AILA

Law Journal

A Publication of the American Immigration Lawyers Association

Cyrus D. Mehta
Editor-in-Chief

Volume 5, Number 2, October 2023

fastcase FULL COURT PRESS

AILA Doc. No. 23121200. (Posted 12/12/23)

AILA Law Journal

Volume 5, Number 2, October 2023

AILA Doc. No. 23121200. (Posted 12/12/23)

AILA LAW JOURNAL (ISSN 2642-8598 (print)/ISSN 2642-8601 (online)) is published two times per year by Full Court Press, a Fastcase, Inc., imprint. Individual issues may be purchased for $60.00, or subscriptions for $99.00 a year. Discounts are available for AILA members and Fastcase legal research users.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Design: Morgan Morrissette Wright and Sharon D. Ray

The cover of this journal features a painting known as *The Sea* by French artist Jean Désiré Gustave Courbet. A leader of the Realist movement, Courbet is also remembered for his political content and activism. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

Cite this publication as:

AILA Law Journal (Full Court Press, Fastcase, Inc.)

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, DC 20005
https://www.fastcase.com

POSTMASTER: Send address changes to AILA LAW JOURNAL, 711 D St. NW, Suite 200, Washington, DC 20004

Disclaimer

The articles featured in the AILA Law Journal do not necessarily represent the views of AILA or the publisher, nor should they be regarded as legal advice from the association or authors. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional.

Likewise, the articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors, or their firms or organizations.

Submissions

Direct editorial inquires and send material for publication to:

ailalawjournal@aila.org

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys, law firms, and organizations working in immigration law.

Questions About This Publication?

For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press, at morgan.wright@vlex.com or at 202.999.4878

For questions about Sales, or to reach Customer Service:

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

ISSN 2642-8598 (print)
ISSN 2642-8601 (online)

An Article I Immigration Court

Congress, It's Time to Jump-Start This Vehicle to Judicial Independence

Mimi Tsankov*

Abstract: Our current immigration court structure, with the court housed within a law enforcement agency, and subject to the whims of politics, underpins an impression that the courts have been transformed into an enforcement agency rather than a fair and neutral arbiter, which is corrosive to public trust. An Article I court would help to fix this broken and ineffective system by implementing a new independent structure that addresses the core elements of concern.

A hallmark of our system of democracy and the rule of law is an independent judiciary. Our immigration court system will never be effective as long as it is housed under the Department of Justice. Congresswoman Zoe Lofgren (D-CA) shared this powerful sentiment before the U.S. House of Representatives, in her role last term as Chair of the Subcommittee on Immigration and Citizenship, while introducing landmark reform legislation.[1] Dropped in the congressional hopper on February 3, 2022, The Real Courts, Rule of Law Act of 2022 (the "Real Courts Bill")[2] is more than just a stopgap to address the ballooning backlog in immigration court caseloads. Chair Lofgren explained that "[a]fter decades of political whiplash, resulting from the ever-changing policies and priorities of the governing Administrations, it is clear that the system is ineffective, inflexible, and far too often, unfair" as she urged Congress to create an immigration court system independent of the executive branch.[3]

The Immigration Courts—Running Out of Steam

Chair Lofgren's proposed structural overhaul has been widely viewed as a catalyst to strengthen due process and restore faith in the system by taking politics out of how the immigration courts are managed.[4] The Real Courts Bill establishes an independent judiciary formulated under Article I, the legislative branch, of the U.S. Constitution. Doing so would remove it from Article II, the executive branch, where it has resided since 1983, when the Executive Office for Immigration Review (EOIR) was constituted to administer the nation's immigration court system.[5] In doing so, the attorney general delegated decision-making authority vested in his role to this separate component within

AILA Law Journal / October 2023, Vol. 5, No. 2, pp. 121–136.

ISSN 2642-8598 (print) / ISSN 2642-8601 (online)

AILA Doc. No. 23121200. (Posted 12/12/23)

the U.S. Department of Justice (DOJ).[6] Yet, over time, the court has outgrown its ability to meet its mandate.[7] Facing chronic underfunding[8] despite its high-profile role in border enforcement,[9] EOIR has been the subject of vigorous criticism over the past couple of decades, resulting in congressional oversight hearings,[10] DOJ Office of Inspector General investigations,[11] and Government Accountability Office (GAO) audits[12] in an effort to articulate the central concerns facing the system.

