

**Statement from the National Immigrant Justice Center**

**House Committee on the Judiciary  
Subcommittee on Immigration and Citizenship  
Hearing: Courts in Crisis—  
The State of Judicial Independence and Due Process in U.S. Immigration Courts  
January 29, 2020**

Chairman Nadler, Chairwoman Lofgren, Ranking Member Buck, and Members of the Subcommittee:

Nearly a century ago, the Supreme Court of the United States described deportation as a deprivation of liberty that “may result ... in loss of both property and life, or of all that makes life worth living.”<sup>1</sup> Today, the gravity of an immigration judge’s decision to order deportation is no less weighty, determining whether an asylum seeker will be returned to the hands of her persecutor or whether a decades-long American resident will be torn from his family. Yet these cases are heard in a broken court system frequently described by the immigration judges themselves as “death penalty cases in a traffic court setting.”<sup>2</sup>

The immigration court system’s dysfunction is largely due to its position within the Department of Justice (DOJ), where it is vulnerable to the political whims of the executive. In recent years, the Trump administration has explicitly attempted to subvert the mission of the immigration court system, trading the safeguarding of due process for the politically driven pursuit of increasing deportations and throwing up roadblocks for those seeking to access protection. At the National Immigrant Justice Center (NIJC),<sup>3</sup> we witness the severe harms that follow, including sham hearings, erroneous deportations, and pervasive family separations.

The administration’s enforcement-oriented approach to what should be an impartial and fair system of adjudications has resulted in a court system unable to meaningfully effectuate justice. The immigration courts are, as the American Bar Association’s Commission on

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<sup>1</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>2</sup> Bryan Schatz, *Mother Jones*, “Our Immigration Courts Aren’t Ready to Handle Millions of Deportations,” Mar. 31, 2017, <https://www.motherjones.com/politics/2017/03/immigration-court-deportations-trump-asylum/>.

<sup>3</sup> NIJC is a non-governmental organization (NGO) dedicated to safeguarding the due process rights of noncitizens. We are unique among immigrant advocacy groups in that our advocacy and impact litigation are informed by the direct representation we provide to approximately 10,000 clients annually. Through our offices in Chicago, Indiana, San Diego, and Washington D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, NIJC provides legal counsel to immigrants, refugees, unaccompanied children, and survivors of human trafficking.

Immigration recently stated, “irredeemably dysfunctional and on the brink of collapse.”<sup>4</sup> Transformational change is necessary to ensure respect for basic human and civil rights in the United States immigration courts.

NIJC applauds this Subcommittee’s consideration of the due process crisis within the immigration court system. We continue to call for an independent immigration court system that is removed from the Department of Justice; until that benchmark is reached, we call on Subcommittee members to engage in robust oversight of DOJ to reverse its unacceptable incursions on the court system’s integrity. This statement: 1) provides a brief overview of the historical vulnerability of the Executive Office for Immigration Review (EOIR) to political sway; 2) outlines the current administration’s attacks on the fairness and independence of the immigration court system; and 3) provides a brief set of principles that must be fulfilled to ensure fairness in the system.

## **I. The Executive Office for Immigration Review: a brief history of political sway**

The Executive Office for Immigration Review (EOIR) is a component of the Department of Justice that includes the immigration courts and their appellate body, the Board of Immigration Appeals (BIA). Unlike other judicial bodies, the immigration courts and the BIA lack meaningful independence from the executive because immigration judges and BIA members are appointed by the Attorney General.<sup>5</sup>

History has shown EOIR to be particularly vulnerable to improper political pressures and sway. In 2003, five members of the BIA were dismissed in what is now widely considered a politically motivated “purge” of left-leaning BIA members orchestrated by Attorney General John Ashcroft’s leadership team.<sup>6</sup> Only a few years later, in 2008, the DOJ Office of the Inspector General found that high ranking officials under Attorney General Alberto Gonzales “committed misconduct, by considering political and ideological affiliations in soliciting and selecting [immigration judges].”<sup>7</sup>

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<sup>4</sup> American Bar Association Commission on Immigration, *2019 Update: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (Mar. 2019),

[https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf).

<sup>5</sup> 8 U.S.C. § 1101(b)(4); 8 CFR 1003.1(a)(1).

