



**STATEMENT OF JUDY PERRY MARTINEZ  
President  
American Bar Association**

**to the**

**SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**for the hearing on**

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

**January 29, 2020**

Chair Lofgren, Ranking Member Buck and members of the Subcommittee:

My name is Judy Perry Martinez and I am the President of the American Bar Association (ABA). The ABA appreciates this opportunity to share our views for this hearing on “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.”

The American Bar Association is the world’s largest voluntary professional organization of lawyers and legal professionals and our members include a broad cross-section of lawyers, judges, academics, and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. Through its Commission on Immigration, the ABA provides continuing education to the legal community, judges, and the public and develops and assists in the operation of pro bono legal representation programs.

The health of all our nation’s court systems is of paramount importance to the ABA. One of the distinctive hallmarks of our democracy is our insistence on an independent judiciary - the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, the proceedings before an immigration court may be a matter of life and death. Yet, the immigration court system lacks the basic structural and procedural safeguards that we take for granted in other areas of our justice system.

Our perspectives on the state of the immigration court system are informed in part by the first-hand experiences of ABA staff and volunteer lawyer members who provide legal services to individuals in immigration proceedings. The ABA has two long-standing pro bono projects that provide direct legal services. The South Texas Pro Bono Asylum Representation project (ProBAR), located in Harlingen, Texas, provides legal services to immigrants and asylum-seekers, adults and children, particularly in detention. It is the largest provider of legal services for unaccompanied immigrant children in the country. ProBAR recently began extending services providing limited legal assistance to asylum seekers living in Matamoros, Mexico while their U.S. immigration proceedings are pending, under the Remain in Mexico policy. The Immigration Justice Project (IJP), located in San Diego, provides legal orientation for 3,500 to 4,000 adult detainees every year as well as legal counsel for detained and non-detained adult migrants, including many who are mentally incompetent to represent themselves.

The ABA’s views are also informed by extensive studies and reports undertaken by our various sections, commissions, and committees. In 2010 the ABA Commission on Immigration published a comprehensive report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of*

*Removal Cases*.<sup>1</sup> In early 2019, the Commission released an update<sup>2</sup> to this report which examined developments over the period of 2010-2018. The update report found that the state of the immigration court system has worsened considerably since the initial 2010 report. At that time, we identified numerous issues hindering due process and the fair administration of justice in the immigration court system and most of these issues continue today.<sup>3</sup> Crucially, the number of cases pending before the immigration courts (about 262,000 cases at the time of the 2010 report) has increased to unprecedented levels, with a current backlog of more than 1,000,000 cases.<sup>4</sup>

While the backlog and increased wait times negatively affect the fairness and effectiveness of the immigration system, current policies and enforcement priorities that aim to accelerate case resolution are further imperiling due process and the viability of the immigration courts.<sup>5</sup> Moreover, judicial independence has been called into question with the adoption of policies that undermine immigration judges' ability to perform their role as neutral arbitrators of fact and law.<sup>6</sup> These concerns go to the very essence of an impartial court.

We highlight below some recent developments that have had a serious impact on the immigration courts' independence and ability to ensure due process. While there are incremental reforms that we would recommend be implemented within the current structure, we ultimately believe the only way to resolve the serious systemic issues within the immigration adjudication system is through the transfer of the immigration court functions from the Department of Justice to a newly-created independent Article I court.

### **Challenges to Judicial Independence**

One of the more pervasive ways in which judicial independence has been undermined is by ever-changing direction from the executive branch. Each administration has used the immigration courts as an extension of immigration enforcement mechanisms by adjusting priorities to align with the prevailing enforcement agenda. Executive orders and policies that reshuffle immigration

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<sup>1</sup> American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote 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.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf)

<sup>2</sup> American Bar Association Commission on Immigration, *2019 Update Report, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2019). [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_2.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf)

<sup>3</sup> *AP visits immigration courts across US, finds nonstop chaos*, KATE BRUMBACK, DEEPTI HAJELA and AMY TAXIN, Associated Press (Jan. 19, 2020) <https://apnews.com/7851364613cf0afb67cf7930949f7d3>; *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, Marissa Esthimer, Migration Policy Institute, (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>.

