

**Questions for the Record Executive Office for Immigration Review Senate Committee on
the Judiciary**

**Subcommittee on Border Security and Immigration
“Strengthening and Reforming America's Immigration Court System”**

April 18, 2018

QUESTIONS FROM CHAIRMAN CORNYN

- 1. Director McHenry, has the Attorney General or Department taken a position on whether Congress should create an Article I immigration court. If yes, can you provide us with the AG's or Department's views on the question?**

RESPONSE: The forerunner to the current immigration court system came to the Department of Justice (Department) in 1940 where it has remained for almost eight decades. Proposals to reconfigure immigration courts as Article I courts and remove them from the Department do not address any of the core challenges currently facing the immigration courts. Their significant shortcomings, without any countervailing positive equities, do not warrant the massive overhaul of the federal administrative system required to carry them out.

The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further. An Article I immigration court system would require an entire new cadre of judges that must be appointed, confirmed, and trained. Such a change would do nothing to address the pending backlog of cases; rather, the backlog would likely grow even faster with less accountability and less oversight. Further, immigration judges already exercise independent judgment and discretion in deciding cases, and placing them in an Article I setting would significantly undermine uniformity in interpreting and administering the immigration laws with no commensurate gain of independence. Immigration judges also exercise sensitive functions in deciding cases that implicate questions of foreign relations, and it would therefore be better that their decisions remain subject to direct review by a principal officer—the Attorney General—who is subject to plenary presidential supervision.

Finally, there are thousands of other administrative judges within the federal system who perform similar functions to immigration judges. Because there is no reason to single out immigration judges from among the thousands of other federal administrative judges, making immigration judges Article I judges would inevitably lead to calls to make *every* administrative judge an Article I judge, and no proposal has reckoned with the ramifications of such a wholesale transformation of the federal administrative state. In short, the concept of reconstituting immigration courts as Article I courts carries both significant costs and unexplored risks with no apparent offsetting benefits. Accordingly, the Department opposes any proposal to make immigration courts Article I courts.

2. Advocates for creating an Article I immigration court believe that it would be more efficient than the current system. However, even if Congress created such a court, it would take years for it to be stood up. In the interim, EOIR would still need to manage the courts and caseload. In light of that I'd like to ask about different proposals for streamlining the current court process:

a. What would it take to create a summary merits process to address clearly frivolous filings and issue a final order of removal simultaneously?

RESPONSE: Creating a summary merits process would likely require a statutory change, as even aliens who file frivolous asylum applications are allowed to apply for withholding of removal under the Immigration and Nationality Act or protection under the Convention Against Torture and may require separate hearings on those applications. The Administration is pleased to work with Congress and offer technical assistance on any legislative proposals regarding a summary merits process.

b. Could EOIR administratively create a motions-only docket like they have in some district courts, where the motions are disposed of by a panel of immigration judges?

RESPONSE: Yes. As part of its plan to reduce the pending backlog of cases, the Executive Office of Immigration Review (EOIR) has already piloted motions dockets at eight courts to streamline that aspect of proceedings and is evaluating the feasibility of expanding such dockets to additional courts.

QUESTIONS FROM SENATOR DURBIN

3. In testimony before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies on April 25, 2018, Attorney General Sessions said:

Mr. Chairman, I'd like to address one matter that I know is important to the Committee: the Legal Orientation Program. I have expressed some concerns about the program, and the Executive Office for Immigration Review has expressed its intent to pause two parts of the program pending the results of a formal review of the program. I recognize, however, that the Committee has spoken on this matter, and, out of deference to the Committee, I have ordered there be no pause while that review is conducted. I look forward to evaluating the findings and will be in communication with the Committee when they are available.

- a. Please provide a detailed description of the formal review of the Legal Orientation Program that EOIR is conducting.
- b. When will this review conclude?
- c. Will you commit to provide the results of the review to this Subcommittee before taking any action to terminate, pause, or alter the Legal Orientation Program?

