

THE IMMIGRATION COURT: ZIGZAGGING ON THE ROAD TO JUDICIAL INDEPENDENCE

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INTRODUCTION

The U.S. Immigration Court system is no stranger to criticism, and the past five years have been blistering. Concerns about hearing delays,¹ judicial professionalism,² case management failures,³ pandemic health and safety procedures,⁴ and

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1. Rebecca Beitsch, *Courts Drowning in Backlog Pose Lingering Immigration Challenge*, HILL (June 6, 2021, 4:11 PM), <https://thehill.com/policy/national-security/556933-courts-drowning-in-backlog-pose-lingering-immigration-challenge> [<https://perma.cc/49AS-VF2W>]; *Immigration Court Backlog Could Lead to Years-Long Wait for Trials*, KGUN (May 27, 2021, 1:53 PM), <https://www.kgun9.com/border-watch/immigration-court-backlog-could-lead-to-years-long-wait-for-trials> [perma.cc/9JB3-GK2N].

2. Editorial, *Immigration Courts Aren't Real Courts. Time to Change That.*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html> [<https://perma.cc/SL84-TMT9>].

3. GREG CHEN & PETER MARKOWITZ, RECOMMENDATIONS FOR DOJ AND EOIR LEADERSHIP TO SYSTEMATICALLY REMOVE NON-PRIORITY CASES FROM THE IMMIGRATION COURT BACKLOG (2021), <https://www.aila.org/File/DownloadEmbeddedFile/88776> [<https://perma.cc/2L2G-XFKW>].

4. Mimi Tsankov, *Postcards from the Pandemic—Part One: US Immigration Courts: A Business-as-Usual Approach to a Once-in-a-Century Pandemic*, INT'L BAR ASS'N, <https://www.ibanet.org/article/02B60C3D-BC56-47D8-9876-CE1574E9AF35> [<https://perma.cc/T7A5-8NJD>]; Mimi Tsankov, *Postcards from the*

politically motivated judicial hiring⁵ have raised serious questions about whether the Immigration Courts can deliver access to justice and whether Immigration Judges (IJs) are judicially independent.⁶

A major source of the criticisms stems from the basic structure of the court system itself.⁷ The Immigration Courts are housed within the U.S. Department of Justice (DOJ), the nation's law enforcement agency. As such, the interplay between "prosecution," a prototypical law enforcement function, and "judicial integrity," a fundamental court principle, can get blurry.⁸ On one hand, IJs are civil servants answering to an Attorney General who signs their paycheck. On the other, IJs face judicial branch review, which expects nothing less than the provision of constitutional procedural due process.⁹ The IJs sitting at this vortex must strike a difficult balance that—even when performed correctly—is susceptible to a *perception* of partiality.¹⁰

This Article begins and ends at that fundamental conflict: while IJs are charged with protecting constitutional procedural due process and exercising decisional independence, they do not have *independent* authority to apply constitutionally mandated due process standards. However, IJs can better achieve their responsibilities if Congress modifies the system to afford independence so that judges will not struggle as a component within a department advancing law enforcement objectives. Such systemic modification would also need to simultaneously afford the high standards of fairness that Immigration Court litigants must receive. In short, a congressionally created Article I

Pandemic—Part Two: The US Immigration Courts: Still in a Health and Safety Crisis More than Five Months In, INT'L BAR ASS'N, <https://www.ibanet.org/article/A0AB9461-82B6-4B95-B518-6CF7B9418C20> [https://perma.cc/5CEV-5SKZ].

5. *A History of Politicized Hiring in Immigration Courts*, S. POVERTY L. CTR., <https://www.splcenter.org/history-politicized-hiring-immigration-courts> [https://perma.cc/ZML9-G3EV].

6. *See Immigration Courts Aren't Real Courts. Time to Change That*, *supra* note 2.

7. *Id.*

8. *See generally Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts, Hearing Before the Subcomm. on Immigr. and Citizenship and Comm. on the Judiciary*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2757> [https://perma.cc/UV9B-S86S].

9. *See id.*

10. *See Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead*, AM. IMMIGR. LAWS. ASS'N (July 6, 2020), <https://www.aila.org/advo-media/press-releases/2020/trump-Administration-makes-immigration-courts-an-e> [https://perma.cc/ACZ4-VKT4].

Immigration Court could promote a more effective and efficient system. Absent a neutral setting, free from interference, the IJs and the process they serve will remain vulnerable to the whims of politics: hence a Republican “zig” to every Democratic “zag.”¹¹

The Article will begin by outlining the basic structure of the existing system and identifying some of the key changes that have impacted IJs on the bench, which have driven us to a moment in history that many argue is our most tenuous. Part I will offer a brief overview of our court structure for context. Part II will explain how, after a tumultuous five years, Immigration Courts are currently significantly tarnished such that rehabilitation of the existing system may serve a short-term purpose but will inevitably fail to address the larger, fundamental inequities that result from a nonindependent court. Part III advocates for the creation of an independent Immigration Court, recognizing it as the only way to avoid the back-and-forth that politics imposes on the current system. The Article concludes that the system needs clearer separation of IJ responsibilities, because an Immigration Court housed within the DOJ enables political leaders to influence and control the daily judicial functions of the IJs who preside over removal cases. Unless fundamental changes are made, Immigration Courts will continue to struggle to be neutral bodies, free from interference, and the process will remain vulnerable to political impulse.

I. STRUCTURAL BACKGROUND

Before we can understand how an Article I Immigration Court could reduce politicization and increase independence, we must examine where the court stands today and under what authority it operates. The Immigration Court is one of multiple components within a relatively obscure entity called the Executive Office for Immigration Review (EOIR), which is an agency tucked within the DOJ.¹²

Under authority delegated by the Attorney General, the Immigration Court’s mission is to preside over administrative removal proceedings at the trial level.¹³ The fact that the

11. See *Immigration Courts Aren’t Real Courts. Time to Change That*, *supra* note 2.

12. 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified as amended at 8 C.F.R. § 1003.0(a) (2021)).

