



Statement of Hon. Mimi Tsankov
President, National Association of
Immigration Judges

January 20, 2022

*For the Rule of Law, An Independent
Immigration Court*

Hearing Before the
U.S. House of Representatives,
Judiciary Committee
Immigration and Citizenship Subcommittee



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INTRODUCTION

I am Mimi Tsankov, President of the National Association of Immigration Judges (NAIJ).¹ For the past 15 years I have served as an Immigration Judge and am currently seated at the New York Federal Plaza Immigration Court. Chairwoman Lofgren, Ranking Member McClintock and members of the Subcommittee, thank you for the opportunity to testify.

I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of immigration judges. Since 1979, the NAIJ has been the recognized representative of immigration judges for collective bargaining purposes. Our mission is to promote the independence of immigration judges and enhance the professionalism, dignity, and efficiency of the immigration courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our immigration court system through: educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating for the integrity and independence of the immigration courts and immigration court reform. We also seek to improve the court system and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining.

I am here today to discuss urgently needed immigration court reform and the unprecedented challenges facing the immigration courts and immigration judges. The immigration courts have faced structural deficiencies, crushing caseloads, and unacceptable backlogs for many years.²

¹ I am speaking in my capacity as President of the NAIJ and not as an employee or representative of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent my personal opinions, which were formed after extensive consultation with the membership of NAIJ.

² Hon. Ashley Tabaddor, Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts,” January 29, 2020, *available at* <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf>.

Many of the “solutions” that have been attempted to address these challenges have in fact exacerbated the problems and undermined the integrity of the courts by compounding the backlog, encroaching on the independent decision-making authority of immigration judges, and compromising the integrity of immigration court proceedings overall through improperly influencing case outcomes. I will be focusing my discussion on the structural defect inherent in the immigration court system and the Department of Justice’s (DOJ) ineffective and counterproductive attempts to solve the immigration court backlog. To fix the backlog and other problems, Congress should remove the immigration courts from the DOJ and create an independent, Article I immigration court.

**THE DOJ’S INEFFECTIVE AND POLITICIZED
MANAGEMENT OF THE IMMIGRATION COURTS IS A
PRIMARY CAUSE OF THE CURRENT IMMIGRATION COURT CRISIS**

Almost two years ago, my former colleague Judge Ashley Tabaddor sat before you and explained how the immigration courts suffer from an inherent conflict since it is housed within the DOJ—a law enforcement agency. That problem still exists, but the urgency with which we must address it is even more pronounced today than it was then. In early January 2020, the backlog was a little over 1 million cases.³ Two years later, it has now swelled to nearly 1.6 million cases and is increasing daily.⁴ I am here to tell you that the immigration courts are in crisis.

Today, approximately 580 Immigration Judges are responsible for adjudicating these cases. That works out to be, on average, over 2,700 cases per judge. Some of my colleagues have so many cases in the queue at their courts that they could be setting trials into 2026 as they simply don’t have earlier space on their dockets. At current levels, and assuming no new cases, the math simply cannot work to bring down that backlog number under the current system for years into the future.

The placement of the immigration courts within the DOJ has created two fundamental problems. First, because the DOJ is a law enforcement agency, it lacks the institutional expertise to manage an independent court and understandably prioritizes its law enforcement functions at the expense of the immigration courts. Second, the politics of immigration enforcement are interjected into the adjudicatory functions of the immigration court system itself through the direct management of the immigration courts by the Office of the Deputy Attorney General, to which the EOIR Director reports.

The DOJ’s management of the immigration courts during the pandemic is a clear example of its inability to effectively lead. The pandemic forced state and federal courts across the country to quickly pivot to online hearings to ensure they could continue to meet their missions. The

³ Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *Pending Cases, New Cases, and Total Completions* (data generated October 19, 2021), available at <https://www.justice.gov/eoir/page/file/1242166/download>.

⁴ *Id.*

immigration courts did not. It took seven months before the immigration courts began to allow even a handful of judges to conduct hearings remotely. When faced with the crisis of the pandemic, the DOJ appeared to have neither the ability nor the will to adjust.

The immigration courts' technology failings pre-dated the pandemic and have resulted in extreme inefficiencies in adjudications. The DOJ's failure to timely modernize court technology resulted in a more than 20-year wait for electronic filings.⁵ The computer systems and printers are outdated and in short supply, and the software programs are several generations behind and lag in processing speed. During the pandemic, the immigration courts have had too few laptops that are capable of letting judges adjudicate cases while on telework because the agency has not invested in technologies that are state-of-the-art over a number of years. Unlike other state and federal courts which have embraced electronic filings and records, we are still operating most often under the weight of hardcopy files. Increasingly, adequate space for court locations has become an issue, leaving many courts bursting at the seams due to thousands of files, with staff having to share cubicles, and cramped, unhealthy and unsafe spaces that were never intended to be used as work space. And even when the immigration courts saw the need to be able to conduct hearings remotely, immigration court management inexplicably failed for months and months to take the steps necessary to acquire the equipment and transition to remote hearings.

