



**AILA Policy Brief:
Restoring Integrity and Independence to America's Immigration Courts**

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The U.S. immigration court system suffers from profound structural problems that have severely eroded its capacity to deliver just decisions in a timely manner, as well as public confidence in its outcomes. The root cause of this dysfunction is a conflict of interest built into the system itself. The immigration courts are overseen by the Attorney General (AG), who also supervises the U.S. Department of Justice (DOJ) lawyers who prosecute immigration cases in federal courts.² This conflict is made worse by the fact that the judges are considered merely government attorneys, a category that fails to recognize the import of their judicial duties and puts them at the whim of the AG.

For years we have seen the detrimental effects of a politicized immigration court system. Administrations have repeatedly made policy decisions not because they're efficient or legally sound, but because they're politically expedient. This flawed system has enabled the Trump Administration to transform the immigration courts into an enforcement agency rather than a fair and neutral arbiter, turning immigration judges, as head of the National Association of Immigration Judges (NAIJ) Judge A. Ashley Tabaddor put it, into "prosecutors in ... judge's robe[s]."³ Through the policies described in this brief, the Attorney General and the Executive Officer for Immigration Review (EOIR) are undermining the independence of immigration judges and weakening due process. Judges are being pressured to render decisions at a break-neck pace at the cost of accuracy. At the same time, DOJ and EOIR are stripping judges of their ability to control their dockets, slowing down the processing of cases and reducing efficiency. EOIR policies – including hiring practices, docket interference, and attempts to terminate the immigration judges' union – are politicizing the immigration courts more than ever before. Such politicization of the courts is a deep stain on EOIR's credibility, one that undermines its efficacy and its credibility.

America's immigration court system has been pushed to its breaking point; band-aid fixes and short-term solutions are no longer enough to reverse course. To ensure a system that meets today's needs and protects due process, Congress must enact legislation that moves the courts outside of the DOJ and into an independent, Article I court.⁴

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² Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, Bender's Immigration Bulletin (Jan. 1, 2008), available at <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf>; ABA Commission on Immigration, *Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report_authcheckdam.pdf [hereinafter "ABA Report"].

³ Patt Morrison, *How the Trump administration is turning judges into 'prosecutors in a judge's robe'*, LOS ANGELES TIMES, (Aug. 29, 2018), available at <http://www.latimes.com/opinion/op-ed/la-op-patt-morrison-judge-ashley-tabaddor-20180829-htlmlstory.html>.

⁴ AILA Statement, *Strengthening and Reforming America's Immigration Court System Hearing*, (April 18, 2018), available at <https://www.aila.org/advo-media/press-releases/2018/aila-statement-on-strengthening-and-reforming>.

I. INHERENTLY FLAWED STRUCTURE

The Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is currently housed under DOJ. While trial-level immigration prosecutors are housed under the U.S. Department of Homeland Security (DHS) within Immigration and Customs Enforcement (ICE), the Attorney General supervises the Office of Immigration Litigation (OIL) which defends immigration cases on behalf of the government in the circuit courts of appeals.⁵ This inherent conflict of interest is made worse by the fact that immigration judges are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them at the whim of the Attorney General. The judges 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 another court.⁶

For years, we have seen Administrations take advantage of this flawed structure to make decisions based on politics, not fairness and efficiency. For example, in an attempt to achieve policy goals, both the Obama and Trump Administrations have manipulated and shuffled the court dockets to prioritize certain cases, moving other cases to the back of the line and further growing the already enormous case backlog.⁷ Stakeholders have also long-expressed concerns about issues such as inadequate staffing and training, lack of transparency into hiring and discipline, a shortage of technological resources, perceived bias, and perhaps most frequently, the ever-growing backlog of cases that has surpassed one million.⁸

The immigration courts were drastically under-resourced due to DOJ hiring freezes and competing funding priorities for a long time, especially when compared to skyrocketing budgets for enforcement agencies.⁹ This disparity in funding led to a massive backlog of pending cases, which was up to 542,411 pending cases at the end of January 2017, when President Trump took office.¹⁰ Under the Trump administration, the pending case backlog has *doubled* and, as of December 31, 2019, reached 1,089,696 cases.¹¹ While purporting to be committed to eliminating the backlog, the Attorneys General's own policies are contributing to this considerable rise in cases. Attorney General Sessions' decision in *Matter of Castro Tum*, discussed below, will eventually result in the addition of approximately 355,835 cases to the docket that were administratively closed at the time of the decision.¹²

II. ATTACKS ON JUDICIAL INDEPENDENCE

A. Case Completion Quotas

⁵ Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, Bender's Immigration Bulletin (Jan. 1, 2008), available at <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf>.

