



AMERICAN
IMMIGRATION
LAWYERS
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Submitted via: www.regulations.gov

**RE: EOIR Docket No. 18-0502
Request for Comment on Organization of the Executive Office for
Immigration Review, 84 Fed. Reg. 44537 (August 26, 2019)**

Dear Assistant Director Alder Reid,

The American Immigration Lawyers Association (AILA) submits the following comments in response to EOIR Docket No. 18-0502, the Executive Office for Immigration Review (EOIR) Interim Rule entitled, “Organization of the Executive Office for Immigration Review,” published in the Federal Register and effective on August 26, 2019 (hereinafter, interim rule).¹

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws. We appreciate the opportunity to comment on this Interim Rule and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

This immediately effective interim rule is contrary to existing law and politicizes the immigration court system, undermining its ability to be a neutral arbiter of justice. AILA strongly urges EOIR to rescind the provisions contained in this interim rule.

AILA opposes the delegation of authority that permits the Director of EOIR to adjudicate certain BIA decisions because it will further manipulate the immigration court system.

This interim rule provides that the Director of EOIR can adjudicate BIA cases if the case has been pending more than 90 days for single Board member cases or 180 days if a three-member panel is

¹ 84 Fed. Reg. 44537 (Aug. 26, 2019).

assigned.² While AILA supports the overarching goal of achieving backlog reduction, this policy change will allow political forces to unfairly shape legal precedent.³ The EOIR Director reports directly to the AG who in recent years has issued an unprecedented amount of precedent decisions that have restricted a judges' authority to manage their own dockets and created obstacles for people to obtain legal counsel.⁴ AILA is concerned that the EOIR director could be heavily influenced by the political climate and issue a flurry of precedent decisions that further threaten due process and fairness in immigration court proceedings.

Furthermore, in addition to concerns about asserting undue political influence, the EOIR Director is hired primarily to focus on managing responsibilities for the court.⁵ The background and experience is vastly different from BIA members that are hired specifically for their years of experience and background in interpreting "complex immigration laws."⁶ The interim rule would allow the EOIR Director to unilaterally issue binding decisions without any checks and balances, and without any vetting to ensure he or she has the substantive knowledge to decide individual immigration cases.

EOIR's creation of the Office of Policy under the Director's authority further politicizes the immigration court system.

EOIR is meant to be a purely an adjudicatory agency, providing case-by-case determinations of noncitizens' removability and claims for relief.⁷ Historically, the Office of the General Counsel (OGC) provided legal advice to EOIR component directors and the Office of the Chief Immigration Judge (OCIJ) took lead on developing operational court policies.⁸ However, in 2017, EOIR created the Office of Policy, charging the new entity with supervising all policy activities including the development and implementation of regulations, policy guidance, and training.⁹

² 84 Fed. Reg. 44537 (Aug. 26, 2019).

³ EOIR, Adjudication Statistics, (Aug. 23, 2019), <https://www.justice.gov/eoir/file/1199201/download>. There are numerous factors that contribute to the backlogs such as sudden policy changes and shifts in BIA member staffing. *See also*, ABA Report 2019, Reforming the Immigration System, (March 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

⁴ AILA Policy Brief, Restoring Integrity and Independence to America's Immigration Courts, (Sept. 28, 2018), <https://www.aila.org/dueprocess#PDF>.

⁵ *See* DOJ Legal Careers, Job Posting for EOIR Director, (Aug. 1, 2017), <https://www.justice.gov/legal-careers/job/director-2>.

⁶ EOIR BIA Attorney Job Posting, (Feb. 19, 2016), <https://www.justice.gov/legal-careers/job/board-member>.

⁷ Stephen Logomsky, Restructuring Immigration Adjudication, (2010), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1468&context=dlj>.

⁸ *See* prior OGC and OCIJ authority at 72 FR 53676, (Sept. 20, 2007), as amended at 81 FR 92361, (Dec. 19, 2016); *See also* The Asylumist, An Interview with MaryBeth Keller, Former Chief Immigration Judge of the United States, (Oct. 15, 2019), <http://www.asylumist.com/2019/10/15/an-interview-with-marybeth-keller-former-chief-immigration-judge-of-the-united-states/>.

⁹ 84 Fed. Reg. 44537 (Aug. 26, 2019).

