

United States Senate  
WASHINGTON, DC 20510

August 21, 2020

The Honorable Gene Dodaro  
Comptroller General of the United States  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Dodaro:

We are writing to request that the Government Accountability Office (GAO) analyze and audit the Executive Office of Immigration Review's (EOIR) practices with respect to the hiring, training, and evaluation of immigration judges and staffing of immigration courts, as well as their management of these courts during the current COVID-19 pandemic. GAO's insight will help Congress determine if additional legislation is necessary to address these issues, as well as inform appropriations decisions.

In February, we wrote to Attorney General William Barr to express our concern that the Trump administration is undermining the independence of immigration courts. As outlined in that letter, attached, we are concerned about the mismanagement of EOIR and troubled by regulatory and procedural changes within the Department of Justice (DOJ) that have curtailed the independence of immigration courts. Although more than six months have passed, we have not received a response from DOJ or EOIR. Instead, in that time, EOIR has continued to use its administrative powers to put its thumb on the scale of justice. Most recently, EOIR attempted to buy out all nine career Board of Immigration Appeals judges who had been hired in prior administrations.<sup>1</sup> When the judges refused, they were reassigned to new roles.<sup>2</sup>

While the Trump administration has justified its incursions into the independence of immigration courts as efficiency measures,<sup>3</sup> legal service providers have explained that EOIR's response to the COVID-19 pandemic demonstrates how the agency can use seemingly neutral measures to tip the scales of justice against noncitizens. In order to defend themselves in immigration court, noncitizens must file motions and other papers in person at physical court locations; obtain counsel; meet with their attorneys; present testimony from family members, employers, and/or expert witnesses; and provide medical records, tax records, and other supporting documents. Yet COVID-19 makes these actions potentially dangerous. While EOIR initially postponed all hearings for non-detained individuals, proceedings for detained

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<sup>1</sup> Tanvi Misra, *DOJ 'reassigned' career members of Board of Immigration Appeals*, CQ Roll Call, June 9, 2020, available at <https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/>.

<sup>2</sup> *Id.*

<sup>3</sup> Jeff Sessions, Attorney General, U.S. Dep't of Justice, Remarks to the Executive Office for Immigration Review Legal Training Program (Jun. 11, 2018), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

noncitizens continued to move forward unabated.<sup>4</sup> Immigration courts are now reopening around the country,<sup>5</sup> including in areas that are seeing increases in the number of COVID-19 cases. Because EOIR does not have consistent policies for when attorneys, let alone translators or witnesses, may appear telephonically or by video,<sup>6</sup> participants often must appear in person or not at all.<sup>7</sup> Immigration courts have continued to issue *in absentia* orders of removal for noncitizens who do not appear, even when the likely cause is COVID-19.<sup>8</sup> Nor has EOIR uniformly extended deadlines or continued cases, despite the difficulty noncitizens face in finding and consulting with counsel, obtaining and filing necessary documents and evidence, or securing the appearance of witnesses. These difficulties are particularly acute for detained clients, who have limited access to phone calls and attorney visits.<sup>9</sup> As a result, noncitizens cannot obtain counsel or litigate their cases, and attorneys cannot effectively represent their clients.<sup>10</sup>

EOIR's facially-neutral policies during the COVID-19 pandemic have raised systemic due process concerns.<sup>11</sup> Immigration judges, staff, and litigators have also expressed concerns about the health risks to them and the litigants who appear in immigration courts.<sup>12</sup> Given GAO's prior work on immigration courts,<sup>13</sup> it is uniquely suited to conduct an audit and analysis of EOIR. We ask GAO to look into the following questions:

1. What criteria does EOIR use to hire immigration judges and Board of Immigration Appeals judges? What criteria does EOIR use to determine the number of deputy chief and other management positions for judges, and what criteria does EOIR use to hire for these positions? To what extent does EOIR assess its immigration judge and Board of Immigration Appeals judge hiring efforts? What, if any, challenges has EOIR encountered in recruiting and retaining immigration judges and Board of Immigration Appeals judges? How, if at all, has it addressed them?

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<sup>4</sup> Executive Office for Immigration Review, EOIR Operational Status During Coronavirus Pandemic, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> (last updated Aug. 19, 2020); American Immigration Lawyers Association, "AILA Tracks EOIR's Historical Operational Status During Coronavirus Pandemic," <https://www.aila.org/eoir-operational-status> (last visited Aug. 19, 2020).

