



FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog

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On December 19, 2018, AILA and the American Immigration Council obtained a partially redacted memorandum through the Freedom of Information Act (FOIA), entitled the [Executive Office for Immigration Review's \(EOIR\) Strategic Caseload Reduction Plan](#) (hereinafter "EOIR's plan"). EOIR's plan, which was approved by the Deputy Attorney General for the Department of Justice (DOJ) on October 31, 2017,² states that the overarching goal was "to significantly reduce the case backlog by 2020."³ In the following months, DOJ and EOIR implemented the plan by rolling out several policy initiatives, including multiple precedent-setting opinions issued by then-Attorney General (AG) Jeff Sessions.

Contrary to EOIR's stated goals, the administration's policies have contributed to an increase in the court backlog which exceeded 820,000 cases at the end of 2018.⁴ This constitutes a 25 percent *increase* in the backlog since the introduction of EOIR's plan.⁵ For example, the October 2017 memorandum reveals that EOIR warned DOJ that the Department of Homeland Security's (DHS) potential activation of almost 350,000 low priority cases or cases that were not ready to be adjudicated could balloon the backlog.⁶ Nonetheless, then-AG Sessions ignored these concerns and issued a decision that essentially stripped immigration judges (IJs) of their ability to administratively close cases and compelled IJs to reopen previously closed cases at Immigrations Customs Enforcement's (ICE) request.⁷

The policies EOIR implemented as part of this backlog reduction plan have severely undermined the due process and integrity of the immigration court system. EOIR has placed enormous pressure on IJs by setting strict case quotas on and restricting their ability to manage their dockets more efficiently. This approach treats the complex process of judging like an assembly line and makes it more likely that judges will not give asylum seekers and others appearing before the courts enough time to gather evidence to support their claims. People appearing before the courts will also have less time to find legal counsel, which has been shown to be a critical, if not the single most important factor, in determining whether an asylum seeker is able to prove eligibility for legal protection.

The foundational purpose of any court system must be to ensure its decisions are rendered fairly, consistent with the law and the Constitution's guarantee of due process. Efforts to improve efficiency are also important but cannot be implemented at the expense of these fundamental principles. EOIR's plan has not only failed to reduce the backlog but has eroded the court's ability to ensure due process. Furthermore, EOIR's plan demonstrates the enormous power DOJ exerts over the immigration court system. Until Congress creates an immigration court that is separate and independent from DOJ, those appearing before the court will be confronted with a flawed system that is severely compromised in its ability to ensure fair and consistent adjudications.

I. Background on EOIR's Inherently Flawed Structure

The U.S. immigration court system suffers from profound structural problems that have severely eroded both its capacity to deliver just and fair decisions in a timely manner and public confidence in the system

itself.⁸ Unlike other judicial bodies, the immigration courts lack independence from the Executive Branch. The immigration courts are administered by EOIR, which is housed within DOJ – the same agency that prosecutes immigration cases at the federal level. This inherent conflict of interest is made worse by the fact that IJs are not classified as judges but as government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them under the control of the AG, the chief prosecutor in immigration cases. The current administration has taken advantage of the court’s structural flaws, introducing numerous policies -- including EOIR’s plan -- that dramatically reshape federal immigration law and undermine due process in immigration court proceedings.

II. Policies Identified in EOIR’s Plan

Administrative Closure

Stated Policy Goal: To reduce the case backlog and maximize docket efficiency, EOIR’s plan called for the strengthening of EOIR and DHS interagency cooperation.⁹ EOIR’s plan advised DOJ that “any burst of case initiation by a DHS component could seriously compromise EOIR’s ability to address its caseload and greatly exacerbate the current state of the backlog.”¹⁰

Reality: Despite EOIR’s warning, then-AG Sessions issued a precedent decision in *Matter of Castro Tum*,¹¹ which contributed to a rise in the case backlog. This decision severely restricts a judge’s ability to schedule and prioritize their cases, otherwise known as “administrative closure” and even compels IJs to reopen previously closed cases at ICE’s request.¹²

Administrative closure is a procedural tool that IJs and the BIA use to temporarily halt removal proceedings by transferring a case from active to inactive status on a court’s docket. This tool is particularly useful in situations where IJs cannot complete the case until action is taken by USCIS or another DHS component, state courts and other authorities. Prior to the issuance of *Matter of Castro Tum*, numerous organizations, including the judges themselves, warned DOJ that stripping IJs of the ability to utilize this docket management tool “will result in an enormous increase in our already massive backlog of cases.”¹³ In fact, an EOIR-commissioned report identified administrative closure as a helpful tool to control the caseload and recommended that EOIR work with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.¹⁴