RESPONSE: The Legal Orientation Program (LOP) is a government program with an estimated aggregate cost of almost \$100 million over five years that has not been audited since 2012. The 2012 review of the program was conducted in an unorthodox manner, raising concerns about its validity. It also produced results that EOIR has been unable to replicate despite months of effort.

EOIR is currently undergoing a comprehensive review of the LOP to ensure its effectiveness. EOIR has now completed the first phase of the review and issued a report on its findings, which is available at <http://www.justice.gov/eoir/file/1091801/download>. The Department is committed to providing Congress with reports on phase two and phase three as they become available.

4. The National Association of Immigration Judges testified that EOIR has changed the qualification requirements for immigration judges to prioritize litigation experience over other relevant immigration law experience.

Please provide an explanation of this change in the qualification requirements for immigration judges, including when the change was made, why it was made and what impact the change will have.

RESPONSE: Qualification requirements for immigration judge positions are not

prioritized, as all qualification requirements must be met by the close of the vacancy announcement. “Knowledge of immigration laws and procedures” and “substantial litigation experience, preferably in a high volume context” have been quality ranking factors for immigration judge applicants since at least 2013 and have not changed. In 2015, EOIR replaced a requirement of post-bar relevant legal experience with a requirement of post-bar practice as an attorney.

The change in 2015 created the potential for confusion among applicants because there is no uniform federal standard for the practice of law as an attorney and the definition of practice of law varies considerably from state to state. To alleviate any confusion, and because immigration judges are trial-level judges who perform similar functions as federal administrative law judges (ALJs), EOIR replaced this vague standard in 2017. The current requirement is essentially identical to the one utilized by the Office of Personnel Management in selecting ALJs, and it neither prioritizes litigation experience nor is limited to litigation experience, and it expressly includes administrative law experience.

- 5. The National Association of Immigration Judges testified: “Individual judges have been tasked with responding to complaints voiced by DHS to EOIR management about how a particular pending case or cases are being handled, in disciplinary proceedings without the knowledge of the opposing party.”**
- a. Have you, or anyone on your staff, communicated with DHS about a judge’s handling of a case?**
 - b. Have you or anyone on your staff, attempted to influence any immigration judges in response to communications with DHS?**
 - c. Will you commit not to engage in ex parte communications with DHS about pending cases and not to attempt to influence immigration judges to reach a particular outcome in a pending case?**
 - d. Will you direct EOIR staff not to engage in ex parte communications with DHS about pending cases and not to attempt to influence immigration judges to reach a particular outcome in a pending case?**

RESPONSE: EOIR takes all allegations of improper conduct by an immigration judge seriously, and it reviews all such allegations, regardless of whether they are provided by a respondent, a representative, the Department of Homeland Security, a third-party group, or the media. EOIR also investigates such allegations as warranted and may take further action as necessary, depending on the nature of the improper conduct at issue. EOIR does not engage in *ex parte* communications with parties or other groups regarding the merits of specific cases.

QUESTIONS FROM SENATOR FEINSTEIN

6. You recently issued a memo establishing new performance metrics for all immigration judges, amounting to quotas. According to the memo, in order to maintain satisfactory performance, judges must complete 700 cases per year. The memo does not define the meaning of case completions and there is great concern that these quotas will undermine judicial independence and due process for respondents in immigration proceedings.
- a. Before announcing these quotas, what process did your agency employ to determine how they would affect the agency's workload or the immigration court backlog? Did you perform an analysis or produce an assessment providing a rationale for these quotas? If so, what findings did your review yield?
- b. How did your agency identify 700 as the number of cases necessary for satisfactory performance?

RESPONSE: A performance metric of 700 case completions per fiscal year reflects a considered policy judgment regarding the minimum number of cases an experienced immigration judge working a regular schedule should reasonably be able to complete. It is in line with similar measures at other administrative agencies and in line with both current and historic completion numbers for immigration judges. It is not a quota, which is a fixed number with no deviation. Rather, it is a measure that will be evaluated subject to six discrete factors, along with a seventh catch-all factor, before making a determination about an immigration judge's performance.