<sup>5</sup> American Immigration Lawyers Association, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> Emergency Mot. for a Temporary Restraining Order, Nat'l Imm. Project of the Nat'l Lawyers Guild v. Exec. Office of Imm. Review, No. 1:20-cv-00852-CJN, at 12-18 (D.D.C. Apr. 8, 2020), [available at https://www.aila.org/advo-media/press-releases/2020/temporary-restraining-order-requested-to-stop](https://www.aila.org/advo-media/press-releases/2020/temporary-restraining-order-requested-to-stop).

<sup>8</sup> *Id.* at 15-16.

<sup>9</sup> Monique O. Madan, *Despite national shortage, immigration lawyers required to bring their own medical gear*, MIAMI HERALD, Mar. 22, 2020, <https://miamiherald.com/news/local/immigration/artcile241414486.html>.

<sup>10</sup> *Id.* 12-15, 25-26.

<sup>11</sup> Betsy Woodruff Swan, Union: DOJ deportation appeals workers fear overcrowding, Politico, Apr. 23, 2020, <https://www.politico.com/news/2020/04/23/doj-union-immigration-deportation-coronavirus-202075> ("That is the feeling the [EOIR] employees have, that [EOIR's COVID response is] definitely connected to this administration and their desperation to be able to boast about how great they're doing on their deportation numbers.").

<sup>12</sup> Nat'l Assoc. of Immigration Judges, Am. Assoc. of Immigration Lawyers, & Am. Fed. Of Gov't Employees Local 511, Position on the Health and Safety of Immigration Courts During the COVID-19 Pandemic, Mar. 15, 2020, [available at https://najib-usa.org/images/uploads/newsroom/2020.03.15.00.pdf](https://najib-usa.org/images/uploads/newsroom/2020.03.15.00.pdf).

<sup>13</sup> *See, e.g.*, Gov't Accountability Office, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (June 2017).

2. How does EOIR determine targets for immigration court and Board of Immigration Appeals case completion time frames and caseloads?
3. To what extent has EOIR assessed its immigration court and Board of Immigration Appeals staffing needs? What have any such assessments shown? How do current immigration court staffing levels compare to staffing needs EOIR has identified?
4. How does EOIR assess immigration and Board of Immigration Appeals judge performance?
5. To what extent has EOIR assessed immigration judge and Board of Immigration Appeals judge training needs? What have any such assessments shown?
6. How has EOIR's use of video teleconferencing changed since GAO last reported on it in 2017? What, if any, data is EOIR collecting on hearings using video teleconferencing and the effects of that technology on hearing outcomes?
7. How do EOIR's practices compare to other administrative courts?
8. How, if at all, is EOIR addressing the backlog of cases that were postponed in response to the COVID-19 pandemic?
9. How, if at all, has EOIR's response to COVID-19 affected noncitizens' ability to locate and meet with counsel, obtain and present evidence in their cases, and appear in court? To what extent have the challenges of COVID-19 impacted the number of *in absentia* orders issued by immigration courts?

Please keep our offices apprised of your review. Thank you for your attention to this matter.

Sincerely,



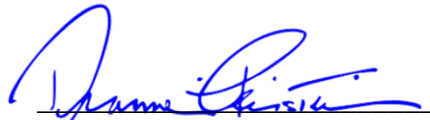
Sheldon Whitehouse  
United States Senator



Richard J. Durbin  
United States Senator



Mazie K. Hirono  
United States Senator



Dianne Feinstein  
United States Senator

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Patrick Leahy  
United States Senator



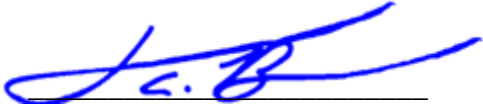
Amy Klobuchar  
United States Senator



Christopher A. Coons  
United States Senator



Richard Blumenthal  
United States Senator



Cory A. Booker  
United States Senator



Kamala D. Harris  
United States Senator

February 13, 2020

The Honorable William P. Barr  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530

Dear Attorney General Barr:

We are deeply concerned that the Trump administration is undermining the independence of immigration courts and mismanaging their administration. As members of Congress, we seek to ensure that our immigration laws are interpreted and applied fairly and impartially. We write for additional information about the training and hiring of immigration judges, and the management of immigration courts, in order to determine whether immigration courts are fulfilling this essential duty.

