



## Statement of the National Immigration Law Center

Submitted to the House Judiciary Subcommittee on Immigration and Citizenship  
“For the Rule of Law, An Independent Immigration Court”

Thursday, January 20, 2022 at 2:00 PM

Dear Members of the House Judiciary Subcommittee on Immigration and Citizenship,

The National Immigration Law Center (“NILC”) is pleased to submit this statement to the House Judiciary Subcommittee on Immigration and Citizenship for the January 20, 2022 hearing, “For the Rule of Law, An Independent Immigration Court.”

Founded in 1979, NILC is an organization exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. We believe that all people should have the opportunity to achieve their full human potential – regardless of their race, gender, immigration, and/or economic status. Over the past 40 years, NILC has won landmark legal decisions protecting fundamental human and civil rights and advocated for policies that reinforce our nation’s values of equality and justice for all. Furthermore, we engage in policy analysis and advocacy, strategic communications, and provide technical assistance to partner organizations across the country.

We applaud the subcommittee for conducting this much-needed hearing. In February of 2020, NILC joined over fifty immigration, civil rights, faith-based, government accountability, and labor organizations, to urge Congress to establish an immigration court system that is independent of U.S. Department of Justice (DOJ) so that it can enhance due process protections and provide a fair hearing for immigrants.<sup>1</sup>

### **The immigration courts must be independent from the DOJ.**

The U.S. immigration court system suffers from profound structural flaws that have severely eroded its capacity to deliver just decisions in a timely manner. The Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is currently housed under the U.S. Department of Justice, a law enforcement agency. While trial-level immigration prosecutors are housed under the U.S. Department of Homeland Security (DHS) within Immigration and Customs Enforcement (ICE), the Attorney General supervises the Office of Immigration Litigation (OIL) which defends immigration cases on behalf of the government in the circuit courts of appeals.

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<sup>1</sup> American Immigration Lawyers Association (AILA), (Feb. 18, 2020), <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-call-on-congress-establish-independent>.

Because of the structural flaws, the immigration court system has long been vulnerable to political pressure from the executive branch. Administrations have repeatedly made policy decisions not because they are legally sound, but because they're politically expedient. For example, in an attempt to achieve policy goals, the courts have been repeatedly subject to "aimless docket reshuffling" based on politically motivated priorities that vary with each administration.<sup>2</sup> The constant reprioritization of the dockets has exacerbated the already enormous case backlog by displacing previously scheduled cases, meaning that people who have already been waiting years for their hearings are forced to wait even longer. TRAC recently reported that the immigration court backlog is now growing faster than ever, and at the end of December 2021, there was an unprecedented 1,596,193 cases in the immigration court backlog.<sup>3</sup>

This inherent conflict of interest is made worse by the fact that immigration judges are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and put them at the whims of the Attorney General. For example, DOJ imposed case-completion quotas, tying judges' individual performance reviews to the number of cases they complete.<sup>4</sup> A strict timeframe for case completion interferes with a person's right to examine and present evidence, as well as to provide adequate time to find an attorney which is critical to obtaining relief in immigration court. This kind of rushed, assembly-line justice is unacceptable to impose on judges who are making important, often life-or-death, decisions. This policy, which has since been rescinded, is contrary to the foundational purpose of a court system which is to ensure its decisions are rendered both timely and consistent with the Constitution's guarantee of due process.

While EOIR previously introduced several policies that interfered with judicial independence, and even issued decisions directly limiting judges' ability to manage their dockets, EOIR also has a history of improperly intervening directly in individual cases. In August of 2018, EOIR removed an immigration judge from a case due to the judge's decision to delay the case in the interest of due process.<sup>5</sup> Judge Steven A. Morley had decided to continue the high-profile case, *Matter of Castro-Tum*, to ensure adequate time for proper notice. EOIR personally interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing.<sup>6</sup> Subsequently, EOIR transferred dozens of other cases from the judge's docket, allocating them to an immigration judge that would be more likely to deny relief. NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases. The creation of an independent Article I immigration court would protect against improper interference and better safeguard judicial independence.

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<sup>2</sup> Retired Immigration Judge Paul Schmidt, Speech to the ABA Commission, [Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in Our Captive Dysfunction U.S. Immigration Courts!](#), May 4, 2018; NAIJ, [Letter to House CJS Appropriations Subcommittee](#), Mar. 12, 2019.

<sup>3</sup> TRAC, Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases, (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/>.

