

Statement for the Record before the
U.S. House of Representatives, House Committee on the Judiciary, Subcommittee on
Immigration and Citizenship

Hearing Title: For the Rule of Law, An Independent Immigration Court

Thursday, January 20, 2022

Submitted by the Niskanen Center¹

Introduction

Committee Chair Nadler, Ranking Member Jordan, Subcommittee on Immigration and Citizenship Chair Lofgren, and Members of the Committee: thank you for holding this hearing on the importance of creating independent immigration courts in preserving the rule of law.

A critical tenet of our democracy is rooted in a reliable judicial system that bends to no person or interest and is impervious to political influence. Not by design — but prominently in practice — our immigration court system has become a political pawn of Democratic and Republican administrations alike, resulting in gross, insurmountable systemic failures. The long-term effect has been widespread inefficiency, wildly disparate legal outcomes, and degradation of the rule of law meant to apply equally to *all* who encounter the American judicial system. It is no secret that it is in dire need of reform.

The current system is housed within an office at the Department of Justice (DOJ) — the Executive Office for Immigration Review (EOIR), and is headed by a Director “who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals (BIA), the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3.”² The Immigration Judges (IJs) in the nation’s immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA. The most dire consequence of the system functioning as an arm of the Department of

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² Office of the Director, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated May 30, 2017, available at: <https://www.justice.gov/eoir/office-of-the-director>.

Justice is that it makes it practically impossible for impartial, nonpartisan law to develop under the direct supervision of political appointees.

Immigration case outcomes not only change as a result of elections, but can differ significantly based on geographic location. Immigration judges have been stripped of essential judicial powers, like contempt authority, and forced to abide by fluctuating expectations from one administration to another, all while failing to recognize immigration judges as eligible for judicial retirement benefits. Expertise and impartiality are waning, and the effects on migrants and Americans alike are patently obvious by way of skyrocketing backlogs and antiquated processes.

As the conservative American economist Thomas Sowell once wrote, “A generation that jumps to conclusions on the basis of its own emotions, or succumbs to the passions or rhetoric of others, deserves to lose the freedom that depends on the rule of law. Unfortunately, what they say and what they do can lose everyone’s freedom [. . .].”³ Though there exists significant disagreement about immigration policy, enforcement of our immigration laws as they stand is not a political question, and should not change based on partisan whims.

At the Niskanen Center, we believe that reforming the court system to function as an independent and reliable arm of our judiciary requires us to rise above rhetoric and pursue a practical policy vision that addresses the urgent needs of the system. At the heart of an independent court system is removing jurisdiction from the Attorney General, which is expressly provided for in the Immigration and Nationality Act: “determination and ruling by the Attorney General with respect to all questions of law [related to the INA] and all other laws relating to the immigration and naturalization of aliens . . . shall be controlling.”⁴

In order to avoid constitutional implications, the President’s unique role in immigration absent jurisdictional control by the Attorney General can be maintained as it has in the foreign policy

³ Thomas Sowell, “Rule of law, not sentiment.” Opinion editorial Twincities.com. December 9, 2014. Available here: <https://www.twincities.com/2014/12/09/thomas-sowell-rule-of-law-not-sentiment/>.

⁴ Section 103(a)(1) of the INA.

realm,⁵ by preserving the President’s unfettered power to suspend immigration of specific groups of people upon his finding that the admission of a particular group is detrimental to national security interests found in Section 212(f) of the INA.⁶

We applaud the work of the House Committee on the Judiciary, Subcommittee on Immigration and Citizenship towards furthering these shared goals. We must work together to effectuate a new, independent immigration system in a bipartisan fashion.

For its part, the Niskanen Center respectfully requests the Committee consider the following improvements that would result from the implementation of an independent immigration court system: (1) An independent court system would protect established judicial precedent and restore judicial independence; and (2) an independent court system would increase efficiency.

I. An Independent Court System would Protect Established Judicial Precedent and Restore Judicial Independence

Stare decisis is interpreted to mean “to stand by (or adhere to) decisions and not to disturb what is settled,”⁷ and governs American courts by encouraging judges to follow the rule of law established in earlier cases, unless it is clearly erroneous.⁸ It is a critical component to ensuring that no singular authority makes the laws that govern the people of the U.S., but rather thousands of judicial decisions formulate conscientious, stable, and predictable decisions that make up our body of law.

A. The Lack of Judicial Precedent Creates Chaos and Uncertainty

In the absence of judicial precedent, a court or singular party has absolute discretion to decide a case virtually on a whim. This is precisely the situation in immigration courts today, given that the Attorney General can review by certification any immigration case at any time for his own review of the facts and the law, regardless of the decades of judicial precedent and

⁵ U.S. vs. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), available at: <https://supreme.justia.com/cases/federal/us/299/304/case.html>.

⁶ Section 212(f) of the INA.

