

Statement of the Round Table of Former Immigration Judges

Submitted to the House Judiciary Subcommittee on Immigration and Citizenship

**Hearing on “Courts in Crisis: The State of Judicial Independence and Due Process
in U.S. Immigration Courts”**

January 29, 2020

This statement for the record is submitted by former Immigration Judges and former Appellate Immigration Judges of the Board of Immigration Appeals (BIA). Members of our group were appointed to the bench and served under different administrations of both parties over the past four decades. Drawing on our many years of collective experience, we are intimately familiar with the workings, history, and development of the immigration court from the 1980s up to present.

The purpose of the immigration courts is to act as a neutral check on executive overreach in the enforcement of our immigration laws. In their detached and learned interpretation of the laws and regulations, Immigration Judges exist to correct overzealous bureaucrats and policy makers when they overstep the bounds of reasonable interpretation and the requirements of due process.

Unfortunately, no Attorney General has ever created an impartial immigration court system because the immigration courts have always been housed inside the U.S. Department of Justice, subject to the nation’s chief enforcement officer, the Attorney General. Due in large part to the efforts of their union, the National Association of Immigration Judges, (NAIJ), the Immigration Judge corps managed to maintain decision making independence even when faced with increased caseloads and political pressures.

We are extremely disturbed by this administration’s systemic and unprecedented efforts to undermine Immigration Judges’ independence and neutrality. Such efforts have proceeded seamlessly through three different Attorneys General. Even Matthew Whitaker, acting as a caretaker and with no prior immigration law background, managed in his brief time in charge to certify two cases to himself, one of which was a decision of the BIA which had denied asylum and created a difficult standard for those seeking asylum based on their family ties, in order to make such standard even more daunting.

The three Attorneys Generals have together abused their certification power to circumvent the intent of Congress by rewriting our nation’s immigration laws. In

some of their decisions, the Attorneys General have eliminated precedent decision and then imposed requirements that necessitate much more attorney preparation, longer hearings, and more exacting decisions from the Immigration Judges themselves in order to grant relief where such relief is due. The disingenuous assertion for doing so was that the parties had stipulated to certain facts and findings without evidence, when in fact the parties had done so - as in all judicial settings - because the evidence in support of such facts and findings was overwhelming and there is no need to burden the court system by presenting them in each case. At the same time, the Department of Justice has greatly expedited the hearings of those who are often most vulnerable, while requiring a growing number of asylum-seekers to either wait in Mexico in a state of homelessness, with little access to counsel or ability to be able to gather evidence; or to alternatively be detained in horrific conditions in remote detention facilities, all with little to no access to counsel.¹ The administration has increasingly denied observers access to Remain in Mexico hearings.² In particular, a member of our group was asked to leave a Remain in Mexico hearing where she was observing a case on the spurious claim that her note taking was distracting.³

In addition to cutting off access to the agency's more controversial classes of hearings, EOIR has also effectively ended the participation of Immigration Judges as speakers in legal conferences and at law schools, including as participants in moot court hearings.⁴ The judges' own union, the NAIJ, has served as the sole voice of its members, publicly speaking out against policies that undermine its independence and impartiality, and in advocating for independent Article I court status. In response, the Department of Justice has sought to silence the NAIJ

¹ On January 24, 2019, the Department of Homeland Security (DHS) announced the Migration Protection Protocols (MPP), a policy also known as "Remain in Mexico," which requires individuals seeking asylum at our southern border to remain in Mexico while their U.S. removal proceedings are pending.

² Adolfo Flores, Immigration "Tent Courts" Aren't Allowing Full Access To The Public, Attorneys Say, (1/13/2020), <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>.

³ The Round Table of Former Immigration Judges, Letter to Director McHenry and Chief Immigration Judge Santoro, (Dec. 10, 2019), https://immigrationcourtside.com/wp-content/uploads/2019/12/McHenry-letter_letterhead-1.pdf.

⁴ The Knight First Amendment Institute, Knight Institute Calls on DOJ's Executive Office for Immigration Review to Suspend Policy Silencing Immigration Judges, (Jan. 6, 2020), <https://knightcolumbia.org/content/knight-institute-calls-on-doj-executive-office-for-immigration-review-to-suspend-policy-silencing-immigration-judges>.

through a present effort to decertify on the same basis that was rejected previously this union that has been certified since 1979.⁵

The Attorneys General have also issued decisions stripping Immigration Judges of the judicial tools needed to properly execute their duties. Through precedent decisions by certification, then-Attorney General Jeff Sessions issued binding decisions stripping Immigration Judges of their long-standing ability to administratively close⁶ or terminate⁷ cases where appropriate or necessary, or even to continue hearings where due process requires.⁸

The above actions of Attorneys General, as well as the reshuffling of Immigration Judge dockets to assure that cases are heard based on the political priority of the day as opposed to due process concerns, has resulted in unprecedented, skyrocketing backlogs.⁹ The backlog has increased exponentially despite the dramatic increase in Immigration Judge appointments, most of which have favored individuals with enforcement backgrounds. Some have wondered if this is an attempt to implode the Immigration Court system, but whether it is intentional or not, this could be the ultimate effect.