Nonetheless, the former AG issued *Matter of Castro Tum*¹⁵ sharply curtailing IJs’ ability to administratively close cases. The decision even called for cases that were previously administratively closed cases to be put back on the active immigration court dockets.¹⁶ In August 2018, ICE directed its attorneys to file motions to recalendar “all cases that were previously administratively closed...” with limited exceptions—potentially adding a total of 355,835 cases immediately onto the immigration court docket.¹⁷ Three months later, ICE had already moved to recalendar 8,000 cases that had previously been administratively closed, contributing to the bloated immigration court case backlog.¹⁸ In response, members of Congress sent a letter to DOJ and DHS outlining their concerns about ICE’s plans to recalendar potentially hundreds of thousands of administratively closed cases, further clogging the system and delaying and denying justice to the individuals within it.¹⁹

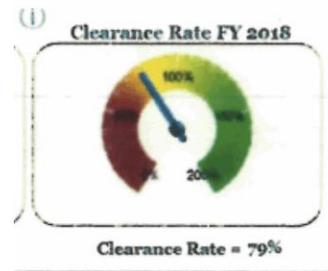
Quotas and Deadlines

Stated Policy Goal: To expedite adjudications, EOIR’s plan calls for the development of caseload management goals and benchmarks.²⁰

Reality: EOIR imposed unprecedented case completion quotas and deadlines on IJs, that pressure judges to complete cases rapidly at the expense of balanced, well-reasoned judgment.²¹

At the time EOIR’s plan was issued, EOIR’s collective bargaining agreement with the National Association of Immigration Judges (NAIJ) prohibited “the use of any type of performance metrics in evaluating an IJ’s performance.”²² Despite opposition from NAIJ,²³ DOJ and EOIR imposed case completion quotas and time-based deadlines on IJs, tying their individual performance reviews to the number of cases they complete.²⁴ Among other requirements, IJs must complete 700 removal cases in the next year or risk losing their jobs.²⁵ Disturbingly, DOJ unveiled new software, resembling a “speedometer on a car” employed to track the completion of IJs’ cases.²⁶

Sample Image of “IJ Performance Data Dashboard”



(Source: [Vice News](#))²⁷

AILA, the American Immigration Council, and other legal organizations and scholars oppose the quotas that have been described by the NAIJ as a “death knell for judicial independence.”²⁸ The purported argument for these policies is that it will speed the process up 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. Given that most respondents do not speak English as their primary language, a strict time frame for completion of cases interferes with a judge’s ability to assure that a person’s right to examine and present evidence is respected.²⁹

These policies also impact 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 Association of Pro Bono Counsel explained that the imposition of case completion quotas and deadlines “will inevitably reduce our ability to provide pro bono representation to immigrants in need of counsel.”³⁰ Unrepresented people often face hurdles in court that can cause case delays, and scholars have concluded that immigrants with attorneys fare better at every stage of the court process.³¹ Furthermore, these policies compel IJs to rush through decisions may result in errors which will lead to an increase in appeals and federal litigation, further slowing down the process.

Continuances

Stated Policy Goal: To “streamline current immigration proceedings”³² and “process cases more efficiently,”³³ EOIR’s plan called for changes in the use of continuances in immigration court.³⁴

Reality: The restrictions DOJ and EOIR placed on the use of continuances make it far more difficult for immigrants to obtain counsel and interfere with judges’ ability to use their own discretion in each case.

EOIR and DOJ introduced policies that pressure judges to deny more continuances at the expense of due process. In July 2017, the Chief IJ issued a memorandum which pressures IJs to deny multiple continuances, including continuances to find an attorney or for an attorney to prepare for a case.³⁵ Following this policy change, then-AG Sessions issued the precedential decision, *Matter of L-A-B-R- et al.*, interfering with an IJ’s ability to grant continuance requests and introducing procedural hurdles that will also make it harder for people to request and IJs to grant continuances.³⁶

These policy changes weaken due process protections and contradict the agency’s plan to “improve existing laws and policies.” Continuances represent a critical docketing management tool for IJs and are a necessary means to ensure that due process is afforded in removal proceedings. The number one reason respondents request continuances is to find counsel, who play a critical role in ensuring respondents receive a fair hearing.³⁷ Continuances are particularly important to recent arrivals, vulnerable populations (such as children), and non-English speakers—all of whom have significant difficulties navigating an incredibly complex immigration system. Furthermore, individuals represented by counsel contribute to more efficient court proceedings. NAIJ’s President, Judge A. Ashley Tabaddor, explained, “It is our experience, when noncitizens are represented by competent counsel, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly.”³⁸

Video Teleconferencing (VTC)

Stated Policy Goal: To expand its adjudicatory capacity, EOIR called for pilot VTC “immigration adjudication centers.”³⁹

Reality: EOIR expanded the use of VTC for substantive hearings undermining the quality of communication and due process.

