



**Why America Needs an Independent Immigration Court System  
Statement of the American Immigration Lawyers Association**

Submitted to the Subcommittee on Immigration and Citizenship of the House Judiciary  
Committee for the Hearing Entitled  
“For the Rule of Law, an Independent Immigration Court”

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The American Immigration Lawyers Association (AILA), the national bar association of over 16,000 immigration attorneys and law professors, submits the following statement for the record.

AILA urges Congress to enact legislation that would create an independent immigration court system under Article I of the Constitution. The establishment of an independent immigration court would separate it from the Department of Justice (DOJ), which currently exercises authority over its operations, personnel, and legal decisions. For the better part of a century, the executive branch has controlled the immigration courts, a structure that renders them vulnerable to improper influence and political pressure. In recent years, this inherent flaw in the system has undermined the courts’ credibility, integrity, and ability to render fair decisions. The creation of an Article I immigration court system will increase the stature of the courts and ensure due process for the people appearing before them.

The immigration courts should be independent from the executive branch

In 1983, the Executive Office for Immigration Review (EOIR), which manages the immigration courts and the Board of Immigration Appeals (BIA), was established within DOJ. This structure placed the Attorney General in the position to control both the immigration court system – including the immigration judges and members of the Board of Immigration Appeals -- and the attorneys within the Office of Immigration Litigation (OIL), which represents the government against immigrant respondents in the circuit courts of appeals. As such, there is an inherent conflict of interest built into the system. Simply put, the chief prosecutor oversees the judges that hear the cases.

A striking example of the harm caused by this structural defect is the lack of judicial independence exercised by immigration judges. Unlike Article III federal judges, immigration judges are government attorneys whose positions are not guaranteed tenure or many of the other protections that insulate judges from outside influence. Lacking protection from executive

branch interference, immigration judges have been subject to highly intrusive practices that jeopardize the quality and consistency of their decisions, and more fundamentally, their ability to deliver fair results.

For example, in 2018, a policy was implemented imposing case completion quotas as part of judges' individual performance reviews.<sup>1</sup> Under this policy, judges' jobs were at risk if they did not close a fixed number of cases. The policy pressured judges to accelerate their decisions and likely influenced them to deny requests for continuances and requests to examine and present evidence—components that are essential to ensure a fair hearing and thorough review of a case.<sup>2</sup> While the quota rule has been rescinded, a future administration could reinstitute it as long as the courts remain under executive branch authority.<sup>3</sup> Another example of the improper pressure the executive branch has exerted over the immigration courts is a December 2017 memorandum issued by then-Attorney General Jeff Sessions encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.<sup>4</sup>

DOJ's hiring process for immigration judges has also been vulnerable to improper influence. In 2008, the DOJ Inspector General conducted an investigation that found the Department had violated federal law by inappropriately considering the political and ideological affiliations of candidates in its hiring practices.<sup>5</sup> A decade later, similar concerns were raised about immigration judge hiring practices.<sup>6</sup> If the immigration courts operated outside of DOJ's purview, the occurrence of such influence and the appearance of bias in hiring would be greatly reduced.

A likely and unfortunate consequence of the current immigration courts' lack of insulation from executive branch interference is the highly disparate asylum grant rates of judges. In 2016, the Government Accountability Office (GAO) confirmed this disparity, noting that, "[f]or fiscal years 1995 through 2014, EOIR data indicate that affirmative and defensive asylum grant rates varied over time and across immigration courts, applicants' country of nationality, and individual immigration judges within courts."<sup>7</sup> As immigration attorney and President-Elect of AILA Jeremy McKinney stated in prior testimony before Congress:

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. A client of mine in Greensboro could move 40 minutes north into Virginia and more than double their chance of being granted asylum.<sup>8</sup>

As long as EOIR operates under the control of DOJ, it will not have necessary authority to manage its docket. This problem is most dramatically illustrated by the ballooning backlog of cases, which currently exceed 1.5 million, and causes respondents to wait upwards of five years to have their cases heard.<sup>9</sup> Ironically, the excessive backlog is partly attributable to the conflicting approaches taken by past administrations, which have attempted to reduce the backlog while also advancing their policy priorities. President Obama's administration

prioritized the adjudication of “family unit” cases, an approach that EOIR later determined “coincided with some of the lowest levels of case completion productivity in EOIR’s history. . . .”<sup>10</sup> President Trump ordered immigration judges deployed to detention facilities on the border, but they were poorly utilized due to the lack of cases in the border region. The effort to surge judges to the border forced the immigration courts to reschedule more than 20,000 other cases that had been awaiting resolution.<sup>11</sup>

The reshuffling of the court docket, which was partly driven by the policy priorities of each administration, not only increased the backlogs but undermined faith and confidence in the integrity of the courts as an unbiased institution.<sup>12</sup> An Article I immigration court would have greater independence to address the current backlog without executive branch interference.

