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BAR ASSOCIATION

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BUREAU OF IMMIGRATION AND NATURALIZATION
DIVISION OF NATURALIZATION

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REPORT ON THE INDEPENDENCE OF THE IMMIGRATION COURTS

**NYSBA Committee on
Immigration Representation
New York City Bar Association**

January 2021

Memorandum

From: Hasan Shafiqullah, Chair, NYSBA Committee on Immigration Representation

To: Scott Karson, NYSBA President

Date: December 22, 2020

Re: Request to adopt the New York City Bar Association Report on the Independence of the Immigration Courts and the Committee on Immigration Representation's Proposed Resolution on Calling for the Creation of an Independent, Article I Immigration Court

The Committee on Immigration Representation recognizes the urgent need to create an independent, Article I immigration court to insulate immigration adjudication from political pressure. Currently, the Executive Office for Immigration Review ("EOIR"), comprised of immigration courts and the Board of Immigration Appeals ("BIA"), is housed within the U.S. Department of Justice ("DOJ"), a law enforcement agency. There is an inherent conflict of interest in housing a judicial adjudicatory body such as EOIR within the DOJ, a federal agency primarily charged with law enforcement.

This conflict of interest was brought into stark relief under the Trump Administration, which has implemented several policies that erode judicial decisional independence and neutrality by aligning the immigration courts and the BIA more closely with the Administration's goals of enforcing harsher and more restrictive immigration policies.

These policies are well-documented in the New York City Bar Association's (NYCBA) October 2020 "Report on the Independence of the Immigration Courts" ("NYCBA Report"), jointly issued by the NYCBA Immigration and Nationality Law Committee, Task Force on the Rule of Law, and Task Force on the Independence of Lawyers and Judges. The report, which is available at <https://s3.amazonaws.com/documents.nycbar.org/files/2020792-IndependentImmigrationCourts.pdf>, details how the Trump Administration has attacked judicial independence by politicizing personnel decisions, restricting immigration judges ("IJ") with performance metrics, reassigning cases, attempting to silence IJs, bypassing the appeals process by having the Attorney General certify immigration cases to himself, restricting IJs' ability to manage their dockets, and restricting immigrants' substantive rights.

These policies have undermined the integrity of the immigration court system and the public's confidence in this court process.

After the issuance of the NYCBA Report, the Administration took additional steps to undermine the independence of the immigration judiciary, first by issuing an Executive Order creating a Schedule F in the excepted service to subject policy-making federal employees to termination at

will,¹ and then by decertifying the IJs' union on the basis that IJs and BIA members are management officials because they are policymakers.² Together, these steps will allow the DOJ to terminate any IJs and BIA members who incur the disfavor of the DOJ or the President. Regardless of who may be in the White House, no administration should have the authority to manipulate and undermine the integrity of the immigration judiciary.

The NYSBA Committee on Immigration Representation urges NYSBA to adopt the NYCBA Report, and to join the many other voices³ that have called for an independent, Article I immigration court.

Further, the NYSBA Committee on Immigration Representation urges NYSBA to adopt the following proposed resolution calling on Congress to establish an independent, Article I immigration court system.

¹ See Executive Order on Creating Schedule F In The Excepted Service, issued Oct. 21, 2020, available at <https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/>

² See DOJ v. NAIJ, 71 FLRA 207 (Nov. 2, 2020), available at https://www.flra.gov/system/files/decisions/v71_207%20REGION%20COMBINED.pdf

³ E.g., American Bar Association, American Immigration Lawyers Association, Federal Bar Association, National Association of Immigration Judges, Congress Should Establish An Independent Immigration Court (July 11, 2019), https://www.naij-usa.org/images/uploads/publications/ABA_-_Congress_Should_Establish_an_Independent_Innigration_Court.pdf; American Bar Association, ABA Again Calls for an Independent Immigration Court (July 23, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719/; Federal Bar Association, Article I Immigration Court (last visited Oct. 9, 2020), <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/>; American Immigration Lawyers Association, AILA Calls for Independent Immigration Courts (Jan. 31, 2020), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts>; Marcia Brown, The Best Way to Protect Immigrants From the Whims of Politics, The New Republic (Oct. 5, 2020), https://newrepublic.com/article/159530/best-way-protect-immigrants-whims-politics?utm_source=AILA%20Mailing&utm_campaign=5ee067ea28-AILA8-10-05-2020&utm_medium=email&utm_term=0_3c0e619096-5ee067ea28-292020705 (all websites last visited Oct. 19, 2020); Letter to Rep. Zoe Lofgren from nearly 120 organizations, urging her to introduce legislation creating an Article I immigration court (Dec. 14, 2020), <https://www.aila.org/advo-media/aila-correspondence/2020/aila-and-partners-send-letter-requesting-intro>

New York State Bar Association
Committee on Immigration Representation
Resolution

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged a fair and impartial judiciary; and

WHEREAS, the Executive Office for Immigration Review (“EOIR”), comprised of immigration courts and the Board of Immigration Appeals (“BIA”), is housed within the U.S. Department of Justice (“DOJ”), a law enforcement agency;

WHEREAS, there is an inherent conflict of interest in housing a judicial adjudicatory body such as EOIR within the DOJ, a federal agency primarily charged with law enforcement;

WHEREAS, the self-certification of BIA decisions by Attorneys General under the Trump Administration has undermined the independence of immigration judges (“IJ”) and BIA members;

WHEREAS, EOIR policies under the Trump Administration have undermined the independence of IJs and BIA members;

WHEREAS, President Trump issued an Executive Order on Creating Schedule F in the Excepted Service on October 21, 2020, to subject policy-making federal employees to termination at will;

WHEREAS, the National Association of Immigration Judges was decertified as a union by the Federal Labor Relations Agency on November 2, 2020, on the basis that IJs are management officials with policymaking authority;

WHEREAS, no Administration should have the authority to issue such policies and decisions that undermine the integrity of the immigration court system and the public's confidence in the immigration court process;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association urges Congress to establish an independent, Article I immigration court system.



REPORT ON THE INDEPENDENCE OF THE IMMIGRATION COURTS

**Immigration and Nationality Law Committee
Task Force on the Rule of Law
Task Force on the Independence of Lawyers and Judges**

OCTOBER 2020

**REPORT ON THE INDEPENDENCE OF THE
IMMIGRATION COURTS**

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I. INTRODUCTION

The Executive Office for Immigration Review (“EOIR”), which is housed within the U.S. Department of Justice (“DOJ”), is the federal agency responsible for the fate of millions of immigrants in removal proceedings, determining whether noncitizens in detention will be released on bond, and whether, in some circumstances, they may be permitted to proceed to present an asylum claim. EOIR has three components: the approximately 69 immigration courts located throughout the United States, the Board of Immigration Appeals (“BIA”), which reviews appealed Immigration Judge (“IJ”) decisions, and the Office of the Chief Administrative Hearing Officer, the agency that handles employer sanctions and discrimination issues.

There is an inherent conflict of interest in housing a judicial adjudicatory body such as EOIR within DOJ, a federal agency primarily charged with law enforcement. Over the years, many academics, immigration practitioners, bar associations, and judges have criticized the placement of EOIR within DOJ and called for the creation of an independent Article I court.¹

The EOIR’s lack of independence as a sub-agency of DOJ is apparent in the actions that the Trump administration has undertaken to reshape EOIR. Such actions have included hiring Immigration Court and BIA judges who appear to favor more restrictive immigration policies, issuing directives to IJs restricting their ability to control their own dockets and speeding up decisions at the expense of providing immigrants due process, using the power of the Attorney General to certify BIA decisions to himself with the purpose of establishing restrictive policies, and changing long-standing precedent to limit immigrants’ access to humanitarian forms of relief. The inevitable and foreseeable result of these various actions is to tip the scales towards more and faster deportations, at the expense of due process. In addition, DOJ has prevented IJs from speaking out about the effects of these restrictions on their ability to fully and fairly adjudicate immigration cases, and has attempted to decertify the National Association of Immigration Judges (“NAIJ”), a union representing approximately 460 United States immigration judges that has criticized the administration’s actions.

