personnel Management (OPM). See 5 U.S.C. §§ 554, 556, 5557, 3105. For a full analysis of the difference between administrative judges and ALJs, see Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643 (2016).
- 34 INA § 101(b)(4), 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10(a).
- 35 INA § 101(b)(4), 8 U.S.C. § 1101(b)(4).
- 36 8 C.F.R. § 1003.1(a)(1); (d)(1).
- 37 *Id.* at (d)(1)(i).
- 38 *Id.* at (h).
- 39 *Id.* at (d)(2); (e)(4).
- 40 *Id.* at (d)(6).
- 41 See Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, *supra* note 22, at 768, 790–791 (statement of David Hiller, Special Assistant to the Attorney General, Department of Justice, describing the value of “severing the adjudicatory function of the Immigration Service . . . from its other enforcement activities” by moving immigration adjudicators into “a largely independent commission within the Department of Justice”); David L. Millhollan, Executive Office for Immigration Review, in 1983 Att'y Gen. Ann. Rep. 111, 111 (1983) (emphasizing that EOIR is “completely independent of the Immigration and Naturalization Service, the body charged with the enforcement of the immigration laws”); Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 NYU. Rev. L. & Soc. Change 433, 441 & n.19 (1992) [hereinafter Anker, *Determining Asylum Claims*] (“The EOIR was created in 1983 as a separate agency from the INS. Prior to that time, the immigration judges were part of the INS. The purpose of the separation was to remove any perception of prosecutorial bias from the performance of the adjudicatory function of the immigration court.”).
- 42 In the early 2000s, Congress transferred some of the immigration enforcement powers to the newly-created Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107–296, §1102, 116 Stat. 2135; Consolidated Appropriation Resolution of 2003, Pub. L. No. 108–7, §105(a), 117 Stat. 11.
- 43 *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005).
- 44 See, e.g., *Wang v. Att'y Gen.*, 423 F.3d 260, 267–68 (3d Cir. 2005) (“[W]e have repeatedly sought to remind IJs of their duty to remain neutral and impartial when they conduct immigration hearings. . . . A disturbing pattern of IJ misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns.”).
- 45 *Cham v. Att'y Gen.*, 445 F.3d 683, 686 (3d Cir. 2006).
- 46 *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006).
- 47 *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 146, 155–56 (3d Cir. 2005).
- 48 *Shi v. Holder*, 337 F. App'x 666, 668 (9th Cir. 2009).
- 49 *Rivera v. Ashcroft*, 394 F.3d 1129, 1135 (9th Cir. 2005) (quotation omitted).
- 50 *Wang*, 423 F.3d at 269.
- 51 *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (en banc).
- 52 *Todorovic v. Att'y Gen.*, 621 F.3d 1318, 1326 (11th Cir. 2010).
- 53 *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009).
- 54 *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).
- 55 *Abdulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011).
- 56 INA §§ 101(b)(4), 103, 8 U.S.C. §§ 1101(b)(4), 1103.
- 57 See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1899–1900 (2015) (arguing that the constitutional duty to supervise “requires systems and structures of [internal executive-branch] supervision adequate to preserve overall hierarchical control and accountability of governmental power”); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotation omitted).
- 58 See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.”).
- 59 See INA §§ 240(b)(4)(A)-(B), 8 U.S.C. §§ 1229a(b)(4)(A)-(B); see also 8 C.F.R. §§ 1240.10(a)(1),(4).
- 60 See 8 C.F.R. § 1003.12.
- 61 *In re Al-Nashiri*, 921 F.3d 224, 233–34 (D.C. Cir. Apr. 16, 2019).
- 62 *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001)); see also *United States v. McLean*, 891 F.3d 1308, 1309–11 (11th Cir. 2018) (holding that immigration judges are “judicial officers of the United States” for purposes of an assault statute and noting that “[a] number of our sister circuits have characterized an immigration judge as a judicial officer and explained that she is expected to behave like one”); *Islam*, 469 F.3d at 55 (“[A]s a judicial officer, an immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party.”); *Wang*, 423 F.3d at 261 (“We have stressed previously that [a]s judicial officers, [immigration judges] have a responsibility to function as neutral and impartial arbiters. . . .”) (citation omitted).
- 63 See 8 C.F.R. § 1003.10(b) (emphasis added).
- 64 See INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A).
- 65 See 8 C.F.R. § 1003.10(b).