<sup>6</sup> See Ricardo Alonso-Zaldivar and Jonathan Peterson, *Los Angeles Times*, “5 on Immigration Board Asked to Leave; Critics Call It a ‘Purge,’” Mar. 12, 2003, <http://articles.latimes.com/2003/mar/12/nation/na-immig12>.

<sup>7</sup> See Eric Lichtblau, *The New York Times*, “Report Faults Aides in Hiring at Justice Department,” July 29, 2008, <https://www.nytimes.com/2008/07/29/washington/29justice.html>; U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring by Monica*

The past decade has hardly been kinder, as judges have been repeatedly forced to rearrange their dockets by executive branch officials driven by political expediency and anti-immigrant rhetoric.<sup>8</sup> As New York City Immigration Judge Amiena Khan recently put it, “It is just a cumbersome, huge system, and yet administration upon administration comes in here and tries to use the system for their own purposes...”<sup>9</sup> The immigration court system today is extremely fragile, crippled by a backlog of over a million cases<sup>10</sup> and unacceptable disparities in decision making.<sup>11</sup> The deck is stacked against immigrants, who frequently speak to judges through interpreters, more often than not representing themselves in the face of a maze of complex laws,<sup>12</sup> and often in the immediate aftermath of having survived torture or severe persecution.

## **II. Weaponizing the courts: the Trump administration’s efforts to convert the immigration court system into an enforcement machine**

When the current administration came into office, the immigration court system already stood on the brink of chaos, unable to bear additional layers of incompetence and political machinations. And yet, over the past three years the White House, Department of Justice and Department of Homeland Security have acted in concert to deliver an astonishing array of policies and procedures further destabilizing the immigration courts and doggedly orienting case outcomes toward removal. Immigrants appearing without counsel and immigration attorneys

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*Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), <https://oig.justice.gov/special/s0807/final.pdf>.

<sup>8</sup> See Hon. Paul Wickham Schmidt, *The Federal Lawyer*, “Immigration Courts: Reclaiming the Vision,” May 2017, [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2017/May/Features/Immigration-Courts-Reclaiming-the-Vision.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/May/Features/Immigration-Courts-Reclaiming-the-Vision.aspx?FT=.pdf); see also United States Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 2017), <https://www.gao.gov/assets/690/685022.pdf>.

<sup>9</sup> Kate Brumback, Deepti Hajela and Amy Taxin, *Associated Press*, “AP Visits Immigration Courts Across US, Finds Nonstop Chaos,” Jan. 19, 2020, <https://apnews.com/7851364613cf0afbf67cf7930949f7d3>.

<sup>10</sup> As of January 2020, the immigration courts are backlogged by 1,089,696 cases. See TRAC, Immigration Court Backlog Tool, last accessed Jan. 23, 2020, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>11</sup> A recent study showed that the particular judge assigned to an individual seeking asylum changes his or her odds of receiving asylum by over 56 percentage points. In the New York City immigration court, for example, the rate by which individual judges grant asylum varies from 41% to 97.8%. Compare this variance to the Atlanta court, where the grant rate spans 29.2% to 2.3%. See TRAC, “Asylum Outcome Increasingly Depends on Judge Assigned,” Dec. 2, 2016, <https://trac.syr.edu/immigration/reports/590>. Immigration judges in Atlanta have been accused of overt bias against asylum seekers. See Christie Thompson, *The Marshall Project*, “America’s Toughest Immigration Court,” Dec. 12, 2016.

<sup>12</sup> Nationally fewer than 40% of immigrants are able to obtain representation in their immigration court proceedings. Ingrid Eagly and Steven Shafer, *American Immigration Council*, “Access to Counsel in Immigration Court,” Sept. 28, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

alike struggle to navigate a system the Associated Press’s recent investigation found to constitute “nonstop chaos.”<sup>13</sup>

What does immigration court look like today, in early 2020? Immigrants regularly receive notices to appear in court on dates or times when court is not in session.<sup>14</sup> Asylum seekers are released from custody without their asylum paperwork and are unable to obtain copies from the court without filing a request under the Freedom of Information Act.<sup>15</sup> Immigrants are routinely forced to defend against a government prosecutor without being oriented as to how to get their documents translated or even file the paperwork necessary to bring a case.<sup>16</sup> Young children are, as the Associated Press describes, “everywhere....,” forced to “sit on the floor or stand or cry in cramped courtrooms.”<sup>17</sup> The success of an immigrant’s case is most often determined not by the merits of their claim to relief but by a series of random factors including the assigned judge and location of the court; in some courts immigration judges grant close to zero percent of asylum applications brought before them.<sup>18</sup> NIJC attorney Ashley Huebner recently told the Associated Press: “Attorneys are spending so much time on work that is effectively meaningless.... It’s unnecessary, bureaucratic red tape gone crazy.”<sup>19</sup>

This “nonstop chaos” is not accidental or coincidental; it is the result of a series of policies intentionally put in place by the administration to destabilize the immigration court system and make it next to impossible for immigrants within the system to access due process protections and justice.