The New York City Bar Association (“City Bar”) has previously issued statements calling for the Trump administration to withdraw individual policy decisions that undermine the independence of IJs and due process in courts. Further, it has reiterated its position calling for Congress to establish immigration courts as independent Article I courts.² Following our previous statements and reports, the City Bar takes this opportunity to examine recent immigration policy changes and to highlight its concerns about their impact on the independence of the immigration court system as well as the due process rights of those who pass through the immigration system.

II. ATTACKS ON JUDICIAL INDEPENDENCE

Under the current administration, DOJ has taken control over EOIR in a manner that appears to prioritize the administration’s political agenda over fairness in the immigration court system. The changes detailed in this section raise grave concerns about the independence of IJs.

A. Politicized Personnel Decisions and Reorganization

DOJ, through EOIR, has taken several steps to reorganize immigration courts and the BIA in a way that aligns them more closely with the administration's goals of enforcing harsher and more restrictive immigration policies. Along with rules publicly issued by EOIR, memos obtained through Freedom of Information Act ("FOIA") requests detail DOJ's and EOIR's efforts to effect structural changes to the immigration court system that undermine its independence.

First, an Office of Policy has been newly created within EOIR. There is a serious question presented by its mere existence within an agency that ostensibly adjudicates cases one by one and in an impartial manner according to law and established precedent, not at the direction of policy makers. Originally established in 2017, the Office of Policy's role was expanded in 2019,³ adding oversight of key functions related to due process, for example, the management of the program that accredits non-lawyers to provide assistance to indigent respondents, with the resulting concern that this important program is being undermined.⁴ Furthermore, it appears the Office of Policy has been responsible for establishing the metrics and time limits placed on IJs and the BIA,⁵ which have adversely affected IJs' ability to control their dockets and ensure that individuals appearing in immigration court are afforded due process. Advocates and judges alike have raised concerns that the creation of the Office of Policy has a political focus beyond the administration of a fair and impartial adjudicatory court system.

Second, we take note of the hiring changes made to the BIA, the administrative body charged with reviewing appeals of IJ decisions. Its decisions are binding on IJs, making it a powerful agency in determining the outcome of cases and defining the contours of immigration law.

One of the initial changes implemented under the Trump Administration was to increase the size of the BIA from seventeen members to twenty-one in 2018, and then to twenty-three in March 2020. In doing so, EOIR quietly changed the hiring process, allowing it to fast track candidates by removing the two year probationary period for applicants who had been IJs and making them permanent BIA members immediately.⁶ Under the new procedures, openings at the BIA are posted publicly for fourteen days instead of the previous thirty days, and the time for current board members to submit their evaluations of candidates was shortened from a week to three days.⁷ While EOIR maintains that the shortened hiring timelines make the process more efficient, these changes raise concerns about whether the expedited process allows DOJ, through EOIR, to limit the number of applicants and advance its preferred candidates.⁸

Notably, the recent hires to the BIA (with the exception of one who had been a DOJ trial attorney) have all been IJs with records of much higher than average asylum denial rates. The average asylum-denial rate among newly-appointed judges was just over 92%, compared to the national average of 63.1%.⁹ Further, the fact that most of the new hires were former IJs means that, under the newly crafted rule, the BIA probationary period did not apply to them. This has allowed former IJs to be named as permanent board members immediately, and makes it harder to remove them from their positions, even for cause. For example, Judge Philip J. Montante Jr. was recently appointed as a permanent member despite ethics complaints that include a 2014 complaint for allegedly showing bias in adjudicating an immigration case.¹⁰

In addition, DOJ has actively sought to replace BIA members appointed under prior administrations and whose asylum denial rates are generally lower than those of newer appointees. In a recently obtained memo to nine BIA members appointed by previous administrations, DOJ offered buyouts and voluntary separation incentive payments to encourage them to resign or retire.¹¹ Although this type of financial incentive may be typical in workforce reduction efforts, the circumstances here indicate that the goal was not primarily to reduce costs but, instead, to reshape the BIA, as the members would be replaced by those holding the newly created position of “appellate immigration judge.”¹² EOIR Director McHenry advised that these appellate IJs can now be assigned to immigration courts around the country and have the ability to review cases at both the trial and appellate levels.¹³ Tasking BIA members to handle both trial and appellate cases creates potential conflicts of interest that would further undermine the independence of the immigration judicial system.

B. Restricting Judges with Performance Metrics

In addition to these changes in the composition of the BIA, new metrics have been instituted by EOIR to evaluate each IJ’s performance, further raising concerns over interference with IJs’ independence and the resulting erosion of due process. In order to receive a *satisfactory* review, IJs must complete 700 cases per year, maintain a remand rate from the BIA and federal circuit courts of appeal of less than fifteen percent per year, and meet at least three of the following six additional requirements:

- Issue decisions within three days of completing a merits hearing in 85% of non-status detained removal decisions
- Issue decisions within 10 days of completing a merits hearing in 85% of non-status non-detained removal decisions (unless completion is prohibited by statute, such as cancellation caps)
- Decide motions within 20 days of receipt in 85% of their cases
- Make bond decisions on the day of the hearing in 90% of cases
- Complete individual hearings on the initial scheduled hearing date in 95% of the cases (unless the Department of Homeland Security does not produce a detained respondent), and
- Issue decisions in 100% of cases on the day of the initial hearing in credible fear and reasonable fear reviews (unless DHS does not produce a detained respondent)¹⁴

The minimum requirement of fully adjudicating 700 cases per year averages out to approximately three cases per day.¹⁵ DOJ has maintained that the requirements are aimed at reducing the large backlog of immigration cases, which on average can take longer than two years to adjudicate. However, this ignores the underlying reasons for the backlog, including the varying degrees of complexity in adjudicating these cases, the historical underfunding of the immigration court system, the insufficient number of judicial law clerks, and the increased enforcement that have led to the large current backlog.¹⁶

On January 29, 2020, Judge Ashley Tabaddor testified in her capacity as President of the National Association of Immigration Judges (“NAIJ”) at a congressional hearing on the “State of Judicial Independence and Due Process in U.S. Immigration Courts.” Judge Tabaddor detailed how the application of the metrics unfairly penalizes judges who choose to manage proceedings at a measured and deliberate pace such that respondents, who often appear unrepresented and do not speak English fluently, understand the proceedings and are afforded due process. As explained in greater detail below, attempts to rush through a hearing to adjudication puts judges in a difficult position of choosing between meeting the metric for a satisfactory evaluation to maintain their jobs and ensuring due process rights for respondents because, as Judge Tabaddor testified, “. . .it is often quicker for an immigration judge to deny a case than to grant the respondent’s application for relief....”¹⁷

While DHS is always represented by counsel and increasingly opposes and appeals any grant of relief to an immigrant, respondents, many of whom appear *pro se*, often do not have the resources or knowledge to appeal cases. Respondents also carry the evidentiary burden in most immigration proceedings, other than those where DHS seeks to remove people previously admitted into the United States, such as lawful permanent residents. These and other factors make it easier for IJs to speed up decisions and maintain a favorable appeal rate in compliance with metrics by ruling in favor of DHS rather than immigrants. It is far simpler and quicker to say an unrepresented child has not met his or her burden of proof than to devote time to developing the record and engaging in the complex analysis of fact and law that due process requires.

In addition, in August of 2019, EOIR issued an interim ruling that delegated authority to decide appellate cases from the Attorney General to the Director of EOIR, a position that previously had no adjudicatory role. The rule charges the EOIR Director with issuing a decision within fourteen days if the BIA does not decide a case within 90 days for detained cases or 180 days for non-detained cases.¹⁸ Like the metrics placed on IJs, this rule is problematic because it provides additional incentive for the BIA to adjudicate cases with a focus on speed rather than substantive review. Further, it is concerning that the director, a political appointee, would have authority to issue a precedential ruling, outside the regular appellate process.