⁶ ABA Report, *supra* note 2.

⁷ A. Ashley Tabaddor, *INSIGHT: Immigration Courts Face More Than 80,000 Canceled Hearings in Federal Shutdown*, Bloomberg Law (Jan. 29, 2019), available at <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-immigration-courts-face-more-than-80-000-canceled-hearings-in-federal-shutdown-1>.

⁸ AILA IJ Quota Brief, *supra* note 3; Priscilla Alvarez, *Immigration court backlog exceeds 1 million cases, data group says*, CNN, (Sep. 18, 2019), <https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html>.

⁹ ABA Report, *supra* note 2.

¹⁰ TRAC, *Immigration Court Backlog Jumps Again in August*, (Sept. 26, 2018), available at <http://trac.syr.edu/whatsnew/email.180926.html>.

¹¹ TRAC, *Immigration, Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location* (2020), available at https://trac.syr.edu/phptools/immigration/court_backlog/

¹² *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

Beginning Monday, October 1, 2018, the Attorney General subjected all immigration judges to individual case completion quotas and time-based deadlines as a basis for their performance reviews.¹³ This unprecedented policy requires judges to adjudicate a certain number of cases or face discipline which may result in termination of employment. The policy was described by NAIJ as a “death knell for judicial independence” and will undoubtedly pressure judges to rush through decisions to protect their own jobs.¹⁴ Disturbingly, DOJ unveiled new software, resembling a “speedometer on a car,” employed to track the completion of judges’ cases.¹⁵ The quotas are at odds with recommendations made by an independent third party in a report commissioned by EOIR itself, which recommends a judicial performance review model that “emphasizes process over outcomes and places high priority on judicial integrity and independence.”¹⁶

Imposing numeric quotas on immigration judges contributes to the Administration’s broader agenda to streamline removal procedures and deport massive numbers of people at the expense of due process. Judges feel pressure to accommodate the quotas at the cost of potentially excluding essential facts from their consideration. Given that most respondents do not speak English as their primary language, a strict time frame for completion of cases can interfere with a judge’s ability to assure that a person’s right to examine and present evidence is respected.¹⁷ This policy also profoundly impacts asylum seekers, who may need more time to gather evidence that is hard to obtain from their countries of origin, as well as unrepresented individuals, who may need more time to obtain an attorney. The purported argument for quotas is that it will speed up the adjudication process for the judges. However, applying this kind of blunt instrument will compel judges to rush through decisions and may compromise a respondent’s right to due process and a fair hearing. Poorly reasoned decisions or gross errors leads to an increase in appeals and federal litigation, further slowing down the process.

B. Attorney General Certifications

Under the INA, the Attorney General has authority to re-open and refer cases previously decided by the BIA to himself for a new decision.¹⁸ Known as “certification,” this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. Under the previous

¹³ Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges, (March 30, 2018), available at <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>; *Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts*, National Association of Immigration Judges, Jan. 31, 2018, available at https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf; See also Department of Justice, *Immigration Judge Performance Measures Overview*, June 7, 2018, available at <https://www.aila.org/infonet/eoir-legal-training-prgm-ij-performance-measures>.

¹⁴ NAIJ, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (October 2017), available at https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

¹⁵ *Federal Immigration Court System*, C-SPAN, (Sept. 21, 2018), available at <https://www.c-span.org/video/?451809-1/federal-immigration-court-system&start=348>. [hereinafter “C-SPAN NAIJ”] (“[t]his past week or so, they [EOIR] unveiled what’s called the IJ dashboard...this mechanism on your computer every morning that looks like a speedometer on a car,” said Ashley Tabaddor, and ‘it has all of the numbers there and 80% of it is red and there is a little bit of yellow and a little bit of green. The goal is for you to be green but of course you see all of these reds in front of you and there is a lot of anxiety attached to that.”).