13. 8 C.F.R. § 1003.14 (2021).

Immigration Court is contained within the DOJ is critical to understanding why IJs do not have structural independence.¹⁴ It means that although IJs have authority to preside over cases, they are in fact civil servants who can be disciplined or terminated by the Attorney General.¹⁵ Thus, despite having decisional independence to decide cases based on immigration laws and regulations and despite being held to the highest standards of judicial conduct, at the end of the day, IJs still work for the Attorney General, who can discipline or fire them.

The court has more than 525 IJs,¹⁶ with a Chief Immigration Judge who reports to the EOIR Director, who, in turn, reports to the Office of the Attorney General.¹⁷ The decisions that are issued by IJs at the Immigration Court level can be appealed to another EOIR component, the Board of Immigration Appeals (BIA).¹⁸ The BIA also operates through Attorney General-delegated authority and is directed to exercise its independent judgment in hearing administrative appeals of IJ decisions.¹⁹

There are sixty-nine Immigration Courts across the United States.²⁰ Cases are initiated through the filing of an instrument called a “Notice to Appear” before the Immigration Court by a separate Executive Branch entity: the Department of Homeland Security (DHS).²¹ Within the DHS, the Immigration and Customs Enforcement (ICE) brings charges of removability, as set forth in the Notice to Appear, against individuals called “respondents,” who it argues are present in the United States in violation of the nation’s immigration laws.²² ICE trial attorneys represent the U.S. government as civil prosecutors in the Immigration Court removal proceedings.²³

14. 8 U.S.C. § 1229a(b)(1).

15. 8 C.F.R. § 1003.109 (2021).

16. *EOIR Immigration Court Listing*, U.S. DEP’T OF JUST. (Sept. 9, 2021), <https://www.justice.gov/eoir/eoir-immigration-court-listing> [<https://perma.cc/42FN-2RG6>].

17. 8 C.F.R. § 1003.1 (2021).

18. *Id.*

19. *Id.*

20. *EOIR Immigration Court Listing*, *supra* note 16.

21. 8 C.F.R. § 239.1 (2021).

22. See Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf’t, to Attorneys of the Off. of the Principal Legal Advisor on Civil Immigration Enforcement & Removal Policies & Priorities (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [<https://perma.cc/K8HA-U22J>].

23. See 8 U.S.C. § 1229; 8 C.F.R. § 239.1 (2021).

In Immigration Court, an IJ has authority to preside over the entire court proceeding, deciding questions of removability and eligibility for relief from removal.²⁴ Responsibilities include administering oaths, receiving evidence, and interrogating, examining, and cross-examining the respondent and any witnesses.²⁵ Respondents can apply for relief or protection from removal, such as asylum,²⁶ cancellation of removal,²⁷ or protection under the Convention Against Torture.²⁸ In such situations, respondents bear the burden of proof in establishing that they satisfy the applicable eligibility requirements and that relief from removal should be granted in the exercise of discretion.²⁹

For years, the Immigration Court has been suffering from a severe backlog stemming from the fact that there are far more cases than judges available to hear them.³⁰ With case backlogs reported at over 1.3 million cases in February 2021, on average, each judge should be responsible for about 2,500 cases.³¹ As such, IJs preside over high-volume dockets averaging about three to four individual trials per day. In addition, IJs regularly hold status conference-like hearings—called “master calendar” hearings—that address multiple, separate cases during morning or afternoon docket settings.³²

The high-profile backlog and the high-stakes politicized nature of immigration policy has resulted in unprecedented public focus on the challenges faced by the Immigration Courts.³³ The

24. 8 C.F.R. § 1003.10 (2021).

25. *Id.* § 1003.10(b).

26. *Id.* § 208.13.

27. 8 U.S.C. § 1229b(b).

28. 8 C.F.R. §§ 208.16–.18 (2018).

29. See DEP'T OF HOMELAND SEC., FACT SHEET: USCIS AND ICE PROCEDURES IMPLEMENTING EOIR REGULATIONS ON BACKGROUND AND SECURITY CHECKS ON INDIVIDUALS SEEKING RELIEF OR PROTECTION FROM REMOVAL IN IMMIGRATION COURT OR BEFORE THE BIA 4 (2011), https://www.uscis.gov/sites/default/files/document/fact-sheets/EOIR_FactSheet_2011_FINAL.pdf [<https://perma.cc/XJ4G-PB5L>].

30. Daniel Costa, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, ECON. POL'Y INST. (July 24, 2014), <https://www.epi.org/publication/immigration-court-caseload-skyrocketing> [<https://perma.cc/93GB-XN7L>].

31. Greg Chen & Peter L. Markowitz, *Unclogging the Nation's Immigration Court System*, HILL (Feb. 1, 2021, 4:30 PM), <https://thehill.com/opinion/immigration/536794-unclogging-the-nations-immigration-court-system?rl=1> [<https://perma.cc/5G37-8VVT>].

32. Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 626 (2009).

33. Letter from Rep. Pramila Jayapal, Member of Cong., to Merrick Garland, Att'y Gen. (June 10, 2021) (on file with the American Immigration Lawyers

next Part will delve into that topic and focus on how structural dependency is at the heart of a range of factors that trigger concern about the status quo.

II. FUNDAMENTAL INEQUITIES RESULTING FROM A NONINDEPENDENT COURT

For almost two decades, there has been growing public skepticism about the impact of structural dependence on the Immigration Court.³⁴ This dependency—which places Immigration Courts under the purview of the Executive Branch but requires that courts adhere to the highest judicial standards for due process—is responsible for a range of factors that trigger concern about the status quo. Part II examines some issues caused by the Immigration Court’s structural dependence, including reports of politicized hiring, inadequate and imbalanced funding, insufficient hiring of judge teams, insufficient time to adequately consider cases, heavy reliance on the use of oral decisions, instances of judicial intemperance and burnout, and concerns about overreliance on videoconferencing.