C. Reassigning Cases

Compounding the concerns over the effect of quotas and time limits on the independence of the immigration courts, IJs’ dockets have been reassigned on a large scale in a manner that undermines judicial independence.

Perhaps the clearest example of this is the removal of Immigration Judge Steven Morley from the high-profile remand of *Matter of Castro-Tum*.¹⁹ The troubling chain of events began when Judge Morley administratively closed a case over concern that notice may have been sent to an incorrect address for the respondent, an unaccompanied and unrepresented minor.²⁰ In 2018, then Attorney General Jeff Sessions self-certified the case to issue a decision restricting the ability of judges to manage their dockets with administrative closure.²¹ According to a complaint filed by NAIJ, when the case subsequently was remanded to Judge Morley, EOIR Director James McHenry instructed Judge Morley that he must hear the case within 14 days, an extraordinarily expedited schedule.²² On the day of the hearing, after an attorney acting as friend of the court appeared and requested a continuance to allow for the respondent to be located and questions of notice to be

resolved, Judge Morley granted a continuance.²³ The case allegedly was reassigned to a different judge within days of the decision, even though Judge Morley was only informed of the reassignment more than a month later.²⁴ According to the complaint filed by NAIJ on Judge Morley's behalf:

On July 19, 2018, [Assistant Chief Immigration Judge] Jack Weil sent an email to Judge Morley stating that the Castro-Tum case had been reassigned because the Court had been expected to make a decision at the May 31, 2018 hearing, either by terminating proceedings or entering an *in absentia* order of removal. ACIJ Jack Weil telephoned Judge Morley later the same day and the two discussed the contents of the email. ACIJ Weil conveyed the position of management that Judge Morley should not have continued the matter "at the request of the friend of the court," but rather should have issued a final order in the case. ACIJ Weil asserted that the AG's decision stated that if the Respondent did not appear, the Judge "should" proceed by way of an *in absentia* order of removal....

In addition, Judge Morley learned that the 26 cases in which he sought certification due to the identical issue of the adequacy of the [Office of Refugee Resettlement] documentation were also being reassigned. Most, but not all, were remanded from the BIA. Furthermore, Judge Morley next learned that approximately 60 cases which Judge Morley had administratively closed due to the inadequacy of ORR documentation, and for which DHS had filed motions to re-calendar, were to be reassigned.²⁵

This example demonstrates DOJ and EOIR's use of case reassignment to interfere in normal judicial processes and override IJ decisions.

Beyond this specific case, IJs generally no longer have the ability to manage and prioritize their own dockets. For example, they may be reassigned cases by EOIR that are on a "rocket docket" that expedites cases to removal by creating obstacles and disincentives for asylum applicants, including children.²⁶

In addition to the creation of "rocket dockets," EOIR has also created border/tent courts to quickly adjudicate asylum cases presented by mostly Central American applicants who have crossed the southern border without inspection. IJs with their own dockets in cities around the country have been assigned to adjudicate matters at the border via video or even in person, forcing them to put off hearing their regular docket cases, often for many years.²⁷ Indeed, rather than reducing the significant backlog of cases, case reassignments, managing of IJs dockets, fast-tracking of cases and border/tent courts have failed to increase efficiencies, as demonstrated by the steadily increasing numbers of pending cases, now totaling over one million.²⁸ Furthermore, the constant re-shuffling of cases and subsequent delays in hearings keep respondents in legal limbo and undermine due process by causing evidence to grow stale and witnesses to become unavailable.

The fast tracking of cases that EOIR deems priorities, along with the implementation of case quotas and time limits, effectively hamper the ability of judges to control their dockets and has helped to create a system that improperly uses EOIR as an extension of DOJ enforcement rather than independent adjudication. The new metrics which emphasize speed over careful deliberation, along with internal policy changes and modifications to the BIA, have created an environment in which many immigration judges and BIA members feel they are unable to continue effectively and independently adjudicating cases, and have led many to transfer or retire from their positions.²⁹

The resulting open positions have been filled by a corps of less-experienced IJs, which would logically call for stepped-up training and resources; however, EOIR is providing less training and fewer resources than in the past. In 2019, the in-person IJ training conference was cancelled. And judges who attended the 2018 conference reported that the focus was on how to deport respondents faster, often based on unfounded assumptions that their claims are likely false.³⁰ The Department of Justice also recently announced that it is canceling diversity and inclusion trainings, including those for IJs, following an executive order that called such trainings “offensive and anti-American.”³¹ EOIR has also ended the practice of having judicial law clerks provide legal updates to judges and, instead, funnels all updates through the new Office of Policy (discussed below), whose reports have been untimely and lack in-depth analysis.³² All of this allows DOJ the opportunity to use training and legal updates to further its goal of restricting immigration at the expense of due process and the independence of IJs and board members.

D. Attempts to Silence Immigration Judges

The DOJ also has prevented IJs from speaking publicly and has made efforts to decertify the union of IJs in a manner that further undermines the independence of the immigration courts.

The National Association of Immigration Judges (“NAIJ”) was formed in 1979 and represents the roughly 460 IJs employed by EOIR. NAIJ represents IJs on the issues typically handled by other labor unions, such as engaging in collective bargaining on pay and working conditions and representing its members in disciplinary proceedings. During the current COVID-19 epidemic, NAIJ has also taken a leading role in demanding the temporary closure of the Immigration Courts and that other safety measures be taken in order to protect the health and safety of its members, in addition to the attorneys and immigrants who must appear before them.³³ More broadly, NAIJ’s mission is “to promote independence and enhance the professionalism, dignity, and efficiency of the Immigration Courts . . . work[ing] to improve [the] court system through educating the public, legal community and media, testimony at congressional oversight hearings, and advocating and lobbying for immigration court reform.”³⁴

Since IJs are employees of the DOJ, and subject to DOJ rules, they are limited by DOJ policy from speaking publicly regarding the court and its procedures. In prior administrations, IJs were permitted to present their views as long as they made it clear that the views were their own and not those of EOIR. In 2017, EOIR changed its policy to require that judges seek prior approval before speaking, even for such routine events as being a guest speaker at a law school class. Then, in January 2020, EOIR went even further, prohibiting judges from speaking altogether about immigration law or policy, even in their personal capacity.³⁵ Judges can be disciplined or even fired for speaking publicly about immigration-related issues.

On July 1, 2020, NAIJ filed a federal lawsuit in the U.S. District Court Eastern District of Virginia alleging that the speaking restrictions are “an unconstitutional prior restraint on judges who wish to write or speak publicly in their personal capacities.” NAIJ seeks a preliminary injunction to stop EOIR from continuing to enforce the policy.³⁶

In an important exception to the DOJ speaking ban, IJs who are officers of the NAIJ are permitted to speak publicly in their role as union officials. Due to DOJ restrictions, the ability of NAIJ officials to speak publicly is critical to informing the public, Congress and government policy makers about EOIR practices and the inherent conflicts that arise from housing a judicial function within DOJ, a law enforcement agency.

