



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

Statement of the American Immigration Lawyers Association

**Submitted to the Senate Judiciary Subcommittee on Border Security and Immigration
Hearing on “Strengthening and Reforming America’s Immigration Court System”**

April 18, 2018

Contact:

Greg Chen
Director of Government Relations
gchen@aila.org; 202-507-7615

Laura Lynch
Senior Policy Counsel
llynch@aila.org; 202-507-7627

The American Immigration Lawyers Association (AILA) is the national bar association of more than 15,000 attorneys and law professors who practice and teach immigration law. Drawing upon the experience of AILA lawyers who represent noncitizens every day in removal proceedings nationwide, AILA offers these views with respect to law and policies governing the immigration court system.

The U.S. immigration court system does not meet the standards which justice demands. Chronic and systemic problems have resulted in a severe lack of public confidence in the system’s capacity to deliver just and fair decisions in a timely manner. Years of disproportionately low court funding levels - as compared to the rapid expansion of immigration enforcement funding for Immigration and Customs Enforcement (ICE) and U.S. Customs Border Protection (CBP) - have contributed to an ever-growing backlog of cases that is now approaching 700,000. The lack of adequate resources has not only resulted in overworked staff but also compromised the system’s ability to assure proper review of every case.

As a component of the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR) has been particularly vulnerable to political pressure. Immigration judges, who are currently appointed by the Attorney General and are DOJ employees, have struggled to maintain independence in their decision making. In certain jurisdictions, the immigration court practices and adjudications have fallen far below acceptable norms. The grant rates for cases are highly disparate among judges--asylum grant rates are less than 5 percent in some jurisdictions yet higher than 60 percent in others--thus giving rise to criticism that outcomes may turn on which judge is deciding the case rather than established principles and rules of law.¹

Despite the well-documented flaws in the current immigration court system, the DOJ and EOIR have failed to propose any viable plan to address these concerns. Instead of working to improve the system, the administration has implemented a series of policies that will undermine the independence of immigration judges and due process for the sole purpose of accelerating deportations. In March, Congress appropriated funds to hire 100 additional immigration judge teams. As part of its oversight responsibility, Congress should insist that EOIR implement procedures, in its expenditure of these funds, to ensure due process and fairness in proceedings.

Congress should create an independent immigration court system in the form of an Article I court.

In its current state, the immigration court system requires a complete structural overhaul. AILA recommends that Congress create an independent immigration court system in the form of an Article I

¹ Government Accountability Office, “GAO-17-72: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges,” (Nov. 2016), <http://www.gao.gov/assets/690/680976.pdf>.

court, modeled after the U.S. Bankruptcy Court.² Such an entity would protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court system. The new Article I immigration courts should include trial and appellate level courts with further review to the U.S. Circuit Courts of Appeals. Judges should be appointed by the U.S. Courts of Appeals for ten-year terms and should be highly qualified and well-trained and represent diverse backgrounds. This structural overhaul would advance the immigration court's status as a neutral arbiter, ensuring the independent functioning of the immigration judiciary. AILA's recommendations for restructuring the court are contained in the 2018 AILA board resolution.³

Mandatory quotas will lower the quality of adjudications and compromise due process.

Various news sources, including *The Wall Street Journal*⁴ and *The Daily Beast*,⁵ recently reported that EOIR will impose case completion quotas on immigration judges starting on October 1, 2018.⁶ These measures will tie the number of cases that judges complete to their performance evaluation, putting more pressure on judges to rule under tight deadlines. Immigration judges already have among the highest caseloads of any bench officers. Imposing numeric deadlines on judges will not improve their performance. Instead, quotas will compromise the quality of their decisions and result in grave errors like the wrongful deportation of an asylum seeker back to dangerous, life-threatening circumstances.

By regulation, immigration judges are appointed by the Attorney General and are employees of DOJ. They do not enjoy many of the protections of Article III federal judges, such as life tenure. In fact, immigration judges have no fixed term of office and can be fired by the Attorney General or be relocated to a different court. Case completion quotas that are tied to a judge's performance evaluation will severely jeopardize an immigration judge's ability to remain independent and impartial, since he or she could be potentially terminated for making a good faith legal decision of which their supervisor does not approve.

DOJ has restricted procedural safeguards and threatened access to counsel.

No one should be compelled to navigate the extremely complex immigration removal and deportation process without the assistance of legal counsel. Deportation is a severe consequence, yet the government does not guarantee legal representation to immigrants facing removal. Vulnerable individuals, including children, asylum seekers and those who speak little or no English, typically face immigration proceedings without any legal representation. At the very minimum, individuals shall be provided with a reasonable amount of time to be able to find counsel. In July 2017, EOIR released a memorandum, which compels immigration judges to deny multiple continuances, including continuances to find an attorney or for an attorney to prepare for a case.⁷ The guidance emphasized that there is no "right to a continuance" and that judges should give weight to "administrative efficiency" when deciding whether to issue a continuance.