A. *ABA Reports & the Calls for an Article I Court*

In 2010, the concern about the Immigration Court’s lack of independence crystalized when the American Bar Association (ABA) released its findings from a comprehensive national study analyzing the contours of this issue. The 2010 ABA Report focused on all aspects of the immigration process, including those beyond the Immigration Court component.³⁵ In doing so, it

Association’s Research Library); *Representatives Urge Attorney General to Reverse Trump’s Attacks on Immigrants*, AM. IMMIGR. LAW. ASS’N (June 10, 2021), <https://www.aila.org/infonet/representatives-urge-attorney-general-to-reverse> [<https://perma.cc/TRG2-VYQ6>] (“On 6/10/21, Representative Pramila Jayapal (D-WA) led 60 lawmakers in calling on DOJ to immediately implement a set of reforms on immigration court backlogs, regulatory and policy review, EOIR personnel, legal representation, criminal prosecutions, and the ongoing pandemic.”).

34. *Politicized Hiring at the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008). See generally ALISON PECK, *THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION* (2021) (providing a summary of the history of the Immigration Courts).

35. See generally ARNOLD & PORTER LLP, AM. BAR ASS’N COMM’N ON IMMIGR., *REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE THE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES* (2010), [hereinafter 2010 ABA REPORT]

articulated a comprehensive explanation of how independence concerns and perceptions of fairness were tied to the quality and professionalism of presiding IJs and their ultimate accountability.

The 2010 ABA Report outlined a number of failures under the current Immigration Court system that contributed to difficulties in administering justice equitably and efficiently. First, pointing to large caseloads and lack of adequate resources to effectively manage dockets, the 2010 ABA Report noted that justice delayed resulted in justice being denied.³⁶ It noted that, just to keep up with case filings, judges would need to issue four decisions a day given then-current levels of IJ staffing.³⁷ Moreover, law-clerk staffing levels were inadequate for the quantity of work expected to be completed.³⁸

Next, the 2010 ABA Report pointed out that IJs were not provided with sufficient training and professional development opportunities—to the detriment of the entire system.³⁹ This lack of training reportedly impacted everything from decision-making and awareness about human-rights conditions in countries respondents were fleeing to courtroom sensitivity and understanding of new developments in the law.⁴⁰

In some instances, the 2010 ABA Report noted concerns about politicization in the selection and qualification of IJs.⁴¹ Prior to 2004, the Attorney General had largely delegated the entire process to the Chief Immigration Judge, and the process involved an application, a resume, and an oral interview by a

https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [https://perma.cc/CT2G-T3VJ].

36. *See id.* at 1-39.

37. *Id.* at 2-16.

38. *Id.* at 2-17.

39. *Id.* at 2-19–2-20 (“Although EOIR recently instituted improvements to the training program for immigration judges, some stakeholders have raised concerns about the . . . current training programs. In particular, some believe that training should aim to ensure that immigration judges understand that one of their obligations is to avoid deporting a refugee in violation of the 1951 Refugee Convention and its 1967 Protocol. Others recommend that the training programs devote more time and resources to training immigration judges on ethics and temperament, cultural sensitivity and awareness, how to make appropriate credibility determinations, how to effectively identify fraud, changing country conditions, and new developments in immigration law.” (footnotes omitted)).

40. *Id.*

41. *Id.* at 2-18 (“[T]he . . . criteria for hiring immigration judges is missing many of the traditional criteria associated with judicial selection.” (footnote omitted)).

judge.⁴² However, in 2004, hiring authority that had previously been delegated was re-assumed directly by the Office of the Attorney General, which solicited candidates and then informed EOIR who to hire.⁴³ This led to documented violations of federal law prohibiting politicized hiring.⁴⁴

The 2010 ABA Report also raised concerns about the failure to provide adequate supervision over IJs and to discipline them when appropriate⁴⁵ and acknowledged serious issues related to IJs' retention and removal.⁴⁶ Of particular note, the 2010 ABA Report identified that fundamentally there were multiple, specific issues related to court proceedings themselves, including too few IJs, insufficient time to adequately consider cases, a heavy reliance on the use of oral decisions, instances of judicial intemperance and burnout, and overreliance on videoconferencing.⁴⁷ With the increase in federal circuit court scrutiny of IJ decisions, EOIR stepped up performance oversight and employee discipline.⁴⁸

The 2010 ABA Report concluded by recommending three possible solutions. One option was to create an Article I court for the entire Immigration Court system, including a trial-level division and an appellate division.⁴⁹ The second option was to

42. *Id.* at 2-10.

43. *Id.*

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

45. 2010 ABA REPORT, *supra* note 35, at 2-21.

46. *Id.* at 2-24.

47. *Id.* at 2-25–27.

48. *Id.* at 2-21–22.

49. Joan Churchill, *An Article I Immigration Court — An Idea that is Growing*, COUNTERBALANCE MAG., Summer 2021, at 15, https://www.nawj.org/uploads/files/counterbalance/cb35_2.pdf [<https://perma.cc/GQY8-K9PR>] (providing a description of the early history of an Article I solution). The notion of an Article I solution is not new and dates back to at least 1978 when then-President Carter established an Interagency Task Force on Immigration Reform comprised of representatives from the Departments of State, Labor, and Justice. *Id.* The work of the Task Force led to the formulation of a Congressional Select Commission on Immigration and Refugee Policy, and in 1980, retired Chairman of the Board of Immigration Appeals, Maurice A. Roberts, released a draft Article I proposal. *Id.* at 15–16; Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 1 (1980). In his 1980 law review article, Roberts examined various alternative court structures and proposed the creation of a tribunal that would reside outside of the DOJ and serve as a specialized statutory Article I immigration court, with both trial and appellate divisions—the “Roberts Model.” *Id.* at 16–20. He argued that such a system would better ensure the judicial tradition of independence, which renders courts less likely than other governmental agencies to yield to political pressures. *Id.* at 18–20. In his attached draft bill, judges would be appointed by the President and confirmed by the Senate for fixed terms of fifteen

create an independent Executive Branch agency that would house both the trial-level and appellate courts. The third option represented a hybrid model, whereby the appellate entity would be converted to an Article I court, and the trial-level Immigration Courts would be placed in an independent administrative agency.⁵⁰ Such an Article I Immigration Court would essentially replace the existing structure and serve as the principal adjudicatory forum described under Title II of the Immigration and Nationality Act. It would become an adjudicative entity established by Congress under its Article I legislative powers.⁵¹