Indeed, the NAIJ has played an active role in opposing policy changes made by the Trump administration’s DOJ that impinge on the independence of IJs and, as a consequence, erode the due process rights of the immigrants who appear before them. This information and criticism come from those who are best situated to present them—the judges themselves.³⁷

The NAIJ has opposed the imposition of case quotas on IJs and the promulgation of rules reorganizing EOIR, charging that such changes are meant to advance the improper transformation of EOIR into a deportation enforcement tool rather than allowing it to perform as an independent judicial body. The union criticized the changes delegating authority from the Attorney General to the EOIR Director (Director), a politically appointed position, and expanding the Director’s authority to decide cases even though the position was never intended to have adjudicatory power. The union has spoken out against the establishment of an Office of Policy within EOIR, and against the changes to the organizational roles of the Office of General Counsel (OGC) and the Office of Legal Access Programs (OLAP), changes that enhance law enforcement rather than independent decision making, and that undermine the proper role of the courts. The NAIJ has also criticized EOIR’s mismanagement of funds allotted for its operation.³⁸

In August 2019, NAIJ issued a report responding to questions from members of Congress about DOJ policies affecting the court. The report stated:

The U.S. Department of Justice (DOJ)’s troubling and indefensible mismanagement of the Immigration Court system is unacceptable. Administering a court system is incongruous with DOJ’s role as a law enforcement agency. This inherent conflict of interest precludes the judicial independence of IJs and ultimately compromises due process of the parties appearing before the court.³⁹

The NAIJ concluded its report by calling for the removal of the immigration court from the DOJ and supporting the formation of an independent Article I immigration court.

Given the important role the NAIJ plays and its criticism of the DOJ’s mismanagement of the court, it is perhaps not surprising that the current administration initiated proceedings with the Federal Labor Relations Authority to decertify the NAIJ. DOJ filed a complaint with that body in August 2019 claiming that IJs are “management” and are, therefore, not entitled to form a union. The apparent goal of DOJ was to dissolve the NAIJ and effectively silence the voice of its officers who represent all IJs. The FLRA held a hearing on the petition in January 2020. In a decision

issued on July 31, 2020, the FLRA denied the administration’s request and held that IJs are not “management,” citing as support for its conclusion, in part, several of the new DOJ restrictions on the power of IJs to control their own dockets.⁴⁰

III. ATTORNEY GENERAL SELF-CERTIFICATION TO BYPASS APPEALS PROCESS

The DOJ has also taken the unusual step of embracing a previously rarely-used procedural tool, self-certification. Certification allows the Attorney General—simultaneously the United States’ head immigration adjudicator and head immigration prosecutor—to intervene directly in the immigration appeals process by selecting specific cases to review and then issuing binding rulings. To refer any decision to himself, the Attorney General need only serve the interested parties with a written notice of the referral. Though prior administrations used this power sparingly, the current administration has wielded it with vigor. In the last three years, the Trump Administration’s Attorney Generals have issued thirteen certified immigration decisions,⁴¹ in comparison, over the course of eight years, the Obama administration issued only four such decisions.⁴²

These recent certified decisions range from outlining administrative policies limiting IJs’ discretion and ability to manage their dockets, to substantive holdings vacating or reversing established precedential decisions. A number of the decisions undermine asylum protections: *Matter of A-B*-⁴³ and *Matter of L-E-A*-⁴⁴ specifically seek to limit grounds for asylum by overturning precedential decisions, while *Matter of R-A-F*-⁴⁵ limits the definition of torture.

But perhaps the most frequent use of the self-certification power in recent years has been in the area of procedural matters. A series of Attorney General-certified cases severely limit the ability of IJs to manage their own dockets by restricting their use of judicial tools including continuances, administrative closure, and termination. Against the backdrop of an over one million case backlog, with new performance metrics focused almost exclusively on the quick disposition of cases, the inevitable result of the new procedural restrictions on IJs is the fast-tracking of cases and increased removal orders, at the expense of the measured deliberation required by due process of law.

As these cases demonstrate, Attorney Generals in recent years are using this procedural tool to rewrite immigration court policies through changes in substantive case law, rather than following more traditional pathways of issuing regulations and legislative recommendations, both of which, notably, are more lengthy and transparent processes.

This unprecedented use of attorney general self-certification to bypass the legislative process is apparent in cases like *Matter of A-B*-, which sought to end asylum protections for survivors of domestic violence. In that case, the Attorney General referred the case to himself directly from the IJ. Although this act drew swift criticism, then-Attorney General Sessions dismissed allegations of bias based on his prior comments hostile to asylum seekers. Similarly, in *Matter of Thomas and Matter of Thompson*, Attorney General Barr rejected criticism that rulemaking rather than certification is a more appropriate approach to shaping immigration law, and emphasized “[his] authority as agency head to proceed by adjudication.”⁴⁶ Yet it is precisely this duality of being both adjudicator and agency head that raises due process concerns.

In response to the DOJ's aggressive use of self-certification to reshape immigration law, the American Bar Association in 2019 issued a resolution urging DOJ to set clear standards for when such intervention is permissible. The ABA's resolution further urged DOJ to certify decisions only "sparingly" and within "the ordinary administrative appeal process."⁴⁷

The use of this procedural tool to bypass normal adjudicative and legislative processes is further evident when considering the decision *Matter of E-F-H-L*.⁴⁸ This precedential 2014 BIA decision held that all asylum applicants were entitled to a full and fair hearing without having to first meet a threshold of *prima facie* eligibility. After issuing this precedential opinion, the case itself was remanded back to the IJ, where it was subsequently administratively closed for reasons unrelated to the substance of the BIA's decision. In 2018, the Attorney General self-certified this closed case and, in a one-page decision, vacated *E-F-H-L* as moot because, after remand, the applicant had withdrawn the asylum application at issue. Thus, the DOJ vacated a precedential decision critical to the due process rights of respondents by using the self-certification process to revive a case that was not before an immigration judge or the BIA, and based on a tangential procedural reason.

Two years later, the administration then used *Matter of E-F-H-L* as justification for sweeping proposed regulatory changes severely limiting asylum seekers' right to a full hearing, arguing that the regulatory change was consistent with its self-created precedent.⁴⁹ Similarly, several of the certified cases build upon each other: for example, *Matter of A-B* cites to *Matter of Castro-Tum* to support the broad use of authority to select a case in any posture, noting that the BIA exercises "only the authority provided by statute or delegated by the Attorney General."⁵⁰

The Attorney General's dual position as both the nation's chief immigration adjudicator and chief prosecutor is an inherent conflict of interest. The current Administration's liberal use of self-certification to reshape immigration case law and limit individual IJ discretion throws this conflict into greater relief. Moving the immigration court system out of the DOJ and making it into an independent Article I court would safeguard immigration law from being rewritten by each administration, and would thus ensure due process for the immigrants appearing before the courts.

IV. UNDERMINING DUE PROCESS

In addition, recent changes to procedural rules limit how immigration judges handle cases. Restrictions on continuances, administrative closure, termination, and changes of venues, case completion quotas, processing fees, barriers to appeal, and the allocation of court resources all impact the judicial role of a court and can undermine due process.

A. Temporal Restrictions through Case Quotas and Limits on Continuances, Administrative Closure, the Status Docket, and Termination

In addition to undermining judicial independence, case quotas and other restrictions have serious implications for procedural due process. Docket management is a critical component of any judge's responsibility, both to ensure due process for respondents and to maintain a reasonable court workload. However, changes in policy over the last few years have sought to force parties and IJs to make rushed decisions that endanger both of these functions.

The immigration courts have traditionally used several mechanisms to provide a party with additional time—for example, to find counsel, prepare evidence, or pursue collateral matters. A continuance adjourns a matter to another date, the status docket requires parties to file an update by a set date, administrative closure removes a case from the court’s active docket until one of the parties asks that it be re-calendared, and termination without prejudice disposes of a case unless the government chooses to initiate proceedings anew.

