



**Statement of Karen T. Grisez, on behalf of the American Bar Association
to the Subcommittee on Immigration and Citizenship, House Judiciary Committee
“For the Rule of Law, An Independent Immigration Court”
January 20, 2022**

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

My name is Karen Grisez. I am Pro Bono Counsel at the Washington D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP and a former chair of the American Bar Association (ABA) Commission on Immigration. On behalf of the ABA, and its president Reginald Turner, thank you for the opportunity to share our views for this hearing entitled “For the Rule of Law, An Independent Immigration Court.”

The ABA is the world’s largest voluntary association of lawyers and legal professionals, and our members include a broad cross section of lawyers, judges, academics, and law students. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and seeks to promote the rule of law both at home and abroad. Through its Commission on Immigration, the ABA advocates for improvements in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of pro bono legal representation programs.

Due Process and Judicial Independence are Key Components of the Rule of Law

One of the ABA’s four primary goals is to advance the rule of law. We have defined key objectives in seeking to achieve that goal, which include promoting due process through working for just laws and a fair legal process, assuring meaningful access to justice for all persons, and preserving the independence of the legal profession and the judiciary.

While there is no single definition of the rule of law, judicial independence is a fundamental concept that is universally accepted. Judicial independence means that judges are not subject to external pressure and influence and are free to make impartial decisions based solely on fact and law. In our view, the rule of law and judicial independence are mutually reinforcing and essential to the foundation of our justice system and our democracy.

For this reason, since its inception, the ABA has worked to protect the independence of the judiciary for courts at every level in the United States, as well as for our federal administrative judiciary. Our support for the concept of judicial independence also extends to the immigration removal adjudication system. In 2006, the ABA first adopted a position supporting the “the

neutrality and independence of immigration judges, both at the trial and appellate levels, and of any federal agency by which they are employed, so that such judges and agencies are not subject to the control of any executive branch cabinet officer.”¹ In 2010, after a multi-year study² on the state of the immigration removal adjudication system, on which I elaborate further below, the ABA adopted a policy specifically recommending the creation of an independent Article I immigration court.³ That position was reiterated in a follow-up study issued in 2019.⁴ We came to this conclusion because, as currently constituted, the immigration courts lack many of the basic structural and procedural safeguards necessary to ensure due process and fair and impartial adjudications.

As you know, the immigration courts are currently housed within the Department of Justice (DOJ). Immigration judges serve as career DOJ attorneys with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. They have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. In addition, under the current certification process, the Attorney General can refer cases to him or herself for consideration, essentially acting as chief judge. All of these factors undermine public confidence in the impartiality of immigration judges. While incremental improvements might be made within the current structure, the immigration courts will not be, nor be perceived as, truly independent until the system is restructured to remove the courts from the Department of Justice.

The lack of independence not only undermines the integrity of the system as a whole, but adversely impacts due process for individuals in the system as well.

Hallmarks of Due Process

Fundamentally, due process requires that laws and legal proceedings must be fair. Courts have identified several aspects essential to the basic concept of due process in judicial and administrative proceedings. Hearings must generally incorporate the following elements to afford due process to the affected individual or entity:

Notice of Proposed Action to be taken by the Government Agency and Grounds for It

¹ American Bar Association House of Delegates, 2006 Midyear Meeting, Resolution 107C (February 2006), [2006 MY 107C \(americanbar.org\)](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2006_MY_107C.pdf).

² *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, American Bar Association Commission on Immigration (February 2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

³ American Bar Association House of Delegates, 2010 Midyear Meeting, Resolution 114F (February 2010), [2010 MY 114F \(americanbar.org\)](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2010_MY_114F.pdf).

⁴ 2019 Update Report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, American Bar Association Commission on Immigration (March 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf

Opportunity to be Heard Hearing Before an Impartial Tribunal

When considering the details of individual hearings in more detail, courts have identified the following indicators of due process:

- Opportunity for Confrontation and Cross-Examination of Witnesses
- Discovery (right to know opposing evidence)
- Right to Present Evidence
- Decision made based on Record of Proceedings
- Opportunity to be represented by Counsel

Although the immigration courts provide some of the elements of due process under the current system, they fall short of providing full and fair hearings in too many cases. Many of the shortcomings of the current system do not stem primarily from existing rules and written procedures (for example, in Executive Office for Immigration Review (EOIR) regulations and practice manuals), but in the way those are interpreted and applied by representatives of EOIR. And further, the location of EOIR within DOJ, under absolute control of the Attorney General, is at the root of that problem.