While DOJ officials insist that continuances are being used improperly to delay proceedings, in fact,

² See Appendix A - American Immigration Lawyers Association, "Resolution on Immigration Court Reform" (Feb. 3, 2018), <http://www.aila.org/File/DownloadEmbeddedFile/74919>.

³ *Id.*

⁴ Laura Meckler, *The Wall Street Journal*, "New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations," Apr. 2, 2018, <https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158>.

⁵ Betsy Woodruff, *The Daily Beast*, "New Quotas for Immigration Judges Are 'Incredibly Concerning,' Critics Warn," Apr. 2, 2018, <https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn>.

⁶ American Immigration Lawyers Association, "Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of the Courts" (Oct. 13, 2017), <http://www.aila.org/ijquotas>.

⁷ Memorandum from Mary Beth Keller, Chief Immigration Judge, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 17-01: Continuances to All Immigration Judges, et al. (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download>.

continuances are often necessary to ensure due process and ultimately to prevent the deportation of someone to life-threatening conditions. The number one reason people request a continuance is to find a lawyer.⁸ Someone who is trying diligently but cannot find a lawyer should not be forced to proceed in their case. Asylum seekers and others seeking relief are ten times more likely to win protection from the courts if they have the benefit of legal counsel.⁹ Furthermore, legal representation also increases the efficiency of the court process and enables cases to move faster thereby saving valuable time for immigration judges who must ensure that respondents receive due process. Taking discretion away from judges to properly manage their own dockets interferes with judicial independence and interferes with a judge's ability to ensure administrative efficiency.

DOJ will defund the Legal Orientation Program (LOP) undermining due process and efficiency.

Until a comprehensive counsel program is created, it is vital that existing legal orientation and access to counsel programs be expanded. AILA is deeply concerned that EOIR plans to terminate the 15-year-old Legal Orientation Program (LOP), announced on April 10, 2018, despite its positive impact on judicial efficiency and fundamental fairness.¹⁰ Through the LOP, representatives from nonprofit organizations have provided essential information to immigration detainees about the immigration court system. LOP operates in 38 facilities and provides legal information to 50,000 people each year, nearly all of whom are unrepresented.¹¹ LOP has been shown to improve efficiency and immigration court appearance rates, help with access to pro bono legal services, and has saved about \$17.8 million each year for the courts and enforcement agencies.¹² The American Immigration Council has reported that immigrants in detention are the least likely to obtain representation, with only 14 percent of detained immigrants acquiring legal counsel.¹³ While LOP is not a substitute for legal counsel, it is a critical resource that assists detained immigrants in navigating a complex immigration court process.

The Attorney General has certified several decisions to himself.

AILA is also concerned that the Attorney General has certified for his review several Board of Immigration Appeals (BIA) decisions. The issues in these certifications strike at the heart of a respondent's ability to have a full and fair hearing, and include: the authority of an immigration judge to administratively close proceedings [*Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018)], the right of an asylum applicant to have a full evidentiary hearing [*Matter of E-F-H-L*, 27 I&N Dec. 245 (A.G. 2018)], what qualifies as a "particular social group" for purposes of an asylum application [*Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018)], and the ability of an immigration judge to grant a continuance for "collateral" matters to be adjudicated [*Matter of L-A-B-R- et al.*, 27 I&N Dec. 245 (A.G. 2018)].

⁸ See Government Accountability Office (GAO), Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017), page 125, Table 13, <http://www.gao.gov/assets/690/685022.pdf>.

⁹ Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court," American Immigration Council (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁰ Maria Sacchetti, *The Washington Post*, "Justice Dept. to halt legal-advice program for immigrants in detention" (Apr. 10, 2018), https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html?utm_term=.7add5e325584.

¹¹ See Department of Justice Press Release 17-889, "Return to rule of law in Trump administration marked by increase in key immigration statistics," (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

¹² U.S. Department of Justice, Legal Orientation Program, (updated Nov. 16, 2016), <https://www.justice.gov/eoir/legal-orientation-program>; Department of Justice, Cost Savings Analysis – The EOIR Legal Orientation Program, (updated Apr. 4, 2012), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

¹³ Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court," American Immigration Council, (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

While most of the certifications have stated that interested amici can submit briefs, the DOJ has refused to provide any information on the cases, including copies of the underlying decisions (which can be redacted, if necessary) or even which immigration court decided the cases and thus what circuit law applies. This lack of transparency is unacceptable. While we have yet to see the Attorney General's decisions in most of these cases, cumulatively, they have the potential to affect the majority of cases working their way through our immigration court system.