7. Two years ago, it was reported that an immigration judge made comments implying that toddlers as young as three and four years old can be taught immigration law. ("Can a 3-year old represent herself in immigration court? This judge thinks so," Washington Post, March 5, 2016) This is truly absurd, and it is especially concerning considering that this judge is responsible for training other immigration judges. To address the lack of legal representation for children in deportation proceedings, Senator Hirono and I have introduced legislation that would require the appointment of counsel in these cases.
- a. Do you believe that toddlers can be taught the complexities of immigration law to sufficiently represent themselves in court?
- b. What is your agency doing to ensure that children in immigration proceedings receive due process and are not sent back to countries where their life may be in danger?
- c. Do you support providing counsel, at government expense, in certain immigration proceedings? If so, in which instances?

- d. **Do you support providing counsel, at government expense, to children in immigration proceedings?**

RESPONSE: The job of an immigration judge on the bench is to adjudicate the case before him or her in a timely and impartial manner based on the facts and evidence of the case. All respondents, including children, are afforded due process protections established by the Immigration and Nationality Act and attendant regulations. Under federal law, 8 U.S.C. § 1362, 1229 (b)(4), all respondents have a right to counsel in immigration proceedings at no expense to the government, and EOIR adheres to the law. The issue of counsel for children at government expense remains in litigation, and it would not be appropriate to comment further.

8. **In March, Attorney General Sessions referred a decision from the Board of Immigration Appeals, *Matter of E-F-H-L*, to himself and vacated the decision. In that case, the Board held that asylum applicants are entitled to hearings on their applications. As you know, the Attorney General has the power to overrule a decision made by the Board of Immigration Appeals pursuant to 8 CFR § 1003.1(h).**

- a. **What is the rationale for vacating this decision and what is its intended effect?**
- b. **In light of this decision and related concerns, how will you ensure that asylum seekers with legitimate claims receive due process?**

RESPONSE: The Attorney General's decision is published and available at *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018). All respondents, including those with pending asylum applications, are afforded due process protections established by statute and regulation.

9. **In a December 2017 blog post, the Center for Immigration Studies—an organization that advocates for lower levels of immigration—recommended that the Attorney General use his referral authority to in effect make it possible for immigration judges to reach a decision on an asylum application without holding a full evidentiary hearing. Procedurally, the Attorney General's decision to vacate *Matter of E-F-H-L* appears consistent with this recommendation. Did the Attorney General consult the Center for Immigration Studies or any other organizations in anticipation of his decision to vacate *Matter of E-F-H-L*? If so, which organizations?**

RESPONSE: I do not maintain or have access to the Attorney General's schedule. To my knowledge, the Attorney General has not consulted with any outside organizations regarding the merits of any case he has referred to himself, though multiple outside organizations have filed amicus briefs in those cases in response to his invitations to do so.

10. **In all the cases that Attorney General Sessions has referred to himself pursuant to 8 CFR § 1003.1(h), has he consulted you or any outside organizations? If he has**

consulted with you, on which cases did he elicit your counsel and what recommendations did you make? If he consulted with organizations, provide a list.

RESPONSE: The Attorney General has not consulted me regarding the merits of any case he has referred to himself, though EOIR has provided data, background information, and logistical support as needed.

I do not maintain or have access to the Attorney General's schedule. To my knowledge, the Attorney General has not consulted with any outside organizations regarding the merits of any case he has referred to himself, though multiple outside organizations have filed amicus briefs in those cases in response to his invitations to do so.

11. Provide a list of all cases that have been referred to the Attorney General pursuant to 8 CFR § 1003.1(h) from 2001 to present.