While the creation of an Article I Immigration Court was circulating as but one of several ABA-proposed solutions, all of the problems identified in the 2010 ABA Report amplified during the decade following the report's release.⁵² Spanning three separate Executive Branch administrations, critics observed

years and at compensation comparable to that of other federal judges. *Id.* at 19. Under the Roberts Model, there would be a proposed salary increase to attract the best-qualified candidates as well as a screening panel that would make hiring recommendations to the President. *Id.* While he did not envision a provision for “grandfathering in” the present IJs and BIA members, he argued that “many undoubtedly would be found qualified for the new court.” *Id.* He suggested that this revamped system would make dispositions more timely and help alleviate backlogs, which were a problem even then. *Id.* at 20. Finally, he argued that the Roberts Model would establish uniformity of decision-making with a cadre of “independent, competent and compassionate judges.” *Id.*

50. 2010 ABA REPORT, *supra* note 35, at 6-32.

51. *Id.*

52. Letter from Rep. Pramila Jayapal, Member of Cong., to Merrick Garland, Att’y Gen., *supra* note 33; *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS’N, <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court> [<https://perma.cc/LHF2-4347>]. In 2014, the Federal Bar Association (FBA) drafted model legislation to create such a court and enable a systemic overhaul. Christine Lockhart Poarch, *The FBA’s Proposal for the Creation of a Federal Immigration Court*, FED. LAW., Apr. 2014, at 10. It proposed that Congress establish a new, specialized Article I court transferring EOIR adjudicatory responsibilities to the U.S. judiciary—the “FBA Model.” *Id.* While the proposal was similar to the ABA-proposed Article I court in some respects, there were marked distinctions. *Compare id. with* 2010 ABA REPORT, *supra* note 35. The FBA Model was modeled on the Bankruptcy Court structure, with all EOIR functions administered by the Administrative Office of the U.S. Courts. Poarch, *supra*. A chief immigration appeals judge would be nominated by the President with Senate confirmation for a five-year term, overseeing an appellate court of fifteen Senate-confirmed immigration appeals judges, themselves appointed to fifteen-year terms with staggered five-, ten-, and fifteen-year appointments. *Id.* at 10–11. Appellate court decisions would be made by three-judge panels rather than single judges. *Id.* at 11. The court would have trial-level IJs appointed to fifteen-year terms by the relevant judicial circuit, similar to the bankruptcy judge appointment process. *Id.* All current IJs and BIA board members would be appointed to initial terms. *Id.*

continuing challenges in all of the ABA-identified areas.⁵³ For example, IJ dockets had expanded exponentially—at the start of 2014, there were 344,230 backlogged cases,⁵⁴ and by 2018, this number had grown to 768,257.⁵⁵ A lack of adequate resources continued to make managing dockets challenging, and beginning in 2016, Congress appropriated funds specifically targeted at supporting “Judge Teams” so that sufficient staff could be hired to support each judge effectively.⁵⁶ In-person annual training conferences were sporadic, and some years, IJs were simply given recordings to review at their home courts.⁵⁷ While some development opportunities were afforded, with the constant change in caselaw in the complex field of immigration law, the training materials were under constant need of refinement, and dedicated training staff were, at times, inadequately supported.⁵⁸

The EOIR focused on hiring a large corps of supervisory IJs, which resulted in the bloating of the mid-level managerial ranks, and many new supervisory judges joining the corps lacked sufficient judicial experience.⁵⁹ Even the system of discipline employed by the EOIR involving how to address complaints against IJs was criticized for failing to afford basic measures of due process for those accused.⁶⁰

53. 2010 ABA REPORT, *supra* note 35, at vi.

54. *Immigration Court Backlog Keeps Rising*, TRAC IMMIGR. (May 15, 2015), <https://trac.syr.edu/immigration/reports/385/#> [<https://perma.cc/7LA3-T58W>].

55. *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536> [<https://perma.cc/94GJ-Q2P6>].

56. Press Release, Representative Henry Cuellar, Rep. Cuellar Helps Secures 50 New Immigration Judge Teams in Conference Committee (Mar. 11, 2019), <https://cuellar.house.gov/news/documentsingle.aspx?DocumentID=403144> [<https://perma.cc/55AJ-CFNP>].

57. 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> [<https://perma.cc/N95Q-F6YB>].

58. HUMAN RIGHTS FIRST, THE U.S. IMMIGRATION COURT: A BALLOONING BACKLOG THAT REQUIRES ACTION, <https://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf> [<https://perma.cc/4UYM-HXKL>].

59. *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).

60. *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) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges).