Conclusion

Taken together, these policies announced by DOJ during the past year will have the undeniable effect of eroding the most important guarantee of our legal system: the right to a full and fair hearing by an impartial judge. The Attorney General justifies his plans as necessary to eliminate fraud, but they will most likely harm families, children, people who qualify for relief under our immigration laws, and individuals who have suffered some of the most violent atrocities and deserve humanitarian protection. These policies will have the greatest impact on indigent respondents and those who have fled from dangerous and violent circumstances but who should nonetheless have a meaningful opportunity to seek protection provided under U.S. law. Enactment of legislation creating an Article I immigration court is imperative, and AILA recognizes such systemic reform will not happen quickly. In the short term, Congress should closely monitor EOIR practices and request data regarding the processing of cases to ensure that every individual appearing before the courts receives a fair hearing.

Appendix A

RESOLUTION ON IMMIGRATION COURT REFORM AILA Board of Governors Winter 2018

PROPONENT: *AILA Executive Committee and AILA EOIR Liaison Committee*

Introduction: Our immigration court system does not meet the standards which justice demands. Chronic and systemic problems have resulted in a severe lack of public confidence in the system's capacity to deliver just and fair decisions in a timely manner.¹ As a component of the Department of Justice (DOJ), EOIR has been particularly vulnerable to political pressure. Immigration judges, who are currently appointed by the Attorney General and are DOJ employees, have struggled to maintain independence in their decision making. In certain jurisdictions, the immigration court practices and adjudications have fallen far below constitutional norms. Years of disproportionately low court funding levels - as compared to other components of the immigration system such as ICE and CBP - have contributed to an ever-growing backlog of cases that is now well over 600,000.

Despite the well-documented history of structural flaws within the current immigration court system, DOJ and EOIR have failed to propose any viable plan to address these concerns. In fact, instead of working to improve the system, DOJ recently announced initiatives that severely jeopardize an immigration judge's ability to remain independent and impartial.² These new policies are designed only to accelerate deportations, further eroding the integrity of the court system.

RESOLUTION: *The Board hereby reaffirms and clarifies its position on immigration court reform as follows:*

In its current state, the immigration court system requires a complete structural overhaul to address several fundamental problems. AILA recommends that Congress create an independent immigration court system in the form of an Article I court, modeled after the U.S. Bankruptcy Court. Such an entity would protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court system.

Below is an outline of the basic features that should be included in the Article I court.

Independent System: Congress should establish an immigration court system under Article I of the Constitution, with both trial and appellate divisions, to adjudicate

¹ See 2017 AILA Fall Board of Governors Meeting Materials, Sept. 16, 2017, pgs. 4-14, available at http://www.aila.org/about/leadership/bog/schedule/agendas-materials/2017-aila-fall-board-of-governors-meeting-material?utm_source=aila.org&utm_medium=InfoNet%20Search.

² See U.S. DOJ, EOIR, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," Dec. 5, 2017, available at <https://www.justice.gov/opa/press-release/file/1015996/download>; U.S. DOJ, EOIR "Backgrounder on EOIR Strategic Caseload Reduction Plan," Dec. 5, 2017, available at <https://www.justice.gov/opa/press-release/file/1016066/download>; and U.S. DOJ, EOIR, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017, available at <https://www.justice.gov/eoir/file/oppm17-01/download>.

immigration cases. This structural overhaul advances the immigration court's status as a neutral arbiter, ensuring the independent functioning of the immigration judiciary.

Appellate Review: AILA recommends that the new Article I court system provide trial-level immigration courts and appellate level review, with further review to the U.S. Circuit Courts of Appeals and the U.S. Supreme Court. To prevent overburdening Article III courts, it is necessary to include an appellate court within the Article I court system.

Judicial Appointment Process: AILA recommends the appointment of trial-level and appellate-level judges for a fixed term of no less than 10 years, with the possibility of reappointment. These judges would be appointed by the U.S. Court of Appeals for the federal circuit in which the immigration court resides.

The traditional Article I judicial appointment process, which relies on Presidential appointment with Senate confirmation, would be unworkable for the immigration court system and could easily create a backlog in judicial vacancies. The U.S. Bankruptcy Court system, which uses a different appointment process than other Article I courts, is a better model for the immigration court system, due to the comparable size and the volume of cases. Like the U.S. Bankruptcy Court System, which has 352 judges, the immigration court currently has over 300 judges. Traditional Article I courts have far fewer judges than that of the U.S. Bankruptcy Court System. Therefore, AILA recommends a judicial appointment system that closely resembles that of the U.S. Bankruptcy Court.

Hiring Criteria for Judges: Trial and appellate judges that are selected should be highly qualified, and well-trained, and should represent diverse backgrounds. In addition to ensuring racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographic diversity, AILA advocates for 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. We believe this balance best promotes the development of the law in the nation's interest.