<sup>4</sup> TRAC Immigration, “*Cubans, Venezuelans, and Nicaraguans Increase in Immigration Court Backlog*,” (Jan. 21, 2020), <https://trac.syr.edu/immigration/reports/591/>.

<sup>5</sup> 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](https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf).

<sup>6</sup> *Id.*

judges' dockets without input or reference to the status of any other pending matters are disruptive and counterproductive to the independence of the courts and the administration of justice. This approach undermines judges' ability to independently manage their courtrooms and to administer their dockets in a fair and efficient manner, as well as the public's perception of judicial neutrality and independence. Efforts should be made to minimize political interference with immigration court operations and proceedings.

### *Adoption of Problematic Judicial Performance Metrics*

Immigration judges are subject to performance criteria determined by the executive branch, which are often informed by policy goals rather than objective concern regarding the fair and unbiased functioning of the courts. In essence, immigration judges are in the untenable position of being both sworn to uphold judicial standards of impartiality and fairness while being subject to what appear to be policy-motivated performance standards.<sup>7</sup> While this has long been a reality of the immigration courts, the dilemma was elevated in 2018 when the Department of Justice (DOJ) announced a new performance evaluation system that requires immigration judges to complete 700 cases per year, have a remand rate of less than 15%, and meet at least half of six benchmarks without receiving an "unsatisfactory" rating in any of them.<sup>8</sup>

The National Association of Immigration Judges notes that the imposition of individual case production quotas and time-based deadlines tied to an individual immigration judge's performance evaluation is "unprecedented."<sup>9</sup> As Immigration Judges preside over individual cases they have in front of them on the desktops a color-coded dashboard on how they are doing against the required performance metrics.<sup>10</sup> Such an approach has the potential to pit personal interest of an Immigration Judge against due process and undermines judicial independence in a critical and direct way. While the justification has been to reduce case backlogs, the imposition of strict case production quotas ultimately is likely to expose judges' decisions to additional legal challenges and create additional backlogs. Individuals who believe that their cases were summarily decided because of an arbitrarily imposed deadline may be more likely to appeal, which would result in simply shifting the caseload burden to the Board of Immigration Appeals and the federal courts.

The case production quotas and time-based metrics should be rescinded and replaced with a more robust and transparent review process for immigration judges, where immigration judges are evaluated not only on management of their dockets but also, importantly, their command of substantive law and procedural rules, impartiality and freedom from bias, clarity of oral and

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<sup>7</sup> Statement of Judge A. Ashley Tabaddor, President National Association of Immigration Judges, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" 2 (Apr. 18, 2018), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

<sup>8</sup> Memorandum from EOIR Director James McHenry, Immigration Judge Performance Metrics (Mar. 30, 2018), <http://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

<sup>9</sup> Judge A. Ashley Tabaddor Testimony before Senate on Strengthening and Reforming America's Immigration Court System, *supra* note 7 at 7-8.

<sup>10</sup> *FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog*, American Immigration Lawyers Association, Feb. 21, 2019 (providing a sample image of the "IJ Performance Data Dashboard"), <https://www.aila.org/File/DownloadEmbeddedFile/79301>.

written communications, judicial temperament, administrative skills, and appropriate public outreach. The ABA recommends a judicial performance review model based on the ABA’s Guidelines for the Evaluation of Judicial Performance<sup>11</sup> and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System. These models stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence.

### *Elimination of Judicial Tools to Dispose of Cases*

The potential negative impact of the increased emphasis on quantitative performance metrics is further compounded by DOJ policies and actions that prohibit or discourage the use of other case and docket management tools previously available to immigration judges. In 2017 and 2018, DOJ and the Executive Office for Immigration Review (EOIR) sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination of proceedings as avenues to resolve cases.<sup>12</sup> In the decisions implementing some of these changes, the then-Attorney General stated repeatedly that immigration judges may “exercise only the authority provided by statute or delegated by the Attorney General” and that they have no “inherent authority” to use docket management tools unspecified by regulation.<sup>13</sup>

### *Increased Use and Delegation of Attorney General Certification*

The Board of Immigration Appeals (BIA) is the highest administrative body to interpret and apply the immigration laws throughout the nation.<sup>14</sup> The BIA has appellate jurisdiction and reviews cases on appeal from the immigration courts. BIA precedential decisions are binding on the immigration courts and provide guidance on the proper interpretation of the Immigration and Nationality Act and its implementing regulations.<sup>15</sup>