Recent reports detail how the Trump administration circumvented regular hiring procedures to appoint a cadre of partisan judges to the Board of Immigration Appeals (BIA).<sup>1</sup> The Trump administration also has released a series of rules that will allow for increased political influence over individual cases.<sup>2</sup> These actions are merely the latest steps in the Trump administration's ongoing campaign to erode the independence of immigration courts. The administration's gross mismanagement of these courts further prevents them from providing basic due process. The administration must reverse course to avoid lasting damage to public confidence in our immigration court system.

#### Due Process Requires Immigration Judges To Be Fair and Impartial

Immigration courts were created under the Immigration and Nationality Act (INA) as part of the Department of Justice (DOJ). The U.S. Constitution, precedent, and practice have protected immigration judges from political interference and preserved their impartiality.<sup>3</sup> The Fifth Amendment guarantees the right to due process in deportation proceedings,<sup>4</sup> including "the right

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<sup>1</sup> Tanvi Misra, *DOJ changed hiring to promote restrictive immigration judges*, ROLL CALL, Oct. 29, 2019, <https://www.rollcall.com/news/congress/doj-changed-hiring-promote-restrictive-immigration-judges>.

<sup>2</sup> Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (proposed Aug. 26, 2019) (hereinafter "Interim Rule"); Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463 (2019).

<sup>3</sup> The fact that these courts were created as part of the executive branch does not mean that they are exempted from traditional protections on the independence and impartiality of the judiciary. As several Courts of Appeals have noted, "When Congress directs an agency to establish a procedure . . . it can be assumed that Congress intends that procedure to be a fair one." *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281-82 (4th Cir. 2004) (internal citations and quotations omitted); *Marincas v. Lewis*, 92 F.3d 195, 203 (3rd Cir. 1996) (same). See also *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ("[T]his Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary.").

<sup>4</sup> E.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993).

to an impartial adjudicator.”<sup>5</sup> The INA incorporates these due process protections, giving noncitizens the right to a hearing with an attorney present;<sup>6</sup> a “reasonable opportunity” to examine the evidence against them, to present their own evidence, and to cross-examine witnesses;<sup>7</sup> and the right to an appeal.<sup>8</sup> Federal regulations further require immigration judges to be impartial<sup>9</sup> and independent.<sup>10</sup>

These protections reflect the well-established principle in our legal system that a judge must “observe the utmost fairness,” striving to be “perfectly and completely independent, with nothing to influence or contro[l] him but God and his conscience.”<sup>11</sup> As the U.S. Supreme Court has explained, “[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”<sup>12</sup> This principle is vitally important when deportation—“a drastic measure, often amounting to lifelong banishment or exile”—is at stake.<sup>13</sup>

### Immigration Judges Have Historically Enjoyed Structural Protections to Minimize Political Interference

Immigration judges have traditionally been insulated from political interference when deciding individual cases. The lynchpin of this independence has been the separation of administrative and policymaking responsibilities at the Executive Office for Immigration Review (EOIR) from case-specific adjudications performed by trial-level immigration judges and the judges on the BIA.<sup>14</sup>

Immigration courts are housed within EOIR, a subdivision of DOJ, and its judges are federal civil service employees with civil service protections. The BIA also resides under EOIR and

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<sup>5</sup> *Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1270 (9th Cir. 2001) (“The Fifth Amendment guarantees due process in deportation proceedings. . . . Among other protections, the right to due process encompasses a right to a full and fair hearing . . . ; the right to an impartial adjudicator . . . ; and the evaluation of each case on its own merits . . . .” (internal citations omitted)).

<sup>6</sup> 18 U.S.C. § 1229a(b)(4)(A).

<sup>7</sup> *Id.* § 1229a(b)(4)(B).

<sup>8</sup> *Id.* § 1229a(b)(5) and *passim* (discussing procedures for deportation proceedings generally); 8 U.S.C. § 1158(d)(A)(iii)-(iv) (discussing procedures for asylum).

<sup>9</sup> 8 C.F.R. § 1003.10(b) (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.”); 8 C.F.R. § 1003.1(d)(1) (stating that the Board of Immigration Appeals shall also be “impartial.”). See also, e.g., *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) (“[A]s a judicial officer, an immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party.”); *Torres-Aguilar*, 246 F.3d at 1270 (9th Cir. 2001) (explaining that the Fifth Amendment guarantees due process in deportation proceedings, including “the right to an impartial adjudicator”).