- 66 See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 *Cornell L. Rev.* 369, 396-403 (2006) [hereinafter Legomsky, *Deportation*] (arguing that the rule of law requires judicial independence from real or perceived threats that a decision which displeases an executive official could pose professional risks for the adjudicator, at least at some significant stage of the immigration adjudication).
- 67 See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of [immigration court] proceeding[s], various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”). But see *Fong Yue Ting v. United States*, 149 U.S. 698, 741 (1893) (Brewer, J., dissenting) (arguing that deportation is “among the severest of punishments”).
- 68 INA § 240(b)(4)(A), 8 U.S.C. § 1225(b)(4)(A).
- 69 Through March 2019, there were 274,330 pending immigration court cases in which the respondent was not represented by counsel. Details on Deportation Proceedings in Immigration Court, TRAC Immigration (Mar. 2019), <https://perma.cc/B4KF-K5DV> (first drop-down menu set to “Immigration Court State,” and selected “All”; second drop-down menu set to “Represented,” and selected “Not Represented”; third drop-down menu set to “Outcome”).
- 70 See *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’ A lawyer is often the only person who could thread the labyrinth.”) (citation omitted).
- 71 *Molly Hennessy-Fiske*, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, *L.A. Times* (Mar. 6, 2016), <https://perma.cc/Z6A8-MKRH>.
- 72 *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, TRAC Immigration (Dec. 13, 2016), <https://perma.cc/SS8K-KG7Y>. See generally Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, *Am. Immigration Council*, (2016), <https://perma.cc/4QK7-RZHP> (documenting the low rates of representation in immigration courts and the negative effects of the lack of representation for respondents).
- 73 *Immigration Detention 101*, *Det. Watch Network*, <https://perma.cc/X5BR-SBWJ>.
- 74 *Laura Rivera & Dan Werner*, *No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases*, SPLC, at 31 (2018) [hereinafter *No End in Sight*], <https://perma.cc/UY94-7DLH>; *Esther Yu His Lee*, *The Hurdles Immigrants in Detention Centers Face When Calling Their Lawyers*, *ThinkProgress* (June 14, 2016), <https://perma.cc/C8YF-9ATB>.
- 75 See generally *No End in Sight*, supra note 74 (providing a detailed account of how detention causes individuals to abandon their claims for relief); Eunice Hyunhye Cho & Paromita Shah, *Shadow Prisons: Immigrant Detention in the South*, SPLC, NIPNLG & Adelante Alabama Worker Center (2016), <https://perma.cc/TRA9-PZ7C> (documenting the deplorable conditions in six immigration jails).
- 76 *Emily Ryo & Ian Peacock*, *The Landscape of Immigration Detention in the United States*, 2-3, 14-16 (2018) <https://perma.cc/4KK2-UEB7>; *Kyle Kim*, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They’re Deported*, *L.A. Times* (Sept. 28, 2017), <https://perma.cc/GL5K-FNZB>; *Patrick G. Lee*, *Immigrants in Detention Centers Are Often Hundreds of Miles From Legal Help*, *ProPublica* (May 16, 2017), <https://perma.cc/K9RN-T8VP>.
- 77 See *Michelle Conlin & Kristina Cooke*, *\$11 Toothpaste: Immigrants Pay Big for Basics at Private ICE Lock-Ups*, *Reuters* (Jan. 18, 2019), <https://perma.cc/A55M-2A2D> (noting the low wages paid to immigrants in detention and the high cost of basic goods in detention).
- 78 As of April 2019, 42% of detained immigration court respondents with pending cases were represented. Details on Deportation Proceedings in Immigration Court, TRAC Immigration (Apr. 2019), <https://perma.cc/LB6W-W3ZZ> (first drop-down menu set to “Outcome,” and selected “Pending”; second drop-down menu set to “Custody” and selected “Detained”; third drop-down menu set to “Represented”).
- 79 *Complaint, Torres v. U.S. Dep’t of Homeland Sec.*, No. 5:18-cv-02604 (C.D. Cal. Dec. 14, 2018), <https://perma.cc/HR7J-WA4Z>; *First Amended Complaint, SPLC v. U.S. Dep’t of Homeland Sec.*, No. 1:18-cv-00760-CKK (D.D.C. Oct. 13, 2018), <https://perma.cc/FJ5E-2AWS>; *Detained Immigrants in the Southeast Lack Meaningful Access to Lawyers*, SPLC (2018), <https://perma.cc/WWG6-6EQY>.
- 80 *Fatma E. Marouf*, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 *Baylor L. Rev.* 214, 220 (2015); cf. *Nat’l Immigrant Justice Center*, *Special Considerations When Representing Detained Applicants for Asylum, Withholding of Removal and Relief Under the Convention Against Torture 2-3* (2012), <https://perma.cc/3S7A-DB9F> (advising pro bono attorneys taking cases on the detained docket to take special measures within their firms to try to accommodate the fast pace of such cases, and noting that gathering documentary evidence to support an application for relief may be complicated by the speed of the detained docket); *Sarah Lakhani & Erin Quinn*, *Representing Detained Clients in Bond Hearings at the San Francisco and Los Angeles Immigration Courts*, *Immigrant Legal Res. Center*, 11 (2018), <https://perma.cc/JN5K-BVF4> (similar).
- 81 See, e.g., *Dias-Rivas v. U.S. Att’y Gen.*, -- Fed. Appx. --, 2019 WL 1755642, *17 (Apr. 18, 2019) (*J. Jordan dissenting*) (“In my view, Ms. Diaz-Rivas’ statistics—showing that from 2014 through 2016 asylum applicants outside of Atlanta’s immigration court were approximately 23 times more likely to succeed than asylum applicants in Atlanta—are disquieting and merit further inquiry by the BIA.”).
- 82 See, e.g., *El Paso Administrative Complaint*, supra note 11.
- 83 See *Anjum Gupta*, *Dead Silent: Heuristics, Silent Motives and Asylum*, 48 *Colum. Hum. Rts. L. Rev.* 1, 37-40 (2016) (documenting instances of immigration judge bias based on race, class, education level, status as a single mother, religion, language skills, sexuality, and gender).
- 84 *Id.* at 40-42; *Fatma E. Marouf*, *Implicit Bias and Immigration Courts*, 45 *New Eng. L. Rev.* 417, 428-41 (2011); *Michele Benedetto*, *Crisis on the Immigration Bench*, 73 *Brook. L. Rev.* 467, 474 (2008); *Jaya Ramji-Nogales et al.*, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* 295, 376-77 (2007). Other structural issues noted by these scholars as contributing to the flourishing of judicial bias include: a systemic lack of meaningful appellate review and judicial deference to immigration judges’ credibility determinations; the overrepresentation of white males among immigration judge ranks; and a lack of motivation coupled with high levels of burnout.
- 85 *E.R. Shipp*, *200 New York Lawyers Are Working Free to Aid Haitian Refugees*, *N.Y. Times* at A24 (Jun. 9, 1983), <https://perma.cc/K2FV-HYDV>.
- 86 *American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 773-74 (N.D. Cal. 1989); see also *Carolyn Patty Blum*, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 *Int’l J. Refugee L.* 347, 351-52 (1991). The ABC Litigation covered discriminatory treatment in the context of both affirmative asylum applications and defensive applications adjudicated in immigration court.
- 87 *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796, 799-800 (N.D. Cal. 1991).
- 88 *Id.* at 799.
- 89 *Anker*, *Determining Asylum Claims*, supra note 41, at 449-50, 515-27; see also *id.* at 446 (noting preliminary findings of a second study that suggested the practices identified in the authors’ study “may be common to other immigration courts”).
- 90 *Id.* at 445.
- 91 *Id.* at 450.
- 92 *Marouf*, supra note 84, at 424 (collecting cases in which federal judges found immigration judges bullied, insulted, and mocked respondents, and positing that these immigration judges’ “hostile attitudes reflect an anxiety about immigration and an underlying prejudice toward potential immigrants that is actually quite widespread”); *Letter from Emory Law School and Southern Poverty Law Center, to Juan P. Osuna, Director, EOIR, Re: Observations of Atlanta Immigration Court* (March 2, 2017), <https://perma.cc/56GH-LT6L>.
- 93 See *Jeanette L. Schroeder*, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 *B.U. L. Rev.* 315, 326 (2017) (“[C]redibility determinations in asylum adjudications are often highly subjective. As a result, such determinations are particularly susceptible to immigration judges’ subconscious cultural biases . . .”).
- 94 *ABA Report*, supra note 8, at 2-19.
- 95 Off-the-record comments also contravene respondents’ right to “a complete record” of proceedings. See INA § 240(b)(4)(C), 8 U.S.C. § 1225(b)(4)(C).
- 96 See *Marouf*, supra note 84, at 438 (“intuitive cognitive shortcuts . . . can also lead to ‘severe and systematic errors.’”); *Benedetto*, supra note 84, at 493-98.
- 97 *Asylum Outcome Increasingly Depends on Judge Assigned*, TRAC Immigration (Dec. 2, 2016) [hereinafter *TRAC, Asylum Outcome 2016*], <https://perma.cc/GD9D-C8DW>; see also *Justine van der Leun*, *A Culture of No, VQR* (Fall 2018), <https://perma.cc/ZPG7-GRNN> (quoting an immigration attorney speaking of El Paso ICE Processing Center, “As an asylum seeker, you descend into hell by coming here.”).
- 98 *Gupta*, supra note 83, at 40; see also *Benedetto*, supra note 84, at 497-98; *Ramji-Nogales et al.*, supra note 84, at 328-49 (documenting disparities in grant rates).
- 99 *Asylum Outcome Continues to Depend on the Judge Assigned*, TRAC Immigration (Nov. 20, 2017) <https://perma.cc/5U2K-C6ZJ>.
- 100 See *id.*
- 101 *TRAC, Asylum Outcome 2016*, supra note 97; *Immigration Courts: Still A Troubled Institution*, TRAC Immigration (June 30, 2009) <https://perma.cc/SPY7-UCHU> (investigating “Asylum Grant Rate Disparities”); *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRAC Immigration (Sept. 24, 2007) <https://perma.cc/T6XC-R4R2>; *Ramji-Nogales et al.*, supra note 84, at 328-49.
- 102 *van der Leun*, supra note 97 (discussing *El Paso*); *Hearing on the Human Rights*

