

**Statement of Jeremy McKinney
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**Before the House Judiciary Committee’s Subcommittee on Immigration and Citizenship
“Courts in Crisis: The State of Judicial Independence and Due Process in U.S.
Immigration Courts”**

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Introduction

Chairwoman Lofgren, Ranking Member Buck, and members of the subcommittee, thank you for inviting me to speak with you today about the urgent need to protect and reform our immigration courts, a system that has long suffered from profound structural problems and where core principles of judicial independence and due process have badly eroded.

My name is Jeremy McKinney, and I serve as the elected Second Vice President of the nonpartisan American Immigration Lawyers Association. Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors who practice, research, and teach in the field of immigration law. As part of its mission, AILA strives to advance this body of law and facilitate fairness and justice in the field.

I am also the founder of McKinney Immigration Law firm, with offices in Greensboro and Wilmington, North Carolina, and practice frequently in immigration courts and the Board of Immigration Appeals. Indeed, I and thousands of other AILA members routinely represent clients before these Department of Justice entities, known collectively as the Executive Office for Immigration Review (EOIR). EOIR reports to the Attorney General, who simultaneously supervises the Department of Justice (DOJ) lawyers who prosecute immigration cases in Article III federal courts.

Today’s hearing is an essential forum for exploring – and beginning to remedy – serious, systemic problems of due process that are widespread in current immigration court proceedings. A necessary component of ensuring fair adjudications in cases that determine life or death for some immigrants, permanent family unity or separation for others, is to tackle the glaringly inadequate independence from political interference of our nearly 500 immigration trial and appellate judges.

To ensure fundamental fairness and an efficient, functioning court system, judges must be allowed to act as neutral arbiters of fact and law, regardless of who is in power. Instead, this administration and other administrations before it has exploited the structural infirmity that classifies immigration judges as DOJ employees in order to further political agendas. Regardless of one’s substantive views on the law these immigration judges are sworn to apply – or one’s preferred outcomes – we should all agree that independent, Article I immigration courts, removed from political pressure, are critically needed to secure due process in immigration proceedings.

Beyond offending the constitutional guarantee of due process – a right afforded to all persons in this country – the Administration’s myriad attempts to fast-track deportations are not working. The case backlog has more than *doubled*. It often takes the Board of Immigration Appeals a year to resolve even simple joint or unopposed motions. Doing the right thing here is not only the constitutionally required path, but it is also sound public policy. When we curtail a person’s right to a full and fair hearing, we increase, not decrease, litigation and wait times. More contested hearings in immigration court mean more appeals to the Board of Immigration Appeals and more petitions for review to our federal Circuit Courts.

Ultimately, our legal system is always more efficient if we get it right the first time. Attorneys and clients alike would be more likely to trust the decisions of an independent judiciary. Legal interpretations would be more stable and less subject to political whims, leading to many fewer appeals.

I. EOIR’s Inherently Flawed Structure and Poor Results

Separation of powers is understood in bipartisan fashion to be a cornerstone of our republic, underpinned by the distinct roles of three federal-government branches. Many lawyers outside the immigration field therefore echo members of the public in expressing shock when I explain that in immigration cases judges are *not* insulated from executive branch interference. Rather, those judges are exposed to constant meddling by the very federal officials whose administration is also one side of purportedly adversarial proceedings occurring before them.

The Trump administration has taken a series of actions that are particularly hostile to independent adjudication, ranging from substantive alteration of judicial decisions to procedural requirements designed to force immigration judges into rulings that unreasonably accelerate cases to the detriment of due process and the rule of law. AILA agrees with Immigration Judge Ashley Tabbador, President of the National Association of Immigration Judges (NAIJ), who recently described EOIR as a “‘major structural design defect’ whose conflicts of interest, vulnerabilities and weaknesses have been particularly exploited” by this administration.¹

Judge Tabbador has warned that, absent reform, immigration judges will become “prosecutors in a judge’s robe.”² Notably, fiscal year 2019 saw double the number of immigration judge departures from the bench compared with the prior two years, as a significant number of judges have resigned on principle.³ Like AILA, the NAIJ, the American Bar Association, and the

¹ Joe Davidson, Trump has attacked federal unions. Now, for the first time, he’s trying to bust one, WASHINGTON POST (Jan. 18, 2020), https://www.washingtonpost.com/politics/trump-has-attacked-federal-unions-now-for-the-first-time-hes-trying-to-bust-one/2020/01/17/3426d8ea-3971-11ea-a01d-b7cc8ec1a85d_story.html.