Pursuant to existing federal regulations, the Attorney General is authorized to refer BIA decisions to himself or herself for adjudication.<sup>16</sup> Since 2017, there has been a notable increase in the Attorney General’s use of the referral and certification power. Recently the certification process has been used, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies,<sup>17</sup> but also to decide substantive questions

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<sup>11</sup>American Bar Association, *Black Letter Guidelines for the Evaluation of Judicial Performance* (Feb. 2005), [https://www.americanbar.org/content/dam/aba/publications/judicial\\_division/aba\\_blackletterguidelines\\_jpe.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.authcheckdam.pdf).

<sup>12</sup> See EOIR, Memorandum from MaryBeth Keller, Chief Immigration Judge, “Operating Policies and Procedures Memorandum 17-01: *Continuances*,” (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download>; *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

<sup>13</sup> See *Matter of Castro-Tum*, 27 I&N Dec. at 290, 292-93; *Matter of S-O-G- & F-D-B*, 27 I&N Dec. at 464-65.

<sup>14</sup> <https://www.justice.gov/eoir/board-of-immigration-appeals>

<sup>15</sup> 8 C.F.R. § 1003.1(d)(1).

<sup>16</sup> *Id.* § 1003.1(h)(1)(i).

<sup>17</sup> See, e.g., *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

of law governing immigration proceedings that have resulted in reversing longstanding precedential decisions and limiting relief available under the asylum laws.<sup>18</sup>

The precedential implications of using the Attorney General's referral power to overturn longstanding precedent, diminish substantive relief, and eliminate traditional docket management tools is troubling from a due process and systemic standpoint. The Attorney General's referral authority should return to being used sparingly, and only to clarify immigration law after a full administrative review process at the BIA. Such review should be narrowly tailored to address the issues on appeal. It should not be used to rewrite immigration law or promote broad-based policy objectives.

Recently, EOIR issued an interim rule delegating to the EOIR Director the authority to refer a pending case for review and to adjudicate appeals that are not completed within certain time limits. The ABA is troubled by the authority delegated to the EOIR Director because it allows EOIR to pre-empt the process of full agency review by referring cases to the Director that have not been decided by the BIA. As the administrative body responsible for providing clear and uniform guidance to DHS, immigration judges, and the public on the relevant law, the BIA, not the EOIR Director (or the Attorney General), should be responsible for issuing appellate decisions. This is especially true for decisions that have the potential to create new precedent or revisit longstanding doctrine. Allowing the Director, who is appointed by the Attorney General, to refer cases to him- or herself without incorporating more transparency and due process safeguards into the process undermines the legitimacy of the immigration adjudication process.

## **Ensuring Due Process**

### *Access to Counsel and Legal Information*

Ensuring due process in the immigration court system is fundamentally linked to access to counsel and legal information. The ABA consistently has emphasized the importance of increased access to legal services and legal information for noncitizens in immigration proceedings because these services help noncitizens to navigate a complicated area of the law which, in turn, assists courts in making better informed and more efficient decisions.

The presence of competent counsel helps to clarify the legal issues, allows courts to make informed decisions, and can speed the process of adjudication.<sup>19</sup> Immigration judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens thus would facilitate the more efficient processing of claims and lessen the burden on the immigration courts. Moreover, whether a person has legal representation also has been shown to significantly impact the outcome of proceedings.

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<sup>18</sup> See, e.g., *Matter of E-F-L-H*, 27 I&N Dec. 226 (A.G. 2018) (holding that hearing not required in asylum case); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (limiting grounds for asylum claims based on domestic violence).

<sup>19</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV. PA. L.REV. 1, 2 (2015), (finding that "involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings.").

For these reasons, the ABA supports the right to appointed counsel for vulnerable populations, such as unaccompanied children and the mentally ill and disabled, as well as for those who are indigent. However, until such a policy is put in place, it is critically important to retain and expand services such as the Legal Orientation Program (LOP). The LOP is administered by EOIR, which contracts with non-profit organizations to provide information about the court process and basic legal information to individuals in immigration detention through group orientations, individual orientations, self-help workshops, and pro bono screenings and referrals.