<sup>10</sup> 8 C.F.R. § 1003.10(b) (“In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion . . . .”); 8 C.F.R. § 1003.1(d)(1)(ii) (“ . . . Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board . . . .”).

<sup>11</sup> Address of John Marshall, PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830 616 (1830).

<sup>12</sup> *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1909 (2016).

<sup>13</sup> *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018) (internal citations and quotations omitted).

<sup>14</sup> 8 C.F.R. § 1003.0 (2018) (describing the role of the EOIR director); 8 C.F.R. § 1003.1 (describing the role of the BIA); 8 C.F.R. § 1003.10 (describing the role of immigration judges).

currently has 21 appellate immigration judges, including a Chairman and a Vice Chairman.<sup>15</sup> EOIR is led by a Director who is appointed by the Attorney General. The Director sets policy and supervises and evaluates immigration judges' performance.<sup>16</sup> Among those policies are case management procedures that have historically balanced the timely determination of appeals with the requirements of due process.<sup>17</sup>

Importantly, federal regulations have never explicitly allowed the Director to decide immigration cases or direct the result of any case and, since at least 2007, the Director has been expressly forbidden from doing so.<sup>18</sup> The Director also traditionally has had no role in establishing immigration precedent. Until recently, BIA decisions were not binding on all immigration judges and the Department of Homeland Security (DHS) unless a majority of the Board voted to publish them.<sup>19</sup> In other words, no single judge or EOIR official could make a BIA decision binding.<sup>20</sup>

#### The Trump Administration's Attorneys General Have Eroded These Safeguards

As the American Bar Association has noted, the Trump administration has instituted "specific executive policies and practices exerting unprecedented levels of control over immigration judges and their job performance [that] have deteriorated public trust in the immigration court system and undermined judicial independence."<sup>21</sup>

The Trump administration has taken a number of steps to affect case outcomes by restricting immigration judges. Some of these actions, such as imposing case completion quotas<sup>22</sup> and eliminating judges' ability to administratively close cases,<sup>23</sup> create a conflict between immigration judges' obligation to protect due process and the terms on which their job performance is measured. DOJ has also moved to decertify the immigration judges' union,

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<sup>15</sup> See 8 C.F.R. § 1003.1(a).

<sup>16</sup> 8 C.F.R. § 1003.0(b).

<sup>17</sup> 8 C.F.R. § 1003.1(e)(8)(i).

<sup>18</sup> 8 C.F.R. § 1003.0(c) (2018) ("Except as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General, the Director shall have no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge. Nothing in this part, however, shall be construed to limit the authority of the Director under paragraphs (a) or (b) of this section."); 8 C.F.R. § 1003.1 (2018). Prior to 2007, federal regulations only provided that the Director "shall be responsible for the general supervision of the Board of Immigration Appeals and the Office of the Chief Immigration Judge in the execution of their duties." 8 C.F.R. § 1003.1 (2007). They did not authorize the Director to adjudicate cases. *Id.*

<sup>19</sup> 8 C.F.R. § 1003.1(g) (2018).

<sup>20</sup> Decisions by the Attorney General, which were previously rare, see *infra*, were also binding.

<sup>21</sup> Am. Bar Assoc., 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASE 15 (Mar. 2019).

<sup>22</sup> Email from James McHenry, EOIR Director, to All EOIR Judges, on Immigration Judge Performance Metrics (Mar. 30, 2018), available at <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

<sup>23</sup> Memorandum from MaryBeth Keller, Chief Immigration Judge, U.S. Dep't of Justice Executive Office of Immigration Review, Operating Policies and Procedures Memorandum 17-01: *Continuances* (Jul. 31, 2017), available at <https://www.justice.gov/eoir/file/oppm17-01/download>; *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

which has vocally opposed these changes.<sup>24</sup> And in at least one instance, EOIR officials have apparently reassigned cases away from a judge because the Attorney General disagreed with his rulings.<sup>25</sup>