- of Asylum Seekers in the United States, Before the Inter-American Commission on Human Rights (2016) [hereinafter Hearing on the Human Rights of Asylum Seekers] (statement of David Baluarte, et. al.), available at <https://perma.cc/A5EF-SATN>; John Washington, These Jurisdictions Have Become 'Asylum Free Zones', *The Nation* (Jan. 18, 2017), <https://perma.cc/HY7L-7DEJ>.
- 103 El Paso focus group; see also SIFI survey (documenting similar IJ attitudes that asylum seekers just “come to work”).
- 104 El Paso focus group.
- 105 San Francisco focus group.
- 106 San Francisco, Charlotte, and El Paso focus groups.
- 107 El Paso and Atlanta focus groups.
- 108 Atlanta focus group (describing how judges tend to give preferential treatment to attorneys they “trust”); Charlotte (explaining that judges are “not equally horrid to everybody”).
- 109 Atlanta, San Francisco, and Charlotte focus groups (also describing an attorney who married a Latino man and changed her last name; the judge asked her disparagingly “What did you do, marry one of your clients?”).
- 110 Atlanta focus group.
- 111 Id.
- 112 Id.
- 113 Id.
- 114 Id.
- 115 El Paso focus group; see also San Antonio focus group (stating that judges “just want an outcome that matches what their boss wanted”).
- 116 Charlotte focus group.
- 117 San Antonio focus group.
- 118 El Paso focus group.
- 119 San Francisco focus group.
- 120 SIFI survey.
- 121 While EOIR’s Immigration Court Practice Manual recognizes “the discretion of Immigration Judges to act in accordance with law and regulation,” sub-regulatory rules may not unlawfully prejudice a noncitizen’s case. Immigration Court Practice Manual, EOIR (Dec. 2016), <https://perma.cc/ND96-MW9B>; see also 8 C.F.R. § 1003.40 (allowing immigration courts to “establish local operating procedures” provided that “[s]uch operating procedure(s) shall not be inconsistent with [federal regulations]”).
- 122 See INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (instructing that asylum may be granted to a noncitizen “who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section”); 8 C.F.R. § 1208.3(a), (c)(3).
- 123 Charlotte and San Francisco focus groups.
- 124 Charlotte focus group.
- 125 Id.
- 126 El Paso focus group.
- 127 See also Atlanta focus group (holding respondents accountable for legal implications of statements they made at first master calendar, before obtaining representation).
- 128 See INA § 240(b)(4)(B), 8 U.S.C. § 1225(b)(4)(B); see also 8 C.F.R. § 1240.10(a) (echoing respondents’ statutory right to a “reasonable opportunity” to present evidence); 8 C.F.R. § 1240.1(c) (“The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.”).
- 129 See EOIR Memorandum, Operating Policies and Procedures Memorandum 13-03: Guidelines for Implementation of the ABT Settlement Agreement at 6 (Dec. 2, 2013), <https://perma.cc/9YFW-Q7RK>; Charlotte and Atlanta focus groups.
- 130 Immigration Court Practice Manual, *supra* note 121 at Chap. 3.1(b)(ii) (providing for 15-day submission deadline); El Paso focus group (reporting a three-month submission deadline “which is crazy”); Kansas City focus group (describing six-month submission deadlines for asylum cases involving PSG claims); San Francisco focus group (reporting new standing orders requiring evidence to be submitted six months in advance of merits hearing); see also Atlanta focus group (describing that “all the IJs have their own practice” when it comes to submission deadlines).
- 131 San Francisco focus group.
- 132 San Antonio focus group.
- 133 El Paso focus group.
- 134 San Francisco focus group.
- 135 San Antonio focus group (describing a judge talking an interpreter out of correctly interpreting a racial slur).
- 136 Federal courts have noted the importance of expert testimony, finding that exclusion of such testimony can deprive a respondent of due process. See, e.g., *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1057 (9th Cir. 2005) (finding that the IJ’s exclusion of expert testimony violated due process because testimony would have addressed issues not covered in written materials and directly addressed IJ’s concerns about credibility); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005) (finding that denial of expert testimony constituted due process violation); *Tun v. Gonzales*, 485 F.3d 1014, 1028-29 (8th Cir. 2007) (finding that “the IJ’s election to exclude the report of a facially unobjectionable expert without any explanation as to why cross-examination was needed was unfair and unsupportable”); see also *Yang v. Gonzales*, 427 F.3d 1117, 1121–22 (8th Cir. 2005) (finding error and remanding where the IJ failed to accord weight to an affidavit from a non-testifying, facially qualified country conditions expert).
- 137 Atlanta focus group.
- 138 Id.
- 139 San Francisco focus group.
- 140 Such denials are contrary to the intent of statutory and regulatory provisions allowing the use of telephone or video conferences with the respondents’ consent. See INA § 240(b)(2), 8 U.S.C. § 1225(b)(2); 8 C.F.R. § 1003.25(c).
- 141 Atlanta focus group; see also Charlotte focus group (describing judges refusing to allow expert testimony).
- 142 El Paso focus group.
- 143 San Francisco focus group.
- 144 Charlotte focus group.
- 145 San Antonio focus group.
- 146 San Francisco focus group.
- 147 Atlanta focus group.
- 148 Kansas City focus group.
- 149 El Paso focus group.
- 150 Charlotte focus group.
- 151 El Paso focus group.
- 152 San Antonio focus group; see also El Paso focus group (“[The p]roblem with judges constantly changing times is that it’s a waste of our resources.”).
- 153 San Antonio focus group.
- 154 El Paso and Atlanta focus groups.
- 155 El Paso focus group.
- 156 Id.
- 157 Atlanta focus group.
- 158 El Paso, Atlanta, and San Francisco focus groups; SIFI survey; see, e.g., *Lapaix v. U.S. Att’y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010).
- 159 Atlanta focus group.
- 160 El Paso, Atlanta, and San Francisco focus groups; SIFI survey.
- 161 Atlanta focus group; SIFI survey.
- 162 San Francisco focus group (noting the difficulties for private attorneys to “figure out how to charge when prepping merits for the fourth time”). Such rescheduling is especially burdensome for out-of-state attorneys and those handling cases pro bono. While some attorneys travel by choice (or at the request of clients who prefer in-person representation to telephonic), many travel by necessity due to the refusal of some immigration judges to allow telephonic appearances.
- 163 Atlanta focus group.
- 164 Charlotte focus group.
- 165 Id.
- 166 Regrettably, these findings of unprofessionalism are long-standing. See *Assembly Line Injustice*, *supra* note 8, at 12 (detailing a “shocking number of examples of a lack of professionalism that infects Immigration Court proceedings.”)
- 167 El Paso and Charlotte focus groups.
- 168 Atlanta and San Antonio focus groups.
- 169 Kansas City focus group.
- 170 Charlotte focus group.
- 171 San Antonio focus group.
- 172 Kansas City focus group.