Until recently, LOP and several other important programs that seek to increase access to legal information and representation for noncitizens in immigration proceedings were administered by EOIR's Office of Legal Access Programs (OLAP). However, in a recent interim rule, EOIR eliminated OLAP and transferred its functions to the Office of Policy without ensuring that EOIR will continue to prioritize the important programs OLAP administered. For example, the rule removes prior regulatory language at 8 C.F.R. § 1003.0(f)(1) that provided OLAP with the authority to “[d]evelop and administer a system of legal orientation programs to provide education regarding administrative procedures and legal rights under immigration law[.]”<sup>20</sup> This language is replaced in new 8 C.F.R. § 1003.0(e)(1) with a passing reference to the Assistant Director of Policy's duty to “supervise and administer EOIR's *pro bono* and legal orientation program activities[.]”<sup>21</sup>

We hope that this reorganization of EOIR's internal structure will not impact the agency's commitment to the vitality of programs that facilitate access to legal information and representation for noncitizens. Any changes that would result in restricting access to, limiting the scope of, or politicizing the implementation of these critical programs would be strongly opposed by the ABA. We appreciate Congress' past support for LOP through the provision of increased funding and urge your continuing support for and oversight of this vital program.

### *Availability of Interpretation*

The ABA has long supported the use of in-person language interpreters in all courts, including in all immigration proceedings, to ensure parties can fully and fairly participate in the proceedings. This is especially important for non-citizens, who are unfamiliar with the U.S. legal system, and face additional unique barriers to accessing information regarding their legal rights and responsibilities.

A noncitizen's ability to effectively communicate with the immigration court and make her case can be hampered by interpretation failures and these failures can undermine due process. Without reliable, accurate, and consistent interpretation services, unrepresented noncitizens have little or no ability to meaningfully participate in court proceedings. This problem is particularly pronounced for noncitizens whose primary language is uncommon or a regional indigenous dialect.

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<sup>20</sup> See Executive Office for Immigration Review, *Organization of the Executive Office for Immigration Review*, 84 Fed. Reg. 44542 (Aug. 26, 2019).

<sup>21</sup> *Id.* at 44541.

We therefore are seriously concerned about EOIR's recent initiative to replace in-court interpreters with informational videos at initial immigration court hearings. This action has a detrimental impact on the fundamental due process rights of non-citizens appearing in immigration court. Replacing in-person language interpretation with informational videos at master hearings also is likely to undermine, rather than promote, the efficiency of the proceedings.<sup>22</sup> In addition, the accuracy and integrity of the proceedings are implicated when the non-citizen respondent does not have the information she needs to meaningfully participate. The inevitable barriers to communication and confusion that will result are likely to lead to additional delays, as well as an increased number of appeals and remands.

The ABA understands and is sensitive to the challenges inherent in finding qualified interpreters for the many languages spoken by non-citizens who appear before the immigration courts. Nevertheless, in immigration proceedings, where an individual's liberty and personal safety are often at stake, it is especially important that each non-citizen respondent clearly understands her legal rights and obligations, and can respond in a meaningful way.

The ABA believes that the challenges to judicial independence and due process discussed above, as well as others not addressed here, can ultimately only be truly alleviated by fundamentally restructuring the immigration adjudication system.

#### *Remain in Mexico policy*

Many of our concerns regarding the lack of due process in the immigration court system are exemplified, but also significantly exacerbated, by the Administration's Remain in Mexico, or Migrant Protection Protocols (MPP) policy. Under MPP, Customs and Border Protection (CBP) officials return Spanish-speaking nationals from non-contiguous countries back to Mexico after they seek to enter the U.S. unlawfully or without proper documentation, unless the individual can show – in a truncated interview – that it is more likely than not that she will be persecuted or tortured in Mexico.