However, DOJ increasingly has limited access to these tools through the Attorney General self-certification process and policy memoranda. In 2018, the Attorney General restricted judicial discretion to administratively close cases in *Matter of Castro-Tum*.⁵¹ The Attorney General subsequently limited the use of continuances and made granting them more difficult in *Matter of L-A-B-R*.⁵² Later that same year, in *Matter of S-O-G- & F-D-B-*, the Attorney General announced that judges had no authority to terminate or dismiss cases unless expressly set out in statute or regulations.⁵³

In 2019, EOIR released a policy memorandum narrowing the permissible reasons for placing a case on the status docket.⁵⁴ While the EOIR acknowledged that status dockets were in widespread use at many courts for years,⁵⁵ they “systematized” their use in 2018 in a memorandum dictating performance metrics for IJs.⁵⁶ This memorandum constrained IJs’ discretion in scheduling their cases by basing the judge’s performance on whether cases were completed within sixty days and, simultaneously, narrowed IJs’ discretion to use status dockets—a tool that judges could have used to prevent cases that required more time from counting against their performance.⁵⁷

Finally, on August 26, 2020, EOIR published another round of proposed regulatory changes to “make clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases.”⁵⁸

Combined with case quotas and deadlines, these restrictions have further pressured judges to decide cases faster at the expense of due process.⁵⁹ While DOJ justified these measures as efforts to improve efficiency, they appear to have had the opposite effect as the backlog of cases continues to climb.⁶⁰ Indeed, evidence suggests that administrative closure actually helped reduce case backlogs.⁶¹

Given that immigration applications often involve a complex and lengthy process, rushed decisions inevitably equate to more removal orders before people have a reasonable opportunity to find counsel or identify relief. This is especially concerning given that more time is often the best solution for many of the other due process challenges inherent in immigration court—language barriers, no right to free counsel, unaccompanied children, international evidence and witnesses, and vulnerable respondents such as asylum seekers who often need to address symptoms of trauma before they can meaningfully engage with the legal system.⁶²

Tools to provide parties with more time are also important given that there are certain immigration applications over which other agencies have exclusive jurisdiction or which have waiting lists.⁶³ As a result of these separate but interwoven processes, it is important for the courts to have a means for placing cases on hold while related cases are adjudicated by other bodies, which often involves a wait of several years. For example, judges commonly put cases aside for

noncitizens who will soon be able to pursue permanent residency through immediate relatives who are U.S. citizens or permanent residents; abandoned, neglected, and abused children with pending Special Immigrant Juvenile Status (“SIJS”) cases which require proceedings in state court; or survivors of domestic violence pursuing U nonimmigrant status as victims of crime which require steps with law enforcement agencies. By eliminating mechanisms for putting cases on hold, DOJ has effectively pressured judges to order the removal of people with viable paths to lawful status based in statute, but whose requests for relief have not yet been granted.

Constrained judicial discretion is particularly problematic in the SIJS context, where a juvenile or family court has determined that it is not in the child’s best interest to be returned to his or her home country.⁶⁴ The SIJS process requires determinations by a juvenile court,⁶⁵ followed by applications⁶⁶ to immigration authorities. The government, for a substantial part of the process, dictates the timeline for these applications,⁶⁷ which can take years.⁶⁸ Previously, these cases would likely be placed on the status docket. However, the Status Docket Memorandum limited the use of status dockets to three instances: (1) where “an immigration judge is required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition by U.S. Citizenship and Immigration Services..., (2) where an immigration judge is required to reserve a decision rather than completing the case pursuant to law or policy, or (3) in a case that is subject to a deadline established by a federal court order.”⁶⁹ The new policy effectively eliminates a docket-management tool that had promoted efficiency, and has sown confusion amongst practitioners.⁷⁰ In its absence, performance metrics incentivize IJs to resolve cases quickly without waiting for children to complete their SIJS proceedings so that they may receive lawful permanent residence. This creates a risk that juvenile applicants may be removed from the United States in contravention of what a court has determined to be their best interests, and in spite of their statutory eligibility for relief.

In addition, multiple administrations have accelerated cases at the border and cases with family units (currently called “FAMU” cases) with the apparent goal of deterring Central American families from crossing the Southern Border.⁷¹

In these ways, basic procedural mechanisms and immigration court scheduling functions are being limited or curtailed in a manner that promotes political objectives over due process.

B. Accessibility Restrictions through Administrative Barriers

In recent years, the courts have become less accessible for immigrants—from the physical location of the courts to the services provided in them—in a manner that undermines due process. As discussed *infra*, DOJ has increasingly sought to move court functions to remote regions away from urban centers where immigrants would be more likely to have access to family, attorneys, and supportive services. This is exacerbated by EOIR discouraging changes of venue, beginning in 2018.⁷²

EOIR also has scaled back access to in-court interpreters, replacing them with general orientation videos or interpretation by telephone.⁷³ While purportedly a cost-saving measure, the absence of interpretation means that noncitizens struggle to understand the proceedings and their rights and to convey their wishes.⁷⁴

Even simple barriers such as understaffed court phone lines, failure to notify parties of hearing changes, delays in replying to motions, double- or triple-booked hearing slots, monolingual signs, and rules announced via Twitter all wear parties down, requiring them to unnecessarily expend additional resources and making it difficult to present a case.⁷⁵ Respondents in immigration court face death by a thousand cuts. While many challenges relate to staffing and funding, EOIR decides where and how to focus its resources. For example, when the administration wanted to draw attention to the southern border, it sent judges from across the country on details to border courts regardless of actual need, disrupting and delaying cases on their regular dockets, sometimes by several years.⁷⁶ DOJ may take political objectives into consideration when considering how to allocate court resources. Housing the immigration courts within the executive branch thus politicizes what should be objective court procedures and undermines due process. Establishing an independent Article I immigration court would solve this problem.

C. Access to Appellate Review

Such changes, purportedly adopted to improve efficiency, have undermined due process at the trial level, and are especially concerning given that EOIR also has sought to limit access to meaningful appellate review.

For example, DOJ has proposed an extraordinary increase in fees that would result in the limitation of low-income and working-class immigrants' access to justice. EOIR has proposed increasing the fee for appealing an IJ decision to the BIA from \$110 to \$975.⁷⁷ This and other proposed fee increases effectively price people out of justice.

On August 26, 2020, EOIR also published proposed regulations that would prevent the BIA from remanding most cases back to the immigration court, limit the ability of respondents to reopen proceedings *sua sponte*, and expand DHS's ability to reopen proceedings.⁷⁸ The proposal also further limits the use of administrative closure as addressed *supra*, and requires simultaneous briefings such that parties will not be able to fully respond to opposition arguments.

The limits on remands would make it more difficult for immigrants to submit new evidence and address changes in law. However, perhaps most striking is the explicit double standard that allows the BIA to remand cases at any time based on new evidence from DHS while disallowing remands based on new evidence from noncitizens.⁷⁹

Immigrants and their counsel face an increasingly impossible series of obstacles while the regulations favor DHS. For example, the Attorney General's recent decision in *Matter of A-C-A-A-* states that the BIA will consider every element of a claim *de novo* and will not honor stipulations made at the trial level.⁸⁰ This means that respondents, who usually carry the evidentiary and persuasive burden, must engage in the resource-intensive act of addressing even noncontentious elements of a case, all while facing the pressure of rushed hearings with fewer and fewer opportunities to request more time or appeal injustices. Meaningful access to the appellate process is a critical safeguard against these injustices, especially considering more than a third of immigrants in court are unrepresented.⁸¹

V. LIMITING TRANSPARENCY & ACCOUNTABILITY

Transparency and accountability operate in tandem, and both are currently at a critical juncture in the immigration court system. The most significant negative impact of the issues discussed above is on the many immigrants who must navigate the court system as new legal, structural, and policy changes turn its corridors into a maze. Without transparency and accountability, due process is inevitably eroded. The lack of transparency also impedes meaningful attempts at reform.

A. Restricting Public Access to Information

In May 2018, EOIR announced a new initiative promoting transparency, stating that it would release statistics on immigration court adjudications to the public on a regular basis.⁸² Yet just over a year later, Syracuse University's Transactional Records Access Clearinghouse ("TRAC"), a nonpartisan and nonprofit data research center, issued a report noting "gross irregularities" in recently-released EOIR data.⁸³ TRAC operates by using FOIA data to provide detailed reports on important aspects of the immigration court, including asylum grant and denial rates (analyzed by various factors including by judge, by country of applicant, by immigration court location), representation rates, enforcement trends, and topical issues like the rising use of videoconference instead of in-person hearings.