¹⁶ AILA and The American Immigration Council FOIA Response, *Booz Allen Hamilton Report on Immigration Courts (4/6/17)*, available at <https://www.aila.org/casestudy> [hereinafter “Booz Allen Report”].

¹⁷ INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence; EOIR Adjudication Statistics, Hearing Language (Oct. 23, 2019), available at <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture>.

¹⁸ 8 U.S.C. § 1103(g)(2) (West 2018) (“The Attorney General shall establish such regulations . . . [and] review such administrative determinations in immigration proceedings . . .”).

administration, the Attorneys General employed this power only four times over the course of eight years.¹⁹ The Attorneys General under this administration have certified twelve cases and issued ten decisions in two years that have transformed immigration law in ways that run contrary to decades of judicial practice and established law.²⁰ Overall, the decisions are aimed at minimizing the role of judges in immigration courts by restricting their authority to manage their dockets or make decisions based on the facts of each case. In the words of Judge Tabaddor, “[w]hen you provide a prosecutor with a super veto power, that’s a design flaw.”²¹ The certifications issued by the Attorney General include decisions that:

- **Bloat the Docket by Limiting Use of Administrative Closure.** In *Matter of Castro-Tum*, the Attorney General severely limited the discretion of judges and the BIA to administratively close cases, eliminating an important docketing tool.²² An April 2017 report independently commissioned by EOIR had identified administrative closure as a helpful tool, specifically recommending that EOIR work with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.²³
- **Limit Continuances and the Opportunity to Obtain Counsel.** In *Matter of L-A-B-R- et al.*, the Attorney General made it more difficult for judges to grant continuance requests and implemented procedural hurdles that will also make it harder for people to request and immigration judges to grant continuances.²⁴
- **Restrict Discretion to Terminate Cases.** In *Matter of S-O-G- & F-D-B-*, the Attorney General prevents judges and the BIA from terminating or dismissing cases except in very narrow circumstances, a tool judges have used to increase efficiency by removing prioritizing which cases should move forward on their dockets.²⁵
- **Foreclose Asylum for Victims of Domestic Violence, Gangs, and Family-Based Persecution.** In *Matter of A-B-* and *Matter of L-E-A-*, the Attorney General made it far more difficult—in many

¹⁹ Sophie Murguia and Kanyakrit Vongkiatkajorn, *Jeff Sessions Is Executing Trump’s Immigration Plans With a Quiet, Efficient Brutality*, MOTHER JONES, (Sept. 7, 2018), <https://www.motherjones.com/politics/2018/09/jeff-sessions-is-executing-trumps-immigration-plans-with-a-quiet-efficient-brutality/> [hereinafter “Murguia”].

²⁰ *Matter of CASTRO-TUM*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018); *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018); *Matter of M-G-G-*, 27 I&N Dec. 475 (A.G. 2018); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of NEGUSIE*, 27 I&N Dec. 481 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019); *Matter of REYES*, 27 I&N Dec. 708 (A.G. 2019); *Matter of THOMAS and THOMPSON*, 27 I&N Dec. 674 (A.G. 2019); *Matter of CASTILLO-PEREZ*, 27 I&N Dec. 664 (A.G. 2019).

²¹ C-SPAN NAIJ, *supra* note 17.

²² *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1064086/download>.

²³ Booz Allen Report, *supra* note 18.

²⁴ *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1087781/download>. EOIR also issued guidance for judges discouraging the use of continuances and encouraging judges to sanction counsel that request continuances. Memorandum MaryBeth 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), available at <https://www.justice.gov/eoir/file/oppm17-01/download> [hereinafter OPPM 17-01: Continuances]. The Attorney General also issued guidance directing judges to expedite. Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice on Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

²⁵ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1095046/download>.

cases impossible—for survivors of domestic violence, gang persecution, and family-based persecution to apply for and qualify for asylum.²⁶

- **Deny Full Hearings to Asylum Seekers.** In *Matter of E-F-H-L-*, the Attorney General opened the door for judges to deny asylum without first conducting a full evidentiary hearing, depriving asylum seekers of an opportunity to fully present their case.²⁷
- **Limit Bond for Asylum Seekers.** In *Matter of M-S-*, the Attorney General held that someone who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond.²⁸ The decision means that asylum seekers and their families will remain in detention for longer period of time.