A 2017 report commissioned by EOIR concluded that court proceedings by VTC should be limited to “procedural matters” because appearances by VTC may lead to “due process issues.”⁴⁰ Despite these concerns, EOIR expanded use of VTC for substantive hearings. A total of fifteen IJs currently sit in two immigration adjudication centers—four in Falls Church, Virginia, and eleven in Fort Worth, Texas.⁴¹ IJs are currently stationed at these “centers” where they adjudicate cases from around the country from a remote setting.⁴²

For years, legal organizations such as AILA and the American Bar Association (ABA) have opposed use of VTC to conduct in immigration merits hearings, except in matters in which the noncitizen has given consent.⁴³ Technological glitches such as weak connections and bad audio can make it difficult to communicate effectively, and 29 percent of EOIR staff reported that VTC caused meaningful delay.⁴⁴ Additionally, VTC technology does not provide for the ability to transmit nonverbal cues. Such issues can impact an IJs’ assessment of an individual’s credibility and demeanor, which are significant factors in determining appropriate relief.⁴⁵ Moreover, use of VTC for immigration hearings also limits the ability for attorneys to consult confidentially with their clients. No matter how high-quality or advanced the technology is that is used during a remote hearing, such a substitute is not equivalent to an in-person hearing and presents significant due process concerns.

IJ Hiring

Stated Policy Goal: In order to increase the IJ corps and reduce the amount of time to hire new IJs, the former AG introduced a new, streamlined IJ hiring process.⁴⁶

Reality: Following DOJ’s implementation of the streamlined IJ hiring process, DOJ faced allegations of politicized and discriminatory hiring⁴⁷ that call into question the fundamental fairness of immigration court decisions.

On its face, the agency “achieved” its goal to quickly hire more IJs, reducing the time it takes to onboard new IJs by 74 percent and increasing the number of IJs on the bench from 338 IJs at the end of FY2017 to 414 IJs by the end of 2018.⁴⁸ 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.⁴⁹ 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.”⁵⁰ Both Senate and

House Democrats requested an investigation with the DOJ Inspector General (IG) 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.⁵¹ These allegations are 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.”⁵²

Telephonic Interpreters

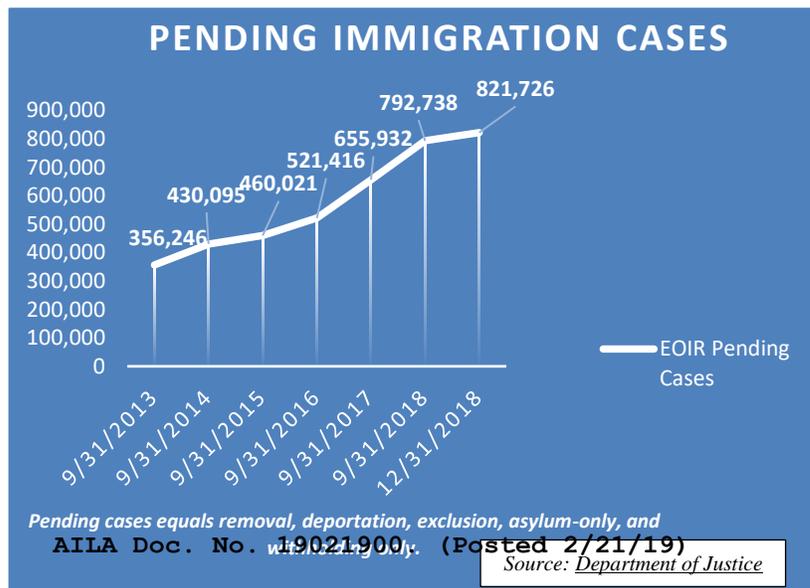
Stated Policy Goal: EOIR requested additional funding to support additional IJs on staff and to improve efficiency.⁵³

Reality: EOIR failed to budget for needed in-person interpreters⁵⁴ resulting in the use of telephonic interpreters for most hearings, which raises concerns about hearing delays and potential communication issues.⁵⁵

In April of 2017, an EOIR-commissioned report revealed that 31 percent of court staff reported that telephonic interpreters caused a meaningful delay in their ability to proceed with their daily responsibilities.⁵⁶ With more than 85 percent of respondents in immigration court relying on use of an interpreter, EOIR’s decision to replace in-person interpreters with telephonic interpreters will undoubtedly make court room procedures less efficient.⁵⁷ In addition, similar to many of the technological concerns cited with use of VTC, communication issues related to use of remote interpreters can jeopardize an immigrant’s right to a fair day in court. For example, it is impossible for telephonic interpreters to catch non-verbal cues that may determine the meaning of the speech.