² Patt Morrison, How the Trump administration is turning judges into “prosecutors in a judge’s robe”, LOS ANGELES TIMES (Aug. 29, 2018), <http://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-judgeashley-tabaddor-20180829-htmstory.html>.

³ Priscilla Alvarez, Immigration judges quit in response to administration policies, CNN (Dec. 27, 2019), <https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html>

Federal Bar Association also support converting immigration courts and the Board of Immigration Appeals to Article I courts.⁴

Immigration judges are considered government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them at the whim of the Attorney General. They have no fixed term of office and can be fired by the Attorney General or relocated to another court.⁵ The immigration courts have been repeatedly subject to “aimless docket reshuffling” based on politically motivated priorities.⁶ President Obama’s administration prioritized the adjudication of “family unit” cases, which EOIR determined “coincided with some of the lowest levels of case completion productivity in EOIR’s history.”⁷ President Trump ordered IJs deployed to detention facilities on the border where they reported very few cases to adjudicate. More than 20,000 cases away from the border were rescheduled as a result of this “surge.”⁸

In addition to EOIR’s fundamentally flawed structure, a history of chronic and systemic problems has caused a severe lack of public confidence in its capacity to deliver just and fair decisions in a timely manner. Stakeholders have long expressed concerns about issues such as inadequate staffing and training, lack of transparency in hiring and discipline, a shortage of technological resources, perceived bias, and, perhaps most frequently, the ever-growing backlog of cases.⁹ 542,411 cases were pending at the end of January 2017 when President Trump took office. Again, the pending case backlog has more than doubled and, as of December 31, 2019, reached 1,089,696 cases.¹⁰

In certain jurisdictions, immigration-court practices and adjudications have fallen far below acceptable norms. As recently as 2016, the Government Accountability Office (GAO) confirmed this disparity, noting that, “[f]or fiscal years 1995 through 2014, EOIR data indicate that

⁴ Lauren Frias, Prominent legal organizations call on Congress to establish an independent immigration court system, BUSINESS INSIDER (July 12, 2019), <https://www.businessinsider.com/legal-organizations-call-on-congress-for-independent-immigration-court-2019-7>

⁵ ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report_authcheckdam.pdf

⁶ Retired Immigration Judge Paul Schmidt, Speech to the ABA Commission, Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in Our Captive Dysfunction U.S. Immigration Courts! (May 4, 2018), <https://www.aila.org/infonet/former-chairman-of-the-bia-paul-w-schmidts-speech>; NAIJ, Letter to House CJS Appropriations Subcommittee (Mar. 12, 2019), https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf.

⁷ Eric Katz, Government Executive, 'Conveyer Belt' Justice: An Inside Look at Immigration Courts (Jan. 22, 2019), <https://www.govexec.com/feature/inside-conveyor-belt-behind-curtain-doj-immigration-courts/>; EOIR, Tracking and Expedition of “Family Unit” Cases (Nov. 11, 2018).

⁸ National Immigrant Justice Center, Internal DOJ Documents Reveal Immigration Courts’ Scramble to Accommodate Trump Administration’s “Surge Courts” (Sept. 27, 2017), <https://www.immigrantjustice.org/staff/blog/internal-doj-documents-reveal-immigration-courts-scramble-accommodate-trump>.

⁹ AILA Policy Brief, Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts, (Oct. 13, 2017), AILA InfoNet Doc. No. 17101234, <https://www.aila.org/infonet/aila-policy-briefimposing-numeric-quotas-judges>

¹⁰ TRAC Immigration, Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location (2020), https://trac.syr.edu/phptools/immigration/court_backlog/

affirmative and defensive asylum grant rates varied over time and across immigration courts, applicants' country of nationality, and individual immigration judges within courts."¹¹ Attorneys who practice in these jurisdictions report that it is as though they are practicing in an entirely different legal system, one that does not recognize the binding nature of jurisprudence regarding asylum law. In fiscal year 2019, 69 percent of asylum seekers were denied asylum or other relief.¹² However, asylum grant rates for some immigration courts are so low that it is virtually impossible to obtain protection. For example, TRAC reported that 12 immigration courts accumulated asylum denial rates above 90 percent including Atlanta which denied over 97 percent of more than 2,000 asylum applications.¹³