Three of the decisions (*Matter of Castro-Tum*, *Matter of L-A-B-R-*, *Matter of S-O-G- & F-D-B-*) will force judges to proceed in cases in which the person is eligible for some kind of relief. These are cases that could be resolved by other agencies and result in a grant of legal status. To compel the courts to move forward in such cases is an efficient and wasteful expenditure of the court's resources.

C. Seeking Termination of Immigration Judges Union

On August 9, 2019, DOJ petitioned the Federal Labor Relations Authority (FLRA) in an attempt to strip immigration judges of their right to unionize.²⁹ DOJ claims that the National Association of Immigration Judges (NAIJ) is no longer a valid union because the judges are managers who can't form unions under the Federal Service Labor-Management Relations statute. DOJ cited a series of "factual and legal developments" it says have added managerial weight to the judges' authority and rendered moot the FLRA's 2000 ruling rejecting EOIR's bid to break up the union.³⁰ However, these claims are at odds with both the reality of judges' positions, and the efforts made by this Administration to limit the judges' independence, management power, and authority. The administration has micromanaged dockets by restricting docketing tools, they have limited judges' discretion in adjudication, and they have imposed strict performance quotas.

III. POLITICIZATION OF THE COURTS

A. Docketing Interference

In August of 2018, EOIR removed an immigration judge from a case due to the judge's decision to delay the case in the interest of due process.³¹ Judge Steven A. Morley had decided to continue the high-profile

²⁶ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1070866/download>; *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), available at <https://www.justice.gov/file/1187856/download>.

²⁷ *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1040936/download>.

²⁸ *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), available at <https://www.justice.gov/eoir/file/1154747/download>.

²⁹ *Federal Labor Relations Authority Petition, Filed By U.S. Department of Justice Against National Association of Immigration Judges, IFPTE Judicial Council 2*, Case No. W A-RP-19-0067 (filed August 15, 2019), available at <https://www.aila.org/File/Related/19081303d.pdf>.

³⁰ For more information, see *Featured Issue: DOJ Moves to Decertify the Immigration Judges Union*, AILA Doc. No. 19081303 (January 21, 2020), <https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union>.

³¹ Press Release, National Association of Immigration Judges, *Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts* (Aug. 8, 2018), available at <https://www.aila.org/infonet/judges-union-grievance-violation-due-process-right>

case, *Matter of Castro-Tum*, to ensure adequate time for proper notice.³² EOIR personally interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing.³³ Subsequently, EOIR transferred dozens of other cases from the judge's docket, allocating them to an immigration judge that would be more likely to deny relief.³⁴ NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases.³⁵

B. Hiring Policies and Practices

Under the leadership of Attorney General Sessions, the DOJ has faced recent allegations of politicized hiring based on candidates perceived political or ideological views.³⁶ On April 11, 2017, Attorney General Sessions announced that he “implemented a new, streamlined hiring plan” to reduce the time it takes to hire immigration judges.³⁷ On its face, the agency “achieved” its goal to quickly hire more immigration judges, reducing the time it takes to onboard new immigration judges by 74% and increasing the number of immigration judges on the bench from 338 at the end of FY2017 to 442 by October 2019.³⁸ What these statistics do not reveal is that the new plan amended hiring processes to provide political appointees with greater influence in the final selection of IJs.³⁹ In addition to procedural changes, DOJ also made substantive changes to IJ hiring requirements, “over-emphasizing litigation experience to the exclusion of other relevant immigration law experience.”⁴⁰ Both Senate and House Democrats requested an investigation with the DOJ Inspector General to examine allegations that DOJ has targeted candidates and withdrawn or delayed offers for IJ and BIA positions based on their perceived political or ideological views.⁴¹ These allegations are

³² *Id.*

³³ NAIJ, *Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ*, (Aug. 8, 2018), available at <https://www.aila.org/infonet/naij-grievance-redress-removal>. [hereinafter “NAIJ Grievance”].

³⁴ *Id.*

³⁵ NAIJ Grievance, *supra* note 32.