RESPONSE: The following are published decisions by an Attorney General since 2001 following a referral pursuant to 8 C.F.R. § 1003.1(h) or its predecessor:

Matter of Y-L-, A-G- & R-S-R-, 23 I&N Dec. 270 (A.G. 2002)
Matter of JEAN, 23 I&N Dec. 373 (A.G. 2002)
Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003)
Matter of C-Y-Z-, 23 I&N Dec. 693 (A.G. 2004)
Matter of E-L-H-, 23 I&N Dec. 700 (A.G. 2004)
Matter of R-A-, 23 I&N Dec. 694 (A.G. 2005)Matter of MARROQUIN, 23 I&N Dec. 705 (A.G. 2005)
Matter of LUVIANO, 23 I&N Dec. 718 (A.G. 2005)
Matter of A-H-, 23 I&N Dec. 774 (A.G. 2005)
Matter of J-F-F-, 23 I&N Dec. 912 (A.G. 2006)
Matter of S-K-, 24 I&N Dec. 289 (A.G. 2007)
Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008)
Matter of A-T-, 24 I&N Dec. 617 (A.G. 2008)
Matter of R-A-, 24 I&N Dec. 629 (A.G. 2008)
Matter of SILVA-TREVINO, 24 I&N Dec. 687 (A.G. 2008)
Matter of COMPEAN, BANGALY & J-E-C-, 24 I&N Dec. 710 (A.G. 2009)
Matter of COMPEAN, BANGALY & J-E-C-, 25 I&N Dec. 1 (A.G. 2009)
Matter of DORMAN, 25 I&N Dec. 485 (A.G. 2011)
Matter of CHAIREZ and SAMA, 26 I&N Dec. 686 (A.G. 2015)
Matter of CHAIREZ and SAMA, 26 I&N Dec. 796 (A.G. 2016)
Matter of CASTRO-TUM, 27 I&N Dec. 187 (A.G. 2018)
Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)
Matter of A-B-, 27 I&N Dec. 227 (A.G. 2018)
Matter of L-A-B-R- et al., 27 I&N Dec. 245 (A.G. 2018)
Matter of A-B-, 27 I&N Dec. 247 (A.G. 2018)

In 2015, Attorney General Holder issued a published decision in *Matter of SILVA-TREVINO*, 26 I&N Dec. 550 (A.G. 2015), though it is not clear if that decision followed a referral pursuant to 8 C.F.R. § 1003.1(h).

- 12. When exercising the referral authority provided in 8 CFR § 1003.1(h), do you believe the Attorney General should provide notice and an opportunity for interested parties to participate as amicus?**

RESPONSE: Attorney General Sessions has provided amici an opportunity to participate in all three cases he has referred in which he has called for briefs from the parties. There is no entitlement to briefing when a matter is certified for Attorney General review, and the practice of allowing amicus briefing has varied from case to case among prior Attorneys General.

- 13. Your agency recently halted the Legal Orientation Program, which provides detained immigrants with information on removal proceedings. Considering that representation rates for detained individuals is about 30 percent, or lower, this development is highly concerning. (“Who is Represented in Immigration Court,” TRAC, October 16, 2017) The program was established under George W. Bush’s administration, and EOIR’s own website notes that it has made it possible for cases to be completed “faster, resulting in fewer court hearings and less time spent in detention.” (EOIR Legal Orientation Program Website, March 16, 2016)**

- a. Do you agree with the statements on your agency’s website, which acknowledge that the Legal Orientation Program has made removal proceedings more efficient?**

RESPONSE: The Legal Orientation Program (LOP) is a government program with an estimated aggregate cost of almost \$100 million over five years that has not been audited since 2012. The 2012 review of the program was conducted in an unorthodox manner, raising concerns about its validity. It also produced results that EOIR has been unable to replicate despite months of effort. Consequently, the statements about the results of that study no longer appear on EOIR’s website.

EOIR is currently undergoing a comprehensive review of the LOP to ensure its effectiveness. EOIR has now completed the first phase of the review and issued a report on its findings, which is available at <http://www.justice.gov/eoir/file/1091801/download>. The Department is committed to providing Congress with reports on phase two and phase three as they become available.