A review of the elements of due process in the context of immigration court hearings provides a few illustrations.

The standard Notice to Appear in immigration court generally does provide a simple statement of the proposed action to be taken (removal from the United States) and the factual and legal bases for that action. However, the current system of shifting docket priorities and reassignment of judges combined with delay in lodging of the Notices to Appear with the immigration courts by DHS components means that respondents often receive inaccurate or untimely notice of their hearing dates. Moreover, the EOIR automated telephone line and online portal are frequently not kept up to date. Even if respondents know how to use these tools, they do not always get correct information. Additionally, change of address forms often do not timely make it into the file. These issues often result in the issuance of *in absentia* removal orders and, at best, the need for a motion to reopen to address the notice issue.

The adequacy of the opportunity to be heard is completely within the purview of the sitting immigration judge. Some of the due process issues presented include the time necessary to seek representation; time needed for attorney preparation; time necessary to identify, locate and obtain translation of evidence, often from another country; and time allotted for the hearing, including the number of witnesses allowed to testify, and (in a non-COVID environment), the availability of telephonic appearances by counsel and witnesses. The Immigration Court Practice Manual provides guidelines on some of these issues, but in almost every instance also allows individual judges to deviate from them on a case-by-case basis. The significant time pressures on immigration judges, particularly in unrepresented cases, often lead them to minimize testimony as well as hearing and argument time. Anything not on the

record cannot be raised on appeal, making these procedural rulings by immigration judges critical to case outcomes.

The availability of a hearing before an impartial tribunal is one of the due process requirements most severely impacted by the current structure. Under the existing system, both immigration judge and Board of Immigration Appeals (BIA) member selection is done by the Attorney General. Hiring criteria have been less than transparent and too often subject to political influence. Although the recent expansion of immigration judge hiring does reflect more diversity in backgrounds of new hires than had been seen in recent years, the hiring procedures are still not publicly available and the perception persists that the immigration court bench is weighted towards former government employees, including in particular DHS prosecutors.

Due process requires a decision based on the record. The primary issue here is what does or does not get into the record, and consequently, what the judge and any appellate body is able to consider. Once again, the extreme time pressures on immigration judges and the shifting docketing priorities imposed upon them lead to under-developed records and, in turn, decisions that aren't based on all relevant facts.

Finally, due process requires the opportunity to be represented by counsel. The Immigration and Nationality Act currently allows for representation but only at no expense to the government. EOIR's placement within DOJ means that the Attorney General interprets that statute and determines how much access to counsel a respondent receives. For example, the Office of Legal Access Programs provides a Legal Orientation Program in some, but not all, detention centers. Limited scope representation by attorneys is possible in bond hearings but not in other contexts. For example, an attorney cannot enter an appearance only for a Master Calendar Hearing, even though that is when pleadings are taken and relief to be sought must be identified. And, outside of the context of the pandemic, there is no uniformity in the ability or criteria for counsel to appear telephonically or by other remote means. Although allowed by the Practice Manual, this opportunity is unevenly applied and forces some respondents to proceed without counsel even when counsel would be available to them with these accommodations.

There can be no doubt that the emphasis on speed and prompt adjudications can lead to a literal "rush to judgment" on an inadequate record. An independent Article I Court would better protect many of the features that we recognize as hallmarks of due process and a fundamentally fair system.

An Article I Court is the Best Option to Enhance the Rule of Law in the Immigration Adjudication System

Recognizing that a new structure is necessary to promote independence and due process, the next consideration is which structure would best serve the needs of the immigration adjudication system and those that are subject to its jurisdiction.

Article I, Section 8 of the Constitution grants Congress the power to “constitute Tribunals inferior to the supreme Court.”⁵ These are known as “Article I courts” or, occasionally, “legislative courts.” Congress has used its Article I powers to create several specialized courts, including the United States Tax Court,⁶ the United States Bankruptcy Court,⁷ the United States Court of Federal Claims,⁸ and the Court of Appeals for Veterans Claims.⁹ Examination of the structure and operations of these courts can help inform consideration of an Article I immigration court.