³⁶ In April of 2017, House Democrats submitted a letter to the Attorney General expressing concern about reports that the DOJ “may be using ideological and political considerations to improperly-and illegally-block the hiring of immigration judges.” *House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process*, (April 17, 2018), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>. A month later, top Senate and House Democrats submitted a letter to the Inspector General requesting an investigation into the allegations that DOJ has targeted candidates and withdrawn or delayed offers for immigration judge and BIA positions based on their perceived political or ideological views. *Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ*, (May, 8, 2018), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig>.

³⁷ Department of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement, (Apr. 11, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

³⁸ Department of Justice, *EOIR Adjudication Statistic, IJ Hiring*, (Oct. 2019), available at <https://www.justice.gov/eoir/page/file/1104846/download>.

³⁹ Department of Justice, *EOIR Announces Largest Ever Immigration Judge Investiture*, Sept. 28, 2018; Document Obtained via FOIA by Human Rights First, *Memorandum for the Attorney General, Immigration Judge Hiring Process*, Apr. 4, 2017.

⁴⁰ Strengthening and Reforming America's Immigration Court System, Hearing Before Subcommittee on Border Security and Immigration, of the Senate Committee on the Judiciary, 115th Cong. 5 (2018) (A. Ashley Tabaddor, President, NAIJ), available at <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>. See also Questions for the Record available at <https://www.judiciary.senate.gov/imo/media/doc/Tabaddor%20Responses%20to%20QFRs.pdf>.

⁴¹ *Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ*, May 8, 2018.

Problematic hiring practices are not new for this agency. Over a decade ago, the IG and the Office of Professional Responsibility revealed that then-Attorney General Alberto Gonzales utilized political and ideological considerations in the hiring of IJ and BIA candidates. *U.S. Department of Justice IG Report*, (2008).

particularly troublesome given the influx in the number of IJs resigning and reports that experienced IJs are “being squeezed out of the system for political reasons.”⁴² Since January of 2017 through the summer of 2019, the Trump administration appointed at least 190 immigration judges which accounted for 43% of the total at the time.⁴³

There are also concerns about politicized hiring at the BIA. CQ Roll Call obtained documents via FOIA revealing that DOJ quietly changed an already opaque hiring procedure to permanently place six immigration judges who have been repeatedly accused of bias on the BIA.⁴⁴ The San Francisco Chronicle was the first to report in August that EOIR promoted six judges to the immigration appeals court, all of whom have high rates of denying immigrants’ asylum claims and come from the harshest jurisdictions with the lowest asylum grant rates in the nation.⁴⁵

C. BIA Changes

Three policy changes at the Executive Office for Immigration Review (EOIR) have the combined potential to significantly alter the operations of the Board of Immigration Appeals (BIA), as well as the substance of its decisions. First, DOJ published a final rule on July 2, 2019 that affects how the BIA issues decisions and how decisions are designated as precedent.⁴⁶ Second, DOJ published an interim rule on August 26, 2019 that reorganizes parts of EOIR and delegates authority to the Director of EOIR from the Attorney General.⁴⁷ And third, EOIR issued a policy memorandum on October 1, 2019 concerning case processing at the BIA.⁴⁸ The rules consolidate a significant amount of power in the EOIR Director, a bureaucratic position at the whim of the Attorney General – not an immigration judge, including the ability to directly decide cases appealed to the Board of Immigration Appeals and to designate cases as precedent.⁴⁹ Taken together, the policies mean BIA appeals will move faster, there is a likelihood that significantly more precedent decisions and non-precedent decisions issues will go against the respondent, and BIA decisions will be more likely to serve the political purposes of the Attorney General, rather than adhere to prior case law.

IV. EOIR POLICIES UNDERMINING DUE PROCESS

Under the leadership of the Attorney General, EOIR has also issued policies and implemented practices that erode due process. These practices and policies strike at the heart of a person’s ability to have a full and fair hearing. They include:

- **No Dark Court Room Policies.** EOIR implemented a “no dark court room” policy, which directs immigration judges to reschedule and advance hearings to any period in which there is no case

⁴² Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS, (Feb. 13, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump>.

⁴³ Amy Taxin, Trump puts his stamp on nation’s immigration courts, AP, (Jul. 23, 2019), available at <https://apnews.com/50e97a112fb142f2abffa061ed5737d6>.

