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Committee on the Judiciary

Subcommittee on Immigration and Citizenship

Subject: For the Rule of Law, An Independent Immigration Court

January 20, 2022

The National Immigration Project of the National Lawyers Guild (NIPNLG) submits this letter in support of Congressman Lofgren’s efforts to establish an independent immigration court. While NIPNLG believes that the entire immigration system must be re-envisioned from its current, enforcement-focused orientation to a welcoming system that values all noncitizens as human beings, we believe that making changes to the immigration court can be an important interim step to provide at least a modicum of fairness in a process that is currently stacked against respondents.

There are two primary problems with housing the immigration court within the Department of Justice (DOJ), which can only be fixed by establishing a truly independent court. First, DOJ is itself a federal enforcement agency; indeed it is the agency which prosecutes noncitizens’ entry at the border. Second, as an administrative “court” within the executive branch, the entire immigration court system is susceptible to politicization: in its hiring, procedures, and, because the Board of Immigration Appeals (BIA) and the attorney general have the power to issue precedential rulings, in the substantive law it creates. As the U.S. Supreme Court has recognized, deportation “may result . . . in loss of both property and life, or of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). In proceedings where the stakes are so high, it is critical that those facing possible removal receive a fair hearing.

*There Is an Inherent Conflict of Interest Where DOJ Prosecutes Noncitizens and Adjudicates Their Cases*

Federal law criminalizes entry or re-entry into the United States without inspection. 8 USC §§ 1325(a) and 1326. In 2019, after then-Attorney General Jeff Sessions, announced a zero-tolerance policy on border crossing, prosecutions for these offenses jumped to over 106,000 for the year. See American Immigration Council, [Prosecuting People for Coming to the United](#)

[States](#), (Aug. 23, 2021). As a result, illegal border crossing prosecutions accounted for over 65 percent of all DOJ prosecutions in 2019. See [Jessica Zhang, Andrew Patterson, \*The Most Prosecuted Federal Offense in America: A Primer on the Criminalization of Border Crossing\*](#), LawFare, (July 25, 2019). As we have documented in NIPNLG, [Rooted in Racism, The Human Impact of Migrant Prosecutions](#), (Dec. 2021), these prosecutions have led, intentionally, to family separations; over-criminalization and detention of noncitizens, including asylum seekers; and basic lack of due process protections. The “crime” of entry without inspection is itself rooted in racist, anti-Mexican sentiment that was pervasive in the early 1900s. See *United States v. Palomar-Santiago*, [Law Professors amicus brief](#) on writ for certiorari to the Supreme Court, (Mar. 2021). When the attorney general directs his employees to prosecute those who violate these laws, he perpetuates the racism that pervades the laws and violates the rights to due process of those who are subjected to them. He also sets the tone for the agency that those who enter the United States without proper documents—regardless of the reason—are criminals who must be prosecuted.

At the same time the attorney general serves as the agency head who sets law enforcement priorities for DOJ, he simultaneously establishes rules and priorities for immigration judges. Thus, when former Attorney General Sessions addressed a newly hired group of immigration judges, he emphasized that DOJ’s criminal prosecutors were practicing “zero tolerance” at the border “not to just prosecute more but to deter and end illegality.” See DOJ, [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). The attorney general further emphasized to the new judges that their true role is not to be independent decision-makers, but rather, “as the statute states, Immigration Judges conduct designated proceedings ‘subject to such supervision and shall perform such duties as the Attorney General shall prescribe.’” *Id.* When the attorney general makes clear to immigration judges that they are his employees and that he expects zero tolerance of immigration violations both from his prosecutors and from his judges, it is clear that the judges’ role is not designed to be that of a neutral decision-maker.