The DOJ's management failures also include its inability to anticipate the demand for immigration court services and submit budget requests for the needed staffing.⁶ The backlog is a function of budgeting imbalances for immigration law enforcement which has not been accompanied by concomitant resources for the immigration courts. In the period that the budget for DHS saw an increase of 300 percent, the immigration courts' budget was only modestly increased by 70 percent. With the immigration courts relegated to the proverbial basement office, the DOJ has neither secured adequate budget appropriations to hire immigration judge teams, nor hired sufficient support staff which is necessary if we are able to get the backlog under control.

Much of the failure of the DOJ's immigration court management flows from the political control it has routinely exerted over the court, both by Democratic and Republican administrations. On the one hand, we are statutorily recognized as "immigration judges," wear judicial robes, and are charged with conducting ourselves consistent with canons of judicial ethics and conduct, in order to ensure our role as impartial decision-makers in the cases over which we preside. In every sense of the word, on a daily basis, when presiding over cases, we are judges: we rule on the admissibility of evidence and legal objections, make factual findings and conclusions of law, and decide the fate of thousands of individuals appearing before us each year. Last year, our decisions were final and unreviewed in 94% of the cases we decided.⁷

⁵ In 2000, EOIR stated that the immigration courts would be implementing electronic filing by 2001. The reality is that as of 2021 only new filings are paperless, with the bulk of the outstanding caseload still using unwieldy, inefficient paper filings. <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Gambler%20Testimony.pdf>.

⁶ Department of Justice, Office of Inspector General, Audit of the Executive Office for Immigration Review's Fiscal Year 2019 Financial Management Practices, June 9, 2020, available at <https://oig.justice.gov/sites/default/files/reports/a20068.pdf>.

⁷ Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *New Cases, and Total Completions* (data generated October 19, 2021), available at <https://www.justice.gov/eoir/page/file/1060841/download>; Department of Justice, Executive Office for Immigration

On the other hand, the DOJ considers immigration judges to be attorneys acting on behalf of the Attorney General, and has created layers of management judges and personnel who eventually report to the Deputy Attorney General. With multiple layers of management oversight and many manager judges even lacking in judicial experience, the trial immigration judges are not free to adopt effective streamlining techniques tailored to their particular jurisdictions and dockets. The immigration courts are run in a hierarchical fashion and the trial immigration judges themselves have been marginalized by an agency that employs top-down edicts. Intense management-driven docket shuffling furthers shifting law enforcement “priorities” which change from one administration to the next. Some administrations prioritize recent arrivals, such as unaccompanied minors and adults with children, over pending cases involving criminal convictions. One administration uprooted approximately one third of all immigration judges in a calendar year to assign them temporarily to “border immigration courts” to create the “optics” of a full commitment to law enforcement measures, even at the expense of delaying thousands of cases at each home court. Other administrations have done just the opposite, prioritizing “aged” cases that had been pending for many years. Regardless of the priorities and rationales behind them, such docket shuffling tactics have led to further delays and have exacerbated the backlog of cases pending before the immigration court system as a whole. The DOJ’s ineffective management of the immigration court has been documented in multiple Office of Inspector General (OIG)⁸ and Government Accountability Office (GAO)⁹ investigations.

This political control over immigration court proceedings yields extreme pendulum swings that leaves apolitical judges reeling as they navigate judicial responsibilities amid heavy political scrutiny. For example, for the period October 2018 to October 2021, a primary focus of the EOIR management judges was overseeing a flawed performance evaluation model which emphasized production quotas and time-based deadlines over judicial competence. A negative performance review due to failure to meet quotas and deadlines could result in termination of employment despite the legal duty of immigration judges, codified by regulation, to exercise independent judgment and discretion in each of the matters before them. This conflict enables political priorities to seep into the very fabric of our judicial process as a focus on quotas at the expense of due process is code for speed over fairness. For the more than 350 judges, approximately 75% of the immigration judge corps, that were on probation during the use of these metrics, we know it weighed heavily on them as they made decisions on the bench - “Should I grant a continuance and risk termination?”¹⁰ Those are the types of considerations that

Review Adjudication Statistics, *Case Appeals Filed, Completed, and Pending* (data generated October 19, 2021), available at <https://www.justice.gov/eoir/page/file/1248501/download>.

⁸ Department of Justice, Office of Inspector General, Limited-Scope Review of the Executive Office for Immigration Review’s Response to the Coronavirus Disease 2019 Pandemic (April 22, 2021), available at <https://oig.justice.gov/reports/limited-scope-review-executive-office-immigration-reviews-response-coronavirus-disease-2019>.