EOIR's director is not a political appointee, yet he has acted as one by promulgating policies that undermine judicial independence. For example, he has created completion quotas that require Immigration Judges to choose between justice for those who appear before them and their own job security. The vast majority of other administrative judges - including Social Security Judges - are exempted from such quotas by statute, and the Immigration Judges were previously exempted by policy. Immigration Judges are told in their training that they are only DOJ attorneys and as employees of the Attorney General and the Department of Justice, they owe loyalty to the objectives of those they serve. Such quotas damage the public's confidence in the immigration court system by creating the perception of bias. Even in the law enforcement context, quotas are seen as harmful. For example, most states outlaw such quotas for traffic tickets issued by

⁵ Eric Katz, The Justice Department says immigration law judges operate as managers, an argument the Federal Labor Relations Authority rejected in 2000, (Aug. 12, 2019), <https://www.govexec.com/management/2019/08/trump-administration-looks-decertify-vocal-federal-employee-union/159112/>.

⁶ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)

⁷ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)

⁸ *Matter of L-A-B-R- et. Al.*, 27 I&N Dec. 405 (A.G. 2018)

⁹ According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University the December 2019, backlog was 1,089,696. See, https://trac.syr.edu/phptools/immigration/court_backlog/

police officers. Pressuring Immigration Judges to adhere to the views of the enforcement officer and agency that employ them contradicts the Supreme Court’s 1954 ruling to the contrary, in which it held that the BIA must decide cases according to its judges’ “own understanding and conscience,” and not those of the Attorney General.¹⁰

EOIR has taken additional actions to undermine the appearance of neutrality so necessary to a court system. The agency posted on its website a press release announcing a “return to the rule of law” based solely on an increase in the number of deportation orders issued by the courts.¹¹ More recently, the agency issued a “Myths vs. Facts” sheet¹² falsely claiming that noncitizens as a rule don’t appear for their court hearings (whereas statistics compiled by TRAC indicate an appearance rate over 90%¹³; that asylum seekers’ claims lack merit, and that attorneys don’t really impact court outcomes. The members of this honorable committee are asked to try to imagine any other court issuing such a statement concerning those that appear before its judges, and to further imagine what the public response would be. Our Round Table was one of several groups that issued a statement strongly criticizing such action.¹⁴

Our group includes a significant number of former Immigration Judges who retired or otherwise left the bench sooner than intended due to the unconscionable policies of the present administration. Two amongst us took the highly unusual step of resigning after only two years on the bench. One of our members made a point of retiring after 28 years on the bench on the day before the oppressive completion quota system went into effect as a statement that he refused to work under such conditions.¹⁵

¹⁰ *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

¹¹ <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>

¹² <https://www.justice.gov/eoir/page/file/1161001/download>

¹³ See, <https://trac.syr.edu/immigration/reports/562/>.

¹⁴ Round Table of Former Immigration Judges, EOIR “Myth vs. Fact” Memo, (May 13, 2019), <https://www.aila.org/infonet/retired-ijs-and-former-members-of-the-bia-object>; See also AILA Policy Brief: Facts About the State of Our Nation’s Immigration Courts, (May 14, 2019), <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-facts-about-the-state-of-our>.

¹⁵ “Immigration Judges say they’re leaving jobs because of Trump policies,” *The Hill*, Feb. 13, 2019, <https://thehill.com/latino/429940-immigration-judges-say-theyre-leaving-jobs-because-of-trump-policies>

We acknowledge our former colleagues still on the bench who continue to afford due process and fairness in their decisions. Their increasing difficulty in doing so was illustrated by the highly-publicized case in which an Immigration Judge in Philadelphia, upon receiving a case remanded by the Attorney General, continued the hearing of a minor who did not appear for purposes of ensuring that the youth received proper notice of the hearing, as required by law. EOIR management immediately removed the case from the judge's docket, along with more than 80 other similar cases. The judge was most improperly chastised by his supervisor. Instead of assigning the case to another judge in the Philadelphia court, EOIR management sent one of its own to Philadelphia for the sole purpose of issuing an *in absentia* removal order against the youth.¹⁶ What message did these actions send to the Immigration Judge corps (in particular, to those recently hired who may be removed without cause within two years of their appointments) about exercising independent judgment? We affirm that such action would have been unthinkable under any prior administration during the four decades in which we served.