- 173 Charlotte focus group.
- 174 El Paso focus group; see also Atlanta, Kansas City, Charlotte, and San Francisco focus groups.
- 175 El Paso, Atlanta, and Kansas City focus groups; SIFI survey.
- 176 Atlanta and San Francisco focus groups.
- 177 San Francisco focus group.
- 178 El Paso focus group.
- 179 Charlotte focus group.
- 180 EOIR and NAIJ, Ethics and Professionalism Guide for Immigration Judges, Jan. 26, 2011, <https://perma.cc/8WTL-77V3>.
- 181 SIFI survey.
- 182 San Antonio focus group; see also San Francisco focus group.
- 183 El Paso focus group (stating that a judge “yelled” at legal expert and called her “incompetent”).
- 184 San Antonio focus group.
- 185 Atlanta focus group.
- 186 San Antonio focus group.
- 187 Atlanta focus group.
- 188 *Id.*; San Antonio focus group (“One judge will ask the same question multiple times, getting more and more hostile, so clients don’t know what to say and they’re terrified, and often the attorneys are too.”).
- 189 Atlanta, San Antonio, Charlotte, and El Paso focus groups.
- 190 Kansas City focus group.
- 191 Atlanta and San Antonio focus groups.
- 192 Kansas City focus group.
- 193 San Antonio focus group.
- 194 San Antonio and Charlotte focus groups.
- 195 Charlotte focus group.
- 196 SIFI survey.
- 197 Atlanta and San Antonio focus groups.
- 198 Atlanta focus group.
- 199 Kansas City focus group.
- 200 Atlanta focus group.
- 201 Regulations Governing Dep’t Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940); Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056 (Feb. 25, 1983).
- 202 8 C.F.R. § 1003.1(b)(3).
- 203 See 8 C.F.R. § 1003.1(d)(1); The requirement of uniformity in federal immigration law can be traced to the Constitution, which directs the creation of “a uniform Rule of Naturalization.” U.S. Const. art. I, § 8, cl. 4. See also David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177, 1181-87 (2016) (discussing uniformity as a goal of appellate systems). In revisions to the Immigration and Nationality Act, Congress has expressed its intent that immigration laws “should be enforced vigorously and uniformly.” See Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added). The Supreme Court has similarly described immigration policy as “a comprehensive and unified system.” See *Arizona v. United States*, 567 U.S. 387, 401 (2012); see also *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), as revised (Nov. 25, 2015) (affirming uniform nature of immigration law). Federal regulations also require uniform application of the immigration laws, mandating that the Board of Immigration Appeals “shall provide clear and uniform guidance . . . on the proper interpretation and administration of the [INA] and its implementing regulations.” See 8 C.F.R. § 1003.1(d)(1).
- 204 See Hearing on the Human Rights of Asylum Seekers in the United States, *supra* note 102, at 1 (analyzing disparities and showing that in “certain jurisdictions in the United States, immigration judges and prosecutors use open and notorious sub-regulatory rules that have no normative legal legitimacy to create asylum free zones, spaces where asylum seekers are systemically denied protection.”); Diaz-Rivas, 2019 WL at *17 (Jordan, J., dissenting) (“In my view, Ms. Diaz-Rivas’ statistics—showing that from 2014 through 2016 asylum applicants outside of Atlanta’s immigration court were approximately 23 times more likely to succeed than asylum applicants in Atlanta—are disquieting and merit further inquiry by the BIA.”).
- 205 See Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge, TRAC Immigration (July 30, 2018), <https://perma.cc/N7X3-MZG9>; Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018, TRAC Immigration, <https://perma.cc/7H3H-PT4W> (showing denial rates that ranged from 3 to 100 percent); Asylum Decisions and Denials Jump in 2018, TRAC Immigration (Nov. 29, 2018), <https://perma.cc/4N6E-TLTE>; van der Leun, *supra* note 97 (“Immigration courts are administrative bodies, divided into regional districts that have developed starkly different patterns of adjudication. Between 2012 and 2017, for example, the New York City court approved close to 80 percent of applications for asylum, according to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which analyzes government data on immigration. In Miami, the approval rate was 30 percent. In El Paso, judges approved asylum seekers at an average rate of just over 3 percent.”)
- 206 See conflicting decisions by BIA issued Apr. 16, 2018, on file with author (reaching opposite conclusions as to whether section 609.713(1) of the Minnesota Statutes qualified as a crime involving moral turpitude under INA § 237(a)(2)(A)(i)).
- 207 San Antonio focus group.
- 208 San Antonio and Atlanta focus groups.
- 209 8 C.F.R. § 1003.1(a)(1). The Attorney General has described the BIA members as merely “Department of Justice attorney[s] who [are] appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department [of Justice] are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department [of Justice]’s mission.” Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002).
- 210 8 C.F.R. § 1003.1(d)(1)(i)-(ii) (subordinating a BIA member’s independent judgment to the “provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General”).
- 211 See sidebar on page 23 (discussing politicized hirings and removals under the Bush Administration).
- 212 Legomsky, *Deportation*, *supra* note 66, at 370.
- 213 *Id.*
- 214 The Attorney General appoints the Director of EOIR. 8 C.F.R. § 1003.0(a). The EOIR director is “responsible for the direction and supervision” of the BIA. 8 C.F.R. § 1003.0(b)(1).
- 215 See Hon. Steven A. Morley, Immigration Judge, and NAIJ, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ* (Aug. 8, 2018) [hereinafter *Morley Grievance*], AILA Doc. No. 18080801.
- 216 8 C.F.R. § 1003.0(c); 8 C.F.R. § 1003.0(b)(1)(ii).
- 217 See Jill A. Family, *A Broader View of the Immigration Adjudication Problem* 23 *Geo. Immigr. L.J.* 595, 604 (2009).
- 218 See 8 C.F.R. § 1003.1(e)(4).
- 219 U.S. Dep’t of Justice, *Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures*, Press Release 02-489 (Aug. 23, 2002), <https://perma.cc/LV9C-4RRV>.
- 220 See *Family*, *supra* note 217 at 606.
- 221 Tal Kopan, *Trump’s New Attorney General Launches Fresh Changes to Immigration Courts*, S.F. Chron., Apr. 12, 2019, <https://perma.cc/SU78-NJD9>.
- 222 See, e.g., President Donald Trump, *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (Apr. 2, 2019) (stating that to reform the U.S. immigration system “we have to do something about asylum. And to be honest with you, you have to get rid of judges.”), <https://perma.cc/4HW4-KFXW>.
- 223 See, e.g., Ramos v. Nielsen, *Order Granting Plaintiff’s Motion for Preliminary Injunction*, 18-CV-01554-EMC, ECF 128 at 30–31 (Oct. 3, 2018) (cataloging evidence of President Trump’s animus against non-white, non-European immigrants and granting injunction against the withdrawal of temporary protections for immigrants from several non-white, non-European countries).
- 224 See Exec. Order No. 13767, *Border Security & Immigration Enforcement Improvements* (Jan. 25, 2017); Exec. Order No. 13768, *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017); U.S. Dep’t of Justice, *Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement*, Press Release No. 17-378 (Apr. 11, 2017) (“In this fight, I am here to tell you, the brave men and women of Customs and Border Protection: we hear you and we have your back. Under the President’s leadership and through his Executive Orders, we will secure this border and bring the full weight of both the immigration courts and federal criminal enforcement to combat this attack on our national security and sovereignty.”); Office of the Attorney General, *Memorandum for the Executive Office for Immigration Review: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017) (instructing BIA board members and immigration judges that “[o]ur primary mission at the Department of Justice—as reflected in the first clause of our mission statement—is to ‘enforce the law and defend the interests of the United States according to the law.’”).