But the area of most grave concern involved the conduct of court proceedings themselves. The creation of specialized dockets, such as the family unit docket for recent arrivals, emphasized speed and the use of technology in ways which, many argued, undermined due process.⁶¹ The challenge of the heavy dockets was further exacerbated by the lack of basic procedural protections afforded to respondents, as they have no right to free representation.⁶² While helpful in terms of addressing the ballooning backlog, the excessive focus on speed implicated questions of fundamental fairness, especially for those who suffered from lack of representation.⁶³

These concerns were carefully examined in a 2017 report by the Government Accountability Office (GAO) that documented how backlogs, mismanagement, and use of outdated technology could be improved through an Article I Immigration Court to deliver justice more effectively.⁶⁴ Yet, by 2018, with the Trump Administration bent on reforming the IJ corps and the system itself,⁶⁵ all of these areas remained under sustained criticism from multiple angles ranging from intractable judicial ethics concerns⁶⁶ to fundamental concerns about access to justice with the backlogs mounting year after year.⁶⁷

61. J. Nicole Alanko, *Biden's Approach to Immigration Backlog Replicates Mistakes of Trump Administration*, MS. (June 8, 2021), <https://msmagazine.com/2021/06/08/biden-immigration-backlog-attorney-trump-famu-family-unit-dockets> [<https://perma.cc/HR3W-PSKM>].

62. KAREN BERBERICH & NINA SIULC, *WHY DOES REPRESENTATION MATTER? THE IMPACT OF LEGAL REPRESENTATION IN IMMIGRATION COURT* (2018), <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf> [<https://perma.cc/6U5N-VCM2>].

63. *See generally* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 22 (2015).

64. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, *IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES* (2017), <https://www.gao.gov/assets/gao-17-438.pdf> [<https://perma.cc/TWC5-A3LY>].

65. *Stephen Miller's Influence on Immigration Policy—and Throughout the Administration*, AM. OVERSIGHT (Jan. 7, 2021), <https://www.americanoversight.org/investigation/stephen-millers-influence-on-immigration-policy-and-throughout-the-administration> [<https://perma.cc/98BA-6UMP>]; Letter from Congressman Elijah Cummings et al., to Att'y Gen. Jeff Sessions (Apr. 17, 2018), <https://doggett.house.gov/sites/doggett.house.gov/files/2018-04-17.EEC%20Dogget%20Castro%20%26%20Beyer%20to%20DOJ%20re.%20EOIR%20Politicization.pdf> [<https://perma.cc/X5J3-FCGD>].

66. *See generally* 5 C.F.R. §§ 2635, 3801 (2021); 28 C.F.R. § 45 (2021).

67. *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) (statement of Hilarie Bass, President, American Bar Association).

It was at this key moment that the ABA released an update to its 2010 Report. In its updated report released in 2019,⁶⁸ the ABA identified that the structural impediments that it had previously reported had become *more pronounced* and that lack of judicial independence and political interference were escalating, rather than de-escalating.⁶⁹ Pointing to a chronically under-resourced court system and leadership at the helm that exacerbated the weakening of procedural protections and threatened due process, the system was now in even more dire need of reform.⁷⁰

Where previously the ABA had offered three solutions to address immigration-system problems, it now rejected an Executive Branch-based court in favor of an Article I solution.⁷¹ It dropped consideration of an independent Executive Branch agency that would house both the trial-level and appellate courts. It also moved away from advocating for a hybrid model with an appellate entity that would be converted to an Article I court and Immigration Courts being housed in an independent administrative agency.⁷² Instead, the ABA identified such pronounced encroachment on judicial independence that it now exclusively supported an independent Article I Immigration Court. We will examine the parameters of the encroachment in the next Part.

B. Other Encroachment on Judicial Independence

A dramatic aspect of the encroachment on judicial independence was reframing performance metrics into a system of unrealistic quotas and unreasonable deadlines.⁷³ For example, from

68. ARNOLD & PORTER LLP, AM. BAR ASS'N COMM'N ON IMMIGR., 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2019) [hereinafter 2019 ABA REPORT], https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [<https://perma.cc/3JTJ-62DW>].

69. *Id.* at 5–6.

70. *Id.*

71. *Id.* at 6.

72. *Id.* at 26.

73. Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 CAL. W. L. REV. 35, 56 (2019). Under this rubric, “statistical ‘completions’ are limited to ‘dispositive’ case decisions, which fails to capture administrative decisions and variations in case complexity.” *Id.* at 47 (footnotes omitted).

October 2018 through October 2021, all judges were required to complete seven-hundred cases per year, a mandate that fails to weigh cases by complexity and is unrealistic and unattainable for the vast majority of the judges.⁷⁴ Tying judicial decision-making to performance reviews is a clear intrusion into the most sacrosanct part of the judicial process—*independence*.⁷⁵ Concerned about improper political interference and manipulation, especially through the imposition of the performance metrics that they deemed unfair and politically motivated, in April 2018, Senators Mazie Hirono (D-Hawaii), Kirsten Gillibrand (D-N.Y.), and Kamala Harris (D-Calif.) introduced a bill to address some troubling features of the current system. The proposed bill clarified the IJ role as judicial in nature and subject to the applicable Code of Judicial Conduct, rather than subject to any code of attorney behavior, to avoid disciplinary consequences for good-faith legal actions made while hearing and deciding cases. That bill was referred to the Senate Judiciary Committee but expired at the end of that legislative year.⁷⁶

Similarly, clear political influence and impingement on judicial independence has occurred through the Attorney General's referral of high-profile matters to himself for decision-making.⁷⁷ During both the Trump and Biden Administrations, the effects of such interference have been intense. Huge swaths of cases that were once ready for resolution were suddenly in need of further preparation, largely due to shifts in political winds and changes in caselaw.⁷⁸ Furthermore, from

74. *Id.* at 46.

75. *Id.* at 47.

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

77. *Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018). Attorney General Sessions, in a case certified to himself, ruled that IJs and BIA Appeals Board Members lacked general authority to administratively close cases and restricted administrative closure to circumstances explicitly provided by regulation or settlement agreement. *Id.* This case restricted use of a critical docket-management mechanism that had been used for more than three decades. *Id.* When the case was remanded to the presiding IJ and Respondent failed to appear for his hearing, the IJ continued the case briefly on due process grounds. As a consequence, the case was removed from the IJ's docket and reassigned to an Assistant Chief Immigration Judge for adjudication. As a result, *Castro-Tum* was ordered to be removed. The NAIJ brought a grievance against the Administration, arguing infringement upon the IJ's independence to provide due process and noting that an additional eighty-six cases had been reassigned for similar reasons.