The highly disparate asylum grant rates among judges gives rise to criticism that outcomes turn on which judge is deciding the case rather than established principles and rules of law. My local immigration court in Charlotte is within the jurisdiction of the 4th Circuit Court of Appeals, along with immigration courts in Arlington and Baltimore. All three immigration courts share identical case law, so one would assume their asylum denial rates would also be similar. Yet Arlington and Baltimore's asylum denial rates are a little over 50 percent, a rate in line with each other and the national average. Charlotte's is over 90 percent.¹⁴ A client of mine in Greensboro could move 40 minutes north into Virginia and more than double their chance of being granted asylum. Instead of working to ensure that judges across the country have the resources, training, and independence to apply the law with greater uniformity and fairness, EOIR recently eliminated the only in-person annual training for immigration judges.¹⁵

Hiring and promotion of judges and appellate judges have been politicized. In April 2018, several Members of Congress wrote a letter to Attorney General Sessions expressing concerns over allegations that the DOJ may be violating federal law by blocking the hiring of much-needed immigration judges based on ideological and political considerations.¹⁶ EOIR also promoted to the Board of Immigration Appeals several immigration judges on the extreme end of asylum denials: "[E]ach of these newest six [Board Members] had an asylum denial rate over 80 percent, with Couch, Cassidy, and Wilson at 92, 96, and 98 percent, respectively. Nationally, the denial rate for asylum cases is around 57 percent."¹⁷ Two of these appointees were among the

¹¹ GAO Report, 17-72, Asylum, Variation Exists in Outcomes of Applications Across Immigration Courts and Judges, (November 2016), <https://www.gao.gov/assets/690/680976.pdf>.

¹² TRAC Immigration, Asylum Decisions Vary Widely Across Judges and Courts – Latest Results, (Jan. 13, 2020), <https://trac.syr.edu/immigration/reports/590/>.

¹³ *Id.*

¹⁴ TRAC Immigration, Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more, <https://trac.syr.edu/phptools/immigration/asylum/>.

¹⁵ National Association of Immigration Judges, "The Immigration Court --In Crisis and in Need of Reform (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf; Letter from EOIR Director McHenry to "All of EOIR", FY 19 Budget, (Mar. 6, 2019), *available at* <https://www.muckrock.com/foi/united-states-of-america-10/mchenry-3619-email-and-responses-70281/#file-817454>.

¹⁶ House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process (Apr. 17, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>

¹⁷ Tanvi Misra, DOJ changed hiring to promote restrictive immigration judges, ROLL CALL (Oct. 29, 2019), <https://www.rollcall.com/news/congress/doj-changed-hiring-promote-restrictive-immigration-judges/>

most-reversed immigration judges in the country, with “the third and fourth highest number of board-remanded cases.”¹⁸ Politicization of appointments and adjudications are a deep stain on EOIR’s credibility, one that can be removed only by restructuring the immigration courts as Article I bodies.

Short-term fixes are not workable. The U.S. immigration court system must be made independent to ensure fairness in court. A new Article I immigration court should be created that includes trial and appellate-level courts with further review to the U.S. Courts of Appeals, as is presently available. This structural overhaul would advance the immigration courts’ status as neutral arbiters, ensuring the independent functioning of the immigration judiciary. We look forward to working with Congress to make these necessary changes a reality.

II. The Administration’s Policies Have Damaged Immigration-Court Independence and Denied Due Process

Despite these well-documented flaws in the current immigration court system, DOJ and EOIR have failed to propose any viable plan to address them. Instead of working to improve the system, the administration has implemented a series of policies that further undermine the independence of immigration judges and due process, for the sole purpose of accelerating deportations.

a. Case Quotas

Despite opposition from immigration judges,¹⁹ EOIR imposed unprecedented case-completion quotas in 2018, tying judges’ individual performance reviews to the number of cases they complete.²⁰ Under these new requirements, known as the Enforcement Metrics Policy, IJs must complete 700 removal cases per year or risk losing their jobs. A strict timeframe for completion of cases interferes with a judge’s ability to ensure that a person’s right to examine and present evidence is respected, as well as to provide adequate time to obtain an attorney, secure various expert witnesses, and obtain evidence from overseas. This kind of rushed, assembly-line justice is unacceptable to impose on IJs who are making important, often life-or-death, decisions.²¹

¹⁸ *Id.*

¹⁹ National Association of Immigration Judges, Misunderstandings about Immigration Judge “Quotas” in Testimony Before House Appropriations Committee (May 2, 2018), <https://www.aila.org/infonet/naij-letter-ag-sessions-misunderstandings-ij-quota>.