⁴⁴ Tanvi Misra, DOJ changed hiring to promote restrictive immigration judges, CQ ROLL CALL, (Oct. 29, 2019), available at <https://www.rollcall.com/news/congress/doj-changed-hiring-promote-restrictive-immigration-judges/>.

⁴⁵ Tal Kopan, AG William Barr promotes immigration judges with high asylum denial rates, SAN FRANCISCO CHRONICLE, (Aug. 23, 2019) available at <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php>.

⁴⁶ *Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, 84 Fed. Reg. 31463 (July 2, 2019).

⁴⁷ *Organization of the Executive Office for Immigration Review*, 84 Fed. Reg. 44537 (August 2, 2019).

⁴⁸ *Case Processing at the Board of Immigration Appeals, PM 20-01* (October 1, 2019)

⁴⁹ 8 CFR §1003.1(e)(8)(ii).

scheduled in their court room.⁵⁰ In addition to reducing the amount of time for judges to prepare and review cases, this policy led some judges to advance hearings with little notice to counsel, sometimes as little as 48 hours before a hearing.⁵¹ Despite widespread concerns around utilizing Video Conferencing for immigration hearings, EOIR has piloted use of Video Conferencing (VTC) immigration adjudication centers (IACs), where IJs will adjudicate cases from around the country.⁵² An EOIR Commissioned report recommended that EOIR limit the use of VTC to procedural matters only due to concerns about how difficult it is for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC.⁵³

- **Discouraging Continuances.** In July of 2017, EOIR issued a memorandum that discourages the use of continuances by judges and even encourages judges to consider sanctions for attorneys who request too many continuances.⁵⁴ Continuances are often a necessary means to ensure due process is afforded in removal proceedings. For example, the number one reason respondents request continuances is to find counsel, who play a critical role in ensuring respondents receive a fair hearing.⁵⁵
- **Restricting Change of Venue.** In January of 2018, EOIR issued a memorandum that limited the authority of judges to grant change of venue motions, stating the changes of venue “create problems in caseload management and operational inefficiencies.”⁵⁶
- **Expedited Adjudications at the Cost of Due Process.** In December of 2017, the Attorney General issued a memorandum encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.⁵⁷
- **Establishing Arbitrary Deadlines for Court Proceedings.** In January of 2018, EOIR issued new case priorities and immigration court performance metrics.⁵⁸ These metrics established various deadlines for the immigration court to complete tasks, including completion of cases, adjudication

⁵⁰ Hoppock Law Firm Blog, “No Dark Courtrooms” is the Secret EOIR Policy That Might Ruin Your Summer, (June 1, 2018), available at <https://www.hoppocklawfirm.com/no-dark-courtrooms-is-the-secret-eoir-policy-that-may-ruin-your-summer/>.

⁵¹ EOIR Open Forum Notes, American Immigration Lawyers Association, (June 16, 2018), on file with author.

⁵² DOJ Backgrounder, EOIR Strategic Caseload Reduction Plan, (Dec. 5, 2017), available at <https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction>.

⁵³ Booz Allen, *supra* note 18.

⁵⁴ OPM 17-01: Continuances, *supra* note 25. (“[I]t may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. §1003.102.”).

⁵⁵ GAO Report, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, (June 2017), available at <https://www.aila.org/infonet/gao-report-actions-needed-to-reduce-case-backlog>.

⁵⁶ Memorandum Mary Beth Keller, Chief Immigration Judge, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 18-0 1: Change of Venue to All Immigration Judges, et al. (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026726/download>.

⁵⁷ Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review* (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

⁵⁸ Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures to The Office of the Chief Immigration Judge, et al, (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026721/download>.

of motions, and completion of credible fear interviews.⁵⁹ The metrics work hand-in-hand with the quotas to speed cases towards a resolution.