Immigration Judges also depend on a fair review of their decision on administrative appeal to the BIA. We are sad to report that the Appellate Immigration Judges on the BIA have abdicated the independent understanding and conscience recognized 66 years ago by the Supreme Court. Last month, a judge sitting on the U.S. Court of Appeals for the Third Circuit stated in a concurring opinion of the court: "it is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring Quinteros' removal rather than as the neutral and fair tribunal it is expected to be. That criticism is harsh and I do not make it lightly."¹⁷ And on January 23, 2020, a three Judge panel of the U.S. Court of Appeals for the Seventh Circuit suggested holding the BIA's judges in contempt of court, "with all the consequences that possibility entails."¹⁸ What provoked such reaction was the BIA's decision to completely ignore a binding order of an Article III court because then-Attorney General Jeff Sessions in a footnote to a certified decision had expressed his disagreement with such decision. The Seventh Circuit stated that the Board's action "beggar's belief," adding that it has "never before encountered defiance of a remand order, and we hope never to see it again." But as long as the Attorney General holds the power to

¹⁶ National Association of Immigration Judges, Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ, (Aug. 8, 2018), <https://www.aila.org/infonet/naij-grievance-redress-removal>.

¹⁷ *Quinteros v. Att'y Gen.*, No. 18-3750 (3d Cir. Dec. 17, 2019).

¹⁸ *Baez-Sanchez v. Barr*, No. 19-1642 (7th Cir. Jan. 23, 2020).

remove them and the Circuit Courts don't, the BIA will err on the side of job security.

With the BIA acting as the Attorney General's enforcer, Immigration Judges are increasingly concerned with whether U.S. Immigration Customs Enforcement (ICE) might appeal a grant of relief. One of the requirements specified in the immigration judges' performance quotas requires that not more than 15 percent of the immigration judges' decisions can be remanded or reversed on appeal by the BIA.

It is the role of Congress to write the immigration laws and that of the Attorney General to uphold them. This administration has sought to rewrite those laws in defiance of directives of the Supreme Court and the Courts of Appeal which demonstrates that it is time for Congress to remove the responsibility for creating a fair immigration court from the Attorney General. The administration has stymied the efforts of immigration judges to faithfully execute their sworn obligations to accord due process to everyone who appears before them and to decide every case on its own merits after a full and fair consideration of the evidence. Instead, EOIR has imposed unrealistic productivity mandates that place speed above all considerations of fairness.

For all of the above reasons, we hope that Congress will take steps towards removing the immigration courts and BIA from the Department of Justice and establishing an independent Article I Immigration Court. In the meantime, we hope that Congress will use the powers at its disposal to limit undue influence on the Immigration Judges; to protect the NAIJ union from decertification; and to call the BIA to account for its recent outrageous behavior.

We appreciate the opportunity to provide this statement for the record and look forward to engaging as Congress considers reforming the immigration court system.

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Sincerely,

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens (N.Y.) Wackenhut Immigration Courts, 1997-2013

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark, and Elizabeth, NJ, 1994-2005

Hon. Teofilo Chapa, Immigration Judge, Miami, 1995-2018

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007

Hon. George T. Chew, Immigration Judge, New York, 1995-2017

Hon. Joan Churchill, Immigration Judge, Arlington, VA 1980-2005

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia M. Espenosa, Appellate Immigration Judge, BIA, 2000-2003

Hon. Noel Ferris, Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019

Hon. Jennie L. Giambastiani, Immigration Judge, Chicago, 2002-2019

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018

Hon. Charles Honeyman, Immigration Judge, Philadelphia and New York, 1995-2020

Hon. Rebecca Jamil, Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002

Hon. Carol King, Immigration Judge, San Francisco, 1995-2017

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995-2018

Hon. Donn L. Livingston, Immigration Judge, Denver and New York, 1995-2018

Hon. Margaret McManus, Immigration Judge, New York, 1991-2018

Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017

Hon. Laura Ramirez, Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy, Immigration Judge, Newark, NJ 2008-2010

Hon. Paul W. Schmidt, Chair and Appellate Immigration Judge, Board of Immigration Appeals, and Immigration Judge, Arlington, VA 1995-2016

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019

Hon. Denise Slavin, Immigration Judge, Miami, Krome, and Baltimore, 1995-2019

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017

Hon. Gustavo D. Villageliu, Appellate Immigration Judge, BIA, 1995-2003

Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017

Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge,
New York 1989-2016