²⁰ EOIR, Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>; see also National Association of Immigration Judges, Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts, (Jan. 31, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf; EOIR’s Strategic Caseload Reduction Plan (Oct. 23, 2017), <https://www.aila.org/EOIRplan>.

²¹ INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence. See AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts (Oct. 12, 2017), <https://www.aila.org/ijquotas#PDF>.

During a March 7, 2019 congressional hearing, the director of EOIR asserted that several other agencies also have “case completion goals.”²² However, other agencies’ goals are used to determine resource allocation, while EOIR’s case-completion quotas are tied directly to an IJ’s performance evaluations.²³ AILA and other legal organizations and scholars oppose the quotas, which have been described by the NAIJ as a “death knell for judicial independence.”²⁴ In fact, recommendations made by an independent third party, in a report commissioned by EOIR itself, propose a judicial performance-review model that “emphasizes process over outcomes and places high priority on judicial integrity and independence.”²⁵

Immigration judges already have among the highest caseloads of any comparable federal adjudicator. Imposing numeric deadlines on judges will not improve their performance. Instead, quotas compromise the quality of their decisions and cause grave errors.

b. Attorney General Certifications

Under the Immigration and Nationality Act, the Attorney General has authority to re-open and adjudicate cases previously decided by the Board of Immigration Appeals.²⁶ Known as “certification,” this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. Under the previous administration, Attorneys General Eric Holder and Loretta Lynch employed this power only four times over the course of eight years.²⁷ By contrast, the Trump administration has already certified twelve cases.

Overall, the decisions that emerge from this administration self-dealing are consistently aimed at minimizing the role of immigration judges by restricting their authority to manage dockets or make decisions based on the facts of each case. In the words of Judge Tabaddor, “[w]hen you provide a prosecutor with a super veto power, that’s a design flaw.”²⁸

²² House Committee on Appropriations, Commerce, Justice, Science, and Related Agencies (116th Congress), Executive Office for Immigration Review (Mar. 7, 2019), <https://appropriations.house.gov/legislation/hearings/executive-office-for-immigration-review>.

²³ In fact, Congress “specifically exempted ALJs from individual performance evaluations as a mechanism to ensure their independence from such measures and protect the integrity of their decisions.” See National Association of Immigration Judges, Letter to House CJS Appropriations Subcommittee (Mar. 12, 2019), https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf.

²⁴ AILA and the American Immigration Council, DOJ Strips Immigration Courts of Independence (Apr. 3, 2018), <https://www.aila.org/advo-media/press-releases/2018/doj-strips-immigration-courts-of-independence>; *see also* National Association of Immigration Judges, Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges (Oct. 2017), https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

²⁵ AILA and the American Immigration Council FOIA Response, Booz Allen Hamilton Report on Immigration Courts, (Apr. 6, 2017), <https://www.aila.org/casestudy>.

²⁶ 8 U.S.C. § 1103(g)(2) (“The Attorney General shall establish such regulations . . . [and] review such administrative determinations in immigration proceedings . . .”).

²⁷ Sophie Murguia and Kanyakrit Vongkiatkajorn, Jeff Sessions Is Executing Trump’s Immigration Plans With a Quiet, Efficient Brutality, MOTHER JONES (Sept. 7, 2018), <https://www.motherjones.com/politics/2018/09/jeff-sessions-is-executing-trumps-immigration-plans-with-a-quiet-efficient-brutality/>.

²⁸ Immigration Judge Ashley Tabaddor, President of the National Association of Immigration Judges on C-SPAN, <https://www.c-span.org/organization/?130013/National-Association-Immigration-Judges>.