The Trump administration has also sought to influence immigration case outcomes by changing the composition of the immigration judge cohort. We are deeply concerned about reports of overt politicized hiring of immigration judges and the “utter lack of transparency” in the hiring process.<sup>26</sup> Congress has directed EOIR to fill “positions with highly qualified individuals from a diverse pool of candidates, including those with non-governmental, private bar experience, to conduct fair, impartial hearings consistent with due process.”<sup>27</sup> However, DOJ has changed the qualifications for immigration judges to favor those with law enforcement experience over those with other types of experience.<sup>28</sup> Most recently, the administration subverted the normal process to hire six new BIA judges with records in line with the Trump administration’s anti-immigration agenda.<sup>29</sup> All six were immigration judges known for their high asylum denial rates:<sup>30</sup> over 80 percent, compared to the national average of 57 percent.<sup>31</sup> Two of the new judges also had the third and fourth highest number of board-remanded cases of all immigration judges, and several were subject to complaints from litigants.<sup>32</sup> Although these issues raise significant questions about these individuals’ performance as judges, they were omitted from the memos recommending that these judges be hired.<sup>33</sup> The EOIR Director also violated standard hiring procedure: instead of going through the typical two-year probationary period, these judges were immediately appointed to the BIA on a permanent basis.<sup>34</sup>

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<sup>24</sup> E.g. Statement, Nat’l Assoc. of Immigration Judges, Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges (Oct. 1, 2017), available at [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Quotas\\_in\\_IJ\\_Performance\\_Evaluation\\_10-1-17.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf).

<sup>25</sup> Nat’l Assoc. of Immigration Judges, Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ, Aug. 8, 2018, available at <https://www.aila.org/infonet/naij-grievance-redress-removal>. In *Castro-Tum*, *supra* note 24, Mr. Castro-Tum, a juvenile, failed to appear twice for his hearing. *Id.* Rather than terminate the proceeding or issue a deportation order in absentia, the presiding immigration judge, Judge Steven Morley, administratively closed the case, finding that DHS failed to provide sufficient notice of the proceeding to Mr. Castro-Tum. *Id.* The Attorney General *sua sponte* re-adjudicated, reversed, and reopened the case. *Id.* The Director then ordered Judge Morley to hold a hearing in that case within 14 days. *Id.* When Judge Morley granted a continuance rather than terminate the case or issue a deportation order at the next court date, the DOJ transferred both *Castro-Tum* and several similar cases away from him. *Id.*

<sup>26</sup> Am. Bar Assoc., 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASE 17 (Mar. 2019). See also Innovation Law Lab & Southern Poverty Law Center, THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 22-23 (June 2019).

<sup>27</sup> S. Rep. 116-127, at 85 (2019), available at <https://www.appropriations.senate.gov/imo/media/doc/FY2020%20CJS%20Appropriations%20Act,%20Report%20116-127.pdf>.

<sup>28</sup> Am. Bar Assoc., *supra* note 26, at 22.

<sup>29</sup> Misra, *supra* note 1.

<sup>30</sup> Tal Kopan, *AG William Barr promotes immigration judges with high asylum denial rates*, SAN FRANCISCO CHRON., Aug. 23, 2019, available at <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php>.

<sup>31</sup> Misra, *supra* note 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*



Under the Trump administration, once hired, immigration judges receive limited training, and the training they do receive reportedly emphasizes that immigration courts are part of the Trump administration's enforcement efforts, rather than an independent body. One former immigration judge expressed "grave concerns" regarding whether new immigration judges "have been appropriately trained to be judges in a professionalized, [truly independent] immigration court."<sup>35</sup> Another explained that "there isn't even any attempt at a proper training. The whole indoctrination is you're not judges, you're really enforcement. You're really a branch of DHS in robes."<sup>36</sup> Recent training sessions for immigration judges have emphasized the administration's enforcement priorities rather than substantive legal updates. According to one former immigration judge, the judges' 2018 annual training conference "was profoundly disturbing. Do things as fast as possible. There was an overarching theme of disbelieving aliens and their claims and how to remove people faster."<sup>37</sup>

### Rewriting Immigration Laws for Ideological Purposes

The Trump administration has shifted the power to decide cases away from immigration judges entirely and put it in the hands of its Attorneys General, who have exercised direct control over the outcomes of an increasing number of immigration cases. Although the Attorney General has long had the ability to *sua sponte* re-adjudicate immigration appeals,<sup>38</sup> prior Attorneys General have used this power sparingly. According to the Congressional Research Service, Attorneys General in the Obama administration exercised this power only five times in eight years.<sup>39</sup> Trump administration Attorneys General have exercised this power 16 times in just two and a half years.<sup>40</sup> These decisions "substantially rewrit[e] immigration law . . . unilaterally and with an undeniably ideological bent."<sup>41</sup> You also finalized a rule that gave himself unilateral authority to make any decision by the BIA binding.<sup>42</sup> Most recently, the administration issued an interim rule that will give the EOIR Director—a political appointee who serves at the pleasure of the Attorney General—the unprecedented power to decide immigration appeals and make his decisions binding.<sup>43</sup> Because the Director will now have a role in deciding cases and setting precedent, he can send a clear signal to judges regarding how they should rule, and can enforce that through his power to evaluate the performance of those same judges. The exercise of this power is inconsistent with the INA and due process.