- 225 See IJ Roundtable, remarks by Jeffrey Chase at 1:19:21 (“I think that’s clearly the goal of the administration, is to weaponize.”); accord. id., remarks by Paul Schmidt at 1:19:18.
- 226 See IJ Roundtable, remarks by Paul Schmidt at 22:21.
- 227 See also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635, 1672 (2010) [hereinafter Legomsky, *Restructuring Immigration Adjudication*], (“As the nation’s chief law enforcement officer, the attorney general has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of decisionmaking, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and fairness of procedures. The attorney general’s enforcement responsibilities might well dictate the relative priorities assigned to those conflicting interests.”).
- 228 Jefferson Sessions, Attorney General, Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018) [hereinafter Sessions Legal Training Remarks], <https://perma.cc/458L-A79B>.
- 229 Jefferson Sessions, Attorney General, Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR) (Sept. 10, 2018) [hereinafter Sessions Largest Class of Immigration Judges Remarks], <https://perma.cc/CYQ6-UQEX>.
- 230 Id.; Sessions Legal Training Remarks, supra note 228.
- 231 Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BuzzFeed News (Feb. 13, 2019), <https://perma.cc/24XF-QMDP>.
- 232 See IJ Roundtable, remarks by Rebecca Jamil at 1:28:49.
- 233 See id., remarks by Paul Schmidt at 1:08:27.
- 234 El Paso focus group.
- 235 Atlanta focus group.
- 236 El Paso focus group; see also San Antonio focus group (reporting judge asking “If you were so afraid, why didn’t you just do what you were supposed to and present at the border?”).
- 237 Atlanta focus group (also noting that “Judges tend to see clients as a criminal, because they entered ‘illegally’ which prohibits them from seeing them as a victim.”).
- 238 San Antonio focus group (stating that judges “who are horrific remain horrific and they were horrific before” the Trump Administration).
- 239 El Paso and Atlanta focus groups.
- 240 Atlanta focus group.
- 241 See Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration “Rocket Docket”*: Understanding the Due Process Implications, Legal Aggregate (Aug. 15, 2014), <https://perma.cc/QSB9-NKEJ>; Marks, supra note 8, at 50 (“There is no other court that would turn the docket “on its head” at the request of one party or for politicized priorities, yet the immigration courts “flipped” the docket by moving the cases of new arrivals to the front of the line, despite the objection of immigration judges who are in the best position to control their dockets on a case-by-case basis, which allows them to make decisions based on the individual factors bearing on each case.”).
- 242 Memorandum from Mary Beth Keller, Chief Immigration Judge, to All Immigration Judges, *Case Processing Priorities* (Jan. 31, 2017), <https://perma.cc/G58C-FDXJ>.
- 243 Memorandum from James R. McHenry III, Director, to All of EOIR, *Tracking and Expedition of “Family Unit” Cases* (Nov. 16, 2018) [hereinafter McHenry, “Family Unit” Cases], available at <https://perma.cc/T4CX-3ADW>.
- 244 Bryan Schatz, *Our Immigration Courts Aren’t Ready to Handle Millions of Deportations*, MotherJones (Mar. 31, 2017), <https://perma.cc/EQ4A-LMBD>.
- 245 Julia Manchester, *Judge Says Immigration Courts Backlog is Related to DOJ Priorities*, The Hill (Feb. 5, 2019), <https://perma.cc/HQK7-3SZW>.
- 246 As Michelle Brané, the director of the Women’s Refugee Commission’s Migrant Rights and Justice program, has explained: “Nobody who has a valid asylum claim wants to be waiting around for five years. It makes it more difficult to gather information, the information gets stale, witnesses disappear, people get settled and then if they lose it’s much harder to leave. And all of those years are spent in fear and anxiety and uncertainty for those people who’ve fled violence.” Schatz, supra note 244.
- 247 McHenry, “Family Unit” Cases, supra note 243.
- 248 Manchester, supra note 245.
- 249 Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do*, Politico (Sept. 27, 2017), <https://perma.cc/CM4R-U9YT>.
- 250 Nick Miroff & Maria Sacchetti, *Burgeoning Court Backlog of More Than 850,000 Cases Undercuts Trump Immigration Agenda*, Wash. Post (May 1, 2019), <https://perma.cc/P24E-W9WN>.
- 251 San Antonio focus group.
- 252 San Francisco focus group.
- 253 This Immigration Judge Has a Fix, supra note 6.
- 254 IJ Roundtable, remarks by Paul Schmidt at 32:02; see also id., remarks by John Richardson at 24:53 and Carol King at 33:58.
- 255 IJ Roundtable, remarks by Rebecca Jamil at 34:48.
- 256 Sessions Largest Class of Immigration Judges Remarks, supra note 229; Sessions Legal Training Remarks, supra note 228.
- 257 Jefferson Sessions, Attorney General, Remarks to the Executive Office for Immigration Review (EOIR) (Oct. 12, 2017), <https://perma.cc/9BP6-6FX6>.
- 258 Id.
- 259 Sessions Largest Class of Immigration Judges Remarks, supra note 229.
- 260 Atlanta focus group.
- 261 El Paso focus group.
- 262 SIFI survey.
- 263 Charlotte focus group.
- 264 Id.
- 265 Id. (elaborating that “I just resent how they always accuse us of unethical things and fabricated things.”).
- 266 Atlanta and El Paso focus groups.
- 267 San Antonio and Charlotte focus groups.
- 268 San Antonio focus group.
- 269 Atlanta focus group.
- 270 San Francisco focus group.
- 271 Kansas City focus group.
- 272 IJ Roundtable, remarks by Paul Schmidt at 1:00:34.
- 273 Id., remarks by John Richardson at 1:08:09.
- 274 American Immigration Lawyers Association, *The Need for an Independent Immigration Court Grows More Urgent as DOJ Imposes Quotas on Immigration Judges* (Oct. 1, 2018), AILA Doc. No. 18100103 (press release); see also Email from James McHenry, EOIR Director, to All EOIR Judges, on *Immigration Judge Performance Metrics* (Mar. 30, 2018), AILA Doc. No. 18040301.
- 275 This Immigration Judge Has a Fix, supra note 6; see also Liz Robbins, *In Immigration Court, It is Judges v. Justice Department*, N.Y. Times (Sept. 7, 2018), <https://perma.cc/J3SZ-ECBH> (describing the monitoring of immigration judges with a “performance dashboard . . . which indicates if they are keeping up their pace.”).
- 276 National Association of Immigration Judges, *Imposing Quotas on Immigration Judges Will Exacerbate the Case Backlog at Immigration Courts*, (Jan. 31, 2018) [hereinafter NAIJ, *Imposing Quotas*], <https://perma.cc/DM4E-BJ2X>; National Association of Immigration Judges, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (Oct. 2017) [hereinafter NAIJ, *Threat to Due Process*], <https://perma.cc/4M4E-BJ2X>; see also American Immigration Lawyers Association, AILA Policy Brief: *Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts*, AILA Doc. No. 17101234 (Oct. 13, 2017).
- 277 This Immigration Judge Has a Fix, supra note 6.
- 278 See 5 U.S.C. § 4301(2)(D); NAIJ, *Imposing Quotas*, supra note 276. Unlike Administrative Law Judges (ALJs) who oversee adjudications in other federal agencies and are appointed based on merit and relatively insulated from political influence, immigration judges serve at the will of the Attorney General and have no tenure guarantees.
- 279 See AILA *Restoring Integrity and Independence*, supra note 8; DOJ Executive Office for Immigration Review, *Legal Case Study Summary Report* (Apr. 6, 2017) [hereinafter Legal Case Study Summary Report], AILA Doc. No. 18042011, at 20 (recommending implementation of performance reviews that “emphasize[] process over outcomes and [places] high priority on judicial integrity and independence”).
- 280 NAIJ, *Imposing Quotas*, supra note 276.
- 281 Atlanta focus group.
- 282 See IJ Roundtable, remarks by John Richardson at 52:15 (responding that “of course” quotas impact fairness of case outcomes).
- 283 See id., remarks by Carol King at 1:02:11.
- 284 NAIJ, *Threat to Due Process*, supra note 276; NAIJ, *Imposing Quotas*, supra note 276.
- 285 Atlanta focus group; see also Kansas City focus group (recounting judge telling attorney “there are no more three-hour hearings”).