- b. Do you believe that access to legal information or counsel helps ensure due process in removal proceedings?**

RESPONSE: All respondents are afforded due process protections established by statute and regulation, and immigration judges provide significant information on the record to safeguard those protections, including advising respondents of their

numerous rights in immigration proceedings. Immigration judges also advise respondents of the availability of pro bono legal services, ensure that respondents receive a copy of the list of pro bono legal service providers maintained by EOIR, and ensure that respondents receive a copy of their appeal rights. They also explain the charges against a respondent in non-technical language. Immigration judges inform respondents of their apparent eligibility to apply for any protection or relief under the INA and afford respondents an opportunity to file an application for such relief or protection. Additionally, for a respondent who expresses a fear of persecution or harm upon return to a country to which he or she may be subject to removal and who has not previously filed an application for asylum or withholding of removal, an immigration judge will inform that respondent of his or her right to seek such protection or relief, and will make available to the respondent the appropriate application forms for such protection or relief. The immigration judge will also advise the respondent of the consequences of filing a frivolous asylum application.

- 14. As you are aware, there is precedent from the Board of Immigration Appeals allowing victims of domestic violence to qualify for asylum under certain circumstances. Do you believe that victims of domestic violence should continue to be eligible for asylum?**

RESPONSE: On June 11, 2018, the Attorney General issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) addressing this issue. This opinion is the subject of current, ongoing litigation. Pursuant to longstanding Department policy, it would not be appropriate to comment further.

QUESTIONS FROM SENATOR HIRONO

15. The Department has suspended the Legal Orientation Program, saying they need to stop it in order to study its efficiency. But, as Ms. Gambler noted in the 2016 GAO report, the Vera Institute of Justice, which administers the program, provides EOIR with quarterly reports.

Why not keep this program running while it's being studied? It has been up and running for years and provides effective guidance to pro-se immigrants in how to navigate a complicated and confusing system.

RESPONSE: On April 25, 2018, the Attorney General announced that the Legal Orientation Program (LOP) will not be paused pending review.

16. Immigration proceedings are civil and not criminal, so immigrants in removal proceedings do not have a right to counsel, and much less than half actually get a lawyer. A 2016 study by the American Immigration Council tells us that only 37 percent of all immigrants get attorneys when they appear in immigration court. Now, the department and EOIR are making it even harder for them to be represented, mostly by speeding up the proceedings and cutting the time they have to find someone. To me, this is an unacceptable denial of due process.

What steps is EOIR taking to ensure more immigrants are represented in their immigration court hearings?

RESPONSE: The representation rate in removal proceedings as of March 31, 2018, is 68%. By statute, all respondents are entitled to representation in removal proceedings at no expense to the government, and EOIR adheres to the law. Pursuant to regulation, immigration judges advise respondents of the availability of pro bono legal services and ensure that respondents receive a copy of the list of pro bono legal service providers maintained by EOIR.

17. The GAO Report says that you are working to develop a strategic plan to address your staffing problems.
- a. What is the status of that planning process?
 - b. When will you have action items to follow up on?

RESPONSE: EOIR has committed to developing and implementing a comprehensive strategic workforce plan. In April 2017, EOIR established an Immigration Court Staffing Committee which, among other things, examined how best to address staffing needs in both the short and long term, assessed critical skills and competencies needed to achieve future programmatic results, and developed strategies to address gaps in alignment of human capital. The Immigration Court

Staffing Committee met throughout summer and autumn 2017 to develop recommendations regarding strategic workforce planning at EOIR. Those recommendations were finalized in early 2018 by a working group, and two staffing models—one for larger courts and one for smaller courts—have been announced. To implement these models, EOIR has developed new positions to staff the immigration courts while also revising the position descriptions of certain already existing positions.

18. Can you explain what guarantees there are in the hiring process for immigration judges that they will be chosen in a fair and neutral manner with no political considerations at all?

RESPONSE: Immigration judges are selected through a rigorous, open, competitive, and merit-based process. As federal employees, they are afforded significant employment rights and are protected by merit systems principles from prohibited personnel practices. Every advertisement for an immigration judge position clearly indicates that “[t]he United States Government does not discriminate in employment on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, political affiliation, sexual orientation, marital status, disability, genetic information, age, membership in an employee organization, retaliation, parental status, military service, or other non-merit factor.” EOIR unequivocally adheres to these principles in hiring immigration judges.