In October 2019, TRAC noticed that over 1,500 records were missing from that month's EOIR data release.⁸⁴ Since that date, records have continued to disappear. In one report, TRAC noted that 68,282 of the asylum applications included in the March 2020 data release were missing from the April release.⁸⁵ This is just one month, and the problem is cumulative, reaching back to October 2019. The data points missing include what applications for relief were filed and the final decisions on those applications.⁸⁶ These data are critical to providing any objective oversight of the true functioning of the system, especially given explicit legal and policy directives to resolve cases as quickly as possible.

As TRAC notes, "the management of the court system itself, including the quota system recently imposed on IJs, presupposes the accuracy of the court's own records." EOIR denied any issues and accused TRAC of making "inflammatory and inaccurate accusations."⁸⁷ In September 2020, TRAC announced that EOIR had restored some records due to public outcry but warned that others continue to go missing.⁸⁸

In addition and as discussed above, EOIR has also taken steps to limit the ability of IJs to speak publicly about their work. This forecloses a meaningful avenue for public engagement with and knowledge about the immigration court system. IJs are perhaps the best situated of any actor to shed light on the interworking of new policies and procedures. Yet they may not, or else risk losing their jobs.

The COVID-19 pandemic also has brought to light unanticipated challenges with transparency. EOIR's response during the pandemic has been disjointed and reactionary; its communications regarding new policies and procedures were often made at the last minute and showed little regard for litigants, which include a high percentage of *pro se* individuals.⁸⁹

EOIR chose the pandemic as the moment to embrace social media and online announcements. Immigration courts were opened and closed by tweet without individual notice, alongside standing orders regarding filings and telephonic appearances. EOIR's online portal was updated on a lagging basis. Representatives were expected to monitor social media to determine whether hearings were proceeding. Because EOIR only announced court closures extending one or two weeks into the future, lawyers were forced to spend time preparing clients, witnesses, and documentary filings in the midst of stay-home orders, or else risk missing a filing deadline. Yet these efforts were often ultimately a waste of time and effort, as EOIR continued to extend court closures on an *ad hoc* basis. EOIR also often announced unplanned court closures hours *after* courts had already shut their doors, deleted tweets without keeping a record of changes, and announced new policies without sufficient notice.⁹⁰ Even worse, EOIR seemingly expected *pro se* applicants to also receive these critical updates via Twitter or by continuously refreshing the EOIR webpage regarding the operational status of the immigration courts. Many individuals traveled on public transportation in the midst of a pandemic only to reach buildings that were closed.

B. Removing Courts and Respondents from the Public Eye

The Trump Administration has taken a series of steps never taken before to force asylum-seekers to remain abroad while awaiting their hearings in the U.S. via the Migrant Protection Protocols (“MPP”) or to force certain asylum seekers to seek asylum in third countries via Asylum Cooperative Agreements (“ACAs”).⁹¹ Many subject to these programs have been forced to abandon their claims altogether, and return to their home countries or third countries where they will face serious harms. Given the humanitarian concerns at stake, rigorous accountability and transparency of how asylum seekers are treated by the U.S. government are essential. Instead, by forcing asylum seekers to wait in Mexico or referring them to third countries for asylum adjudication, DHS removes asylum seekers from the public eye by forcing them to adjudicate their claims in closed, temporary facilities at the U.S.-Mexico border or in third countries far outside the purview of U.S. legal observers and press.

DHS began implementing MPP at the San Ysidro, California, port of entry in January 2019. By the end of Spring 2019, MPP was expanded across the length of the Southern Border.⁹² Those subject to MPP are forced to remain in Mexico for extended periods of time while awaiting their hearings in the U.S. These asylum seekers are often vulnerable to poverty, crime and disease and are not offered the rudimentary protections and resettlement services that international refugee populations are offered by the office of the United Nations High Commissioner for Refugees and other non-governmental organizations in other similarly-situated global refugee processing sites.

While attempting to survive in this environment, asylum seekers under MPP are forced to gather evidence and prepare for hearings without access to counsel and whilst navigating a disorganized immigration process rife with logistical barriers, errors and confusion. For example, asylum seekers subject to MPP often report receiving hearing notices with incorrect dates and times.⁹³ While logistical and due process challenges permeate the MPP process, less than 5% of asylum seekers subject to MPP are able to secure counsel.⁹⁴ Given their forced placement in Mexico, lack of counsel and inherently vulnerable positions, it is essential to ensure asylum seekers placed in MPP receive a full and fair hearing and an opportunity to meaningfully avail themselves of requisite protections mandated by the Immigration and Nationality Act and international law. Instead, as asylum seekers are forced to wait out the asylum process in Mexico or apply for asylum

in third countries, the DHS essentially removes these vulnerable populations from the public eye with no means of observation or accountability to ensure that the U.S. is meeting its obligations under international law.

C. Immigration Adjudication Centers and Limited Access

Since September 2019, DHS has been expanding the use of tent facilities where IJs appear via video teleconference (VTC) to adjudicate asylum and other forms of humanitarian relief for those under MPP.⁹⁵ By systematically moving immigration adjudication at the Southern Border to tent courts whose access is regulated by the DHS, not only are applicants subject to limited judicial oversight (i.e., IJs are unable to review documents applicants are receiving from the Office of Chief Counsel), but attorney-observers, press and the public, who normally have access to Immigration Courts, are allowed only limited access, at best.⁹⁶ After receiving criticism for limiting access to tent courts, DHS directed component agencies to allow public access to the facilities.⁹⁷ Despite these directives, the agency has failed to operationalize these directives in a manner that allows meaningful access to tent court facilities and have constructed new obstacles to transparency.⁹⁸ For example, though Master Calendar hearings have long been open to the public at immigration courts across the country, logistical obstacles such as DHS prohibitions on writing materials have impeded press access and transparency.⁹⁹

To further complicate efforts to achieve transparency, DOJ has judges appear remotely from Immigration Adjudication Centers (IACs) via teleconference at tent court hearings. These adjudication centers serve as a hub for IJs who beam into courtrooms remotely to hear cases, and are completely cut off from the public.¹⁰⁰ Coupled with the obstacles to access tent court themselves, DHS's closure of IACs to the public essentially seals off the immigration adjudication process from public view for those subject to MPP.

D. Pushing People Back to Third Countries

The Trump Administration also has modified DHS and DOJ regulations implementing the asylum provisions at INA Section 208(a)(2)(A) to bar a noncitizen from even applying for asylum in the United States, without any evaluation of the merits of the underlying asylum claim, in certain situations where the United States has entered into an Asylum Cooperative Agreement (ACA) with a Central American country.¹⁰¹ The current policies change screening requirements, allowing an asylum officer to make a threshold determination as to whether an asylum seeker falls under selected criteria, a decision which is not reviewable by any federal court. Devastatingly, if an asylum seeker is denied the opportunity to apply for asylum in the United States, the U.S. government will also not consider applications for withholding of removal and protection under the Convention against Torture, reasoning that the United States could simply remove the noncitizen to the third country under the agreement.

The United States has recently entered into ACAs with El Salvador, Guatemala and Honduras. These countries are neither "safe" as required by the INA, nor do they provide "access to a full and fair procedure for determining a claim to asylum."¹⁰² Instead, the U.S. government is essentially sending asylum seekers directly back into countries where their lives are threatened while denying them fair and full access to asylum protections mandated under international human rights law, leaving little accountability, transparency or review over how decisions are made about

who is subject to ACAs or what protections asylum-seekers have and receive in ACA countries. Though these agreements have been enacted with the express purpose of increasing efficiency and decreasing backlogs, they serve to create a framework for thwarting legitimate asylum claims without any means of accountability.