286 Charlotte focus group. See also IJ Roundtable, remarks by Paul Schmidt at 56:22 (noting that for immigration judges “if you’re really good you could do two [asylum merits hearings] a day. So you know that judges doing four a day are doing a substandard job.”).

287 Atlanta focus group.

288 See IJ Roundtable, remarks by John Richardson at 52:15.

289 See Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 *Geo. Immigr. L.J.* 207, 238-46 (2012) (describing how pre-existing narratives and the “availability heuristic” can shape immigration court adjudications); Gupta, *supra* note 83.

290 El Paso, Atlanta, Kansas City, and San Francisco focus groups; SIFI survey.

291 Atlanta focus group; see also Kansas City focus group (describing how judges often “leave it to the attorney [to decide] which case is going to get continued”).

292 El Paso and San Francisco focus groups (describing how you “can show up fully prepared, but if the case before goes longer, you don’t get to appear”).

293 Atlanta focus group.

294 San Francisco focus group.

295 See IJ Roundtable, remarks by Paul Schmidt at 56:51.

296 Atlanta focus group.

297 *Id.* (also reporting judge telling court administrator to speed up the process because he was “behind on his number”); El Paso focus group (reporting that one judge said each judge must see 50 cases per day under new Trump Administration policies); Kansas City focus group (describing judge saying “we have 90,000 cases, do you really think that I’m going to get through my quota?”); and San Francisco focus group (recounting that immigration judge spoke about case completion requirements and scheduled accordingly).

298 El Paso focus group.

299 Atlanta focus group.

300 El Paso focus group (describing how even “old school judges” have been pressured under the Trump Administration, despite initially saying that “Sessions wasn’t going to tell them what to do”).

301 Atlanta focus group.

302 See IJ Roundtable, remarks by Paul Schmidt at 1:06:11.

303 See *id.*, remarks by Jeffrey Chase at 1:10:24.

304 American Immigration Lawyers Association, *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*, Press Release (Aug. 8, 2018), AILA Doc. No. 18080800.

305 Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence (July 30, 2018), AILA Doc. No. 18073702.

306 NAIJ has filed a formal grievance against EOIR seeking redress for the unwarranted removal of these cases from Judge Morley’s docket. See *Morley Grievance*, *supra* note 215.

307 Indeed, “the immigration laws have been termed second only to the Internal Revenue Code in complexity.” *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004).

308 Immigration judgeships are classified as career positions, as distinguished from political appointments. U.S. Dep’t of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008) [hereinafter U.S. Dep’t of Justice, *Investigation of Allegations*], at 11-12, <https://perma.cc/MCW9-UM3T>. For such career positions, discrimination in hiring on the basis of political affiliation is prohibited by DOJ policy and federal law. *Id.* at 12.

309 See, e.g., Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her Over Politics*, CNN (June 21, 2018), <https://perma.cc/3GRQ-SZEP>; see also AILA *Restoring Integrity and Independence*, *supra* note 8, at 5-6.

310 Letter from Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, & Donald S. Beyers, Jr., *Members of Congress, to Attorney General Jefferson Sessions* (April 17, 2018), <https://perma.cc/RC2T-8WVJ>; Letter of Elijah E. Cummings et. al., *Members of Congress, to Attorney General Jefferson Sessions* (May 8, 2018), AILA Doc. No. 18050960.

311 Tabaddor, *Strengthening & Reforming*, *supra* note 11.

312 Human Rights First, *Immigration Court Hiring Politicization* (Oct. 18, 2018), <https://perma.cc/4BPM-7FA3> (noting that, of the immigration judges hired in 2018, close to 88 percent are former DHS or government attorneys, and over one-third lack any immigration law experience); see also Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1666-1669. Former immigration judges also

noted the appointment of judges who “are very law enforcement-oriented” into IJ positions. See IJ Roundtable, remarks by John Richardson at 31:07; see also *id.*, remarks by Rebecca Jamil at 31:28.

313 Human Rights First, *Immigration Court Hiring Politicization*, *supra* note 312.

314 See IJ Roundtable, remarks by John Richardson at 1:31:10.

315 See *id.*, remarks by Paul Schmidt at 32:02.

316 El Paso and Atlanta focus groups.

317 San Francisco focus group.

318 Aleaziz, *supra* note 232. Attorneys also described how many judges were leaving the bench in response to EOIR’s management under the Trump Administration. One practitioner described that for IJs “who want to respect due process, it’s frustrating for them because [they] have to go through cases quickly” – and when they find it “impossible” to do their job, some quit. See San Francisco focus group.

319 Atlanta focus group.

320 Aleaziz, *supra* note 231.

321 *Id.*

322 Attorneys also describe how this IJ turnover can drastically impact case schedules. When an IJ retires, their “docket gets bumped/rescheduled for months,” with a “domino effect” on pending cases. See Charlotte and San Francisco focus groups.

323 Aleaziz, *supra* note 231.

324 U.S. Dep’t of Justice, *Investigation of Allegations*, *supra* note 308; see also Family, *supra* note 217, at 607-08 (discussing the controversial hiring of Garry Malphrus, still a member of the Board, which was “heavily influenced by the political wishes of administration officials” under the second Bush administration). The extensive investigation by the Department of Justice revealed that officials in the Office of the Attorney General (OAG) under the Bush administration used their control over hiring to systematically appoint immigration judges based on their loyalty to the Republican party or conservative political ideology. U.S. Dep’t of Justice, *Investigation of Allegations*, *supra* note 308, at 69-124; see also Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1665-1666; Family, *supra* note 217, at 545. In direct violation of the law, OAG staff treated immigration judge positions as political appointments and selected candidates based on political ties through input from the Bush White House and other Republican sources. U.S. Dep’t of Justice, *Investigation of Allegations*, *supra* note 308, at 69-124.