- **Issuing Fake or Phantom Court Dates:** Following the Supreme Court's decision in *Pereira v. Sessions*, which said that all NTAs in immigration court must include a date, time, and location, [EOIR knowingly](#) began to provide DHS components with artificial hearing dates to circumvent these requirements.⁶⁰ On January 31, 2019, news outlets reported more than 1,000 immigrants showed up to immigration courts nationwide only to discover that the hearings did not exist.⁶¹ Hundreds of immigrants traveled for many hours, took days off of work, took their children out of school in order to attend these hearings. Once they arrived at the overcrowded courts, they faced confusion and chaos. A similar scene erupted on Oct. 31, 2018, when hundreds of immigrants appeared for court nationwide and they did not actually have hearings scheduled.⁶² The Dallas immigration court reportedly turned away dozens of immigrants on September 13, 2018 because the dates listed on their NTAs were “fake dates” or “dummy dates.”⁶³ Attorneys have also reported that NTAs have ordered immigrants to appear in court outside of normal operating hours, such as midnight, weekends, and on dates that do not exist, such as September 31st, 2018. These fake dates pose significant hardships for clients and make an already opaque, complicated process extremely confusing for the thousands of immigrants who are trying to do the right thing and show up to court.
- **Opening Immigration Adjudication Centers (IACs):** Instead of securing more space for additional brick-and-mortar courtrooms, EOIR created two new adjudication centers where immigration judges adjudicate cases from around the country from a remote setting.⁶⁴ EOIR's website indicates that a total of nineteen IJs currently sit in two immigration adjudication centers—five in Falls Church, Virginia, and fourteen in Ft. Worth, Texas.⁶⁵ The two new facilities are called “centers,” not “courts,” despite being places where immigration judges decide whether to issue orders of deportation. Reports indicate that Immigration Adjudication Centers are remote-only facilities that are closed to the public, including to respondents, ICE trial attorneys, and attorneys

⁵⁹ *Id.*

⁶⁰ *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

⁶¹ Maria Sacchetti and Francisco Alvarado, *Hundreds show up for immigration-court hearings that turn out not to exist*, Washington Post (Jan. 31, 2019), available at https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html; Catherine E. Shoichet, Angela Barajas and Priscilla Alvarez, *New wave of 'fake dates' cause chaos in immigration courts Thursday*, CNN (January 31, 2019), available at <https://www.cnn.com/2019/01/31/politics/immigration-court-fake-dates/index.html>; Kate Smith, *ICE told hundreds of immigrants to show up to court Thursday — for many, those hearings are fake*, CBS News (January 31, 2019), available at <https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/>.

⁶² Catherine E. Shoichet, *100+ immigrants waited in line in 10 cities for court dates that didn't exist*, CNN (November 2, 2018), available at <https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html>.

⁶³ Dianne Solis, *ICE is ordering immigrants to appear in court, but the judges aren't expecting them*, Dallas News (September 16, 2018), available at <https://www.dallasnews.com/news/immigration/2018/09/16/ice-is-ordering-immigrants-to-appear-in-court-but-the-judges-arent-expecting-them/>.

⁶⁴ Katie Shepherd, *The Judicial Black Sites the Government Created to Speed Up Deportations*, Immigration Impact (January 7, 2019), available at <https://immigrationimpact.com/2019/01/07/the-judicial-black-sites-the-government-created-to-speed-up-deportations/#.XitIbiN7laQ>.

⁶⁵ Department of Justice Website, EOIR Immigration Court Listing (last visited January 24, 2020), <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

representing respondents with representation agreements on file.⁶⁶ The lack of transparency and rushed expansion of video teleconferencing poses hurdles to ensuring due process.

- **Opening Tent Courts on the Southern Border:** [DHS and DOJ opened massive temporary tent facilities](#) in Laredo and Brownsville, Texas that are functioning as virtual immigration court rooms for cases subject to the Remain in Mexico policy. During the hearings, asylum seekers are held in tents at the ports of entry while judges appear remotely via video conference. DHS and DOJ have provided little information about basic operations and procedures at the tent courts including the schedule and list of immigration judges that are assigned to these cases.⁶⁷ The location of the tent courts in Laredo and Brownsville compels asylum seekers to wait in two of the most dangerous cities in the world: Nuevo Laredo and Matamoros.⁶⁸ Both Remain in Mexico and the tent courts impose significant hurdles to due process, including making it difficult for asylum seekers to find representation and making it difficult for attorneys to represent asylum seekers.