A few examples illustrate this ideological approach designed to expedite cases without regard for resulting obstacles to due process and immigration judge autonomy:

- **Bloating the Docket by Limiting Use of Administrative Closure.** In *Matter of Castro-Tum*, the Attorney General severely limited the discretion of judges and the BIA to administratively close cases, eliminating an important docketing tool.²⁹ An April 2017 report independently commissioned by EOIR had identified administrative closure as a helpful tool, specifically recommending that EOIR work with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.³⁰ The U.S. Court of Appeals for the Fourth Circuit has overturned *Matter of Castro-Tum*, concluding that immigration law unambiguously permits immigration judges to control their own dockets.³¹
- **Limiting Continuances and the Opportunity to Obtain Counsel.** In *Matter of L-A-B-R*, the Attorney General made it more difficult for judges to grant continuance requests and implemented procedural hurdles that make it harder for people to request and immigration judges to grant continuances.³²
- **Restricting Discretion to Terminate Cases.** In *Matter of S-O-G- & F-D-B-*, the Attorney General prevented immigration judges and the BIA from terminating or dismissing cases except in very narrow circumstances, eliminating a tool judges have traditionally used to increase efficiency by prioritizing which cases should move forward on their dockets.³³
- **Foreclosing Asylum for Victims of Domestic Violence, Gangs, and Family-Based Persecution.** In *Matter of A-B-* and *Matter of L-E-A-*, the Attorney General attempted to make it far more difficult for survivors of domestic violence, gang persecution, and family-based persecution to apply for and qualify for asylum.³⁴

²⁹ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1064086/download>.

³⁰ [Booz Allen Hamilton Report, supra note 22](#).

³¹ *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019).

³² *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1087781/download>.

EOIR also issued guidance for judges discouraging the use of continuances and encouraging judges to sanction counsel that request continuances. Memorandum by MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download>. The Attorney General also issued guidance directing judges to expedite. Memorandum from Jeff Sessions, Attorney General, Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017), <https://www.justice.gov/eoir/file/1041196/download>.

³³ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1095046/download>.

³⁴ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>; *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), <https://www.justice.gov/file/1187856/download>. For a discussion of subsequent federal-court litigation, see Victoria Neilson, New Government Guidance on *Matter of A-B-Incorporates Grace v. Whitaker* (Jan. 28, 2019), <https://cliniclegal.org/resources/asylum-and-refugee-law/new-government-guidance-matter-b-incorporates-grace-v-whitaker>

- **Denying Hearings to Asylum Seekers.** In *Matter of E-F-H-L-*, the Attorney General appeared to open the door for judges to deny asylum without first conducting a full evidentiary hearing, depriving asylum seekers of an opportunity to fully present their case.³⁵
- **Limiting Bond for Asylum Seekers.** In *Matter of M-S-*, the Attorney General held that someone who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond.³⁶ The decision means that asylum seekers and their families will remain in detention for longer period of time.

Three of these decisions (*Matter of Castro-Tum*, *Matter of L-A-B-R-*, *Matter of S-O-G- & F-D-B*) are aimed at forcing judges to proceed in cases where an immigrant is eligible for some kind of relief. These are cases that could be resolved by other agencies with a grant of legal status. To compel immigration judges to move forward in such cases is a bafflingly inefficient and wasteful use of resources, particularly considering the more than one million cases that are backlogged. Combined with an unusual frequency of published BIA decisions along the same lines, DOJ is giving license to ICE to deport individuals who have approvable applications for relief that are pending solely due to DHS delay: processing backlogs beyond the immigrant’s control.³⁷

c. Docketing Interference

In August 2018, EOIR removed an immigration judge from a case due to the judge’s decision to delay in the interest of due process.³⁸ Judge Steven A. Morley had decided to continue the high-profile case, *Matter of Castro-Tum*, to ensure adequate time for proper notice.³⁹ EOIR personally interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing.⁴⁰ Subsequently, EOIR transferred dozens of other cases from the judge’s docket, allocating them to an immigration judge perceived as more likely to deny relief.⁴¹ NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases.⁴²

d. Politicization of Immigration Judges

³⁵ *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1040936/download>.

³⁶ *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), available at <https://www.justice.gov/eoir/file/1154747/download>.