The greater legal community has been voicing its growing concerns as well. Organizations ranging from the American Bar Association (ABA) and the Federal Bar Association (FBA) to the National Association of Immigration Judges (NAIJ) and the American Immigration Lawyers Association (AILA) have examined the legal structure of the court in depth.[13] Moreover, these organizations have kept up a steady drumbeat of concerns about judicial independence backsliding at the court.[14] AILA and others pointed to the Trump administration's exploitation of "foundational flaws to manipulate the courts to their breaking points—pressuring judges to render decisions at a break-neck pace at the cost of accuracy, eliminating docketing tools, growing the backlog, and restricting access to relief."[15]

The Court System on a Collision Course

Today, roughly 700 immigration judges (IJs) preside at about 70 immigration courts and adjudication centers located throughout the country.[16] Administering provisions of the Immigration and Nationality Act, they enforce our nation's system for both removing noncitizens and considering their claims to remain in the country.[17] Some of these hearings can be quite lengthy, and IJs spend the majority of their time adjudicating applications for relief from removal, including asylum, withholding of removal, protection under the Convention Against Torture, cancellation of removal, adjustment of status, and certain waivers.[18] They review credible fear and reasonable fear determinations made by the Department of Homeland Security (DHS) as well, and conduct bond redetermination proceedings for respondents in removal proceedings.[19] With this vast array of case-types, averaging 71,450 new case filings *per month*,[20] and with only a comparative "handful" of judges presiding to address the influx, the backlog of cases has continued to grow and currently stands at 2.4 million.[21]

With the pressure to complete this heavy and mounting workload, each administration's response has varied with a range of measures, and, quite often, manipulation of docketing priorities. During both the Trump and Biden administrations, the effects of shifting priorities have been intense. Thousands of cases that were once ready for resolution were suddenly in need of further preparation, largely due to shifts in executive branch political viewpoints and the resulting changes in precedent case law that affects case outcomes.[22] These

dramatic adjustments in docketing priorities have, at times, sidelined efficiency and due process interests, as the judges and the parties navigate sharp and sudden changes to the rules of the road.[23]

The Trump administration emphasized "judging" the judges according to strict—even unrealistic—performance metrics.[24] Both the Trump and Biden administrations have prioritized the use of specialized dockets, funneling cases by type before docket-designated judges in efforts to improve efficiency.[25] But, for these judges with existing heavy caseloads, those matters already in the pipeline are off-ramped awaiting their turn. With years of data to analyze what is working and what isn't, it seems that an overemphasis on the speed of judicial throughput has collided with the ever-shifting priorities, resulting in reduced efficiencies. On the contrary, critics argue that we are experiencing erosion of due process amid a growing backlog.[26] Speed over quality undervalues judicial preparation, prioritizes docket shuffling based on political priorities of the moment, and compromises constitutional due process.[27]

Even John Oliver Thinks the System Isn't Fair

The public's perception is that the current immigration court system is not always fair or effective—which are the fundamental expectations about a court, generally.[28] Media about the failures of the immigration court system is relentless.[29] Even late night television host John Oliver devoted an episode of his weekly news satire program, *Last Week Tonight with John Oliver*, to excoriate the immigration court system and its troubles.[30] At its core, when there is an overemphasis on completing cases, affording procedural due process in accordance with the Fifth Amendment can impede management's desire for speed in adjudication.[31] This pressure to complete cases notwithstanding the need to ensure that due process standards are ensured has drawn ever greater scrutiny of the system.[32] What makes that pressure so pernicious is that although the judges have the authority to exercise decisional independence, which has been delegated to them by the attorney general, they do not enjoy *structural* independence.[33] It is this tension between, on the one hand, being an "employee" of the Department of Justice, with very limited docket control, and subject to discipline for failing to meet performance metrics, while, on the other hand, serving as a judge with decisional independence, that strains the way in which judges are able to manage their dockets and which has, over time, sown public distrust in the system.[34]

Are the Courts in Need of a Tune-Up or a Chop Shop?

The pressure to make a change has been building. In 2008, Hon. Dana Leigh Marks, then president of the National Association of Immigration

Judges, published an article in *Bender's Immigration Bulletin* calling on Congress to establish an independent Article I immigration court.[35] AILA followed suit, later that year advancing draft Article I legislation to the Obama administration transition team.[36]

By 2010, the American Bar Association (ABA) had released a comprehensive national study (the "2010 ABA Report") analyzing how structural dependence frustrated perceptions of fairness.[37] The 2010 ABA Report called for improvements in professionalism and greater accountability in order to counteract the independence concerns.[38] It found that inadequate resources, from courthouse staff to judicial law clerks, impeded docket management efforts.[39] The study concluded that training and professional development opportunities were lacking, leading to a host of deficiencies around sensitivity in the courtroom and awareness about some human rights conditions and emerging developments in immigration law.[40] The judicial hiring process had become politicized, with repeated violations of the basic federal laws designed to avoid such perceptions.[41] It also acknowledged that there were too few judges for the workload and insufficient time to adequately consider cases.[42] That the judicial model employed involved multiple trials a day, and relied so heavily on the use of oral decisions, it was no surprise that judges were, at times, intemperate, due in part to "burnout."[43]