### The benefits of an Article I court

AILA recommends Congress create a separate immigration court system using its legislative authority under Article I of the Constitution, thereby removing the immigration courts from the authority of the executive branch. The new system would not need to alter many characteristics of the immigration courts, which currently include both trial-level and appellate-level tribunals with further review to the U.S. Circuit Courts of Appeals and the U.S. Supreme Court.

The judicial appointment process in an Article I court would offer immigration judges greater protection from undue influence. Judicial appointments could be for a fixed term, with the possibility of reappointment and protections against removal without cause. These accountability measures will protect decisional independence. In addition, an Article I judgeship would carry greater prestige and likely attract more highly qualified individuals, further strengthening the reputation and integrity of the system.

The political ideology of immigration judges should not be a determining factor in any judicial system. This is true regardless of political party, as both Republican and Democratic administrations put undue pressure on EOIR due to its position within the executive branch. AILA also recommends that the immigration courts ensure the robust representation of individuals of diverse backgrounds among judges and staff to promote racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographic diversity. Further, AILA recommends a recruitment and selection process that is designed to ensure that the overall corps of immigration judges is balanced between individuals with a nongovernment, private sector background and individuals from the public sector. This balance best promotes the development of the law in the nation’s interest.

### Conclusion

The current immigration court system under DOJ is flawed due to its lack of independence from the executive branch. With mounting pressure on the executive branch to reduce the excessively high case backlog and manage cases more expeditiously, the courts already have and will continue to experience pressure to compromise on the protections of due process. Allowing that status quo to continue is unacceptable. The formation of an Article I immigration court would ensure that the principles of fairness and rule of law are protected and never sacrificed for

efficiency. AILA urges Congress to act immediately and pass legislation to restructure our nation's immigration courts into an Article I system.

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<sup>1</sup> Memorandum from James McHenry, Director, Executive Office for Immigration Review, to all immigration judges, *Immigration Judge Performance Metrics* (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>; 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](https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf); see Department of Justice, *Immigration Judge Performance Measures Overview* (June 7, 2018), <https://www.aila.org/infonet/eoir-legal-training-prgm-ij-performance-measures>.

<sup>2</sup> See INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence.

<sup>3</sup> Priscilla Alvarez, *Justice Department Eliminates Trump-Era Case Quotas for Immigration Judges* (Oct. 20, 2021), <https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html>.

<sup>4</sup> Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review* (Dec. 5, 2017), <https://www.justice.gov/eoir/file/1041196/download>.

<sup>5</sup> U.S. Department of Justice Office of Professional Responsibility and Office of Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), <https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf>.

<sup>6</sup> Letter sent by House Democrats to Attorney General Jeff Sessions (Apr. 17, 2018), <https://www.aila.org/infonet/house-democrats-demand-doj-respond-to-allegations>.

<sup>7</sup> Government Accountability Office, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* (Nov. 2016), <https://www.gao.gov/assets/690/680976.pdf>.

<sup>8</sup> Statement of Jeremy McKinney, American Immigration Lawyers Association, 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” (Jan. 29, 2020), <https://www.congress.gov/116/meeting/house/110402/witnesses/HHRG-116-JU01-Wstate-McKinneyJ-20200129.pdf>.

<sup>9</sup> TRAC Immigration, *Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, [https://trac.syr.edu/phptools/immigration/court\\_backlog](https://trac.syr.edu/phptools/immigration/court_backlog) (Pending cases, All United States and Average Days, Nationalities) accessed Jan. 19, 2022.

<sup>10</sup> Memorandum from James McHenry, Director, EOIR, to all of EOIR, *Tracking and Expedition of “Family Unit” Cases* (Nov. 16, 2018), <https://www.aila.org/infonet/eoir-memo-tracking-expedition-family-unit-cases>; see also Eric Katz, ‘Conveyor Belt’ Justice: An Inside Look at Immigration Courts (Jan. 22, 2019), <https://www.govexec.com/feature/inside-conveyor-belt-behind-curtain-dojs-immigration-courts>.

<sup>11</sup> Heidi Altman and Tara Tidwell Cullen, *Internal DOJ Documents Reveal Immigration Courts’ Scramble to Accommodate Trump Administration’s “Surge” Courts* (Sept. 27, 2017), <https://immigrantjustice.org/staff/blog/internal-doj-documents-reveal-immigration-courts-scramble-accommodate-trump>.

<sup>12</sup> See Paul W. Schmidt, Speech to the ABA Commission on Immigration, *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>; see also 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](https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf).