



Federal Bar Association

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For the Rule of Law, An Independent Immigration Court
Hearing Before the U.S. House of Representatives, Judiciary Committee
Immigration and Citizenship Subcommittee

Introduction

Good afternoon. I am Elizabeth Stevens, former Chair of the Federal Bar Association's (FBA) Immigration Law Section and a member of the FBA's Sections and Divisions Council.¹² Now in private practice with the Poarch Thompson Law Firm, I retired from the Department of Justice's (DOJ) Office of Immigration Litigation (OIL) in December of 2016, after serving as an Assistant Director of OIL's District Court Section for over eight years. During my time at OIL, in addition to my duties of supervising attorneys and handling cases, I was heavily involved in drafting and commenting on proposed legislation and regulatory reforms. Significantly, I was also a member of Attorney General Ashcroft's 2005 investigation of the Executive Office for Immigration Review (EOIR); my focus was on the individual immigration courts.

Thank you for convening this hearing on a matter of critical importance to the federal government's delivery of timely, effective adjudication for those facing potential removal from this country, including those seeking immigration benefits like asylum or permanent residency.

¹ The FBA is the foremost professional association for attorneys engaged in the practice of law before federal administrative agencies and the federal courts, with over fifteen (15) thousand members of the legal profession. They are affiliated with almost 100 local FBA chapters in many of your states. There are also thirty sections and divisions organized by substantive areas of practice, such as the Immigration Law Section.

² The FBA's Immigration Law Section has two primary foci - first, educating both new and senior attorneys in the complex and ever-changing world of immigration law. Second, to improve the effectiveness of the adjudicatory process, primarily with hearings before the immigration courts, the appeal process at the Board of Immigration Appeals, and judicial review in the federal courts, but also with related agency adjudications on immigration matters before DHS, the Department of Labor, the Department of Health & Human Services, and the Department of State. Our highest priority is to assure the integrity, independence, fairness, and effectiveness of the immigration process for those it serves - those facing removal, those seeking benefits for themselves, family members, or employees, and all U.S. taxpayers who have an interest in assuring that our immigration adjudication system works – and works fairly.

The FBA has determined, after significant review and discussion, that an independent Article I Immigration Court is the best option available. In line with the FBA's mission "to strengthen the federal legal system and administration of justice," the FBA believes that establishment of an independent Article I immigration court would improve the adjudication of immigration cases without making changes to substantive immigration law. Our thinking is based on the following precepts:

- Maintaining the immigration adjudicatory function within DOJ undermines efficient adjudication which denies due process.
- Making DOJ responsible for immigration adjudication politicizes an important function, which has been compounded by practices depriving immigration judges of effective authority and autonomy.
- Reestablishing the immigration courts under Article I of the Constitution will ensure their decisional independence and, by making immigration judges solely responsible for managing the court and their own dockets, promote more timely decision-making and efficient operation.
- Establishing an Article I court to provide impartial adjudication in specialized areas of federal law has a long, successful history, including such matters as tax administration, veterans' benefits, and military justice.
- Replacing the current immigration courts with an independent Article I court is an idea whose time has come.

Let's review each of these main points.

DOJ's immigration courts are inefficient, denying due process.

There is broad consensus throughout the legal community that the current system for adjudicating immigration claims is dysfunctional and deserves systemic overhaul. We have a half-formal, half-informal adjudication system in which immigration judges have little control over their dockets and are unable to use the contempt authority authorized by Congress. This

situation—exacerbated by COVID-19—has produced a backlog most recently estimated at close to 1.6 million cases.³ On average, individuals wait over 900 days—close to three years—between receiving the initial charging document and the final hearing on the merits of their case.⁴ The Board of Immigration Appeals has their own backlog – as of the end of FY 2021, over 91,000 appeals were pending – and the Board had completed only 30,723.⁵

EOIR is a bureaucracy, not a true court system. It is top-heavy with headquarters functionaries, many at GS-15 or higher positions, whose duties are not primarily related to adjudication. Its capabilities have degraded over time, becoming a pale reflection of the well-administered adjudicative system that the people and their congressional representatives expect. Headquarters programs, largely duplicative of functions performed by other DOJ entities and elsewhere in the government, drain resources that should be devoted to case adjudication (which receives only a fraction of the EOIR budget). As the 2017 report of the Government Accountability Office (GAO) has documented, skyrocketing caseloads continue to generate larger immigration hearing backlogs, even with the hiring of additional immigration judges.⁶ Immigration case hearings are now being scheduled in December 2023 (or not scheduled). This is “justice delayed,” contrary to congressional (and public) expectations for timely and efficient judicial administration.

Barriers to reform within the federal government have also negated the existing statute granting immigration judges authority to impose contempt sanctions upon noncompliant parties appearing before them.⁷ Moreover, immigration judges have no direct control over their dockets

³ TRAC Immigration Court Backlog Tool, available at https://trac.syr.edu/phptools/immigration/court_backlog/.

⁴ *Id.*

⁵ See EOIR Adjudication Statistics for the Board of Immigration Appeals, available at <https://www.justice.gov/eoir/page/file/1248506/download>

⁶ See GAO-17-438, IMMIGRATION COURTS: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017).

⁷ See 8 U.S.C. § 1229a(b)(1) (1996):

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue

or clerical staff—both are controlled through a separate administrative pipeline to headquarters. And although EOIR says that e-filing will be broadly available starting this month, paper continues to reign, contributing to storage and retrieval costs, increased space needs, lost filings, continuances, and more. Also, EOIR’s less-than-functional implementation of courtroom technology, including video-teleconferencing (VTC) and WEBEX, has led to difficulties maintaining connectivity, hearing respondents, exchanging paper documents, conducting accurate foreign language interpretation, and assessing the demeanor and credibility of respondents and witnesses.

Current immigration adjudication is politicized with judges who lack authority and autonomy.

Currently, Board of Immigration Appeals members and immigration judges are considered only “attorneys representing the United States in litigation” – not independent judicial officers.⁸ They are subject to discipline if the Attorney General disagrees with their decisions, and thus lack independence to freely adjudicate the matters before them. The potential for political influence means that they cannot ensure due process and decisions made solely according to law.

In addition, due to the number of immigration judges and members of the Board of Immigration Appeals who are former DHS or DOJ attorneys and the co-location of some immigration courts with Immigration and Customs Enforcement offices, a broad perception exists that immigration judges and DHS attorneys are working together, or that the immigration courts act as a rubber stamp approving and supporting DHS actions. This perception leads to significant lapses in perceived due process; for example, individuals do not appear because they

subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (*under regulations prescribed by the Attorney General*) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.

(emphasis added). No such regulations have ever been promulgated.

⁸ See, e.g., Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a “Purge,”* L.A. TIMES (Mar. 12, 2003), <http://articles.latimes.com/2003/mar/12/nation/na-immig12>.

think the system is rigged, do not appeal a bad decision because they lack resources after the long wait for a merits hearing, or do not pursue potential relief for which they might be eligible. Conversely, it also leads to more motions to reopen or reconsider initial decisions, and more petitions for review in the circuit courts of appeals, as the availability of further review in federal court postpones finality, encourages litigation, and undermines the authority of initial Board of Immigration Appeals determinations.

An independent Article I court will promote timely decisions and efficient court operation.

A number of alternatives to the current arrangement exist, all have pluses and minuses. An independent Article I immigration court is, we believe, the best option. Though it will not single-handedly fix the current trial- and appellate-level backlogs—which depend in part on jurisdictional and policy decisions that go beyond the establishment and implementation of an independent Article I court—replacing EOIR with a court in fact as well as name should be a considerable improvement. With individual trial judges controlling their dockets and staff, and no longer subject to shifting decisions by political superiors, the focus will be on justice rather than political outcomes. Also, the court as a whole would be able to establish and modify administrative and procedural rules as needed without following the current byzantine requirements for consulting with numerous different offices and agencies. An independent Article I immigration court would simply apply the law to the cases that DHS brings before it, and it would accord appropriate deference to the legal interpretations on which the Executive’s enforcement actions are based. Moreover, Congress—not the Executive—has the supreme authority to determine what level of due process is accorded individuals who seek to enter the United States, or those already here.

Some commentators have proposed turning EOIR into a separate executive agency or placing the immigration courts within the regular federal court system.⁹ The FBA believes that similar bureaucratic issues would arise if a separate executive agency is established outside of DOJ. Although Congress has the constitutional authority to establish new courts either as part of the Article III judiciary or as independent tribunals under Article I, the Judicial Conference of the United States opposes the creation of a specialized immigration court system within the judicial branch or otherwise making the federal judiciary primarily responsible for administrative support of the immigration courts.¹⁰ Hence, the best option remaining is the creation of an independent Article I immigration court.

Managed by the judges themselves rather than bureaucrats, an Article I Immigration Court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect.

The benefits of decisional independence in an adjudicative context are compelling.... People who decide cases should base their decisions on their honest assessments of the evidence and their honest interpretations of the relevant law, not on the basis of which outcomes are most likely to please the officials who have the power to fire them. In addition, decisional independence serves to avoid defensive judging (playing it safe); to protect unpopular individuals, minorities, and viewpoints; to operationalize separation of powers; to nourish public confidence in the integrity of the justice system; to prevent “reverse social Darwinism,” in which the most honest and most courageous adjudicators are the ones first culled from the herd; to make the positions attractive enough to recruit the most talented candidates; and to sustain a continuity of interpretation from one administration to the next.

Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635-1721 (2010).

Specialized Article I courts have a long, successful history in the United States.

Independent Article I courts are not a newfangled idea; an independent Article I immigration court is consistent with congressional practice in other areas of federal law—tax

⁹ See GAO 17-438.

¹⁰ See Report of the Proceedings of the Judicial Conference of the United States, September 22-23, 1982, at pp. 63-64, available at <https://www.uscourts.gov/sites/default/files/1982-09.pdf>; Report of the Proceedings of the Judicial Conference of the United States, September 13, 2016, at 18-19, available at https://www.uscourts.gov/sites/default/files/2016-09_o.pdf.

administration, veterans benefits, and military justice—where there has been a role for both executive policy-making, priority-setting and impartial adjudication. Much like the current immigration courts, the United States Tax Court, the United States Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces started out as internal components of civilian or military bureaucracies, with little or no separation from those responsible for broader administrative leadership. Ultimately, in response to concerns about fairness and impartiality in the adjudication of individual cases, Congress pulled the adjudicative functions out and established independent Article I courts.

This is an idea whose time for implementation has come.

The idea of taking the next logical step—establishing an independent Article I immigration court—is not new. It has been proposed numerous times over the past three decades (including a series of bills introduced in the House of Representatives between 1982 and 1999), and was recommended by the Select Commission on Immigration and Refugee Policy.¹¹ Even then, experts saw the need for change because of “[l]ong delays [that] pervade the quasi-judicial hearing and appellate process.” and the reality that “[immigration judges] are subject to inappropriate interference from law enforcement personnel, lack the necessary control over the administration of their own hearings, and lack the resources needed to carry out their essential functions.”¹² Nothing has changed the situation since that time; all of the same problems exist today. EOIR’s dysfunctions, which are highlighted in the 2017 GAO report, continue to contribute to monumental immigration judge caseloads and significant backlogs.

An Article I court would not duplicate or create new jobs or in any way expand the size of the federal government. Nor would it require (as some other Article I proposals might) an extremely high number of presidential appointments requiring Senate confirmation (a concern

¹¹ See U.S. Immigration Policy and the National Interest (Mar. 1, 1981), *available at* <https://files.eric.ed.gov/fulltext/ED211612.pdf>.

¹² See Peter J. Levinson, “A Specialized Court for Immigration Hearings and Appeals,” 56 *Notre Dame L. Rev.* 644, 645-46 (1981).

raised because an immigration court, unlike other Article I courts with presidentially appointed judges, would have judges numbering in the hundreds). Instead, a two-tiered system could only require enough presidential appointees to staff the appellate division. Consistent with the Appointments Clause of the Constitution, those appellate judges could be appointed by the President by and with the advice and consent of the Senate, and they in turn could appoint the trial division judges. While the political branches of government would still participate in appointments to the appellate division, the court could be insulated from undue political influence and policy shifts by staggering the terms of office of the appellate judges. Like other Article I courts, judges in both the appellate and trial divisions should serve for renewable 15-year terms and be removable only for cause, enabling them to focus solely on their judicial responsibilities, free of daily concerns about continued employment.

Moving the immigration judiciary out of DOJ would alleviate the perception that it is not independent, and that DHS and individual respondents are not parties of equal standing in immigration cases. This would also cure the perception that the immigration courts and the Board of Immigration Appeals have become so politicized that decisions are based not on the established law but on the changing views of any particular administration. As an Article I court begins to operate, and individual cases start to receive fair, prompt, and accurate attention from that court, respect for its authority and decisions should grow over time, lessening delays caused by parties' dilatory actions as well as the volume of appeals and remands.

Conclusion

We all have strong opinions about whether our nation's immigration laws need a complete overhaul or a quick fix—and how to go about either or both—but as we look to implement changes in our current immigration system, the immigration courts that would be called upon to apply those changes must be lifted from a “halfway there, not-quite-court” to a true court under Article I. It is now well past the time for a “bandage” will work to fix this problem; only through “major surgery” can the system be made whole.

Chair Lofgren, thank you again for the opportunity to appear before you. The Federal Bar Association looks forward to working with you to improve the immigration adjudication process.