The 2010 ABA Report did not, however, specify that an Article I court was the only solution. It recommended three possible paths forward, one of which was for Congress, using its Article I legislative powers, to create an independent immigration court system, comprised of a trial-level division and an appellate-level division to replace the existing structure.[44] The other two options proposed were to create an independent executive branch agency, or to create a hybrid where there would be greater independence at the trial level and more political accountability at the appellate level.[45]

Approaching the Crossroads

In the years following release of the 2010 ABA Report, and throughout the subsequent decade, which saw multiple executive branch administrations, the dockets expanded exponentially and the court's problems festered.[46] Resource challenges deepened, trainings were canceled,[47] and the case law swung widely, reflecting vastly different political and legal approaches to addressing the backlog.[48]

In 2014, the Federal Bar Association crafted an Article I bill (the "FBA Bill") to improve the court structure and ensure judicial independence.[49] The FBA Bill envisioned that 15 immigration appeals judges would be nominated by the president and confirmed by the Senate.[50] They would direct the U.S. Immigration Court and serve 15-year terms.[51] To address political appointment concerns, the bill proposed staggered appointments for 5, 10, and 15

years.[52] At the appellate level, the FBA Bill proposed that decisions be made by a three-judge panel.[53] Under this proposed structure, trial judges would be appointed for 15-year terms by the relevant judicial circuit, in a manner similar to that of bankruptcy judges.[54] To ensure continuity, all IJs and Board of Immigration Appeals members would be appointed to initial terms.[55] Retired judges could be used as senior judges to augment the capabilities of the immigration court as needed, and discipline and removal of judges would be handled in a judicial manner.[56]

The FBA Bill addressed many of the independence concerns, but failed to gain widespread traction. Instead, it would be another four years and the election of Donald Trump as president of the United States before any bill addressing immigration court concerns would be introduced.[57] His administration targeted the courts in a manner never before experienced. While it hired many new immigration judges,[58] the range of strategies implemented nevertheless resulted in a backlog that grew exponentially.[59] The newly hired IJs simply could not keep up with the "tsunami of new cases filed in court by the Department of Homeland Security."[60] The rate of growth in the case backlog grew 16 percent from January 2017 to October that year.[61] It increased another 22.1 percent and 33.3 percent during the next two fiscal years.[62] During the pandemic, the backlog continued to grow at nearly the same rate month after month.[63]

Even more worrisome, though, was the imposition of changes deemed so radical that they fundamentally compromised the integrity of the immigration courts and the ability of judges to ensure fairness and impartiality.[64] Objecting to time-based case evaluation measures that threatened due process[65] and accusing the administration of stacking the appellate courts on ideological grounds[66] and limiting the power of the judges themselves to control their dockets, AILA and many others charged that the court had become highly politicized, transforming it into an enforcement agency.[67] These wide-ranging policy changes cut to the core, eroding judicial independence.[68]

Congress Sets Up a Checkpoint

In April 2018, in an effort to address what they described as "politically-motivated" efficiency standards, and to insulate the judges from improper political interference, Senators Mazie K. Hirono (D-HI), Kirsten Gillibrand (D-NY), and Kamala Harris (D-CA) introduced a bill (the "Hirono Bill") that did not create a separate court, but rather improved on the status quo.[69] It redefined "immigration judge" to be "judicial by nature," mandating that an IJ's actions be evaluated according to a Code of Judicial Conduct.[70] The bill prohibited the discipline of judges for good-faith legal actions made while hearing and deciding cases.[71] It set forth that completion goals and standards could not be used to limit their independent authority or as a reflection of

individual judicial performance. The Senate held hearings that month to explore ways to address the growing backlog and strengthen the immigration court system, at which leadership at the EOIR, the GAO, the NAIJ, the ABA, and the Center for Migration Studies (CMS) presented their views on how to approach the concerns raised.[72]

While the Hirono Bill did not advance in the Senate, around that time the ABA was in the process of updating its 2010 study. In 2019, the ABA revisited its prior proposals, this time doubling down on the Article I solution as the only viable option.[73] It framed an independent court as affording the high standards of fairness and promoted a more effective and efficient system.[74] This view is now widespread, and has been endorsed by a wide range of groups, including the AILA, the FBA, the NAIJ, and others.[75] Soon thereafter, in September of 2020, Senators Sheldon Whitehouse (D-RI), Dick Durbin (D-IL), and Mazie Hirono (D-HI) announced that the GAO would conduct an investigation into EOIR's practices under the Trump administration, including its management of immigration courts during the COVID-19 pandemic.[76]