For asylum seekers returned to the Mexican border cities of Nuevo Laredo and Matamoros, hearings take place in soft-sided tent courts that are adjacent to the international bridges that connect Laredo and Brownsville, Texas to the Mexican cities of Nuevo Laredo and Matamoros, respectively. I and several ABA staff toured the tent court in Brownsville last summer, prior to its opening. During our tour, we were told that the facility had 60 rooms for attorneys to meet with their clients; but, it has become apparent that these rooms are not able to be fully utilized. Attorneys may enter the tent courts only to appear at a hearing for an asylum seeker the attorney already represents; attorneys are not permitted to enter the tent courts to screen potential clients or provide general legal information. Nor are asylum seekers permitted to enter the U.S. to consult with their attorneys, other than for one hour preceding their scheduled hearings. And asylum seekers are not allowed to meet at the court with their attorney following their hearing. An asylum seeker who thus has questions about the proceedings in which she participated or has

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<sup>22</sup> *Confusion, delays as videos replace interpreters at immigrants' hearings*, San Francisco Chronicle, Tal Kopan, Sept. 5, 2019, <https://www.sfchronicle.com/politics/article/Confusion-delays-as-videos-replace-interpreters-14414627.php>



further information to provide to her attorney under privilege cannot do so even though they are both physically present at the tent court. This makes it nearly impossible for MPP asylum seekers to exercise their statutory right to be represented by counsel in removal proceedings.

To render legal services to MPP asylum seekers, U.S.-licensed attorneys either must travel into dangerous Mexican border cities, or try to fulfill their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients. In Matamoros and other border cities, private attorneys and non-profit organizations have formed small groups of volunteers to provide pro se assistance to asylum seekers, but they can only help a small portion of the individuals who need assistance. They face persistent logistical challenges when helping asylum seekers to fill out applications for relief and translate supporting evidence into English. The data confirms that the barriers MPP places on meaningful access to counsel are nearly insurmountable. As of December 2019, fewer than 5 percent of asylum seekers subjected to MPP had secured legal representation.<sup>23</sup>

The hearing process for MPP asylum seekers also does not comport with fundamental notions of due process. MPP asylum seekers are handed notices to appear while in CBP custody in the U.S. before being returned to Mexico. But because most do not have stable shelter in Mexico, the government is not able to reliably serve them with notice if their hearing date changes or is cancelled. Paperwork that accompanies the notices to appear instructs MPP asylum seekers to present themselves at international bridges four hours before their hearings. If they are unable to make the dangerous journey or fail to receive notification of changes in their hearing date, asylum seekers risk being ordered removed *in absentia*.

During MPP hearings, the immigration judge and government counsel often appear via video conference, and no simultaneous interpretation is provided for MPP asylum seekers at the tent courts who are not fluent in English. Generally, the interpreter, who is present with the immigration judge via video conference, interprets only procedural matters and questions spoken by and directed to the asylum seeker by the immigration judge.

Instead of making immigration court proceedings more efficient, the MPP program has had the opposite effect of seriously delaying cases of individuals currently in detention in the border region. For example, attorneys in South Texas have shared that it is now taking two to three months to get a bond hearing, a matter that would have taken a week in the past. These delays raise serious due process concerns and increases the cost to the government when individuals who are eligible for release from detention are forced to remain detained for months before having an Immigration Judge review their custody status. Advocates at the border have also explained that MPP hearings are often changed at the last minute and without prior notice to respondents or their attorneys, causing chaos and confusion for all involved. Furthermore, policies around the MPP program have been implemented inconsistently, making it virtually impossible for attorneys to provide reliable legal advice. For example, over the last few months ICE and CBP have treated asylum-seekers who are granted relief differently, some have been returned to Mexico, others have been detained, and others have been paroled into the country.

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<sup>23</sup> TRAC Immigration, “Details on MPP (Remain in Mexico) Deportation Proceedings”, <https://trac.syr.edu/phptools/immigration/mpp/> (data through December 2019).

The ABA opposes the MPP policy given the serious due process deficiencies inherent in its operation and we are appreciative of the House's commitment to conduct oversight of this very troubling program.

### **Establishing an Independent Immigration Court System**

The immigration adjudication system has evolved numerous times in recent history,<sup>24</sup> but there has been no major structural change since 1983, when EOIR was established.<sup>25</sup> The immigration court's continued existence within the Department of Justice, with its personnel and operations subject to direct control by the Attorney General, who is also the chief law enforcement officer for the Federal government, is a fatal flaw to the reality, and perception, of independence.