### *The Immigration Court Is Uniquely Susceptible to Political Decision-Making Because It Is Housed Within an Executive Agency*

Immigration policy has become increasingly politicized over the past few years. As a result, attorneys general have wielded their power to use the immigration court system to achieve the political ends of the president. In *The Attorney General’s Judges How the U.S. Immigration Courts Became a Deportation Tool*, the Southern Poverty Law Center and Innovation Law Lab describe how the prior administration “weaponized” the immigration court system, tolerating bias within immigration courts, allowing judges to remain on the bench despite abusive behavior towards litigants, and allowing certain jurisdictions to become “asylum free zones” where virtually no one prevails on their claims for protection. See Southern Poverty Law Center and Innovation Law Lab, [The Attorney General’s Judges How the U.S. Immigration Courts Became a Deportation Tool](#), (June 2019). At the same time, former attorneys general promoted immigration judges with the highest deportation rates in immigration to serve on the Board of Immigration Appeals (BIA), thus extending their authority beyond the individual cases they continue to hear. Noah Lanard, [The Trump Administration’s Court-Packing Scheme Fills Immigration Appeals Board With Hardliners](#), MOTHER JONES, Aug. 29, 2019.

As long as the adjudicative system remains under the control of DOJ, an anti-immigrant president can rewrite the substance of immigration law through precedential decisions issued by the attorney general that are binding on all immigration judges and BIA members across the country. Former Attorney General Alberto Gonzales laid out this strategy in his law review article, Hon. Alberto R. Gonzales & Patrick, Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016), and the prior administration employed this strategy extensively, issuing 16 precedential decisions in just four years—more than any prior administration, and all of which made it more difficult for noncitizens to secure legal status in the United States. See Catholic Legal Immigration Network, [CLINIC Analysis: The Trump Administration Used the Administrative Appeals Process to Dramatically Alter Asylum Law](#), (Jul. 28, 2021). These decisions eviscerated asylum protections, see *Matter of A-B- I*, 27 I&N Dec. 316 (A.G. 2018), *Matter of A-B-II*, 28 I&N Dec. 199 (A.G. 2021), and *Matter of L-E-A- II*, 27 I&N Dec. 581 (A.G. 2019); removed immigration judges' control of their own dockets *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018), *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018), *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018), stripped noncitizens of a right to a full hearing before being ordered removed, *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), made it more difficult for noncitizens with past criminal convictions to succeed in applications for relief, *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), and stripped immigration judges' jurisdiction to set bond for noncitizens who have gone through expedited removal, *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). While the BIA has traditionally exercised some degree of adjudicatory independence, under the Trump administration, in 25 asylum-related precedential decisions the BIA issued, 96 percent of them had a negative impact on noncitizens. By way of contrast, under the Obama administration, out of 34 asylum-related precedential decisions, 44 percent had a negative impact on noncitizens, 35 percent were favorable, and 21 percent were mixed. See, *CLINIC Analysis, supra*. Thus, even “career” appellate adjudicators were subject to political influence by the administration in power.

In addition to changing immigration law through the adjudicative process, the attorney general also wielded his power as the boss of immigration judges to speed up adjudications and to attempt to silence criticism. On January 27, 2019, DOJ implemented [case performance metrics](#) for immigration judges, requiring them to complete 700 cases per year, and thereby creating financial incentives for judges to prize speed over fairness. The Trump administration also sought to dissolve the immigration judges' union, ironically claiming that they should be considered managers at the same time it implemented attorney general decisions severely limiting their ability to manage their own dockets. Christina Goldbaum, [Trump Administration Moves to Decertify Outspoken Immigration Judges' Union](#), THE NEW YORK TIMES, Aug. 10, 2019. The prior administration also sought to prevent immigration judges from speaking at all, requiring them to go through onerous pre-approval processes to speak in their personal capacities on immigration issues. See Jack Rodgers, *Immigration Judges Sue Over Restrictions on Speech*, COURTHOUSE NEWS SERVICE, Jul. 1, 2020.

### *Conclusion*

The Trump administration demonized immigrants for political gain. In making immigration restrictionism a cornerstone of the administration's policy, the administration laid bare the systemic problem of housing the immigration adjudication system within the executive branch. NIPNLG believes that Congress must fundamentally transform our immigration laws from their

current focus on criminalization and enforcement, to a welcoming system grounded in humanity and compassion. As an interim measure in furtherance of some measure of due process within the immigration system, NIPNLG supports changing the immigration adjudication system so that it is not so inextricably tied to criminal prosecutions and is not as susceptible to weaponization by anti-immigrant administrations.

We thank you for the opportunity to submit this testimony. If you have any further questions about this letter, please contact Victoria Neilson, Supervising Attorney, The National Immigration Project of the National Lawyers Guild, [victoria@nipnlg.org](mailto:victoria@nipnlg.org).