⁷ John Hanna, The Role of Precedent in Judicial Decision, 2 Vill. L. Rev. 367, 368 (1957). Available at: <https://digitalcommons.law.villanova.edu/vlr/vol2/iss3/2>.

⁸ John Hanna, The Role of Precedent in Judicial Decision, 2 Vill. L. Rev. 367, 368 (1957). Available at: <https://digitalcommons.law.villanova.edu/vlr/vol2/iss3/2>.

expertise that guided the original outcome of the case.⁹ The resulting law undermines the judicial stability that is a cornerstone of America's commitment to the rule of law.

Certification is used often as a powerful tool to change immigration outcomes based on the politics of the current administration. As detailed by NBC News in October, 2019:¹⁰

[Attorney General] Barr's new decisions establish that he is following in the footsteps of his predecessor, Jeff Sessions, by using certification to overturn sometimes decades-old precedent and limit paths to legal residency. Sessions issued decisions on five cases during his tenure. Barr has now issued four. The Trump administration, not yet three years old, is on track to issue more of these decisions than any administration in recent history. In its eight-year span, the Bush administration issued 16 decisions. The Obama and Clinton administrations issued four and three respectively.

By way of example, the Attorney Generals under former President Trump issued several landmark decisions that ran contrary to established law. In *Matter of Castro-Tum*,¹¹ the Attorney General made it nearly impossible for IJs and the BIA to administratively close cases awaiting adjudication in other agencies or in other courts. In *Matter of S-O-G & F-D-B-*, the Attorney General removed the discretion of IJs and the BIA from terminating or dismissing cases in most scenarios, hamstringing judges who used the tool to prioritize caseloads.¹² Finally, in *Matter of L-A-B-R- et al.*, the Attorney General implemented significant procedural hurdles that make it difficult for IJs to grant continuances, forcing people to appear before the court unprepared and without counsel.¹³

⁹ Section 103(a)(1) of the INA.

¹⁰ Adiel Kaplan, "AG Barr issues 2 decisions limiting ways immigrants can fight deportation." NBC News. October 29, 2019. Available at: <https://www.nbcnews.com/politics/immigration/ag-barr-issues-2-decisions-limiting-ways-immigrants-can-fight-n1073026>.

¹¹ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1064086/download>.

¹² *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1095046/download>.

¹³ *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1087781/download>.

Predictably, these changes severely impacted the number of pending cases in an already backlogged immigration court system. Following the aforementioned decisions in 2018, the case backlog in immigration grew from 768,257 to 1,262,765 cases by the end of 2020.¹⁴ At the time of this statement, the backlog nearly exceeds 1.6 million cases.¹⁵ To make matters worse, Attorney General Sessions simultaneously subjected all immigration judges to extreme numeric case completion quotas and deadlines — or risk their jobs.¹⁶ A back-of-the-napkin calculation shows that each immigration judge in the U.S. needs to close approximately 3,000 cases this year — in addition to their new caseloads — to zero the backlogs.

This is to say nothing of the impacts of swiftly changing law to migrants seeking potential protections. Most Americans fail to understand the complexities of our immigration laws — yet, we expect asylum seekers to understand and follow the changing substantive rulings issued by administrations at random.

Under the Trump administration, Attorney General Jeff Sessions reversed decades of carefully considered and developed case law in *Matter of A-B-* and *Matter of L-E-A-* to make it nearly impossible for victims of domestic violence and gang persecution to qualify for asylum status.¹⁷ In *Matter of M-S-*, the Attorney General removed bond eligibility for individuals that established a credible fear of persecution or torture while they awaited full removal proceedings.¹⁸ In the months immediately following this decision, the total number of individuals detained in immigration detention rose from 49,645 in May of 2019 to 52,930 by August of the same year.¹⁹

¹⁴ TRAC Immigration, Backlog of Pending Cases in Immigration Courts as of December 2021. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

¹⁵ TRAC Immigration, Backlog of Pending Cases in Immigration Courts as of December 2021. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

¹⁶ Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges, (March 30, 2018), available at <https://www.aila.org/infonet/eoirmemo-immigration-judge-performance-metrics>.

¹⁷ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1070866/download>; *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), available at <https://www.justice.gov/file/1187856/download>.

¹⁸ *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), available at <https://www.justice.gov/eoir/file/1154747/download>.

¹⁹ TRAC Immigration, ICE Detainees. Available at: https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html.

B. An Independent System would Remedy these Serious Issues

There is no doubt that the President should maintain a level of control over immigration policy in the U.S., but there is an alternative to continuing to house immigration courts under the Department of Justice and the unilateral, unfettered oversight of the Attorney General. By preserving the President's INA 212(f) authority, we can ensure that the executive branch maintains ultimate authority over immigration policy, particularly as it relates to protecting our national security and public safety, but leaves judicial enforcement to the experts.