There is nothing sacrosanct about the current structure of our immigration adjudication system. In fact, the system and its structure have evolved numerous times in recent history.¹⁰ However, there has been no major structural change since 1983, when EOIR was established.¹¹ The recommendation to create an Article I court to replace the current immigration adjudication system also is not a new or novel proposal. In 1981, the congressionally created Select Commission on Immigration and Refugee Policy made such a recommendation in its final report.¹² Legislation to do so was introduced several times in the House of Representatives in the late 1990s.¹³ Many other organizations have reached a similar conclusion, including the American Immigration Lawyers Association, the Federal Bar Association, and the National Association of Immigration Judges. Recently, more than one hundred organizations representing a broad spectrum of civil society have expressed support for an independent Article I immigration court.¹⁴

As noted earlier, since 2006 the ABA has been on record as supporting removal of the immigration court from the control of any executive branch cabinet official. In 2010, the ABA released a report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*.¹⁵ The report was the result of a multi-year study that surveyed relevant literature and interviewed an array of governmental, non-profit, and private sector stakeholders. The findings

⁵ U.S. CONST., art. I, § 8.

⁶ 26 U.S.C. § 7441. Although the Tax Court was originally created as an administrative agency, Congress formally made it an Article I court in 1969.

⁷ 28 U.S.C. § 151(a). Prior to the Bankruptcy Act of 1978, the federal district courts acted as bankruptcy courts.

⁸ 28 U.S.C. § 171(a).

⁹ 38 U.S.C. § 7251.

¹⁰ <https://www.justice.gov/eoir/evolution-pre-1983>.

¹¹ <https://www.justice.gov/eoir/evolution-post-1983>.

¹² U.S. immigration policy and the national interest: the final report and recommendations of the Select Commission on Immigration and Refugee Policy with supplemental views by commissioners, March 1, 1981.

¹³ See H.R. 185, United States Immigration Court Act of 1999, 106th Cong. (1999); H.R. 4107, United States Immigration Court Act of 1998, 105th Cong. (1998); H.R. 4258, United States Immigration Court Act of 1996, 104th Cong. (1996).

¹⁴ Advocates Call on Congress to Establish an Independent Immigration Court, AILA Doc. No. 20021838, February 18, 2020 (signed by 54 organizations), <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-call-on-congress-establish-independent>. National Association of Immigration Judges Letter to Congresswoman Zoe Lofgren, December 14, 2020 (signed by 125 organizations), <https://www.naij-usa.org/images/uploads/publications/2020.12.14.00.pdf>.

¹⁵ Supra fn. 2.

of the report led the ABA to adopt a series of recommendations for incremental reforms for every level of the removal adjudication process, from the decision to initiative removal proceedings through potential federal judicial review. Ultimately, however, we determined that the most promising means through which to address many of the systemic issues was to create an independent adjudicatory body. The report examined various models that Congress might consider and determined a preference for the creation of an Article I court. In 2019, the ABA released an update to the report which confirmed the previous findings and identified creation of an Article I court as the clearly preferable structure.

The reports reviewed options for system restructuring relative to attaining the following goals:

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;

Fairness and perceptions of fairness – Not only must the system actually be fair, it must also appear fair to all participants and the public;

Professionalism of the immigration judiciary – Immigration judges should be talented and experienced lawyers treating those who appear before them with respect and professionalism; and

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 and reviewed existing examples of each model.

Article I Court: An independent Article I court system to replace all of EOIR (including the immigration courts and Board of Immigration Appeals), which would include both a trial-level and an appellate-level tribunal. The models we examined were the United States Tax Court, the United States Bankruptcy Court, the United States Court of Federal Claims, and the Court of Appeals for Veterans Claims.

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-level administrative judges and an appellate-level review board. The models we examined were the Occupational Safety and Health Review Commission, the Merit Systems Protection Board, and the National Labor Relations Board.

Hybrid: A hybrid approach placing the trial-level adjudicators in an independent administrative agency and the appellate-level tribunal in an Article I court. The model examined was the system for granting and assessing veterans' benefits, which consists of an agency within the executive branch for trial-level proceedings and an Article I court for appellate review.

All three models would have advantages over the current system. However, in the process of examining the different models, it became apparent that the least attractive option was the hybrid approach, as it likely would be the most complex and least cost-efficient relative to the other two options. Although the choice between an Article I court and an independent agency was a closer call, 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 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 resulting in fewer appeals to a higher tribunal. When appeals *are* taken, more articulate and reasoned 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.