⁹ U.S. Government Accountability Office, *Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program* (September 18, 2018), available at <https://www.gao.gov/products/gao-18-701t>.

¹⁰ 347 Immigration Judges were appointed by Republican Administrations, which equals 60 percent of the sitting judge corps; 232 Immigration Judges were appointed by Democratic Administrations, which equals 40 percent of the sitting Immigration Judge corps. See also, TRAC Immigration, *More Immigration Judges Leaving the Bench*, July 13, 2020, <https://trac.syr.edu/immigration/reports/617/>; U.S. Department of Justice, *EOIR Announces 22 New Immigration Judges*, December 17, 2021 available at <https://www.justice.gov/eoir/page/file/1457171/download>; U.S. Department of Justice, *EOIR Announces 24 New Immigration Judges*, October 17, 2021 available at

should never be contemplated in a judicial model. Politics cannot be a factor in appointments, promotions, or judicial decision-making. And, while 60 percent of the sitting corps were appointed under Republican administrations and 40 percent under Democratic administrations, this data has no place in a discussion about adjudication if our system is to be considered apolitical and fair. In short, the mission of the DOJ does not align with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities. It seriously compromises the very integrity of the immigration court system.

THE ENDURING SOLUTION OF AN INDEPENDENT IMMIGRATION COURT

An Article I Immigration Court is the Clear Consensus Solution that is Urgently Needed

The solution to the crisis at the immigration courts is to remove the courts from the DOJ and create an independent, Article I immigration court. Under an Article I formulation, the immigration courts could more effectively and nimbly manage their own dockets, tackle their caseloads and implement an effective information technology system. This new immigration court would separate the politics of immigration enforcement from the needs of immigration adjudication.

Creating an independent, Article I immigration court is a good government solution. It will legitimize the integrity of immigration court outcomes and support the rule of law. An independent immigration court will refocus authority to the immigration judges hearing the cases to manage their own dockets. It will allow the Court to fulfill the role contemplated by Congress in the carefully crafted immigration enforcement structure, which created the immigration courts as a neutral balance between the interests of the individuals impacted by those laws and the American public. No longer will vacillating political priorities interfere with case adjudication, and the public that we serve will have greater confidence in the integrity of the process.

Band-Aid solutions cannot solve the persistent problems facing our immigration court. Experience has shown piecemeal solutions are inadequate. The problems compromising the integrity and proper administration of the immigration court underscores the need to remove it from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. The DOJ has been provided years of opportunity to forestall the impending implosion at the immigration courts. Instead of finding long-term solutions to our problems, the DOJ's political priorities and law enforcement instincts have led our courts to the brink of collapse. With the misguided initiative to frequently shuffle dockets and to impose immigration judge production quotas and deadlines, the DOJ put

<https://www.justice.gov/eoir/page/file/1444911/download>; U.S. Department of Justice, *EOIR Announces 10 New Immigration Judges*, July 16, 2021, available at <https://www.justice.gov/eoir/page/file/1412741/download>; EOIR Announces 17 New Immigration Judges, May 6, 2021, available at <https://www.justice.gov/eoir/file/1392116/download>; U.S. Department of Justice, *EOIR Announces 14 New Immigration Judges*, December 18, 2020, available at <https://www.justice.gov/eoir/page/file/1347201/download>; U.S. Department of Justice, *EOIR Announces 20 New Immigration Judges*, October 19, 2020, available at <https://www.justice.gov/eoir/page/file/1326581/download>.

accelerant on the fire and the integrity of the immigration courts has been significantly compromised.

The idea of creating an Article I immigration court, similar to the U.S. Tax Court, has been advanced as far back as the 1981 Select Commission on Immigration and Refugee Policy. Such a structure solves myriad problems which now plague our court: removing a politically accountable cabinet-level policy-maker from the helm; separating the decision makers from the parties who appear before them; protecting immigration judges from the cronyism of too close an association with DHS; assuring a transparent funding stream instead of obscured general budget items buried within a larger Agency with competing needs; and eliminating top-heavy Agency bureaucracy. In the last 35 years, a strong consensus has formed supporting this structural change. For years, experts debated the wisdom of far-reaching restructuring of the immigration court system. Now most immigration judges and attorneys agree the long-term solution to the problem is to restructure the immigration court system. Examples of those in support include the American Bar Association, the Federal Bar Association, the National Association of Women Judges, and the American Immigration Lawyers Association. These are the recognized legal experts and representatives of the public who appear before us. Their voices deserve to be heeded.

NAIJ urges you to take immediate steps to protect judicial independence and efficient resolution of cases at the immigration courts by enacting Article I legislation. Our nation's immigration courts are often the only face of American justice with which noncitizens interact. Our courts need to be an example of impartiality and due process which we would be proud for other countries to replicate. Failure to act will result in irreparable harm to the implementation of our nation's immigration laws as we know them. Action is urgently needed now!