III. Conclusion

The immigration court system is charged with ensuring that individuals appearing before the court receives a fair hearing and full review of their case consistent with the rule of law and fundamental due process. Instead of employing policies that propel the court toward these goals, the administration’s plan relies on policies that compromise due process. IJs responsible for adjudicating removal cases are being pressured to render decisions at a break-neck pace. By some accounts “morale has never, ever been lower” among IJs and their staff.⁵⁸ Moreover, since the introduction of EOIR’s plan, the number of cases pending in the immigration courts has *increased* 25 percent (from 655,932 on 9/31/17 to 821,726 on 12/31/18). This number does not even account for the 35-day partial government shutdown that cancelled approximately 60,000 hearings while DHS continued carrying out enforcement actions.⁵⁹ Congress must conduct rigorous oversight into the administration’s policies that have eroded the court’s ability to ensure that decisions are rendered fairly, consistent with the law and the Constitution’s guarantee of due process. But oversight is not enough. In order protect and advance America’s core values of fairness and equality, the immigration court must be restructured outside of the control of DOJ, in the form of an independent Article I court.⁶⁰



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² *An earlier version of this policy brief, dated February 19, 2019, incorrectly stated that the memo was signed on October 17, 2017. This typo has been corrected. FOIA Response, see pg. 9.

³ On December 5, 2017, EOIR publicly issued a backgrounder for the EOIR Strategic Caseload Reduction Plan. U.S. Department of Justice Backgrounder, [EOIR Strategic Caseload Reduction Plan](#), Dec. 5, 2017.

⁴ U.S. Department of Justice, [EOIR Adjudication Statistics, Pending Cases](#), (Dec. 31, 2018). The over 820,000 cases does not account for the 35-day partial government shutdown that cancelled approximately 60,000 immigration court hearings while at the same time, DHS continued carrying out enforcement actions, *Associated Press*, [Partial shutdown delayed 60,000 immigration court hearings](#), Feb. 8, 2019.

⁵ U.S. Department of Justice, [Adjudication Statistics, Pending Cases](#), Dec. 31, 2018.

⁶ FOIA Response, see pg. 6.

⁷ Jason Boyd, *The Hill*, [“8,000 new ways the Trump administration is undermining immigration court independence,”](#) Aug. 19, 2018.

⁸ ABA Commission on Immigration, [Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (2010).

⁹ FOIA Response, see pg. 6. See also U.S. Department of Justice Backgrounder, [EOIR Strategic Caseload Reduction Plan](#), Dec. 5, 2017.

¹⁰ FOIA Response, see pg. 6.

¹¹ [Matter of Castro-Tum](#), 27 I&N Dec. 271 (A.G. 2018).

¹² *Id.*

¹³ [NAIJ Letter to then-Attorney General Sessions](#), Jan. 30, 2018.

¹⁴ AILA and The American Immigration Council FOIA Response, [Booz Allen Hamilton Report on Immigration Courts](#), Apr. 6, 2017, pg. 26, [hereinafter “Booz Allen Report”].

¹⁵ [Matter of Castro-Tum](#), 27 I&N Dec. 271 (A.G. 2018).

¹⁶ *Id.*

¹⁷ [ICE Provides Guidance to OPLA Attorneys on Administrative Closure Following Matter of Castro Tum](#), June 15, 2018.

¹⁸ Hamed Aleaziz, *Buzzfeed News*, [“The Trump Administration is Seeking to Restart Thousands of Closed Deportation Cases,”](#) Aug. 15, 2018.

¹⁹ [Congressional Letter Requesting Information Regarding Initiative to Recalendar Administratively Closed Cases](#), Sept. 13, 2018.

²⁰ FOIA Response, see pg. 5.

²¹ [Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges](#), March 30, 2018.

²² FOIA Response, see pg. 5.

²³ [Misunderstandings about Immigration Judge “Quotas” in Testimony Before House Appropriations Committee](#), NAIJ, May 2, 2018.

