



## Statement for the Record

Senate Committee on the Judiciary – Subcommittee on Immigration and Citizenship

Hearing on “For the Rule of Law, An Independent Immigration Court”

January 20, 2022

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, law enforcement, veterans, and business constituencies in communities across the country. Leveraging our policy, advocacy, and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

The Forum appreciates the opportunity to provide its views on the reasons why it is urgently necessary for Congress to create a fully independent immigration court system. The trial level immigration courts and the appellate level Board of Immigration Appeals (BIA) are managed by the Executive Office for Immigration Review (EOIR), which is part of the U.S. Department of Justice (DOJ).<sup>1</sup> The U.S. Attorney General leads DOJ and is ultimately in charge of its subdivisions, including EOIR and the Office of Immigration Litigation (OIL). OIL is the office that oversees all affirmative and defensive civil immigration litigation, is responsible for coordinating national immigration matters before the federal district courts and courts of appeals, and provides support and counsel to all federal agencies involved in alien admission, regulation, and removal under U.S. immigration statutes.<sup>2</sup> These competing responsibilities of the Attorney General create an inherent conflict of interest that was embedded in the foundation of the immigration court system.

Further exacerbating the problem, is the fact that the Attorney General is able to both establish regulations and review administrative determinations in immigration proceedings.<sup>3</sup> This certification process “allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA.”<sup>4</sup> An additional complicating factor is the fact that immigration judges are considered government attorneys and lack independence. Unlike Article III federal judges, immigration judges do not have a fixed term in office, can be fired by the Attorney General, and can be relocated to a different court. During the previous administration, executive branch policies like case quotas and limitations on administrative closure and other tools related to docket management undermined due process and judicial independence. And even before that, Democratic and Republican administrations have adopted policy changes

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<sup>1</sup> United States Department of Justice- Executive Office for Immigration Review, “About the Office,” Feb. 3, 2021, <https://www.justice.gov/eoir/about-office>.

<sup>2</sup> United States Department of Justice- Civil Division, “Office of Immigration Litigation,” Sept. 9, 2020, <https://www.justice.gov/civil/office-immigration-litigation>.

<sup>3</sup> 8 U.S.C. § 1103(g)(2).

<sup>4</sup> American Immigration Lawyers Association, “AILA Policy Brief: Restoring Integrity and Independence to America’s Immigration Courts,” Jan. 24, 2020, <https://www.aila.org/dueprocess>.

concerning case docket prioritization, prosecutorial discretion, immigration court funding, and the certification of cases to create and/or reexamine legal precedents, leading to swings from administration to administration.

These structural issues have caused the immigration court system to become increasingly politicized. This has harmed due process for immigrants and undermined the public's faith in the immigration system. The absence of independence in the immigration court system undermines consistency and legally-sound decisions for immigrants.

In addition to the structural flaws in having the immigration court system fall under the direction of DOJ, immigration courts are facing crisis-level case backlogs.<sup>5</sup> They lack capacity to keep up with growing caseloads, with the backlog reaching 1,500,000 cases in fiscal year (FY) 2022, according to the Syracuse University's Transactional Records Access Clearing House (TRAC).<sup>6</sup> Judges are overburdened and face multi-year backlogs in the non-detained docket, negatively impacting ICE trial attorneys, immigration attorneys and advocates, and immigrants themselves.

Over the past few years, EOIR has taken initial steps to begin to address the backlog, creating Immigration Adjudication Centers (IACs) that hear some cases remotely and utilize video technology.<sup>7</sup> In some non-contested cases, such as defensive family-based adjustment or termination because of an approved T visa, remote hearings have been a useful approach. But in contested asylum or cancellation hearings, they pose due process concerns and undermine fair outcomes for migrants seeking their "day in court," leading immigration judges to miss subtle, relevant contextual clues like an immigrant's body language or demeanor, which are often not visible in video proceedings. Other attempts to reduce the backlog have included docket reshuffling, restrictions on the granting of continuances, and the imposition of case quotas on immigration judges. These ad hoc attempts to address the increasing backlog have not proven effective at reducing overall caseloads and have often led to due process concerns.

The Forum strongly believes that creating an independent immigration court system would allow immigration judges to set precedents and better manage their caseloads, ultimately easing the case backlog and preserving due process. It would prevent politicized decision making and promote stability in immigration court policies and decisions.

Accordingly, the National Immigration Forum supports congressional action to establish an independent immigration court system, separate from the DOJ, that would help depoliticize the immigration courts, promote judicial independence, and better protect due process for immigrants. An independent immigration court system would help alleviate the prolonged crisis

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<sup>5</sup> Syracuse University's Transactional Records Access Clearing House (TRAC), "The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts," Jan. 19, 2021, <https://trac.syr.edu/immigration/reports/637/>.

<sup>6</sup> Syracuse University's Transactional Records Access Clearing House (TRAC), "Immigration Court Backlog Tool," [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>7</sup> Katie Shepherd, "The Judicial Black Sites the Government Created to Speed Up Deportations," Immigration Impact, Jan. 7, 2019, [https://immigrationimpact.com/2019/01/07/the-judicial-black-sites-the-government-created-to-speed-up-deportations/#.YeXcF\\_7MI2x](https://immigrationimpact.com/2019/01/07/the-judicial-black-sites-the-government-created-to-speed-up-deportations/#.YeXcF_7MI2x); United States Department of Justice- Office of Public Affairs, "Backgrounder on EOIR Strategic Caseload Reduction Plan," <https://www.justice.gov/opa/press-release/file/1016066/download>.

in our immigration courts and begin to restore the American public's faith in our immigration system.