78. AM. IMMIGR. COUNCIL & ACLU, ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*: PRACTICE ADVISORY (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [<https://perma.cc/V39Y-836E>].

Administration to Administration, the courts have observed dramatic and rapid shifts in docketing priorities that have sidelined efficiency and due process interests.⁷⁹

Finally, one of the more troubling ways in which judicial independence has been attacked is through the DOJ's efforts to decertify the IJs' union and silence some of the Department's most vocal critics.⁸⁰ The union's history of speaking out during every Administration over the past four decades in favor of independence has been mired in a DOJ effort to decertify it. In August 2019, a Trump Administration petition attempted to decertify the union and resulted in a highly partisan Federal Labor Relations Authority (FLRA) decision undoing decades of precedent by recharacterizing IJs as policymakers. The FLRA decision is currently not final, and an unopposed motion to reconsider and remand is pending.⁸¹ The EOIR's effort to silence the outspoken judges on a range of issues, including independence, was spurred by President Trump, who implied, without any evidence, that there was wholesale corruption in the judicial corps and set about silencing the judges himself through the EOIR.⁸² The Trump Administration instituted a policy barring IJs from discussing immigration law in their personal capacities, including during interviews with journalists and at academic conferences, which resulted in a federal First Amendment lawsuit against the DOJ.⁸³

Six months into the Biden Administration, the Immigration Courts have seen some movement toward restoration of the basic tenets of judicial independence.⁸⁴ Yet even with over five-

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

80. Nat'l Ass'n of Immigr. Judges, 71 F.L.R.A. 207 (2020).

81. Press Release, Judge Amiena Khan, President, Nat'l Ass'n of Immigr. Judges, Policy Shift and Legal Action by Dep't of Justice Related to Union Rights for the Nation's Immigration Judges (June 30, 2021), <https://www.ifpte.org/news/naij-statement-on-policy-shift-and-legal-action-by-doj-related-to-union-rights-for-immigration-judges> [<https://perma.cc/36J6-XLUV>].

82. 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> [<https://perma.cc/XU9Z-UY9D>].

83. 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> [<https://perma.cc/ZD3B-AC5G>].

84. *In His First 100 Days in Office, President Joe Biden Has Advanced Three Times as Many Executive Actions on Immigration as Donald Trump Did*, MIGRATION POL'Y INST. (Apr. 26, 2021),

hundred nonsupervisory IJs seated throughout the country, the court still suffers from ballooning caseloads, lack of necessary resources, and continual pressure from performance metrics.⁸⁵

As of the time of this writing, the Biden Administration has implemented anticipated reversals of some of the Trump Administration's substantive policies that significantly implicated judicial independence and due process, with a pronounced liberalizing and refocusing of priorities.⁸⁶ For example, where the Trump Administration used legal precedent to render judicial decision-making inflexible, appropriating discretionary authority back from IJs, the Biden Administration has ceded some of that authority over the past few months.⁸⁷ Two key Trump Administration decisions, *Matter of A-B-* ("A-B- I")⁸⁸ and *Matter of A-B-* ("A-B- II"),⁸⁹ which had broad implications for judicial decision-making and asylum eligibility, were vacated on June 16, 2021. These two cases made the existing review process significantly more nuanced midstream but were decided at the same time that IJs were being required to expedite the process and curtail in-court hearing time.⁹⁰ Moreover, the authority of IJs to exercise greater discretion in reopening cases was restored.⁹¹

More recently, the release of *Matter of S-L-H- & L-B-L*.⁹² allowed IJs to exercise their discretion to rescind an *in absentia* removal order and grant reopening—an authority that had been severely circumscribed during the Trump Administration. Specifically, the case allows for this discretion where an alien establishes, through corroborating evidence, that their late arrival at a removal hearing stems from “exceptional circumstances” under Section 240(e)(1) of the Immigration and Nationality Act.⁹³ Similarly, in cases where respondents are awaiting a decision on

<https://www.migrationpolicy.org/news/first-100-days-office-biden-executive-actions> [<https://perma.cc/BY3B-RQ2R>].

85. *Immigration Courts Aren't Real Courts. Time to Change That.*, *supra* note 2.

86. *Id.*

87. *Id.*

88. A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).

89. A-B-, 28 I. & N. Dec. 199 (Att'y Gen. 2021).

90. A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021); *see also*, Memorandum from the Att'y Gen. to Exec. Off. for Immigr. Rev. (Dec. 5, 2017), <https://www.justice.gov/eoir/page/file/1356096/download> [<https://perma.cc/72LE-RNQL>]; Tsankov, *supra* note 73.

91. Melgar, 28 I. & N. Dec. 169 (B.I.A. 2021); *see also*, H-Y-Z-, 28 I. & N. Dec. 156 (B.I.A. 2020).

92. S-L-H- & L-B-L-, 28 I. & N. Dec. 318 (B.I.A. 2021).

93. *Id.*

a collateral petition for relief that could impact the outcome in the removal proceedings, a 2018 Trump Administration Attorney General decision, *Matter of L-A-B-R*,⁹⁴ placed significant limitations on IJ discretion to grant due-process-providing continuances by severely circumscribing the application of the good cause standard.⁹⁵ The ability of IJs to continue and postpone completion of cases for the collection of additional evidence, for example, was removed.⁹⁶

Worrisome challenges have persisted, and these have gone to the heart of judicial independence. Judicial performance metrics that focus on factors that conflate personal interests with judicial interests, conditioning employment retention on judicial decision-making, remained in effect until late October 2021.⁹⁷ Moreover, a new case-flow management process eliminates default access to a critical judicial tool—the master calendar hearing—and potentially pushes cases to trial prematurely, for example, when not all evidence has been collected or there is other relief pending outside of the Immigration Court system.⁹⁸ The operation of these two policies *together* creates an ethical vise on judicial decision-making.