The DOJ Silences the Squeaky Wheel

One of the more troubling ways in which judicial independence has been attacked is through the Trump administration's efforts to decertify the judges' union and silence some of the Department's most vocal critics.[77] The union's history of speaking out during every administration over the past four decades in favor of independence has been attacked through the DOJ effort to decertify it. In August 2019, a Trump administration petition sought to decertify the union, and a highly partisan Federal Labor Relations Authority (FLRA) decision undid decades of precedent by recharacterizing IJs as policymakers.[78] This drive to silence discussion about the need for judicial independence,[79] and a Trump-era policy barring the judges from discussing immigration law in their personal capacities, including during academic conferences, resulted in a federal First Amendment lawsuit against the DOJ that remains pending.[80]

In Need of an Engine Rebuild—The Real Courts, Rule of Law Act of 2022—An Article I Bill Is Introduced

With concerns escalating, on January 20, 2022, the House Judiciary Committee, Immigration Subcommittee convened a hearing on the state of the court.[81] During a full day of testimony, stakeholders in the FBA, the ABA, the NAIJ, and the CMS described a range of concerns, including those articulated by Chair Lofgren.[82] As the hearing got underway, she described the judges as being "saddled with crushing caseloads" and those who "despite their best efforts, struggle to deliver just and timely decisions that are free from

political influence."[83] She explained that "political influence is born out of the Attorney General's broad authority to reshape immigration policy through rulemaking and a procedural mechanism known as self-certification, that enables use of this authority to bend immigration policy to reflect the will of whatever Administration is using it, undermin[ing] judicial independence" and, as she further explained, the rule of law.[84]

Jeremy McKinney, then-AILA Second Vice President, went on to explain:

> To ensure fundamental fairness and an efficient, functioning court system, judges must be allowed to act as neutral arbiters of fact and law, regardless of who is in power. Instead, this administration and other administrations before it has exploited the structural infirmity that classifies immigration judges as DOJ employees in order to further political agendas. Regardless of one's substantive views on the law these immigration judges are sworn to apply—or one's preferred outcomes—we should all agree that independent, Article I immigration courts, removed from political pressure, are critically needed to secure due process in immigration proceedings.[85]

Chair Lofgren concluded that due process has often suffered, rendering the system "ineffective, inflexible."[86] In supporting the bill, then-FBA President Anh Le Kremer urged Congress to pass it as a means to address a broken system.[87] Then-ABA President Judy Perry Martinez explained, "[T]his structural flaw leaves Immigration Judges particularly vulnerable to political pressure and interference in case management."[88]

Two weeks after this robust hearing and discussion, Chair Lofgren introduced the Real Courts Bill, hailing it landmark legislation to establish an independent immigration court under Article I of the Constitution.[89] Cosponsors Jerrold Nadler (D-NY), Chair of the House Committee on the Judiciary, and Hank Johnson (D-GA), Chair of the Subcommittee on Courts, Intellectual Property, and the Internet, explained that "the bill would implement a structural overhaul of the system to ensure that immigration judges are free from political pressure and can deliver just decisions in accordance with the law."[90]

Looking Under the Bill's Hood and Kicking the Tires

A close review of the Real Courts Bill suggests that it has many attractive features that would afford the long-awaited solution to a court-independence and backlog problem.[91] Under such a proposed system, the court would be administered by qualified and impartial judges, not successive attorneys general. Judges would have adequate court resources and support services to do their jobs effectively.[92] It would establish a trial division with jurisdiction over various immigration-related matters, including removal proceedings, and

an appellate division with jurisdiction over appeals of decisions by the trial division.[93] The independent court would allow trial judges to manage their own caseloads without undue political pressure and enable more effective resource reallocation, including technological advancements to modernize the court's manner of interfacing with the public. As envisioned, appellate division judges would be appointed by the president with the advice and consent of the Senate, in a staggered manner, and that division would then appoint the trial judges.[94]

According to the Real Courts Bill, the appellate and trial court divisions, along with the administrative division, would ensure that qualified and impartial individuals would be appointed to serve as immigration judges at both the trial and appellate levels.[95] The court would manage its own budget, without executive oversight, and as such adequate resources and support systems would be allocated to ensure that the court would operate efficiently, enabling the appointment of temporary immigration judges and court facilities as needed.[96]

To improve transparency and accountability, the bill would require publication of all court rules and procedures, precedent decisions, and pleadings in a manner that would ensure confidential information was protected.[97] Perhaps the most empowering aspect of the bill is that judges would control their own dockets and have the power to compel agency action that is unlawfully withheld or unreasonably delayed, thereby strengthening the integrity of the system.[98] Adherence to important features of due process would be prioritized, including access to counsel, legal orientation programs, and court interpreters.[99]