The direct and indirect involvement of political officials in case-specific adjudications "go[es] to the very essence of an impartial court" because it "undermine[s] immigration judges' ability to perform their role as a neutral arbitrator of fact and law."<sup>44</sup>

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<sup>35</sup> Innovation Law Lab & Southern Poverty Law Center, supra note 26, at 18.

<sup>36</sup> Id.

<sup>37</sup> Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS, Feb. 13, 2019, <https://perma.cc/24XF-QMDP>.

<sup>38</sup> 8 C.F.R. § 1003.1(h)(1).

<sup>39</sup> Available on request.

<sup>40</sup> Id. During the George W. Bush administration, the Attorneys General used this power only three times in the same period (and 21 times during President Bush's eight years in office).

<sup>41</sup> Am. Bar Assoc., supra note 26, at 17.

<sup>42</sup> Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, supra note 2.

<sup>43</sup> Interim Rule, supra note 2.

<sup>44</sup> Am. Bar Assoc., supra note 26, at 14.

## The Trump Administration’s Gross Mismanagement Prevents Immigration Courts From Delivering Justice

The Trump administration has justified many of these incursions into the independence of immigration courts on the basis that they will increase the efficiency of the courts.<sup>45</sup> However, the administration’s gross mismanagement prevents immigration courts from delivering justice effectively, forcing hundreds of thousands of people to wait for their day in court.

As former immigration judges have noted, under the Trump administration “even on the X’s and O’s level, you have this stunning incompetence and inability to run a judicial system just from the technical standpoint—they can’t hire, they can’t plan, they can’t train, they can’t get the resources out there.”<sup>46</sup> Immigration courts still rely exclusively on voluminous paper files, and lack sufficient support staff or translators to function efficiently.<sup>47</sup> The administration has also repeatedly redirected judges to focus on new “priority cases,” causing chaos.<sup>48</sup> When particular cases are expedited, pre-scheduled cases are moved months or years into the future.<sup>49</sup> For example, when the Trump administration “deployed” immigration judges to border courts in 2017, more than 20,000 cases were delayed in the immigration courts they left behind.<sup>50</sup>

As a result, the immigration case backlog has only increased, ballooning from 504,394 cases in 2016<sup>51</sup> to over 1.3 million by September 2019.<sup>52</sup> The average “wait time” for cases in immigration court—the average time a case currently on the docket has been open—has increased from 324 days in 1998 to 696 days this year.<sup>53</sup>

Even as the administration has requested—and Congress has appropriated—additional funds,<sup>54</sup> EOIR cannot “answer simple budgetary and oversight questions” from the Senate Committee on Appropriations to justify how they are spending their money.<sup>55</sup> Nor have they implemented basic procedural improvements that would speed the resolution of cases and reduce the immigration court backlog, like instituting an electronic case management system.<sup>56</sup>

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<sup>45</sup> Jeff Sessions, Attorney General, U.S. Dep’t of Justice, Remarks to the Executive Office for Immigration Review Legal Training Program (Jun. 11, 2018), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>.

<sup>46</sup> Innovation Law Lab & Southern Poverty Law Center, *supra* note 26, at 20.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 19.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 20.

<sup>51</sup> Nolan Rappaport, *Immigration courts irredeemably dysfunctional and on the brink of collapse*, THE HILL, Sept. 23, 2019, available at <https://thehill.com/opinion/immigration/462577-immigration-courts-irredeemably-dysfunctional-and-on-the-brink-of>.

<sup>52</sup> *Immigration Court’s Active Backlog Surpasses One Million*, TRACIMMIGRATION, <https://trac.syr.edu/immigration/reports/574/> (last visited Sept. 30, 2019).

<sup>53</sup> *Average Time Pending Cases Have Been Waiting in Immigration Courts as of August 2019*, TRACIMMIGRATION, [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog\\_avgdays.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php) (last visited Sept. 30, 2019).

<sup>54</sup> Press Release, U.S. Dep’t of Justice, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), available at <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture>; Gregg Re and Jake Gibson, *DOJ seeks \$72M to hire more than 100 immigration judges, attorneys to help clear massive asylum backlog*, FOX NEWS, Mar. 11, 2019.