In the fall of 2018, the Department of Justice began implementing a disastrous system of quotas on the immigration courts, requiring judges to complete at least 700 cases per year while meeting other numerical goals.<sup>20</sup> Prior to its implementation, civil rights advocates and immigration judges themselves voiced fierce resistance to the plan.<sup>21</sup> Ashley Tabaddor, an immigration judge and President of the National Association of Immigration Judges, referred to

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<sup>13</sup> Brumback, “Nonstop chaos,” *supra* n. 9.

<sup>14</sup> Sophia Tareen, *Associated Press*, “Lawyers: Immigration court system is ‘red tape gone crazy,’” Jan. 19, 2020, <https://apnews.com/b8e7f7148b2d104ca21c1e41fff70d23>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Brumback, “Nonstop chaos,” *supra* n. 9.

<sup>18</sup> John Washington, *The Nation*, “These jurisdictions have become asylum free zones,” Jan. 18, 2017, <https://www.thenation.com/article/archive/these-jurisdictions-have-become-asylum-free-zones/>.

<sup>19</sup> Tareen, “Immigration court system,” *supra* n. 14.

<sup>20</sup> See Betsy Woodruff, *The Daily Beast*, “New Quotas for Immigration Judges are ‘Incredibly Concerning,’ Critics Warn,” Apr. 2, 2018, <https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn?source=articles&via=rss>.

<sup>21</sup> National Association of Immigration Judges, “Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges,” Oct. 1, 2017, <http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration>.

the plan as “a recipe for disaster,” noting that it would impact the perception of the integrity of the court;<sup>22</sup> former immigration judge Bruce Einhorn, who served as an immigration judge from 1990 to 2007, referred to the plan as an “affront to judicial independence and the due process of law.”<sup>23</sup> These fears have been more than borne out. Ilyce Shugall, who resigned from her position as an immigration judge as a matter of conscience in March 2019, describes: “My colleagues and I felt the impact of the case quotas on our ability to render correct and well-reasoned decisions.... [J]udges were forced to schedule at least two cases in one time slot ... regardless of whether it was possible to hear two cases in such a short time frame or whether this would allow a judge to consider fully the merits of each case.”<sup>24</sup> The imposition of case quotas heightens already urgent concerns among immigrants and their attorneys that cases will be rushed through the immigration court system as judges respond to concerns about job security instead of due process protections.

Amidst the scrambling of dockets and pressure cooker atmosphere for immigration judges, the Department of Justice is also taking aggressive steps to undermine rights through the manipulation of the immigration law itself. The Attorney General possesses the authority to refer cases of the Board of Immigration Appeals to himself for review; historically the practice has been sparingly used.<sup>25</sup> Long criticized as an unusual and potentially dangerous grant of judicial authority to the executive branch, this authority has become a weapon in the hands of Attorney Generals Sessions and Barr. The Trump administration is on track to issue more certifications than any administration in recent history, massively curtailing the rights of asylum seekers and immigrants through a trove of decisions that collectively: undermine the ability of immigration judges’ to manage their own dockets, cruelly attack the ability of survivors of domestic- and gang-related violence to obtain asylum protections, and impose new barriers for immigrants previously involved in the criminal legal system to seek a second chance in immigration court.<sup>26</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Bruce Einhorn, *Washington Post*, “Jeff Sessions wants to bribe immigration judges to do his bidding,” Apr. 5, 2018, [https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514\\_story.html](https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html).

<sup>24</sup> Ilyce Shugall, *Los Angeles Times*, “Why I resigned as an immigration judge,” Aug. 3, 2019, <https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies>.

<sup>25</sup> Lisa Riordan Seville and Adiel Kaplan, *NBC News*, “AG Barr using unique power to block migrants from U.S., reshape immigration law,” July 31, 2019, <https://www.nbcnews.com/politics/immigration/ag-barr-using-unique-power-block-migrants-u-s-reshape-n1036276>.