VI. CONCLUSION

The New York City Bar Association joins the scores of legal and human rights organizations around the country that have declared the immigration court system hopelessly untethered to providing justice. Given the inherent conflict in housing a judicial body within the nation's top law enforcement agency, the Department of Justice, we call for the removal of the court from DOJ and the creation of a truly independent Article I court. While this call predates the Trump Administration, the many steps that the current administration has taken to politicize the court, as described in this report, have frayed the bare threads of justice that existed before to the point of a complete rupture, leaving not even the appearance of justice or due process of law. It is time – past time – to remedy this conspicuous failure in our legal system and this abuse of the fundamental rights of millions of people.

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October 2020

¹ E.g., American Bar Association, American Immigration Lawyers Association, Federal Bar Association, National Association of Immigration Judges, *Congress Should Establish An Independent Immigration Court* (July 11, 2019), [https://www.naij-usa.org/images/uploads/publications/ABA - Congress Should Establish an Independent Innigration Court.pdf](https://www.naij-usa.org/images/uploads/publications/ABA_-_Congress_Should_Establish_an_Independent_Innigration_Court.pdf); American Bar Association, *ABA Again Calls for an Independent Immigration Court* (July 23, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july_2019_washington_letter/immigration_article_0719/; Federal Bar Association, *Article I Immigration Court* (last visited Oct. 9, 2020), <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/>; American Immigration Lawyers Association, *AILA Calls for Independent Immigration Courts* (Jan. 31, 2020), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts>; Marcia Brown, *The Best Way to Protect Immigrants From the Whims of Politics*, *The New Republic* (Oct. 5, 2020), https://newrepublic.com/article/159530/best-way-protect-immigrants-whims-politics?utm_source=AILA%20Mailing&utm_campaign=5ee067ea28-AILA8-10-05-2020&utm_medium=email&utm_term=0_3c0e619096-5ee067ea28-292020705 (all websites last visited Oct. 19, 2020).

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³ Judge Ashley Tabaddor, *supra*.

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⁶ *Id*.

⁷ Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan To Curb Immigration*, Roll Call, (May 4, 2020), <https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/>.

⁸ *Id*.

⁹ Suzanne Monyak, *Immigration Board Picks Under Trump To Set Lasting Policy*, Law 360, (May 8, 2020), <https://www.law360.com/appellate/articles/1271825/immigration-board-picks-under-trump-to-set-lasting-policy>.

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³⁷ *See, e.g.* <https://www.naij-usa.org/publications/testimony-in-congress>; Written Testimony of J. Ashley Tabbador, before the S. Subcomm. on Border Security and Immigration, *At the Breaking Point: The Humanitarian and Security Crisis at our Southern Border*, 116th Cong., 1st sess., (May 7, 2019) https://www.naij-usa.org/images/uploads/publications/NAIJ_Written_Testimony_Before_Senate_Subcommittee%2C_May_2019.pdf; Letter from J. Ashley Tabbador, President, National Association of Immigration Judges to the Hon. José E. Serrano, Chairman, and Hon. Robert Aderholt, Ranking Member, House Appropriations Committee, Commerce, Justice, Science and Related Agencies Subcomm., (March 12, 2019) https://www.naij-usa.org/images/uploads/publications/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf; Letter from J. Ashley Tabbador, President, National Association of Immigration Judges to the House of Representatives, (January 9, 2019) https://www.naij-usa.org/images/uploads/publications/NAIJ_letter_to_House_of_Representatives%2C_1-9-19_1.pdf; Statement of J. Ashley Tabbador, President, National Association of Immigration Judges before the S. Subcomm. on Border Security and Immigration Hearing, *Strengthening and Reforming America's Immigration Court System*, 116th Congress, 1st sess., (April 18, 2018) https://www.naij-usa.org/images/uploads/publications/NAIJ_Senate_Final_Testimony_4.18_2018_.pdf, J. Amiena Khan and J. Dorothy Harbeck, NAIJ-USA, DOJ Tries to Silence the Voice of the Immigration Judges—Again! (March/April 2020) <https://www.naij-usa.org/images/uploads/newsroom/2020.04.22.02.pdf>; Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 California Western Law Review 36 (2020).

³⁸ National Association of Immigration Judges, Statement on DOJ OIG Report on Executive Office for Immigration Review FY 2019 Financial Management Practices (June 10, 2020) <https://www.naij-usa.org/images/uploads/newsroom/2020.06.10.00.pdf> (citing OIG report at <https://oig.justice.gov/sites/default/files/reports/a20068.pdf>).

³⁹ National Association of Immigration Judges (NAIJ), *The Immigration Court-In Crisis and in Need of Reform* (August 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf.

⁴⁰ *U.S. Dept. of Justice Executive Office for Immigration v. Nat'l Assoc. of Immigr. Judges, Int'l Fed. of Professional and Technical Engineers Judicial Council 2*, WA-RP-19-0067 (July 31, 2020) <https://www.naij-usa.org/images/uploads/newsroom/2020.07.31.00.pdf>.

⁴¹ *Matter of E-F-H-L*, 27 I. & N. Dec. 226 (A.G. 2018) (holding that hearing not required in asylum case); *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) (limiting authority to suspend cases using the procedure known as “administrative closure”); *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) (limiting grounds for asylum claims based on persecution by private actors, potentially affecting claims related to domestic violence and gang violence); *Matter of L-AB-R-*, 27 I. & N. Dec. 405 (A.G. 2018) (making it more difficult and burdensome to obtain a

continuance in immigration proceedings in which the noncitizen is or plans to seek a collateral form of immigration relief); *Matters of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018) (constraining immigration judge's inherent authority to dismiss or terminate removal proceedings); *Matter of Negusie*, 27 I. & N. Dec. 481 (A.G. 2018) (pending); M-G-G-, 27 I. & N. Dec. 475 (A.G. 2018) (pending); *Castillo-Perez*, 27 I. & N. Dec. 664 (A.G. 2019) (holding that two DUIs bar cancellation of removal); *Matter of M-S-*, 27 I. & N. 509 (A.G. 2019); *Matter of Thomas and Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019); *L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019) (narrowing the viability of family as a particular social group); *Matter of R-A-F-*, 27 I. & N. Dec. 778 (A.G. 2020); *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (A.G. 2020) (narrowing the definition of torture); *Matter of A-M-R-C-*, 28 I. & N. Dec. 7 (A.G. 2020) (pending); *Matter of Reyes*, 28 I. & N. Dec. 52 (A.G. 2020) (advancing a new theory of what constitutes an aggravated felony); *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020) (expanding the scope of the BIA's authority in considering matters on appeal).

⁴² The Bush administration issued 16 such decisions; the Clinton administration issued three.

⁴³ *Supra*, note 40.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Matter of Thomas and Matter of Thompson*, 27 I. & N. Dec. 674, 688 (A.G. 2019).

⁴⁷ American Bar Association, Resolution 121A (Aug. 12-13, 2019), available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/121a-annual-2019.pdf>.

⁴⁸ *Matter of E-F-H-L*, 27 I. & N. Dec. 226 (A.G. 2018).

⁴⁹ Notice of Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36277 (proposed June 15, 2020).

⁵⁰ *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 282 (A.G. 2018).

⁵¹ *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

⁵² *Matter of L-A-B-R-et al.*, 27 I. & N. Dec. 405 (A.G. 2018).

⁵³ *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018).

⁵⁴ Memorandum from James R. McHenry, III, Dir., EOIR, Use of Status Dockets (Aug. 16, 2019), <https://www.justice.gov/eoir/page/file/1196336/download>.

