

Congress Must Pass the Real Courts, Rule of Law Act of 2022 (H.R.6577)

Statement of the American Immigration Lawyers Association Submitted to the House Judiciary Committee for the Markup of the Real Courts, Rule of Law Act of 2022 (H.R.6577)

April 6, 2022

The American Immigration Lawyers Association (AILA), the national bar association of over 16,000 immigration attorneys and law professors, submits the following statement for the record.

AILA urges the Judiciary Committee to pass and Congress to enact the Real Courts, Rule of Law Act of 2022 (H.R.6577), which would create an independent immigration court system under Article I of the Constitution. The establishment of an independent immigration court would separate it from the Department of Justice (DOJ), which currently exercises authority over its operations, personnel, and legal decisions.

For the better part of a century, the executive branch has controlled the immigration courts, a structure that renders them vulnerable to improper influence and political pressure. This inherent flaw in the system has undermined the courts' credibility, integrity, and ability to render fair decisions. The creation of an Article I immigration court system will not only ensure due process for those who appear before the courts but will also empower the courts to function efficiently and effectively.

The Current Immigration Court Structure Is Inherently Flawed

The U.S. immigration court system has long suffered 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.¹ The root cause of this dysfunction is a conflict of interest built into the system itself. In 1983, the Executive Office for Immigration Review (EOIR), which manages the immigration courts and the Board of Immigration Appeals (BIA), was established within DOJ.² This structure placed the Attorney General in the position to control both the immigration court system – including the immigration judges and members of the Board of Immigration Appeals – and the attorneys within the Office of Immigration Litigation (OIL), which represents the government against immigrant respondents in the circuit courts of appeals. Simply put, the chief prosecutor oversees the judges that hear the cases.

This conflict is made worse by the fact that the judges are considered government attorneys, a category that fails to recognize the importance of their judicial duties and leaves them particularly vulnerable to political pressure and interference. Unlike Article III federal judges, immigration judges are not guaranteed tenure or many of the other protections that insulate judges from outside influence. At the whim of the executive branch and the Attorney General, immigration judges have been subjected to political policies and procedures that jeopardize the quality and consistency of their decisions, as well as their ability to produce fair case outcomes.

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 problem is most dramatically illustrated by the ballooning backlog of cases, which currently exceed 1.7 million, and can cause respondents to wait upwards of five years to have their cases heard.³ Ironically, the excessive backlog is partly attributable to the conflicting approaches taken by past administrations, which have attempted to reduce the backlog while also advancing their policy priorities. President Obama's administration prioritized the adjudication of "family unit" cases, an approach that EOIR later said "coincided with some of the lowest levels of case completion productivity in EOIR's history. . . ."⁴ President Trump ordered immigration judges deployed to detention facilities on the border, but they were poorly utilized due to the lack of cases in the border region. The effort to surge judges to the border forced the immigration courts to reschedule more than 20,000 other cases that had been awaiting resolution.⁵

The Real Courts, Rule of Law Act of 2022 Is the Solution

AILA welcomes the Real Courts, Rule of Law Act of 2022 as the clear solution to fixing this deeply flawed system. Most importantly, this legislation would move the courts outside of the DOJ into an independent immigration court consistent with Article I of the United States Constitution. This change would free judges from the political whims of Attorneys General, make certain the court system has adequate resources and support to operate efficiently and effectively, and improve transparency and accountability in court proceedings.

The Real Courts, Rule of Law Act of 2022 would also offer immigration judges greater protection from undue influence, helping to ensure decisions that are fair and consistent. Article I judgeship would carry greater prestige and likely attract more highly qualified individuals, further strengthening the reputation and integrity of the system. Once passed, it will be imperative that the new courts prioritize the robust representation of individuals of diverse backgrounds among judges and staff to promote racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographic diversity.

The Real Courts, Rule of Law Act of 2022 Should Enjoy Broad Support

AILA urges broad, bipartisan support of the Real Courts, Rule of Law Act of 2022. This narrowly tailored legislation does not alter substantive immigration law or policy. Instead, it restructures an outdated court system that has proven itself over and over again to be deeply flawed, into a new court system that is set up to deliver efficient, effective, and fair outcomes. This legislation is a good government solution to a problem that has been widely acknowledged by experts of all political backgrounds.

Conclusion

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 court system that meets today's needs and protects due process, Congress must enact the Real Courts, Rule of Law Act of 2022 (H.R.6577).

¹ See American Immigration Lawyers Association, *Policy Brief: Restoring Integrity and Independence to America's Immigration Courts* (Updated January 24, 2020), available at <https://www.aila.org/File/DownloadEmbeddedFile/77605>. Statement of Jeremy McKinney, American Immigration Lawyers Association, Before the House Judiciary Committee's Subcommittee on Immigration and Citizenship, "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" (Jan. 29, 2020), <https://www.congress.gov/116/meeting/house/110402/witnesses/HHRG-116-JU01-Wstate-McKinneyJ-20200129.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; ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2019 Update report), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

² 48 Fed. Reg. 8,038 (Feb. 25, 1983). See also DOJ EOIR, *Evolution of the U.S Immigration Court System: Post-1983* (Updated April 30, 2015), available at <https://www.justice.gov/eoir/evolution-post-1983>.

³ TRAC Immigration, *Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, https://trac.syr.edu/phptools/immigration/court_backlog (Pending cases, All United States and Average Days, Nationalities) accessed April 4, 2022.

⁴ Memorandum from James McHenry, Director, EOIR, to all of EOIR, *Tracking and Expedition of "Family Unit" Cases* (Nov. 16, 2018), <https://www.aila.org/infonet/eoir-memo-tracking-expedition-family-unit-cases>; see also Eric Katz, 'Conveyor Belt' Justice: An Inside Look at Immigration Courts (Jan. 22, 2019), <https://www.govexec.com/feature/inside-conveyor-belt-behind-curtain-dojs-immigration-courts>.

⁵ Heidi Altman and Tara Tidwell Cullen, *Internal DOJ Documents Reveal Immigration Courts' Scramble to Accommodate Trump Administration's "Surge" Courts* (Sept. 27, 2017), <https://immigrantjustice.org/staff/blog/internal-doj-documents-reveal-immigration-courts-scramble-accommodate-trump>.