We've Been Down This Road Before

The notion of establishing an independent immigration court is actually not a new one. On the contrary, Maurice Roberts proposed the idea in 1980 following his term as Chair of the Board of Immigration Appeals.[100] He even crafted a draft statute for such a court.[101] The proposal received such widespread bipartisan interest at the time that in the following year Congress convened a Select Commission on Immigration and Refugee Policy to review proposals, which in the end recommended the creation of an Article I immigration court.[102] Legislative creation of independent courts is also not a new concept. It has been successful many times over. Courts such as the U.S. Tax Court,[103] the Court of Appeals for the Armed Forces ,[104] the U.S. Court of Veterans Appeals,[105] and the U.S. Court of Federal Claims[106] were all created under Article I of the U.S. Constitution.

As Elizabeth J. Stevens remarked in her testimony before the House, speaking on behalf of the FBA, Congress has successfully created independent courts in areas of law that involve executive policymaking, priority setting, and impartial adjudication.[107] She pointed to the Tax Court and the Court of Appeals for the Armed Forces as examples of Article I courts that were initially internal components of civilian and military bureaucracies, much like the

current immigration court. She noted that due to concerns about fairness and impartiality, Congress created these independent Article I courts in a manner that effectively reassigned their agencies' adjudicative functions.[108]

In the immigration court context, an Article I court would more fairly address the individual liberty and personal safety interests at issue and the trial judges could better exercise their statutory authority to grant protection from persecution.[109] With political control removed from the adjudicatory process, an independent court could restore the public's faith in the system.[110] It could address the growing backlog as well. At present, immigration judges have little control over their dockets, and cases are transferred among dockets by supervisory immigration judges based on changes in priority. Individuals wait an average of 663 days to have their cases adjudicated.[111]

While an independent Article I court would not erase the backlog, it would offer administrative efficiencies and docket control, which are necessary components of a healthy court structure. Of course, the backlog is affected by some factors outside of the control of the court, such as the rate at which new cases are filed. But the changes in court policies can have a significant impact on cases once they are filed, in terms of remands, motions to reopen, and motions to reconsider, where immigration judges and the Board of Immigration Appeals need to revisit a case multiple times, and which expand the backlog.[112]

Will the 118th Congress Be the Driving Force?

In December 2022, the Real Courts Bill was reported out of the Committee on the Judiciary, awaiting further review by the entire House of Representatives.[113] However, failing to receive a vote on the floor of the House of Representatives, the Real Courts Bill officially "died" at the close of the 117th Congress.[114] To be reconsidered in the 118th Congress, it would have to be reintroduced and assigned a new bill number to begin its journey through the legislative process once again.[115]

At present, the Real Courts Bill, or one like it, awaits a reintroduction in the 118th Congress so that our immigration court system can achieve independence, function effectively, and overcome historical limitations that have resulted in a massive backlog reported to be over 2.4 million cases and growing. The status quo continues to do a disservice to the parties that appear before the courts and the public that deserves a system that inspires confidence.[116] Our current structure, with the court housed within a law enforcement agency, and subject to the whims of politics,[117] underpins an impression that the courts have been transformed into an enforcement agency rather than a fair and neutral arbiter, which is corrosive to public trust.[118] An Article I court would help to fix this broken and ineffective system by implementing a new independent structure that addresses the core elements of concern.[119] Congress, it's time to get this show on the road.

Notes

* Mimi Tsankov is the President of the National Association of Immigration Judges (NAIJ). The views expressed here do not necessarily represent the official position of the U.S. Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

1. *For the Rule of Law, An Independent Immigration Court, Hearing Before the Subcomm. on Immigr. and Citizenship, H. Comm. On the Judiciary*, 117th Cong. (2022) (statement of Chair Zoe Lofgren), https://www.congress.gov/event/117th-congress/house-event/114339/text [hereinafter "Chair Lofgren Statement"]; *Real Courts, Rule of Law Act of 2022*, H.R. 6577, 117th Cong. (2022), https://www.govinfo.gov/content/pkg/BILLS-117hr6577rh/pdf/BILLS-117hr6577rh.pdf [hereinafter Real Courts Bill].

2. Transactional Records Access Clearinghouse (TRAC), *Immigration Court Backlog*, https://trac.syr.edu/phptools/immigration/backlog/ (Immigration > Tools > Immigration Court Backlog).

3. Chair Lofgren Statement, *supra* note 1.

4. *Id.*

5. DOJ, EOIR, *About the Office*, https://www.justice.gov/eoir/about-office (Background Information). *See also* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038 (Feb. 25, 1983) (announcing the establishment of the Executive Office for Immigration Review).

6. 48 Fed. Reg. at 8038-39.

7. Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47077, U.S. Immigration Courts and the Pending Cases Backlog (Apr. 25, 2022), https://crsreports.congress.gov/product/pdf/R/R47077.

8. Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, Fed. Law. (Mar. 2012), at 25, 28, https://www.fedbar.org/wp-content/uploads/2012/03/Marks-immigration-pdf-1.pdf; *see also* American Immigration Council, Empty Benches: Underfunding of Immigration Courts Undermines Justice (May 2015), https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice#:~:text=Over%20the%20past%20decade%2C%20Congress,cases%20they%20receive%20each%20year.

9. Muzaffar Chishti, et al., Migration Policy Institute, At the Breaking Point: Rethinking the U.S. Immigration Court System (July 2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf.

10. *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. and Immigr. of the S. Comm. on the Judiciary*, 115th Cong. (2018); *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts, Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (2020); *For the Rule of Law, an Independent Immigration Court: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 117th Cong. (2022), https://www.govinfo.gov/content/pkg/CHRG-117hhrg47087/html/CHRG-117hhrg47087.htm.

11. *Politicized Hiring at the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Glenn A. Fine, Inspector General, Department of Justice).

12. U.S. Gov't. Accountability Office, Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 1, 2017), https://www.gao.gov/products/GAO-17-438.

13. Joint Letter from Robert Carlson, President, American Bar Ass'n, et al., to members of Congress (July 11, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/update-final-organizational-letter-independent-immigration-court-7-11-19.pdf.

14. *Id.*

15. AILA, *Featured Issue: America Needs a Fair and Independent Immigration Court* (Mar. 24, 2023), https://www.aila.org/advo-media/issues/immigration-courts.

16. DOJ, EOIR, *Office of the Chief Immigration Judge*, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios.

17. DOJ, EOIR, *About the Office*, https://www.justice.gov/eoir/about-office.

18. EOIR, Immigration Court Practice Manual ch. 1.4, Jurisdiction and Authority, https://www.justice.gov/eoir/reference-materials/ic/chapter-1/4.

19. *See* 8 C.F.R. §§ 1240.1(a), 1240.31, 1240.41.

20. EOIR, *Executive Office for Immigration Review Adjudication Statistics: New Cases and Total Completions*, https://www.justice.gov/eoir/page/file/1060841/download.

21. EOIR reported in July 2023 that the pending caseload was 2,159,486. EOIR, *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, https://www.justice.gov/eoir/page/file/1242166/download.

22. *See* Am. Immigr. Council & ACLU, Administrative Closure After *Matter of Cruz-Valdez*: Practice Advisory (Jan. 18, 2022), https://www.aclu.org/wp-content/uploads/legal-documents/2019.10.22_castro-tum_pa_w_zuniga_romero_update_-_final.pdf.

23. *Politicized Hiring at the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008).

24. Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 California W. L. Rev. iss. 1, art. 3 (2020), https://scholarlycommons.law.cwsl.edu/cwlr/vol56/iss1/3; *see generally* Letter from Jill E. Family, Commonwealth Professor of Law and Government, et al., to Jeff Sessions, U.S. Att'y Gen. (Aug. 14, 2018), https://commonwealthlaw.widener.edu/files/resources/letter-tosessions-immigration-adjudication-with-s.pdf.

25. Press Release, DOJ, Office of Public Affairs, DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021), https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings.

26. *Judicial Independence Sidelined*, *supra* note 24, at 42.

27. *Id.*

28. Alicia Caldwell, *Clogged Courts Worsen U.S. Immigration Crisis*, Wall St. J. (Sept. 1, 2023), https://www.wsj.com/politics/policy/immigration-courts-yearslong-backlog-illegal-immigration-c732d381.

29. Elliott Spagat, *Immigrants Waiting 10 Years in U.S. Just to Get a Court Date*, AP News (Apr. 26, 2023), https://apnews.com/article/immigration-courts-wait-54bb5f7c18c4c37c6ca7f28231ff0edf; Editorial Board, *America's Immigration Courts Are a Diorama of Dysfunction*, Wash. Post (Jan. 9, 2017), https://www.washingtonpost

.com/opinions/americas-immigration-courts-are-a-diorama-of-dysfunction/2017/01/09/38c59cf6-ceda-11e6-b8a2-8c2a61b0436f_story.html.

30. *Last Week Tonight with John Oliver*, "Immigration Courts" (HBO Apr. 1, 2018), https://www.youtube.com/watch?v=9fB0GBwJ2QA&themeRefresh=1.

31. *Judicial Independence Sidelined*, *supra* note 24, at 37.

32. *Id.*

33. *Id.*

34. *Id.*

35. Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigr. Bull. 1 (2008).