Proposals to create an Article I court to replace the current immigration adjudication system are not new or novel. In 1981, the congressionally-created Select Commission on Immigration and Refugee Policy made such a recommendation in its final report. Several bills were introduced in the House of Representatives in the late 1990s.<sup>26</sup> More recently, many experienced and respected organizations and individuals have reached a similar conclusion. These include, among others, the American Immigration Lawyers Association<sup>27</sup>, the Federal Bar Association,<sup>28</sup> and the National Association of Immigration Judges. The ABA in 2006 urged that immigration judges and courts not be subject to the control of any executive branch cabinet officer. In 2010, we adopted a position specially calling for the creation of an Article I court.

In our view, any major court system restructuring should be aimed at attaining the following goals: (1) Independence - Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions without any improper influence, particularly where that influence makes the judges fear for their job security, (2) Fairness and perceptions of fairness - Not only must the system actually be fair, it must appear fair to all participants, (3) Professionalism of the immigration judiciary - Immigration judges should be qualified and experienced lawyers representing diverse backgrounds, and (4) Increased efficiency - An immigration system must process immigration cases efficiently without sacrificing quality, particularly in cases where noncitizens are detained.

With these goals in mind, we examined three basic restructuring options: 1) Article I Court - an independent Article I court system which would include both a trial-level and an appellate-level tribunal; 2) Independent Agency - a new executive adjudicatory agency, which would be independent of any other executive department or agency, to replace EOIR and contain both trial

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<sup>24</sup> DOJ EOIR, *Evolution of U.S. Immigration Court System: Pre-1983*, <https://www.justice.gov/eoir/evolution-pre-1983>.

<sup>25</sup> DOJ EOIR, *Evolution of U.S. Immigration Court System: Post-1983*, <https://www.justice.gov/eoir/evolution-post-1983>.

<sup>26</sup> See H.R. 185, United States Immigration Court Act of 1999, 106<sup>th</sup> Cong. (1999); H.R. 4107, United States Immigration Court Act of 1998, 105<sup>th</sup> Cong. (1998); H.R. 4258, United States Immigration Court Act of 1996, 104<sup>th</sup> Cong. (1996).

<sup>27</sup> RESOLUTION ON IMMIGRATION COURT REFORM, AILA Board of Governors, Winter 2018, <http://www.aila.org/File/DownloadEmbeddedFile/74919>.

<sup>28</sup> Federal Bar Association, *Article I Immigration Court*, <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/>

level administrative judges and an appellate-level review board; and 3) Hybrid - a hybrid approach placing the trial-level adjudicators in an independent administrative agency and the appellate-level tribunal in an Article I court.

While we believe all three models would have advantages over the current system, we determined that the Article I model presented the best option for meeting the goals and needs of the system. The Article I model is likely to be viewed as more independent than an agency because it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government. Given these advantages, in our view, the Article I court model is the preferred option.

The primary benefit of each of the models is to provide a forum for adjudication that is independent from any executive branch department or agency. Removing the adjudication system from the Department of Justice, whose primary function is a law enforcement agency, is vital to assuaging concerns about fairness and the perception of fairness. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication.

An Article I court also should attract highly-qualified judicial candidates and help to further professionalize the immigration judiciary. History has shown the potential for the politicization of the hiring process and an inherent bias toward the hiring of current or former government employees. Removing the hiring function from the Department of Justice also may increase the diversity of experience in the candidate pool. Providing for a set term of sufficient length, along with protections against removal without cause, will similarly protect decisional independence and make Article I judgeships more attractive.

By attracting and selecting the highest quality lawyers as judges, an Article I court is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal. When appeals *are* taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands requesting additional explanations or fact-finding.

These improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.

We recognize that restructuring alone would not immediately solve all the challenges facing the immigration courts. Regardless of the structure of the system, the immigration courts will have to deal with challenges faced by all courts, such as funding, hiring personnel, technology, and day-to-day management. However, while there may be some short-term costs and inconveniences,

we believe that transitioning the system to an Article I court will bring long-term benefits to the government and those in the system.

### **Conclusion**

The core principle of any fair adjudication system must be that independent and impartial judges decide cases on the merits, evaluating the facts and the law in each case, after a hearing that fully comports with due process. The current immigration court system fails to meet those goals in many respects. It is time for Congress to establish a truly independent Article I court.

Thank you for this opportunity to share our views.