³⁷ See, e.g., *Matter of Mayen-Vinalay*, 27 I&N Dec. 755 (2020), <https://www.justice.gov/eoir/page/file/1236941/download>.

³⁸ National Association of Immigration Judges, Judges’ Union Files Grievance Over DOJ’s Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts (Aug. 8, 2018), <https://www.aila.org/infonet/judges-union-grievance-violation-due-process-right>

³⁹ *Id.*

⁴⁰ 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>.

⁴¹ *Id.*

⁴² *Id.*

DOJ in this administration has been alleged to engage in politicized immigration-judge hiring based on candidates' perceived political or ideological views.⁴³ On April 11, 2017, then-Attorney General Sessions announced that he "implemented a new, streamlined hiring plan" to reduce the time it takes to hire immigration judges.⁴⁴ Reports indicate that DOJ "surreptitiously has made substantive changes to the qualification requirements for judges, over-emphasizing litigation experience to the exclusion of other relevant immigration law experience" and providing political appointees with greater influence in the final selection of IJs.⁴⁵ NAIJ has opposed this policy, arguing that it will lead to even more skewed appointments favoring former ICE trial attorneys.⁴⁶

e. EOIR Policies Undermining Due Process

EOIR has also issued policies that erode due process. These policies have a singular focus on speed and efficiency, and strike at the heart of a person's right to a full and fair hearing. Those policies include:

- **No Dark Court Room Policies and Rapid Expansion of Video Teleconferencing.** EOIR implemented a "no dark court room" policy, which directs immigration judges to reschedule and advance hearings to any period in which there is no case scheduled in their court room.⁴⁷ In addition to reducing the amount of time for judges to prepare and review cases, this policy led some judges to advance hearings with little notice to counsel, sometimes as little as 48 hours before a hearing.⁴⁸ In addition, despite widespread concerns around using Video Teleconferencing (VTC) for immigration hearings, EOIR has piloted use of VTC immigration adjudication centers (IACs), where

⁴³ In April 2017, House Democrats submitted a letter to the Attorney General expressing concern about reports that the DOJ "may be using ideological and political considerations to improperly - and illegally - block the hiring of immigration judges." House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process (Apr. 17, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>. A month later, top Senate and House Democrats submitted a letter to the Inspector General requesting an investigation into allegations that DOJ has targeted candidates and withdrawn or delayed offers for immigration judge and BIA positions based on their perceived political or ideological views. Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ (May, 8, 2018), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig>.

⁴⁴ Department of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

⁴⁵ Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, Strengthening and Reforming America's Immigration Court System, 115th Cong. 5 (2018) (A. Ashley Tabaddor, President, National Association of Immigration Judges), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>; Department of Justice, [EOIR Announces Largest Ever Immigration Judge Investiture](#) (Sept. 28, 2018), Document Obtained via FOIA by Human Rights First, [Memorandum for the Attorney General, Immigration Judge Hiring Process](#), Apr. 4, 2017.

⁴⁶ *Id.*;

⁴⁷ Hoppock Law Firm, "No Dark Courtrooms" is the Secret EOIR Policy That Might Ruin Your Summer, (June 1, 2018), <https://www.hoppocklawfirm.com/no-dark-courtrooms-is-the-secret-eoir-policy-that-may-ruin-your-summer/>.

⁴⁸ American Immigration Lawyers Association, EOIR Open Forum Notes (June 16, 2018), on file with author.

IJs will adjudicate cases from around the country.⁴⁹ Yet an EOIR- commissioned report recommended that EOIR limit the use of VTC to procedural matters *only* due to concerns about how difficult it is for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC.⁵⁰

- **Discouraging Continuances.** In July 2017, EOIR issued a memorandum that discourages the use of continuances by judges and even encourages judges to consider sanctions for attorneys who request too many continuances.⁵¹ Continuances are often a necessary means to ensure due process in removal proceedings. For example, the number-one reason immigrants request continuances is to find counsel, who play a critical role in ensuring a fair hearing.⁵²
- **Restricting Change of Venue.** In January 2018, EOIR issued a memorandum that limited the authority of judges to grant change of venue motions, stating that changes of venue “create problems in caseload management and operational inefficiencies.”⁵³
- **Expediting Adjudications at the Cost of Due Process.** In December 2017, the Attorney General issued a memorandum encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.⁵⁴
- **Establishing Arbitrary Deadlines for Court Proceedings.** In January 2018, EOIR issued new case priorities and immigration-court performance metrics.⁵⁵ These metrics established various deadlines for the immigration court to complete tasks, including completion of cases, adjudication of motions, and completion of credible fear interviews.⁵⁶ The metrics work hand-in-hand with the case-completion quotas discussed above to speed cases towards a resolution regardless of fairness.
- **Devaluing the Legal Orientation Program (LOP).** EOIR has operated LOP in immigration detention centers since 2003; LOP now operates in 38 facilities and provides