36. Arnold & Porter, LLP for ABA Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 6-20 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

37. *Id.*

38. *Id.* at 6-34.

39. *Id.*

40. *Id.* at 2-9.

41. *Id.* at 2-24.

42. *Id.* at 2-10.

43. *Id.* at 1-25.

44. *Id.* at 6-33.

45. *Id.* at 6-1 to 6-36.

46. *See* TRAC, *supra* note 2.

47. Tal Kopan, *Justice Department Cancels Diversity Training, Including for Immigration Judges*, San Francisco Chronicle (Oct. 9, 2020), https://www.sfchronicle.com/politics/article/Justice-Department-cancels-diversity-training-15635203.php.

48. *Judicial Independence Sidelined*, *supra* note 24, at 37.

49. *See* Christine Lockhart Porch, *The FBA's Proposal for the Creation of a Federal Immigration Court*, Fed. Law. 10 (Apr. 2014), https://www.fedbar.org/wp-content/uploads/2019/12/Proposed-Article-I-Immigration-Court-pdf.pdf.

50. *Id.* at 11.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Chair Lofgren Statement, *supra* note 1.

58. Tanvi Mistra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call (Oct. 29, 2019), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/; *see also* Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, Reuters (Mar. 8, 2021), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179.

59. *TRAC Immigr. Tool, The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, https://trac.syr.edu/immigration/reports/637/.

60. EOIR Adjudication Statistics, *Pending Cases, New Cases, and Total Completions*, https://www.justice.gov/eoir/page/file/1060841/download.

61. *TRAC Immigr. Tool, The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, https://trac.syr.edu/immigration/reports/637/.

62. *Id.*

63. *Id.*

64. In December 2019, AILA and the Southern Poverty Law Center, Innovation Law Lab, Las Americas Immigrant Advocacy Center, Asylum Seeker Advocacy Project, Catholic Legal Immigration Network, Inc., and Santa Fe Dreamers Project filed a lawsuit challenging what they termed "the weaponization of the nation's immigration court system" by creating policies designed to make asylum eligibility unattainable. AILA, *Immigrant Advocacy Groups File Suit Challenging the Weaponization of Immigration Courts* (Dec. 18, 2019), https://www.aila.org/infonet/immigrant-advocacy-groups-file-suit-challenging. *See also* Press Release, AILA, DOJ Proposes Regulation to Turn Immigration Appeals into Tool of the Administration's Anti-Immigrant Agenda (Aug. 26, 2020), https://www.aila.org/infonet/immigration-courts.

65. *See* Press Release, AILA, The Need for an Independent Immigration Court Grows More Urgent as DOJ Imposes Quotas on Immigration Judges (Oct. 1, 2018), https://www.aila.org/advo-media/press-releases/2018/need-independent-court-doj-judges; *see also* Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, Brookings (June 18, 2018), https://www.brookings.edu/articles/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/.

66. Press Release, AILA, New Policy Memo Appears Designed to Collapse Board of Immigration Appeals (Oct. 3, 2019), https://www.aila.org/advo-media/press-releases/2019/new-policy-memo-appears-designed-to-collapse-bia.

67. AILA, *How the Trump Administration Broke the Immigration Court System* (Apr. 19, 2021), https://www.aila.org/infonet/immigration-courts. *See also* Press Release, AILA, Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead (July 6, 2020), https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e.

68. The National Association of Immigration Judges (NAIJ) filed a formal grievance seeking redress for the unwarranted removal of cases from the docket of a Philadelphia-based immigration judge. Tal Kopan, *Immigration Judge Removed from Cases After Perceived Criticism of Sessions*, CNN (Aug. 8, 2018), https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html.

69. Immigration Court Improvement Act, S.663, 116th Cong. (2019).

70. Press Release, Sen. Mazie Hirono, Hirono, Gillibrand, Harris Introduce Bill to Insulate Immigration Judges from Political Interference (Apr. 18, 2018), https://www.hirono.senate.gov/news/press-releases/hirono-gillibrand-harris-introduce-bill-to-insulate-immigration-judges-from-political-interference.

71. *Id.*

72. *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. and Immigr. of the S. Comm. on the Judiciary*, 115th Cong. (2018), https://www.judiciary.senate.gov/committee-activity/hearings/strengthening-and-reforming-americas-immigration-court-system.

73. Arnold & Porter for the ABA Commission on Immigration, 2019 Update Report: Reforming the Immigration System, vol. 2, 2-29 (Mar. 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

74. *Id.*

75. Chair Lofgren Statement, *supra* note 1.

76. Press Release, Sen. Sheldon Whitehouse, Senators Announce GAO Investigation of Trump Politicization of Immigration Courts as COVID-19 Rages (Sept. 14, 2020), https://www.whitehouse.senate.gov/news/release/senators-announce-gao-investigation-of-trump-politicization-of-immigration-courts-as-covid-19-crisis-rages.