Notably, EOIR launched its new Office of Policy on December 11, 2017, *prior* to the issuance of this interim rule and without formal rulemaking or notice to the public.¹⁰ This office quickly took over the authority delegated by regulation to OGC and OCIJ.¹¹ In addition, the Office of Policy became the driving force behind the development and implementation of new substantive policies that improperly interfere with judicial decision-making and the due process rights for respondents. For example, in 2018, EOIR implemented case completion quotas as part of immigration judges' performance reviews, compelling them to decide cases under strict deadlines or face potential discipline.¹² The Office of Policy is responsible for the issuance of policy memorandums that shuffled the immigration court dockets, prioritizing the adjudication of family unit cases and requiring IJs to reschedule hundreds of long-pending cases.¹³ IJs have also been provided with guidance from this component that dictates how IJs should decide asylum seekers' requests for continuances.¹⁴ Policies like these treat the complex process of judging cases like an assembly line, increasing pressure on judges to speed cases at the expense of giving respondents time to gather evidence and find an attorney.¹⁵

The delegation of broad policy authority to one department within the Director's office is deeply troubling. As an adjudicatory system, EOIR should be creating policy primarily through BIA precedent decision-making.¹⁶ Allowing a newly-created department with a direct line to the most politicized position – the Director of EOIR – to consolidate and expand the power to create new

¹⁰ Catholic Legal Immigration Network, Inc. (CLINIC) FOIA Disclosures on the Office of Policy, (Oct. 24, 2019), <https://cliniclegal.org/sites/default/files/resources/2019-1024-eoir-disclosure-ehdc-creation-staffing-office-policy.pdf>. CLINIC obtained internal agency emails revealing the December 11, 2017 launch date for the Office of Policy.

¹¹ See prior OGC and OCIJ authority at 72 FR 53676, (Sept. 20, 2007), as amended at 81 FR 92361, (Dec. 19, 2016); See also *The Asylumist*, An Interview with MaryBeth Keller, Former Chief Immigration Judge of the United States, (Oct. 15, 2019), <http://www.asylumist.com/2019/10/15/an-interview-with-marybeth-keller-former-chief-immigration-judge-of-the-united-states/>.

¹² Maria Sacchetti, Immigration judges' union calls for immigration court independent from Justice Department, *Washington Post*, Sept. 21, 2018, https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigrationcourts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?noredirect=on. This unprecedented move was described by the National Association of Immigration Judges (NAIJ) as a “death knell for judicial independence” and pressures judges to rush through decisions rather than give careful consideration to the law and facts in each case. See [https://www.naij-usa.org/images/uploads/publications/NAIJ - Concerns Regarding Implementation of Quotas 10-17-17.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_-_Concerns_Regarding_Implementation_of_Quotas_10-17-17.pdf). Quotas interfere with judicial independence and emphasize the quantity of the cases decided over the quality of the decisions.

¹³ EOIR PM 19-04, Tracking and Expedition of “Family Unit” Cases, (Nov. 16, 2018), <https://www.justice.gov/eoir/page/file/1112036/download>.

¹⁴ EOIR PM 19-05, Guidance Regarding the Adjudication of Asylum Applications Consistent with INA §208(d)(5)(A)(iii), (Nov. 19, 2018), <https://www.justice.gov/eoir/page/file/1112581/download>.

¹⁵ American Immigration Council, Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁶ Former BIA Chairman Paul Schmidt, PWS “Quick Takes” on EOIR Interim Reorganization Rule, (Aug. 23, 2019), <https://immigrationcourtside.com/2019/08/23/heres-my-quick-take-on-eoirs-interim-rule-on-reorganization/>.

policy calls into question the impartiality and integrity of the court system. Because of these concerns, AILA opposes the creation and formalization of the EOIR Office of Policy.

EOIR's issuance of the new interim rule does not comply with the Administration Procedures Act (APA).

The interim rule became effective immediately upon publication.¹⁷ EOIR failed to provide preliminary notice and an opportunity for the public to comment on changes that dramatically impact the administration of justice in the immigration court system. EOIR asserts that the interim rule is exempt from usual requirements of prior notice and comment and a 30-day delay in effective date because the interim rule only affects the agency's internal organization, not the general public.¹⁸ As discussed above, EOIR has enacted significant changes that dramatically reshape the courts and undermine due process removal proceedings. As such, the public should have been provided a meaningful opportunity to participate in the rulemaking process prior to EOIR moving forward with these regulatory changes.

Conclusion

We appreciate the opportunity to offer these comments in response to EOIR's interim rule and look forward to continuing to engage with EOIR on this important issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

¹⁷ 84 Fed. Reg. 44537 (Aug. 26, 2019).

¹⁸ 84 Fed. Reg. 44537 (Aug. 26, 2019), citing 5 U.S.C. §553.