⁴⁹ DOJ Backgrounder, EOIR Strategic Caseload Reduction Plan (Dec. 5, 2017), <https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction>.

⁵⁰ Booz Allen Hamilton Report, *supra* note 22.

⁵¹ OPM 17-01: Continuances, *supra* note 30. (“[I]t may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. §1003.102.”).

⁵² Government Accountability Office, Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017), <https://www.aila.org/infonet/gao-report-actions-needed-to-reduce-case-backlog>.

⁵³ MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review Operating Policies and Procedures Memorandum 18-01: Change of Venue (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026726/download>.

⁵⁴ Sessions Memo *supra* note 30.

⁵⁵ Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

⁵⁶ *Id.*

legal information to 50,000 people each year.⁵⁷ While not a substitute for legal counsel, LOP is often the only source of basic legal information that assists detained immigrants in navigating a complex court process. The American Immigration Council has reported that immigrants in detention are the least likely to obtain representation, with only 14 percent of detained immigrants acquiring legal counsel.⁵⁸

LOP has been proven to increase court efficiency and save taxpayer dollars. A 2012 study commissioned by DOJ demonstrated that the program decreased the average length of time a person is detained by six days, saving approximately \$17.8 million each year. EOIR's own website publicly endorsed the LOP program in 2017, stating that "[e]xperience has shown that the LOP has had positive effects on the immigration court process," and an independent report commissioned by EOIR recommended that DOJ "consider expanding know your rights and legal representation programs, such as ... LOP."⁵⁹

Despite this overwhelming support, DOJ attempted to end the program in April 2018 and removed content on its website that endorsed the program. After significant criticism, it rescinded its proposed termination, but continues to undermine the program by releasing flawed evaluations of its efficacy. Deportation is a severe consequence, yet the government does not guarantee legal representation to immigrants facing removal. Vulnerable individuals, including children, asylum seekers and those who speak little or no English, typically face immigration proceedings without any legal representation, so LOP is vital to protecting their rights and ensuring accurate adjudications.

- **Concentrating Power with Non-Judicial EOIR Officials.** A rule issued in August 2019 reorganized EOIR to delegate authority from the Attorney General to the EOIR director to adjudicate cases "that cannot be completed in a timely fashion."⁶⁰ As a senior bureaucrat and not an immigration judge, the director should not have that power. An October 2019 memo goes even further and pressures BIA members to speed up adjudications without care for due process.⁶¹

Taken together, these EOIR/DOJ policies have had the undeniable effect of eroding the most important guarantee of our legal system: the right to a full and fair hearing by an impartial judge. The changes harm families, children, people who qualify for relief under our immigration laws, and individuals who have suffered some of the most violent atrocities in their countries of origin and have the right to humanitarian protection. These policies have the greatest impact on

⁵⁷ Vera Institute of Justice, Statement on DOJ Analysis of Legal Orientation Program (Sept. 5, 2018), <https://www.vera.org/newsroom/statement-on-doj-analysis-of-legal-orientation-program>.

⁵⁸ Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

⁵⁹ American Immigration Lawyers Association, Policy Brief: Facts About the State of Our Nation's Immigration Courts (May 14, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/80205>.

⁶⁰ EOIR Interim Rule, Organization of the Executive Office for Immigration Review (Aug. 26, 2019), <https://www.federalregister.gov/documents/2019/08/26/2019-18196/organization-of-the-executive-office-for-immigration-review>

⁶¹ James R. McHenry III, Case Processing at the Board of Immigration Appeals (Oct. 1, 2019), <https://www.justice.gov/eoir/page/file/1206316/download>.

indigent respondents and those who have fled from dangerous and violent circumstances and should have a meaningful opportunity to seek protection under U.S. law.