77. *DOJ, EOIR v. Nat'l Ass'n of Immigr. Judges*, 71 F.L.R.A. 207 (2020).

78. Int'l Fed. of Prof'l and Technical Engineers, *NAIJ Statement on Policy Shift and Legal Action by DOJ Related to Immigration Judges' Union Rights* (July 1, 2021), https://www.ifpte.org/news/naij-statement-on-policy-shift-and-legal-action-by-doj-related-to-union-rights-for-immigration-judges.

79. Eric Katz, *Immigration Judges Are "Shocked and Disappointed" by Trump's Disparagements*, Gov't Exec. (June 25, 2018), https://www.govexec.com/management/2018/06/immigration-judges-are-shocked-and-disappointed-trumps-disparagements/149273/.

80. Cristian Farias, *The Trump Administration Is Gagging America's Immigration Judges*, Atlantic (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195.

81. Chair Lofgren Statement, *supra* note 1.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Courts in Crisis*, *supra* note 10 (statement of Jeremy McKinney, then-Second Vice President, American Immigration Lawyers Association), https://www.congress.gov/116/meeting/house/110402/witnesses/HHRG-116-JU01-Wstate-McKinneyJ-20200129.pdf.

86. Rep. Zoe Lofgren, Press Release, The Real Courts, Rule of Law Act of 2022 Creates an Independent "Article I" Immigration Court, Free from the Political Influence of the Executive Branch (Feb. 3, 2022), https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system.

87. FBA Statement on Rep. Zoe Lofgren's (D-CA) Independent Immigration Courts Legislation (Feb. 2, 2022), https://perma.cc/8DDY-G4MU.

88. *Courts in Crisis*, *supra* note 10 (statement of Judy Perry Martinez, President, American Bar Association), https://www.congress.gov/116/meeting/house/110402/witnesses/HHRG-116-JU01-Wstate-PerryMartinezJ-20200129.pdf.

89. Lofgren Press Release, *supra* note 86.

90. *Id.*

91. *See* Real Courts Bill, *supra* note 1.

92. Lofgren Press Release, *supra* note 86.

93. Real Courts Bill, *supra* note 1, at 2.

94. *Id.* at 3-10.

95. *Id.* at 14.

96. *Id.* at 47-49.

97. *Id.* at 12, 42-43.

98. *Id.* at 44.

99. *Id.* at 43.

100. Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1 (1980). *See also* Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. Rev. 644 (1981).

101. *Id.*

102. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners 23 (Mar. 1, 1981), https://files.eric.ed.gov/fulltext/ED211612.pdf.

103. 26 U.S.C. § 7441.

104. An Act to amend section 867(a) of title 10, United States Code, in order to establish the Court of Military Appeals as the United States Court of Military Appeals under article I of the Constitution of the United States, and for other purposes, Pub. L. No. 90-340, 82 Stat. 178 (1968); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, sec. 924(a), 108 Stat. 2663, 2831 (1994) (renaming the Court of Military Appeals the U.S. Court of Appeals for the Armed Forces).

105. 38 U.S.C. §§ 7251-7299.

106. Federal Courts Improvement Act, 28 U.S.C. §§ 1491-1509.

107. *For the Rule of Law, an Independent Immigration Court*, *supra* note 10 (statement of Elizabeth J. Stevens, on behalf of the Federal Bar Association), https://docs.house.gov/meetings/JU/JU01/20220120/114339/HHRG-117-JU01-Wstate-StevensE-20220120.pdf.

108. *Id.* at 2.

109. *Id.*

110. *For the Rule of Law, an Independent Immigration Court*, *supra* note 10 (statement of Karen T. Grisez, on behalf of the American Bar Association), https://docs.house.gov/meetings/JU/JU01/20220120/114339/HHRG-117-JU01-Wstate-GrisezK-20220120.pdf.

111. TRAC, *supra* note 2.

112. Chair Lofgren Statement, *supra* note 1.

113. Real Courts Bill, *supra* note 1.

114. Andrew Weber, *Tip of the Congressional Iceberg*, Library of Congress Blogs (Jan. 11, 2011), https://blogs.loc.gov/law/2011/01/tip-of-the-congressional-iceberg.

115. *Id.*

116. *Strengthening and Reforming America's Immigration Court System*, *supra* note 72 (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf; *The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary* (Jan. 29, 2020) (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges), https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf.

117. *Judicial Independence Sidelined*, *supra* note 24, at 42.

118. *Id.*

119. Opinion, *Immigration Courts Aren't Real Courts. Time to Change That*, New York Times (May 8, 2021), https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html.