V. ATTACKS ON IMMIGRATION COUNSEL AND ACCESS TO REPRESENTATION

Federal law guarantees noncitizens facing removal the right to counsel but does not entitle those who are unable to pay for counsel to have one appointed at the government's expense.⁶⁹ In fact, only 37 percent of all noncitizens and 14 percent of detained noncitizens are represented.⁷⁰ However, unrepresented people often face hurdles in court that can cause case delays, and the American Immigration Council has found that "immigrants with attorneys fare better at every stage of the court process."⁷¹ Despite the well-documented benefits of counsel, the administration has repeatedly attacked immigration lawyers by referring to them as "dirty immigration lawyers"⁷² and accusing attorneys of engaging in fraud.⁷³ Then-Attorney General Sessions even compared immigration lawyers and federal criminal defense lawyers to "water seeping under an earthen dam," and concluded that they have no duty or interest in upholding the integrity of the system. These are sweeping allegations from the nation's chief law enforcement officer that reflect an improper bias against immigration lawyers.

⁶⁶ Priscilla Alvarez, *More immigration judges to be assigned to cases at tent facilities*, CNN (December 6, 2019), available at <https://www.cnn.com/2019/12/06/politics/immigration-court-judges-remain-in-mexico/index.html>.

⁶⁷ AILA Policy Brief: Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent, AILA Doc. No. 20011061 (January 10, 2020), available at <https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful>; Organizations Urge Congress to Conduct Significant Oversight of Remain in Mexico and Use of Tent Courts by DHS and DOJ, AILA Doc. No. 19100734 (October 7, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/organizations-urge-congress-to-conduct-significant>; Featured Issue: Port Courts, AILA Doc. No. 19091660 (January 24, 2020), available at <https://www.aila.org/advo-media/issues/all/port-courts>.

⁶⁸ AILA Policy Brief, *DHS and DOJ Are Opening Secretive Port Courts Along the Southern Border*, (Sept. 6, 2019) available at <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-dhs-and-doj-are-opening-secret>.

⁶⁹ 8 U.S.C § 1362 (West 2018).

⁷⁰ Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council, Sept. 28, 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

⁷¹ Booz Allen, *supra* note 18.

⁷² OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, (Oct. 12, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

⁷³ OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR), (Sept. 10, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

DOJ also attempted to end the Legal Orientation Program (LOP), a program that provides a basic legal orientation for immigrants in deportation proceedings, proven to increase court efficiency and save taxpayer dollars.⁷⁴ After universal condemnation, DOJ rescinded its proposed termination of LOP, but continues to undermine the program by releasing flawed evaluations of LOP's efficacy.⁷⁵ These assertions are contradicted by several studies showing that the LOP program has a positive impact, including an independent report commissioned by EOIR that recommends that DOJ "consider expanding know your rights and legal representation programs, such as the Legal Orientation Program(LOP)."⁷⁶

VI. CONCLUSION

In its current state, the immigration court system is too easily manipulated. The Administration is taking advantage of its structural flaws to distort immigration law, undermine judicial independence, and speed through cases at the expense of due process. These problems can only be solved through a structural overhaul. The creation of an independent immigration court system outside the control of DOJ would protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court.

⁷⁴ Maria Sacchetti, *Justice Dept. to halt legal-advice program for immigrants in detention*, THE WASHINGTON POST, (April 10, 2018), available at 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; See also Press Release, Vera Institute of Justice, *Statement on DOJ's Decision to Halt Legal Orientation Program* (April 11, 2018), available at <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program> [hereinafter "Vera"]. ("The Department of Justice concluded in a 2012 study that this essential work is a cost-effective and efficient way to promote due process and cut through the large backlog of cases, the most significant issue facing the immigration courts today. The same study found that the program created a net savings for the government of nearly \$18 million—meaning, every \$1 the government spent on LOP saved \$4.").

⁷⁵ Lorelei Laird, *DOJ review finds immigrant legal education program ineffective; provider calls study flawed*, ABA JOURNAL, (Sept. 21, 2018), available at www.abajournal.com/news/article/doj_review_finds_immigrant_legal_education_program_ineffective_provider; See also Vera, *supra* note 55 ("There are insurmountable methodological flaws in EOIR's analysis. Our own analysis, which will be submitted to EOIR next week at their request, has starkly different findings that prove the efficiencies LOP yields, to say nothing of the other benefits of this program.").

⁷⁶ Booz Allen Report, *supra* note 18.