<sup>4</sup> EOIR, Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memoimmigration-judge-performance-metrics>.

<sup>5</sup> Press Release, National Association of Immigration Judges, Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts (Aug. 8, 2018), <https://www.aila.org/infonet/judges-union-grievance-violation-dueprocess-right>.

<sup>6</sup> NAIJ, Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ, (Aug. 8, 2018), available at <https://www.aila.org/infonet/naij-grievance-redress-removal>.

EOIR's demonstrated history of problematic hiring practices and politically motivated appointments is due to the conflict of interest inherent in our immigration court system that is housed within a law enforcement agency. Over a decade ago, the Office of Inspector General and the Office of Professional Responsibility revealed that then-Attorney General Alberto Gonzales utilized political and ideological considerations in the hiring of IJ and BIA candidates.<sup>7</sup> More recently, the prior administration embedded multiple political appointees into career government leadership positions at EOIR headquarters.<sup>8</sup> As Senator Durbin outlined in his letter, "Any such conversions to civil positions at EOIR deserve substantial scrutiny given the Trump Administration's pernicious attempts to implement and enforce an ideological agenda by politicizing the immigration court system."<sup>9</sup> The prior administration also packed the immigration court system with judges biased towards enforcement and/or with histories.<sup>10</sup> Last year, Reuters revealed that "[t]he backgrounds of the judges hired under Trump differed significantly from those named under past presidents. For example, 42% had no immigration experience - double the proportion hired previously. Judges hired under Trump were twice as likely to have military court experience, which Reuters found was linked to a higher rate of deportation orders."<sup>11</sup> The creation of an independent immigration court could take steps to limit problematic hiring and the appearance of bias.

Another weakness of an immigration court system housed within the DOJ is its inadequate policy governing complaints of judicial misconduct. One year ago, the San Francisco Chronicle published a stunning expose that documented rampant sexual harassment and sexism within EOIR.<sup>12</sup> The reporting in this article revealed a culture of impunity among immigration judges. Judges with demonstrated histories of misconduct were protected and even promoted within the agency. The agency's inability to address this pervasive issue in a timely manner further illustrates the weaknesses of our current immigration court system.<sup>13</sup>

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<sup>7</sup> DOJ OIG and OPR, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, (Jul. 28, 2008), <https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf>.

<sup>8</sup> Government Accountability Project, The U.S. Department of Justice Must Review EOIR Personnel and Install New Leadership, (May 19, 2021), <https://whistleblower.org/letter/letter-to-doj-on-review-of-eoir-personnel/>.

<sup>9</sup> Letter from Senator Durbin to Attorney General Garland, (Apr. 20, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20DOJ%20-%20RFI%20Trump%20Appointees%20EOIR.pdf>.

<sup>10</sup> On March 8, 2019, then-Attorney General Barr approved a redesigned hiring plan for both immigration judges and the BIA which allowed EOIR to pack the courts with judges biased towards enforcement and/or with histories of poor judicial conduct. See AILA and the American Immigration Council Obtain EOIR Hiring Plan via FOIA Litigation, (May 5, 2020), <https://www.aila.org/EOIRHiringPlan>.

<sup>11</sup> Reade Levinson, Kristina Cooke, Mica Rosenberg, *Special Report: How Trump administration left indelible mark on U.S. immigration courts*, Reuters, (Mar. 8, 2021), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179>.

<sup>12</sup> Tal Kopan, *Bad Conduct, Leering 'Jokes' — Immigration Judges Stay on Bench*, San Francisco Chronicle (Jan. 22, 2021), <https://www.sfchronicle.com/politics/article/Sexually-inappropriate-behavior-runs-rife-in-15889003.php>.

<sup>13</sup> Yilun Chen, *Advocates: Complaint against immigration judge points to flawed accountability system*, (Jan. 18, 2022), <https://www.dispatch.com/story/news/2022/01/15/discipline-system-immigration-judges-lacks-transparency/9157927002/>.

The immigration court system has been pushed to the breaking point and short-term solutions are no longer enough to reverse course. Until Congress creates an immigration court that is separate and independent from the DOJ, those appearing before the court will be confronted with a flawed system that is severely compromised in its ability to ensure fair and consistent adjudications.

NILC looks forward to continuing to work with members of this subcommittee to ensure that Congress enacts legislation that moves the immigration court system outside of DOJ and into an independent, Article I court system.

We thank you for your time on this important matter.

Sincerely,  
The National Immigration Law Center