<sup>55</sup> S. Rep. 116-127, at 85 (2019), available at <https://www.appropriations.senate.gov/imo/media/doc/FY2020%20CJS%20Appropriations%20Act,%20Report%20116-127.pdf>.

<sup>56</sup> *Id.*

This gross mismanagement further erodes immigration courts' ability to act as fair and neutral arbiters of the law, amplifying the pressures on judges to decide cases quickly, not carefully, and in accordance with the administration's priorities.

Conclusion

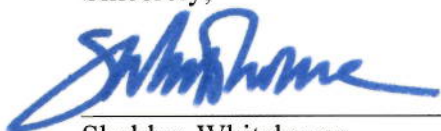
While immigration courts reside within the executive branch, they should not be merely a tool to achieve desired policy outcomes. The administration's recent decisions to subvert the normal hiring process to promote partisan judges, and to increase political influence over individual immigration cases, has undermined public confidence in our immigration courts. These actions create the impression that cases are being decided based on political considerations rather than the relevant facts and law. The appearance of bias alone is corrosive to the public trust.<sup>57</sup>

The United States deserves an immigration court system that is independent, impartial, and functional. Parties appearing in immigration court are equally entitled to a timely hearing in front of a neutral arbiter, consistent with the requirements of the INA and the Constitution. In order to fulfill our obligation to oversee immigration courts and ensure that our laws are applied fairly, we request a staff-level briefing addressing these concerns. We also ask that you provide us with the following:

1. Copies of all written policies related to the hiring of trial-level and appellate immigration judges. If no written policy exists, please provide a detailed description of the hiring of these judges including any changes to the hiring process since 2017;
2. Copies of all recommendation memos written to advocate for the hiring of trial-level and appellate immigration judges from 2017-present;
3. Copies of all materials for trainings of immigration judges from 2017-present;
4. Copies of any documents related to the development and implementation of EOIR's case processing times and quotas. If no written policy exists, please provide a detailed description of how these policies were developed;
5. Copies of any documents related to any employment actions taken against immigration judges as a result of their case processing times and quotas;
6. Any internal guidance that exists governing when the Attorney General or the EOIR Director should make their decisions binding; and
7. Any internal guidance that exists governing when the Attorney General will certify an immigration case to himself.

Please provide these answers and documents by no later than March 13, 2020. Thank you for your prompt attention to this matter.

Sincerely,

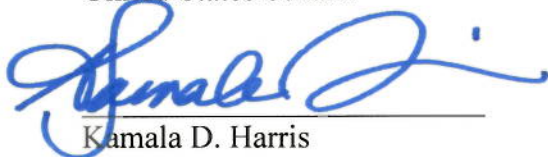
  
Sheldon Whitehouse  
United States Senator

  
Richard J. Durbin  
United States Senator

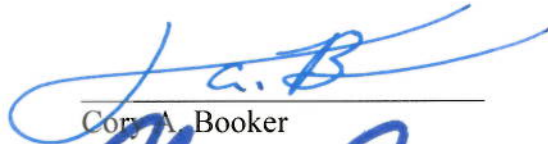
<sup>57</sup> Williams, 136 S.Ct. at 1909.



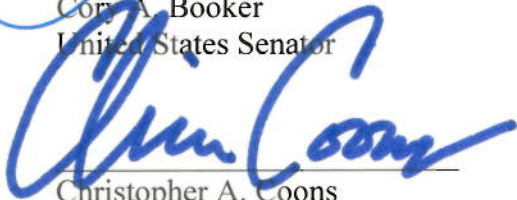
Mazie K. Hirono  
United States Senator



Kamala D. Harris  
United States Senator



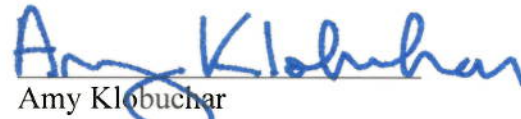
Cory A. Booker  
United States Senator



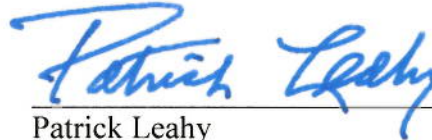
Christopher A. Coons  
United States Senator



Richard Blumenthal  
United States Senator



Amy Klobuchar  
United States Senator



Patrick Leahy  
United States Senator