²⁴ FOIA Response, pg. 5. See also [Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges](#), March 30, 2018; See also [Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts](#), NAIJ, Jan. 31, 2018. See also [Misunderstandings about Immigration Judge “Quotas” in Testimony Before House Appropriations Committee](#), NAIJ, May 2, 2018.

²⁵ See [Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges](#), March 30, 2018.

²⁶ C-SPAN, [Federal Immigration Court System](#), Sept. 21, 2018. (“[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... 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.” NAIJ President, Judge A. Ashley Tabaddor).

²⁷ Ani Ucar, *Vice News*, [“Leaked Report Shows the Utter Dysfunction of Baltimore’s Immigration Court,”](#) Oct. 3, 2018.

²⁸ AILA and the American Immigration Council Statement, [DOJ Strips Immigration Courts of Independence](#), Apr. 3, 2018. See also NAIJ, [Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges](#) (October 2017).

²⁹ INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence.

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- ³⁰ Association of Pro Bono Counsel (APBCo), [Letter to Congress IJ Quotas](#), Oct. 26, 2017.
- ³¹ Ingrid Eagly and Steven Shafer, [Access to Counsel in Immigration Court](#) (2016).
- ³² U.S. Department of Justice Background, [EOIR Strategic Caseload Reduction Plan](#), Dec. 5, 2017, pg. 2.
- ³³ FOIA Response, pg. 8.
- ³⁴ FOIA Response, pgs. 7-8.
- ³⁵ U.S. Department of Justice, [Operating Policies and Procedures Memorandum 17-01: Continuances](#), July 31, 2017.
- ³⁶ [Matter of L-A-B-R- et al.](#), 27 I&N Dec. 405 (A.G. 2018).
- ³⁷ GAO Report, 17-438, [Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges](#), (June 2017).
- ³⁸ Sen. Mazie Hirono, [Written Questions for the Record](#), U.S. Senate Committee on the Judiciary, Apr. 18, 2018.
- ³⁹ FOIA Response, pg. 3.
- ⁴⁰ [Booz Allen Report](#), pg. 23.
- ⁴¹ U.S. Department of Justice, [EOIR Immigration Court Listings](#), Feb. 2019.
- ⁴² Katie Shepherd, American Immigration Council, [The Judicial Black Sites the Government Created to Speed Up Deportations](#), Jan. 7, 2019.
- ⁴³ [AILA Comments on ACUS Immigration Removal Adjudications Report](#), May 3, 2012; [ABA Letter to ACUS](#), Feb. 17, 2012.
- ⁴⁴ [Booz Allen Report](#), pg. 23.
- ⁴⁵ An EOIR commissioned report suggested limiting use of VTC to procedural matters only because it is difficult for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC. [Booz Allen Report](#), pg. 23.
- ⁴⁶ FOIA Response, pg. 3.
- ⁴⁷ Priscilla Alvarez, *The Atlantic*, [Jeff Sessions is Quietly Transforming the Nation's Immigration Courts](#), Oct. 17, 2018.
- ⁴⁸ U.S. Department of Justice, [EOIR Adjudication Statistic, IJ Hiring](#), (Jan. 2019).
- ⁴⁹ U.S. 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.
- ⁵⁰ [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), See also [Questions for the Record](#).
- ⁵¹ [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).
- ⁵² Hamed Aleaziz, *BuzzFeed News*, [Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable](#), Feb. 13, 2019.
- ⁵³ FOIA Response, pg. 3.
- ⁵⁴ [NAIJ Letter to Senators, Government Shutdown](#), Jan. 9, 2019.
- ⁵⁵ *Id.*
- ⁵⁶ [Booz Allen Report](#), pg. 25.
- ⁵⁷ Laura Abel, Brennan Center For Justice, [Language Access in Immigration Courts](#), (2010).
- ⁵⁸ Hamed Aleaziz, *Buzzfeed News*, [The Trump Administration is Seeking to Restart Thousands of Closed Deportation Cases](#), Aug. 15, 2018.
- ⁵⁹ *Associated Press*, [Partial shutdown delayed 60,000 immigration court hearings](#), Feb. 8, 2019.
- ⁶⁰ AILA Statement, [The Need for an Independent Immigration Court Grows More Urgent as DOJ Imposes Quotas on Immigration Judges](#), Oct. 1, 2018. See also the NAIJ letter that joins AILA, the ABA, the Federal Bar Association, the American Adjudicature Society, and numerous other organizations endorsing the concept of an Article I immigration court. [NAIJ Letter, Endorses Proposal for Article I Court](#), Mar. 15, 2018.