Establishing an Article I court should likewise have a positive impact on Article III courts, since greater independence is likely to lead to greater confidence in results, which in turn is likely to reduce the number of appeals to the circuit courts. This is no small matter. In 2020, appeals

from the BIA accounted for 86 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in every circuit except the DC Circuit (which doesn't have jurisdiction over BIA appeals).¹⁶

Of course, independent does not mean unaccountable. To some degree, accountability to the political branches is the flip side of independence. Thus, the trial judges in an Article I court with fixed terms generally would be more accountable than those in an independent agency. As the court would also undertake the administrative functions such as budgeting and personnel management, the court would be accountable to Congress for the responsible and effective use of its resources.

We recognize that restructuring alone would not immediately solve all the problems facing the immigration courts. Regardless of the structure of the system, the immigration courts will have to deal with some matters outside their immediate control, such as changing enforcement policies and fluctuating migration. In addition, issues such as funding, hiring personnel, managing technology, and day-to-day management are challenges faced by courts at every level around the country. 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.

Legal Representation is Critical to Fair and Efficient Courts

Ensuring fairness and due process in the immigration court system is fundamentally linked to access to counsel and legal information. The ABA has emphasized the importance of increased access to legal services 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 consequences of removal can be severe, resulting in separation from family or physical harm or death for those who fled persecution in their home countries. However, individuals in removal proceedings currently have no right to government-funded counsel and must either find a lawyer - which is especially difficult for those in detention - or must represent themselves. Statistics show that nearly half of noncitizens in immigration proceedings lack legal counsel; that figure rises to 70% for those in immigration detention.¹⁷

While representation is difficult to secure for individuals in removal proceedings, it is essential for ensuring just outcomes. It is exceptionally difficult to determine eligibility for waivers or defenses to removal, to comprehend complex statutes, and to navigate evolving case law without counsel. That difficulty is compounded for those with limited or no English proficiency. Individuals who are represented in removal proceedings are between three-and-a-half and ten-

¹⁶Federal Judicial Caseload Statistics 2020, Administrative Office of the U.S. Courts, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020>.

¹⁷ Transactional Records Access Clearinghouse (TRAC), *Who is Represented in Immigration Court?*, Oct. 16, 2017, <https://trac.syr.edu/immigration/reports/485/>.

and-a-half times more likely to succeed on the merits of their cases than those without counsel.¹⁸

Beyond the obvious interest of impacted noncitizens, legal representation also benefits the government and the administration of justice through improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings. It also deters frivolous claims and helps immigration courts to run more efficiently.¹⁹ Above all, increased representation serves the government's interest in ensuring that its decisions in these consequential cases turn on U.S. legal standards and merit and not on an individual's income or ability to find a lawyer.

The ABA ultimately supports the provision of government-appointed counsel, where necessary, for vulnerable populations, such as unaccompanied children and individuals with mental disabilities, as well as those who are indigent. Until such a system is in place, it is critical to preserve and expand the initiatives such as those currently administered by the EOIR Office of Legal Access Programs, including all aspects of the Legal Orientation Program. Any legislation to establish an Article I court should ensure the transfer of these functions to the new court.

Conclusion

The current structure of the immigration removal adjudication system, housed within the Department of Justice and subject to the direct control of the Attorney General, represents an inherent conflict with the principles of independence and fair and impartial courts necessary to satisfy due process. The establishment of an Article I immigration court will address many of the challenges within the current system and we urge Congress to pass legislation to do so as soon as possible.

¹⁸ Karen Berberich & Nina Siulc, Vera Institute of Justice, Fact Sheet: Why Does Representation Matter? The Impact of Legal Representation in Immigration Court 1 & n.3 (Nov. 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representationmatter/legacy_downloads/why-does-representation-matter.pdf (noting that, between October 2000 and August 2018, 54 percent of all immigration cases filed had never been represented); Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 7 (Dec. 2015) (based on national study of removal cases decided between 2007 and 2012, finding that only 37% of noncitizens secured representation).

¹⁹ Berberich & Siulc, *supra* note 8, at 1-2 (noting that represented noncitizens are much more likely to succeed in their cases, obtain release from detention, and show up for their hearings); Vera Institute of Justice, Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 5-6, 27-29, 34-35 (Nov. 2017), www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation (studying program providing a free attorney to nearly all detained financially eligible noncitizens in New York City and finding that it led to more successful case outcomes, helped immigration proceedings run more smoothly, and helped to ensure due process by evaluating and pursuing all potentially meritorious forms of relief); Eagly & Shafer, *supra* note 8, at 2 (finding that the involvement of counsel was associated with gains in efficiency because represented noncitizens brought fewer non-meritorious claims, were more likely to be released from custody, and were more likely to appear at future hearings).