325 U.S. Dep’t of Justice, *Investigation of Allegations*, *supra* note 308, at 112, 116. Although the Attorney General established a new hiring process for immigration judges in 2007, at least one subsequent appointment made by the Bush administration was likely based primarily on political affiliation. See Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1666. Furthermore, the immigration judges who were politically appointed from 2004 to 2006 continued to serve in their positions. See *id.* Years later, another DOJ report revealed rampant nepotism and favoritism in EOIR’s hiring practices for student positions, including among judges and other senior officials. U.S. Dep’t of Justice, *Report Regarding Investigation of Improper Hiring Practices by Senior Officials of the Executive Office for Immigration Review* (Nov. 2014), available at <https://perma.cc/3P9D-N5GS>.

326 See Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 *Bender’s Immigration Bulletin* 3, 11 (Jan. 1, 2008) [hereinafter Marks, *An Urgent Priority*], <https://perma.cc/YX8W-NWKD>; Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1668-1669; Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 *Bender’s Immigration Bulletin* 1154, 1155-56 (Sept. 2004) (examining the positions taken by BIA members in precedent decisions during the period).

327 *Id.*; see also Marks, *An Urgent Priority*, *supra* note 326, at 11.

328 See Jeffrey S. Chase, *The Need for an Independent Immigration Court*, *Opinions/Analysis on Immigration Law* (Aug. 17, 2017), <https://perma.cc/E7AY-S2CP>; Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1670; see also Board of Immigration Appeals, *Procedural Reforms to Improve Case Management*, 67 *Fed. Reg.* 54,878, 54,893 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003). Attorney General John Ashcroft removed members of the BIA who had a track record of issuing decisions in favor of noncitizens and, at the same time, implicitly threatened the remaining immigration judges to toe the line by intimating that they could be transferred out of their jobs at the Attorney General’s whim. Legomsky, *Deportation*, *supra* note 66, at 373-74.

329 See 8 C.F.R. § 1003.1(h)(1)(i) (requiring the Board to refer any of its decisions for review to the Attorney General upon demand); INA § 103(a)(1) (providing that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling”); Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227 at 1671.

330 See Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1671; Jeffrey S. Chase, *The AG’s Certifying of BIA Decisions*, *Opinions/Analysis on*

Immigration Law (Mar. 29, 2018), <https://perma.cc/A73Q-EMKE>; see also generally Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 Iowa L. Rev. Online 18 (2016).

331 See Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1773 (2010); see also *Matter of J-S-*, 24 I. & N. Dec. 520, 531 (2008) (describing the Attorney General's certification power as "plenary"); *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (2003) ("When I undertake review of such decisions pursuant to a referral under 8 C.F.R. § 1003.1(h), the delegated authorities of the IJ and BIA are superseded and I am authorized to make the determination based on my own conclusions on the facts and the law.")

332 See Trice, *supra* note 331, at 1773–74.

333 See Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 878 (2016) (noting that the Attorney General's certification and decision in *Matter of Silva-Trevino* "was controversial both because of the manner in which the Attorney General referred and decided the case and because of its departure from prior law"); Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 Geo. Immigr. L.J. 271, 285–86 (2002) (arguing that Attorney General Janet Reno's decision to certify *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996), was motivated by the fact that the opinion "conflicted with the government's strategy in Supreme Court litigation"); Taylor, *supra* note 330 (noting that the Attorney General's abuse of certification power may correspond to moments of political transition).

334 This Immigration Judge Has a Fix, *supra* note 6.

335 See IJ Roundtable, remarks by Jeffrey Chase at 1:19:21; accord. *id.*, remarks by Paul Schmidt at 1:19:18.

336 See *id.*, remarks by Carol King at 23:44.

337 Charlotte focus group (responding to publication of *Matter of M-S-*, severely restricting asylum seekers' eligibility for bond). Former IJ Paul Schmidt has also pointed out that to issue certifications, "Sessions isn't qualified - he isn't a quasi-judicial officer. It is a denial of judicial ethics for him to act on the case when he'd already taken an anti-asylum position. And [Matter of A-B-] is filled with legal errors and misstatements of the facts. But that's what this administration is all about." See IJ Roundtable, remarks by Paul Schmidt at 1:13:43.

338 See *Matter of A-B-*, 27 I. & N. Dec. at 320 ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."). In *Grace v. Whitaker*, 344 F.Supp. 3d 96 (D.D.C. 2018), the application of the categorical ban on gang and domestic violence asylum claims was held to be illegal. As of this writing, the decision was appealed by the Trump Administration. See *Grace v. Barr*, No. 19-5013 (C.A.D.C. filed Jan. 30, 2019).

339 A refugee is defined as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

340 *Matter of Acosta*, 19 I. & N. Dec. 221, 233 (BIA 1985) (holding that "sex" could satisfy the requirement that a particular social group definition must include an immutable characteristic); *Matter of Kasinga*, 21 I. & N. Dec. 357, 375 (BIA 1996) ("There is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard.").

341 See, e.g., *Ivanov v. Holder*, 736 F.3d 5, 8 (1st Cir. 2013); *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 502 F.3d 285, 291 (3d Cir. 2007); *Gomez Zuluaga v. Att'y Gen. of U.S.*, 527 F.3d 330, 348 (3d Cir. 2008); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc); *Garcia v. U.S. Att'y Gen.*, 665 F.3d 496, 504 (3d Cir. 2011); *Benitez-Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366 (6th Cir. 2010); *Gathungu v. Holder*, 725 F.3d 900, 907 (8th Cir. 2013); *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2014); *Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014); *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014).

342 *Matter of A-B-*, 27 I. & N. Dec. at 320 & n.1.

343 See, e.g., *id.* at 320 ("While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.")

344 See IJ Roundtable, remarks by Paul Schmidt, *supra* note 337.

345 See *id.*, remarks by Jeffrey Chase at 1:16:28.

346 El Paso and Kansas City focus groups.

347 El Paso and Atlanta focus groups. Focus groups suggested that while this trend has worsened, it existed in some courts before 2017. In Charlotte, attorneys reported that a judge told dozens of asylum-seeking women with strong claims based on then-existing domestic violence case law that "they didn't qualify for any type of relief and so they had to take a removal order." Charlotte focus group.

348 El Paso focus group; SIFI survey.

349 El Paso focus group.

350 See IJ Roundtable, remarks by Jeffrey Chase at 59:54.

351 See *id.*, remarks by Paul Schmidt at 1:13:43.

352 See *id.*, remarks by Rebecca Jamil at 1:12:21.

353 See *id.*, remarks by Rebecca Jamil at 1:09:07.

354 Kansas City focus group. For example, one attorney recounted a judge who "absolutely does not grant asylum for domestic violence cases," regardless of the facts of the case. See Atlanta focus group.

355 El Paso focus group.

356 *Id.*

357 Charlotte focus group.

358 Atlanta and El Paso focus groups.

359 *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018).

360 *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 465-66 (Att'y Gen. 2018).

361 See *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (Att'y Gen. 2018).

362 See *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (Att'y Gen. 2018).

363 El Paso focus group (describing the system as "worse because they have eliminated the procedural safeguards that we used to have"); San Francisco focus group (describing the post-Trump era as "defined by tools that have been taken away").

364 See IJ Roundtable, remarks by Paul Schmidt at 44:30.

365 See *id.*, remarks by John Richardson at 37:15.

366 Charlotte and San Francisco focus groups; SIFI survey (explaining that judges in the Stewart Immigration Court "will not grant continuances when the individual hearing is already set. . . . It seems to be a heavy reliance on *Matter of L-A-B-R-*, and taking that case too far").