While maintaining that important discretion and supremacy, we can remove the temptation to manipulate the rule of law in immigration courts by creating an independent court that fosters consistent results, fair outcomes, and is insulated from strong partisan influence. Further, by providing immigration judges with the powers and benefits that other federal judges receive across the U.S., we can entice more experienced and knowledgeable judges to adjudicate the growing number of cases before immigration courts.

II. An Independent Court System would Increase Efficiency

The U.S. judicial system prioritizes fairness and equity, but must also measure court performance that helps allocate resources effectively and efficiently, and ensures the public can see improvement and excellence in our judicial system. Oppositely, in immigration court, there exists little accountability and rules and processes that change with each new incoming administration.

In trial courts across the country, we measure metrics of efficiency like clearance rates, the age of active pending caseloads, the time it takes to dispose a case, court employee satisfaction and the cost of processing a single case (by case type). There is no exact comparison to measure the efficacy of trial courts versus immigration courts, but the data available is one element of a larger picture of systemic inefficiency in our immigration courts.

By way of comparison, the Texas District Courts (which includes criminal civil, civil related to criminal, family, and juvenile cases) saw “the number of cases filed increase each year from

2015 to 2018” then level out in 2019.²⁰ In 2019, 931,828 cases were added to the docket and 876,946 were closed.²¹ Clearance rates for all case types except family were below 100 percent, but all case types — with the exception of civil cases (87 percent) — were cleared at a rate above 90 percent (average clearance rate for all cases was 94 percent in 2019). According to TRAC, in 2019, Texas completed 58,459 immigration cases,²² and left 166,591 pending cases. Though not a one-to-one comparison, the estimated clearance rate across the U.S. for immigration cases is about 35 percent.

Similarly, case processing times present starkly contrasted results. Eighty-two percent of family cases were disposed within a year; 65 percent of juvenile cases were disposed within 90 days; 63 percent of civil cases were disposed within a year; and 62 percent of criminal cases were disposed of within 180 days.²³ In Texas, it took an average of 410 days — over a year — to process an immigration case.²⁴ Nationally, the average number of days to process a case jumped to 533 days in 2019.²⁵ As of 2022, the processing time has doubled to 922 days in Texas courts and 1,066 days — over 3 years — nationally.²⁶

These delays were in spite of a December 2017 memo²⁷ issued by then-Attorney General Jeff Sessions that strongly encouraged “[t]he timely and efficient conclusion of cases serves the national interest. Unwarranted delays and delayed decision making do not. The ultimate disposition for each case in which an alien's removability has been established must be either a removal order or a grant of relief or protection from removal provided for under our immigration

²⁰ Texas Courts Statistical Report 2019. Available at: <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf>. Note: Using 2019 data to avoid COVID-19 impacts in 2020 and 2021.

²¹ Texas Courts Statistical Report 2019. Available at: <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf>.

²² TRAC Immigration, Court Processing Time. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

²³ Texas Courts Statistical Report 2019. Available at: <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf>.

²⁴ TRAC Immigration, Court Processing Time. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

²⁵ TRAC Immigration, Court Processing Time. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

²⁶ TRAC Immigration, Court Processing Time. Available at: https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

²⁷ Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice, Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

laws, as appropriate and consistent with applicable law.”²⁸ Related guidance was issued in January 2018 by EOIR²⁹ that similarly supported deadlines for the completion of cases that were meant to tackle growing case backlogs.

Advocates and immigration lawyers and judges decried this guidance for its failure to acknowledge the importance of due process above expediency, which is a serious allegation. For this discussion, however, it is most important to note that our backlogs doubled under the administration *despite* direction to pick up the pace.

Establishing independent courts and equipping them with the resources necessary to more efficiently close immigrations cases will reduce processing times, send backlogs in the opposite direction for the first time in decades, and will ensure that the courts are accountable to the American people by collecting metrics and outcomes. Bestowing immigration judges with the benefits expected by nearly every other judge in America will ensure more diverse and qualified applicants to fill hundreds of additional positions that to date have been difficult to fill. Additionally, independent courts with dedicated funding can provide for more support staff and electronic case management — tools that are sorely needed in our current immigration courts.

The Future of Immigration Courts

For years, the government has used temporary fixes to bolster our failing immigration adjudication system, including providing more judges and staff, but the changes never go far enough to impact outcomes.

In the end, these enhancements are destined to fail because they are not aimed at correcting for capricious policymaking and the fickle partisan nature of changing administrations, exacerbated by the ever-growing case backlogs. Ultimately, the current system is hampered by a degradation of the rule of law, systemic inefficiencies, and a lack of accountability. An independent court

²⁸ Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice, Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

²⁹ Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures to The Office of the Chief Immigration Judge, et al, (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026721/download>.

system can tackle the root of the issues that have resulted in inefficient, ineffective courts and provide reliable outcomes for those who encounter the American justice system.