Federal Bar Association

February 4, 2020

The Honorable Zoe Lofgren
Chair
Subcommittee on Immigration
and Citizenship
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Immigration
and Citizenship
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: January 29, 2020 Subcommittee Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"

Dear Chair Lofgren and Ranking Member Buck:

We write in connection with the January 29, 2020 hearing of the Subcommittee on Immigration and Citizenship on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" and respectfully request that these comments be included in the hearing record.

The Federal Bar Association (FBA) is the foremost professional association of attorneys and judges engaged in the practice of law and administration of justice before the federal courts and federal administrative agencies. Over 19,000 members of the legal profession belong to the FBA through affiliation with nearly 100 local chapters around the country. The Immigration Law Section is one of 20 sections and divisions that focus on substantive areas of practice.

Since 2013 the FBA has called for the establishment of an Article I "United States Immigration Court" to replace the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ) as the principal adjudicatory forum under title II of the Immigration and Nationality Act. With the aid of our Immigration Law Section, the FBA has drafted and shared with the members of the Judiciary Committee model legislation to create an Article I immigration court that would provide for more timely and effective adjudication of immigration matters.

We believe that a consensus is emerging that the current immigration court system is broken and deserves overhaul. As Congressman Buck noted at the January 29 hearing, immigration court caseload, backlog and morale problems deserve attention. One of the most visible signs of problems is the ever-growing case backlog and the enormous caseloads

that immigration judges carry on their dockets. Statistics from the Transactional Records Access Clearinghouse (TRAC) indicate that, as of December 2019, the backlog is over one million cases – and has been growing for decades. https://trac.syr.edu/phptools/immigration/court_backlog/. During the January 29 hearing, Representative Armstrong expressed his concern that a federal court organizational model may not represent the right approach because the federal courts face their own backlogs. Although TRAC statistics on immigration court workload do not reflect the same case weighting as applied by the Administrative Office of the U.S. Courts (AO) to the U.S. district courts, it is clear that the immigration courts face significantly greater caseloads than Article III district courts. The AO defines a vacancy on a federal district court as a "judicial emergency" when, among several conditions, weighted filings in that court are in excess of 600 cases per judgeship or weighted filings exceed 800 per active judge. In a comparison of immigration court and district court caseloads, the caseloads of the immigration courts are far heavier and burdensome. For example, the Immigration Court in Arlington, Virginia had a pending caseload of 52,980 cases, as of December 2019. https://trac.syr.edu/phptools/immigration/court_backlog/ With 17 immigration judges (without reference to senior status), the Arlington Immigration Court caseload is at four times the baseline of a federal district court "judicial emergency" caseload -- with over 3,100 cases per immigration judge. The Boston Immigration Court fares even worse – with 22 judges and 36,723 pending cases, yielding over 3,300 cases per immigration judge. Even if EOIR could fill all of the currently authorized immigration judge positions immediately, neither court would come close to reaching the caseload levels applied by the federal courts to identify vacancies that warrant emergency attention.

Additional reasons underscore the merits of an Article I court approach and the assurance of sufficient judicial authority and independence to administer justice. Currently, immigration judges are responsible for carrying out formal adjudications; yet, due to bureaucratic resistance within DOJ and DHS, they are deprived of the judicial authority – expressly conferred by Congress – to impose contempt sanctions upon noncompliant parties when necessary. They also lack independence to freely decide the matters before them and are measured negatively in their performance when the Attorney General disagrees with their decisions and remands the respective cases. The recent regulatory reorganization of EOIR, empowering the Director of EOIR – a political appointee – to adjudicate appeals from the immigration courts reflects an approach that introduces greater political influence into the adjudicatory process, not less. In addition, the FBA proposal for the creation of an independent Article I immigration court calls for Presidentially-nominated, Senate-confirmed appellate judges to replace the current Board of Immigration Appeals, consistent with the Appointments Clause of the Constitution. The appellate-level judges would follow a local merit-selection process to appoint immigration judges, a practice similar to that successfully used for decades to appoint bankruptcy judges and magistrate judges. At both appellate and trial levels, the proposed legislation would require the appointment of judges with relevant legal background and experience.

The FBA's model legislation would establish a specialized, independent Article I tribunal that provides distinct benefits. It would provide: fairness in the administration of the immigration laws; adjudication that is free of political influence; fixed terms for

immigration judges; and management of the operation of the courts themselves by their judges, in a manner similar to the operation of the federal courts. We believe these changes would ultimately lead to a court that operates with greater efficiency and cost-effectiveness, with decisions entitled to greater respect. An independent Article I Immigration Court would properly, and constitutionally, take its place beside other Article I courts established by Congress.

At the January 29 hearing, the Honorable Andrew R. Arthur testified that an independent Article I court would interfere with the Executive's foreign relations authority. We disagree. Establishment of an independent Article I court would not remove the ability of the Executive to make decisions in the immigration context that implicate foreign relations. Under the FBA model legislation, the Attorney General, the Secretary of State, and the Secretary of Homeland Security each would retain their decision-making authority over visa issuance, admissions into the United States, national security and related areas; the sole function removed from the Executive is the actual adjudication of removal cases. DHS would still retain the prosecutorial discretion to place a person in removal proceedings. The FBA model legislation provides the immigration court with no new jurisdictional authority; enforcement policy would remain with DHS. At most, the independent Article I immigration court would apply the law to the cases that DHS brings before it, and it would accord appropriate deference to the legal interpretations on which the Executive's enforcement actions are based.

The challenges of administering an effective immigration system are enormous. While we recognize that no structural alternative, including that of an Article I court, will single-handedly eliminate the trial-level case backlog, the transformation of immigration adjudication to an Article I court model would represent the same path that led to the establishment of the United States Tax Court and the United States Court of Appeals for Veterans Claims. Members of Congress – and this Subcommittee – may have strong opinions about whether our nation's immigration laws require overhaul and what that overhaul should entail. But specific steps toward reforming our immigration courts could proceed more immediately. We encourage the Subcommittee to actively consider legislative proposals that would establish an independent Article I immigration court, and we look forward to working with you in that endeavor.

Sincerely yours,

Christian K. Adams
National President

Mark J. Shmueli
Chair, Immigration Law Section

cc: Members of the Subcommittee on Immigration and Citizenship