367 San Francisco focus group.

368 Charlotte focus group.

369 San Francisco focus group.

370 *Id.* (stating that a case was reset due to death of former President George H.W. Bush, with the continuance being marked against the client).

371 *Id.*

372 Atlanta focus group.

373 El Paso focus group.

374 San Francisco focus group.

375 See, e.g., ABA Report, *supra* note 8, at 6–19 ("We...continue to recommend an Article I court system for the entire immigration judiciary and now view it as much superior to an independent agency in the Executive Branch."); AILA Policy Brief: *Restoring Integrity*, *supra* note 8, at 1 ("In order to protect and advance America's core values of fairness and equality, the immigration court must be restructured outside of the control of DOJ, in the form of an independent Article I court."); *Tabaddor, Strengthening & Reforming*, *supra* note 11, at 2 (endorsing the creation of an independent Article I court as "the only enduring solution" to the problems plaguing the immigration court system); *Congress Should Establish an Article I Immigration Court*, Federal Bar Association, , <https://perma.cc/AD39-29VJ> (last visited May 13, 2019) ("Establishing an Article I court would substitute for an overstuffed, bloated bureaucracy a new structure, modeled on the federal courts, their case management expertise, and their demonstrated record for delivering prompt, effective justice."). See also, e.g., *Ramji-Nogales et al.*, *supra* note 84, at 386; 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 73-79* (2017), <https://perma.cc/65W8-KSMZ>; see generally Legomsky, *Restructuring Immigration Adjudication*, *supra* note 227, at 1639 n.7 (citing authorities calling for an Article I immigration court).

376 Letter from Kip T. Bollin & Elizabeth Stevens, Federal Bar Association National President & Chair, Immigration Law Section, to Senators John Cornyn & Richard Durbin, Chairman and Ranking Member of the Subcommittee on Border Security and Immigration, Re: April 18, 2018 Subcommittee Hearing on "Strengthening and Reforming America's Court System" (Apr. 16, 2018), <https://perma.cc/NP6R-ZSLG>.

377 See Ramji-Nogales et al., supra note 84, at 380 (recommending more rigorous hiring standards that require an immigration judge “to demonstrate that he or she is sensitive to cultural differences and likely to treat all parties respectfully; capable of managing a large docket without becoming impatient; predisposed to be very careful in judging the credibility of people who claim to be victims of trauma or torture; and able to produce well-reasoned decisions that take into account all of the evidence and arguments presented by the parties”) and 380 n.147 (describing Canada’s requirements for adjudicators on their Immigrant & Refugee Board, which include an evaluation of “the applicant’s self-control and cultural competence”); ABA Report, supra note 8, at 2–30 (making a similar recommendation).

378 See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 451–452 (2007) (“When political officials make hiring decisions, the temptation to prize ideological and partisan political preferences over judicial aptitude and temperament becomes clear.”).

379 See ABA Report, supra note 8, at 2-18; Legal Case Study Summary Report, supra note 279, at 20–21; Legomsky, *Restructuring Immigration Adjudication*, supra note 227, at 1667 (“The key is to avoid affirmatively systematizing proenforcement biases.”); Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, Appleseed, 20-22 (2012) [hereinafter Appleseed, *Reimagining the Immigration Court Assembly Line*].

380 The American Bar Association recently reported that “DOJ and EOIR have declined to share the new hiring criteria with stakeholders[.]” ABA Report, supra note 8, at 2-19 (discussing the “utter lack of transparency” in the current hiring regime). The ABA has also recommended greater public input and participation in the immigration judge hiring process. See *id.* at 2-31.

381 See, e.g., Legomsky, *Restructuring Immigration Adjudication*, supra note 227, at 1682 (discussing the advantages of turning immigration adjudicators into administrative law judges and the problems of keeping them within DOJ).

382 U.S. Const. art. III, § 1; 5 U.S.C. § 7521.

383 Legomsky, *Restructuring Immigration Adjudication*, supra note 227, at 1678–79 & n.197; see also 10 U.S.C. § 942(c); 26 U.S.C. § 7443(f); 28 U.S.C. § 176; 38 U.S.C. § 7253(f).

384 IJ Roundtable, remarks by Paul Schmidt at 1:34:30.

385 See, e.g., ABA Report, supra note 8, at 2-29 to 2-33 (including, for example, recommendations for prehearing conferences and limitations on hearings by videoconference); Charles Roth & Raia Stoicheva, Nat’l Immigration Justice Center, *Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court 2* (Oct. 2014) [hereinafter NIJC, *Order in the Court*], <https://perma.cc/26YW-3U5V>.

386 Atlanta focus group; San Antonio focus group (reporting that after an attorney filed a complaint, she “literally never heard back” from EOIR); Charlotte focus group.

387 Atlanta, El Paso, Charlotte, and San Francisco focus groups.

388 El Paso and Charlotte focus groups.

389 See ABA Report, supra note 8, at 2-30 (recommending that the disciplinary process for immigration judges be more transparent and independent); Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, Fed. Lawyer, Oct.–Nov. 2016 [hereinafter *A View From the Bench*], at 68–69, <https://perma.cc/WG3H-RXDK> (“The public also has a foggy vision, at best, of the system for filing and processing complaints against immigration judges.”); Appleseed, *Reimagining the Immigration Court Assembly Line*, supra note 379, at 35–36 (recommending that EOIR publicize the complaint process, ensure anonymity of complainants, and publish notices of immigration judge discipline).

390 See ABA Report, supra note 8, at 2-30; *A View From the Bench*, supra note 389, at 68; *Judicial Performance Evaluation: How It Works*, Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, <https://perma.cc/LB3X-LYMA> (explaining best practices for judicial evaluation).

391 *Judicial Performance Evaluation*, supra note 390.

392 See Hausman, *The Failure of Immigration Appeals*, supra note 203, at 1181–82.

393 See IJ Roundtable, remarks by Paul Schmidt at 1:29:41.

394 See, e.g., ABA Report, supra note 8, at 3-16 to 3-17 (recommending three-member panels for all non-frivolous merits cases, making affirmances without opinion discretionary rather than mandatory, and requiring written decisions that respond to all non-frivolous arguments raised by the parties); Appleseed, *Reimagining the Immigration Court Assembly Line*, supra note 279, at 77–79 (similar); Legomsky, *Restructuring Immigration Adjudication*, supra note 227, at 1662–64 (discussing the value of reasoned opinions and multi-member panels); Ramji-Nogales et al., supra note 84, at 384–85 (recommending that the BIA should be required in asylum cases

to make a multi-member decision and, if the case is briefed by the appellant, to respond in writing to those contentions).

395 See 2010 ABA Report, supra note 8, at 3–20 (discussing criticism of the Attorney General’s ability to remove Board members); Ramji-Nogales, supra note 84, at 386 (noting that the BIA “has become overly politicized by the Attorney General through his authority to hire and fire its members at will and to erode its review procedures and powers”).

396 See ABA Report, supra note 8, at 3-16 to 3-18 (detailed recommendations for continued reform of the BIA); NIJC, *Order in the Court*, supra 385 note at 20–27 (same); Appleseed, *Reimagining the Immigration Court Assembly Line*, supra note 379, at 77–80 (same).

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