III. Tent Courts at the Border Are an Affront to Justice and Transparency

In September 2019, DHS opened massive temporary tent facilities in Laredo and Brownsville, Texas, that function as virtual immigration courtrooms for vulnerable asylum seekers subject to DHS's Migrant Protection Protocols (the Remain in Mexico policy).⁶² During the hearings, asylum seekers are held in tents at the ports of entry while judges appear remotely via VTC. Access to counsel and witnesses is an enormous challenge in these remote locations.⁶³

Unlike in other immigration courts, the government barred attorney observers, press, and the public from accessing these facilities, in violation of U.S. Department of Justice (DOJ) regulations requiring immigration hearings generally to be open to the public.⁶⁴ Access to the tent courts is critical to ensuring due process, and AILA, along with several other organizations⁶⁵ and numerous members of Congress,⁶⁶ repeatedly voiced concerns about the lack of transparency. Since they opened, AILA has sent three delegations to visit the tent facilities.

In response, and after months of public demand for access, the *Wall Street Journal* reported on December 29, 2019, that DHS directed component agencies to open the tent courts to the public.⁶⁷ The DHS acknowledgement that transparency is both necessary and required is a vital first step toward upholding due process in tent courts. On January 24, DHS and DOJ provided a tour of the Laredo facility to AILA and other organizations. This was an important step toward transparency which offered additional information about operations and procedures. However, thus far, DHS and DOJ have operationalized the facility in a way that still presents serious obstacles to transparency, access to counsel, and due process.⁶⁸

The due process concerns with tent courts are severe – from the volume of cases and a dearth of counsel to the lack of notice and dangerous conditions in Mexico. The tent courts separate America's immigration courts even further from justice. In the words of Judge Tabaddor, "it's

⁶² Haley Willis et al., Trump Is Having Tent Courthouses Built Along the Border. Here's What They Look Like N.Y. TIMES (Aug. 29, 2019), <https://www.nytimes.com/video/us/politics/10000006681200/border-immigration-tent-courthouses.html?src=vidm>.

⁶³ American Immigration Lawyers Association, AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel (June 3, 2019), <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

⁶⁴ 8 CFR § 1003.27.

⁶⁵ Organizations Urge Congress to Conduct Significant Oversight of Remain in Mexico and Use of Tent Courts by DHS and DOJ (Oct. 7, 2019), <https://www.aila.org/advo-media/aila-correspondence/2019/organizations-urge-congress-to-conduct-significant>.

⁶⁶ Members of Congress Call for Investigation of Tent Courts (Oct. 17, 2019), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/members-of-congress-call-for-investigation-of-tent>.

⁶⁷ DHS spokeswoman Heather Swift said that: "In an effort to ensure consistency, clarity, and transparency, the acting secretary directed [component agencies] to formalize guidance for public access to these facilities, consistent with immigration courts across the country." -Michelle Hackman, U.S. Opens Immigration 'Tent Courts' to Public WALL STREET JOURNAL (Dec. 29, 2019), <https://www.wsj.com/amp/articles/u-s-opens-immigration-tent-courts-to-public-11577620801>.

⁶⁸ American Immigration Lawyers Association, Policy Brief: Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent (Jan. 10, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful>.

more like what you might see, perhaps, in China or Russia, countries that we hear asylum cases from.”⁶⁹

IV. AILA’s Recommendations for Reform

For years we have seen the detrimental effects of a politicized immigration-court system. Administrations have repeatedly made policy decisions not because they are efficient or legally sound, but because they are politically expedient. The immigration courts have been pushed to their breaking point: band-aid fixes and short-term solutions are no longer enough to reverse course. To ensure an immigration court system that meets today’s needs, Congress must enact legislation that moves them outside of DOJ and into an independent, Article I court system. In the immediate term, Congress should closely monitor EOIR practices and request data regarding the processing of cases to ensure that every individual appearing before the immigration courts receives a fair hearing.

⁶⁹ Gus Bova, Immigration Judge Slams ‘Remain in Mexico’ Tent Courts (Sept. 24, 2019), <https://www.texasobserver.org/tent-courts-ashley-tabaddor-border-laredo-asylum-immigration/>.