<sup>26</sup> *See, e.g.*, Liz Vinson, Southern Poverty Law Center, “U.S. Attorney General Tips the Scales in Immigration Court, Leaving One Man Fighting for His Freedom – and His Life,” Dec. 2019, <https://www.splcenter.org/attention-on-detention/us-attorney-general-tips-scales-immigration-court-leaving-one-man-fighting>; Dara Lind, *Vox*, “Jeff Sessions is exerting unprecedented control over immigration courts—by ruling on cases himself,” May 14, 2018, <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>. This list is non-exhaustive.

The relentless stream of policies unleashed by the White House and Department of Homeland Security to obstruct access to asylum on the southern border is another factor contributing to the destabilization and steady erosion of even the veneer of due process rights in the immigration court system. The implementation of the so-called “Migrant Protection Protocols,” or Return-to-Mexico program, has forced thousands of asylum seekers to wait in Mexico in often-life threatening conditions during the months or years it takes for their asylum cases to be heard.<sup>27</sup> Layering harm upon harm, the administration has constructed temporary court facilities for cases adjudicated through MPP to be heard.<sup>28</sup> In these sham court facilities, judges in brick-and-mortar courts in cities throughout the United States adjudicate asylum cases by video. The systematic rights abuses in these courts have been well documented, ranging from systems effectively precluding asylum seekers from accessing counsel to a failure by the administration to allow even basic transparency to journalists and legal observers attempting to bear witness to the proceedings therein.<sup>29</sup> As Aaron Reichlin-Melnick of the American Immigration Council explains, “The goal of MPP is to create a system which fools casual observers into thinking a process exists—while making success near-impossible and harm so pervasive that sensible people give up.”<sup>30</sup>

Amidst this chaos and dysfunction of the immigration court system, the deck is stacked against immigrants, many of whom frequently speak to judges through interpreters, more often than not representing themselves in the face of a maze of complex laws. Due process and civil rights protections are in fact so elusive in today’s immigration court systems that some immigration judges have chosen to resign out of ethical concerns. Ilyce Shugall explained her choice to resign as follows: “I felt like as more and more policies were coming down, it was making it harder and harder to effectively hear cases in the way that I felt was appropriate and in compliance with the state regulations and Constitution.”<sup>31</sup>

### III. Principles for reform

In considering proposals for immigration court reform, NIJC encourages members of Congress to prioritize the following principles:

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<sup>27</sup>Human Rights First, *A Year of Horrors: the Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico* (Jan. 2020), <https://www.humanrightsfirst.org/sites/default/files/AYearofHorrors-MPP.pdf>.

<sup>28</sup> Adolfo Flores, *Buzzfeed News*, “Immigration ‘Tent Courts’ Aren’t Allowing Full Access To The Public, Attorneys Say,” Jan. 13, 2020, <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>.

<sup>29</sup> *Id.*

<sup>30</sup> Zachary Mueller, *America’s Voice*, “Immigration 101: What is ‘Remain in Mexico’, or the Migration Protection Protocols (MPP)?,” Nov. 15, 2019, <https://americasvoice.org/blog/remain-in-mexico-mpp/>.

<sup>31</sup> Priscilla Alvarez, *CNN*, “Immigration Judges Quit in Response to Administration Policies,” Dec. 27, 2019, <https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html>.

- Ensure judicial independence by removing the immigration court system from the Department of Justice.
- Give immigration judges true authority over their courtrooms by removing categorical bars to relief and ensuring that all immigrants have the opportunity to have a fair day in court.
- Promote judicial transparency at the trial court and appellate levels.
- Grant the appellate body the scope of review necessary for the fair administration of justice.
- Restore fairness to immigration adjudication by providing the jurisdiction necessary for the trial court and appellate body to ensure fairness and due process for everyone seeking immigration relief.
- Restore strong judicial review at the federal court level.
- Ensure that all individuals appearing before the immigration court have access to counsel by providing for the availability of appointed counsel for all immigrants facing removal.

These principles reflect the dire need for judicial independence and functional management of a court system that is in tragic disarray. NIJC calls on members of Congress to engage in robust oversight of DOJ and EOIR to protect the impartiality of the immigration court system in the face of clear evidence of the administration's efforts to conscript it into furthering an agenda of mass deportations.