The traditional way in which these concerns would reach the greater legal community is through union outreach. As federal employees, the IJs are unionized and for forty years have been represented by the National Association of Immigration Judges (NAIJ), which serves as a prominent voice for due process and judicial independence.⁹⁹ However, the Trump Administration sought to disband the union through a decertification action, and the Biden Administration continued that policy until December 7, 2021, at which time the Administration agreed tentatively to recognize the NAIJ as the union representing the

94. *L-A-B-R*, 27 I. & N. Dec. 405, 406 (Att’y Gen. 2018).

95. *Id.*

96. *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. 1–13 (2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges).

97. *See generally* Tsankov, *supra* note 73.

98. *See* Memorandum from Tracy Short, C. Immigr. J., to Off. of the Chief Immigr. J. (Apr. 2, 2021) (on file with author) (replacing Memorandum from James McHenry III, Dir. of Exec. Off. for Immigr. Rev. to Exec. Off. for Immigr. Rev. (Nov. 30, 2020) (on file with author)).

99. *About the NAIJ*, NAT’L ASS’N OF IMMIGR. JUDGES, <https://www.naij-usa.org/about> [<https://perma.cc/WBL7-WSRJ>].

IJs.¹⁰⁰ This action, coupled with the Trump Administration's severe limiting of private-capacity speaking engagement authority,¹⁰¹ has targeted the IJs' means of speaking out in support of due process and judicial independence. For example, when the Trump Administration implemented the case-flow management process¹⁰² that fundamentally altered immigration court practice by eliminating master calendar hearings and placed significant emphasis on performance metrics, the NAIJ was uniquely poised to explain how doing so would impede fairness and due process.

As IJs, we are facing an Immigration Court backlog that now exceeds 1.6 million cases.¹⁰³ With only about five-hundred trial-level judges charged with addressing that caseload, the stark numbers simply do not support a quick resolution. Any lasting solution must include dramatic legislative and Executive Branch action leading to comprehensive immigration reform. In the meantime, our nation's political leaders will continue to engage in debates about the most effective solutions, and the pendulum will swing again. But the IJs will need to struggle through upholding judicial standards at great professional risk, as performance continues to be tied to completion of unrealistic and due-process-curtailling quotas and deadlines. It is a task that is becoming increasingly difficult and cries for resolution.

100. Nat'l Ass'n of Immigr. Judges, 71 F.L.R.A. 1046 (Nov. 2, 2020); *see also* Eric Katz, *Biden Administration Recognizes Immigration Judge Union, Reversing Trump Decision*, GOV'T EXEC. (Dec. 7, 2021), <https://www.govexec.com/workforce/2021/12/biden-administration-recognizes-immigration-judge-union-reversing-trump-decision/187358> [<https://perma.cc/73P3-FNKP>]; Matt Zapotosky, *Justice Department Moves to Potentially Decertify Immigration Judges' Union*, WASH. POST (Aug. 9, 2019), https://www.washingtonpost.com/national-security/justice-department-moves-to-potentially-decertify-immigration-judges-union/2019/08/09/17dc0450-bae4-11e9-a091-6a96e67d9cce_story.html [<https://perma.cc/Y4LG-X6RU>]; Christina Goldbaum, *Trump Administration Moves to Decertify Outspoken Immigration Judges' Union*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/10/us/immigration-judges-union-justice-department.html> [<https://perma.cc/3CR5-6DYF>]; Press Release, Int'l Fed'n of Pro. Tech. Eng'rs, *Anti-Union Majority on Federal Labor Board Throws a Wrench in the Gears of Justice* (Jan. 25, 2022), <https://www.ifpte.org/news/anti-union-majority-on-federal-labor-board-throws-a-wrench-in-the-gears-of-justice> [<https://perma.cc/B2D5-4DWP>].

101. Nat'l Ass'n Immigr. Judges v. McHenry, 477 F. Supp. 3d 466 (E.D. Va. 2020), *appeal docketed*, No. 20-1868 (4th Cir. Aug. 12, 2020).

102. Memorandum from James McHenry III, Dir. of Exec. Off. for Immigr. Rev., to Exec. Off. for Immigr. Rev. (Nov. 30, 2020) (on file with author).

103. *Immigration Court Backlog Now Growing Faster than Ever, Burying Judges in an Avalanche of Cases*, TRAC IMMIGR. (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675> [<https://perma.cc/BFW3-36KF>].

III. AWAITING AN ARTICLE I IMMIGRATION COURT

With stakeholder review of the system so broadly critical of the Immigration Court's integrity, and with criticism over judicial independence at its core, an independent Immigration Court is needed to address mounting concerns. Congressional leaders and those in the greater academic and legal stakeholder community have taken note of the concerns expressed, and there has been a chorus of voices¹⁰⁴ calling for a legislative solution: the creation of an independent Article I Immigration Court.

On February 3, 2022, Representative Zoe Lofgren (D-CA), Chair of the House Immigration and Citizenship Subcommittee, introduced H.R. 6577, The Real Courts, Rule of Law Act of 2022—hailed as landmark legislation to establish an independent immigration court under Article I of the Constitution.¹⁰⁵ Co-sponsored by 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, 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.¹⁰⁶

The NAIJ,¹⁰⁷ the ABA,¹⁰⁸ the American Immigration Lawyers Association (AILA),¹⁰⁹ the Federal Bar Association

104. Letter from Am. Immigr. Laws. Ass'n et al., to Joseph Biden, President of the U.S. (Feb. 1, 2021) (on file with the American Immigration Lawyers Association); 2010 ABA REPORT, *supra* note 35, at 6-4; *see also* 2019 ABA REPORT, *supra* note 68, at 6; *Congress Should Establish an Article I Immigration Court*, *supra* note 52; AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS (2020).

105. The Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. § 2 (2022).

106. Press Release, Rep. Zoe Lofgren, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022), <https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system> [<https://perma.cc/GL2V-8D2B>].

107. NAT'L ASS'N OF IMMIGR. JUDGES, AN ARTICLE I IMMIGRATION COURT - WHY NOW IS THE TIME TO ACT: A SUMMARY OF SALIENT FACTS AND ARGUMENTS, (2021), https://www.naij-usa.org/images/uploads/newsroom/Article_1_-_NAIJ_summary-of-salient-facts-and-arguments_2.20.2021.pdf [<https://perma.cc/9FGX-UFPQ>].

108. *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on the Border Sec. and Immigr. of the S. Comm. on the Judiciary*, 115th Cong. (2018).

109. *Featured Issue: Early Immigration Actions Taken by the Biden Administration*, AM. IMMIGR. LAWS. ASS'N (Apr. 29, 2021), <https://www.aila.org/infonet/first-100-days> [<https://perma.cc/85JE-HP8N>].

(FBA),¹¹⁰ and many others in the legal community have decried the way that judicial independence is being eroded. If the pressures that IJs are under continue to stand, the integrity of the Immigration Court system will likely collapse under its own weight.

While Attorney General Merrick Garland has acknowledged that backlog is an issue, he has not yet explained what measures he will utilize to address it.¹¹¹ Recently, he was pressed by sixty members of the House of Representatives to use his authority to make changes, but thus far, this pressure has yielded limited results. While Senate Judiciary Committee leaders have called on the DOJ to recognize the Immigration Judges' union and reverse the Trump Administration's efforts to dismantle it, the DOJ has been slow to act.¹¹²

In the meantime, if the NAIJ is no longer permitted to retain its authority as the recognized representative for collective bargaining purposes, then IJs will be less independent and even more susceptible to political pressure. Before such fundamental change is implemented, we will need to adopt temporary measures to identify and address the root causes of the backlog, because many of the policies that were created around that goal, so far, seem to have impacted judicial independence.¹¹³ And lastly, there is no doubt that the funding imbalances that have plagued the courts impede the ability of our interconnected system to succeed. In short, we need to examine solutions that do not undermine the basic tenets of our judicial system, and there is broad consensus supporting formation of an Article I Immigration Court.

110. *Congress Should Establish an Article I Immigration Court*, *supra* note 52.

111. Rebecca Beitsch, *House Democrats Push Garland for Immigration Court Reforms*, HILL (Jun. 10, 2021, 4:48 PM), <https://thehill.com/policy/national-security/557874-house-dems-push-garland-for-immigration-court-reforms> [<https://perma.cc/UU5G-ZUWT>].

112. Erich Wagner, *Senate Democrats Call on Attorney General to Restore Immigration Judges Union*, GOV. EXEC. (May 26, 2021), <https://www.govexec.com/management/2021/05/senate-democrats-call-attorney-general-restore-immigration-judges-union/174311> [<https://perma.cc/87B5-YGR6>].

113. AM. IMMIGR. LAWS. ASS'N, *AMERICA AS A WELCOMING NATION: THE FIRST 100 DAYS OF THE BIDEN ADMINISTRATION* (2021), <https://www.aila.org/File/Related/21041902.pdf> [<https://perma.cc/U6JA-7T3Q>].

CONCLUSION

Congressional leaders and national legal groups, including the ABA,¹¹⁴ the FBA,¹¹⁵ and AILA,¹¹⁶ have called for large-scale reform and the creation of an independent Article I Immigration Court. Without a clear separation of IJ responsibilities, an Immigration Court that remains housed within the DOJ will forever enable Executive Branch political leaders to influence and control the daily functions of the IJs who preside over removal cases.¹¹⁷ Unless the Immigration Court is reformulated as a neutral body, free from interference, we will continue to see wide swings in policy that accompany each new political leader.

We are hopeful now that, with a new Article I Immigration Court bill having been introduced in the U.S. Congress, political leaders will implement an enduring solution to this crisis. However, even if such a change is implemented, the transition will take years to complete. While much has changed since January 2021 with the installation of a new Administration under President Joe Biden,¹¹⁸ the Immigration Courts remain in as precarious a situation as ever. For the time being, IJs will continue to drown under the weight of interference, whipsawed between the ever-changing policy priorities that are introduced from Administration to Administration.

While we await implementation of a comprehensive solution, ideally in the form of an Article I court, IJs must continue to work within the given system and maintain the highest judicial standards. But, with job security creeping into the calculus of how to rule on the bench, our system is diminished. A structure that conflates an IJ's exercise of their adjudicatory responsibilities with enforcement, as we have observed through imposition of unrealistic case-completion quotas and deadlines, erodes public confidence in the Immigration Court system. If we

114. *Report Recommends Major Changes to Immigration System*, ABA, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/aba-commission-to-recommend-immigration-reform> [<https://perma.cc/F7EJ-EWGU>].

115. *Congress Should Establish an Article I Immigration Court*, *supra* note 52.

116. *See AILA: Trump Administration Erodes Integrity and Fairness in Immigration Courts*, AM. IMMIGR. LAWS. ASS'N (Oct. 12, 2017), <https://www.aila.org/advo-media/press-releases/2017/trump-Administration-erodes-integrity-and-fairness> [<https://perma.cc/NL2T-4G3U>].

117. *Id.*

118. *Featured Issue: Early Immigration Actions Taken by the Biden Administration*, *supra* note 109.

can institute a system where IJs are independent, where they are not tasked with enforcement, and where they have both the time and resources needed to carefully evaluate pending matters, IJs will be enabled to maintain the high standards that Immigration Court litigants should receive. Through an Article I Immigration Court, our system will segregate the prosecutorial function from the adjudicatory function and thereby promote a more effective and efficient system.

The current system is falling short of our democratic ideals. An Article I Immigration Court will instill integrity and professionalism and restore public trust in this honorable institution, making it more effective in handling the fair, expeditious, and orderly review and processing of immigration cases.