⁵⁵ *Id.*

⁵⁶ EOIR, in establishing performance metrics for Immigration Judges discussed the availability of a status docket in 2018, stating, "Eighty-five percent (85%) of all non-status detained removals cases should be completed within 60 days of filing of the Notice to Appear (NTA), reopening or recalendar of the case, remand from the Board of Immigration Appeals (BIA), or notification of detention." Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures to The Office of the Chief Immigration Judge, et al (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

⁵⁷ *Id.*

⁵⁸ Notice of Proposed Rulemaking: Administrative Closure: Appellate Procedures and Decisional Finality in Immigration Proceedings, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020).

⁵⁹ See Immigration. And Nationality Law Committee, NYCBA, *Quotas in Immigration Courts Would Be Neither Efficient Nor Just* (April 10, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/quotas-in-immigration-courts-would-be-neither-efficient-nor-just>; Lous C. LaBrecque, *Immigration Judges Not Meeting DOJ Production Goals, House Told*, *Daily Labor Report*, Bloomberg (Jan. 29, 2020), <https://news.bloomberglaw.com/daily-labor-report/immigration-judges-not-meeting-doj-production-goals-house-told>.

⁶⁰ See TRAC Immigration Project, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/>; American Immigration Lawyers Association, FOIA

Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog, AILA Doc. No. 19021900 (Feb. 21, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/79301>.

⁶¹ TRAC Immigration Project, *The Life and Death of Administrative Closure* (Sept. 10, 2020), <https://trac.syr.edu/immigration/reports/623/>.

⁶² See USCIS, *Refugee, Asylum and International Operations Combined Training Course: Interviewing Survivors of Torture and Other Severe Trauma* (Oct. 11, 2012), available beginning at p. 301 at https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf.

⁶³ See Catholic Legal Immigr. Network, Inc., *Seeking Continuances in Immigration Court in the Wake of the Attorney General's Decision in Matter of L-A-B-R-* (Dec. 6, 2018), <https://cliniclegal.org/file-download/download/public/611>.

⁶⁴ U.S. Citizenship and Immigration Services, *Special Immigrant Juveniles* (last accessed July 20, 2020), available at <https://www.uscis.gov/working-united-states/sij>.

⁶⁵ In order to qualify for SIJS status, an applicant must demonstrate that he or she, amongst other qualifications, is “dependent on the [juvenile] court, or in the custody of a state agency or department or an individual or entity appointed by the court;” cannot be reunified with one or both parents due to abuse, abandonment, neglect, or a similar basis; and it is not in the best interest of the child to return to his or her country of nationality or last residence or that of his or her parents. *Id.*

⁶⁶ Following this determination, a SIJS applicant can petition for SIJS classification by filing a form I-360. If a SIJS classification is obtained, he or she may apply for register permanent residence and adjust his or her status adjustment based on his or her SIJS determination using an I-485. *Id.*

⁶⁷ While the Trafficking Victims Protection and Reauthorization Act provides that a “SIJ” petition pursuant to an I-360 must be adjudicated in 180 days, USCIS has declined to recognize that this constitutes a legal requirement. U.S. Citizenship and Immigration Services, Chapter 4 – Adjudication, Policy Manual Vol. 6 n. 3 (last accessed July 20, 2020), <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4#footnotelink-3>; see also, Immigration Legal Res. Ctr., *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* 4 n. 5 (June 2018), https://www.ilrc.org/sites/default/files/resources/sijs-5th-2018-ch_03.pdf; Complaint - Class Action for Injunctive and Declaratory Relief, *Moreno v. Cissna*, 2:19-cv-00321 (W.D. Wash. March 5, 2019), <https://www.nwirp.org/wp-content/uploads/2019/03/Moreno-Galvez-v-Cissna--Complaint.pdf> (Alleging that on numerous occasions, the Government had exceeded the deadlines imposed on it by Congress and, as a result, applicants had aged out of SIJS status, with the court later enjoining these deportations.)

⁶⁸ The timeline for an adjustment of status pursuant to an I-485 application is based on a quota controlled by the Department of Homeland Security. To apply using an I-485, an applicant's “Final Action Date” must be current. An applicant's final action date is determined by the date on which he or she submitted his or her I-360 petition. As of the July 2020 bulletin, the final action date for SIJS status adjustments, for applicants from El Salvador, Guatemala, and Honduras, was February 1, 2017. For January, February, March, and May 2020, the current date was August 2016 with the date retrogressing to July 2016 during April 2020. *Special Immigrant Juvenile Status Manual*, SAFE PASSAGE PROJECT 54 (3d ed. 2017) <https://www.safeassageproject.org/wp-content/uploads/2017/09/Safe-Passage-Project-SIJS-Manual-summer.2017.pdf>; *Adjustment of Status Filing Charts from the Visa Bulletin*, U.S. Citizenship and Immigration Services (last accessed July 20, 2020), available at <https://www.uscis.gov/visabulletininfo>.

⁶⁹ Status Docket Memorandum, *supra* n. 1.

⁷⁰ Lenni Benson & Alexandra Rizio, *EOIR Policy Memo 19-13, “Use of Status Dockets” How the Court Administration is Constraining Local Control*, Safe Passage Project (Sept. 4, 2019) (finding that the policy did left some ambiguity as to when, in the SIJS process, a status docket might be used), <https://www.safeassageproject.org/2019/09/eoir-policy-memo-19-13-use-of-status-dockets-how-the-court-administration-is-constraining-local-control/#:~:text=On%20August%2016%2C%202019%2C%20Executive,the%20use%20of%20status%20dockets.&text=The%20status%20docket%20allowed%20young,to%20become%20available%20to%20them>.

⁷¹ See TRAC Immigration Project, *With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported* (Oct. 18, 2016), <https://trac.syr.edu/immigration/reports/441/>; Jeffrey S. Chase, *EOIR*

Creates More Obstacles for Families (Dec. 13, 2018), <https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families>.

⁷² Memorandum Mary Beth Keller, Chief Immigration Judge, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 18-0 1: Change of Venue to All Immigration Judges, et al. (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026726/download>.

⁷³ Hamed Aleaziz, *Immigration Judges Are Railing Against A Plan To Replace Court Interpreters With Videos*, BuzzFeed (July 12, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-judges-court-interpreters-videos>.

⁷⁴ Laura Abel, *Language Access in Immigration Courts*, Brennan Center for Justice at New York University School of Law (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf.

⁷⁵ E.g., Kate Brumback, Deepti Hajela & Amy Taxin, *AP visits immigration courts across US, finds nonstop chaos*, Associated Press (Jan. 19, 2020), <https://apnews.com/7851364613cf0afbf67cf7930949f7d3>; Camila DeChalus, *Immigration attorneys face courtroom challenges amid pandemic*, Roll Call (June 17, 2020), <https://www.rollcall.com/2020/06/17/immigration-attorneys-face-courtroom-challenges-amid-pandemic/>.

⁷⁶ See Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do.*, Politico (Sept. 27, 2017), <https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649>.

⁷⁷ 85 Fed. Reg. 11866 at 11870 (Feb. 28, 2020).

⁷⁸ Notice of Proposed Rulemaking: Administrative Closure: Appellate Procedures and Decisional Finality in Immigration Proceedings, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020).

⁷⁹ See *id.* at 52500 (proposed 8 CFR § 1003.1 (d)(7)(v)).

⁸⁰ *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020).

⁸¹ EOIR, *Current Representation Rates* (Apr. 15, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>.

⁸² Office of Public Affairs, Dep't. of Justice, Executive Office for Immigration Review Releases Court Statistics, Announces Transparency Initiative, Justice News (May 9, 2018) <https://www.justice.gov/opa/pr/executive-office-immigration-review-releases-court-statistics-announces-transparency>.

⁸³ TRAC Immigration Project, *Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy* (Oct. 31, 2019), <https://trac.syr.edu/immigration/reports/580/>.

⁸⁴ *Id.*

⁸⁵ TRAC Immigration Project, *EOIR's Data Release on Asylum So Deficient Public Should Not Rely on Accuracy of Court Records* (June 3, 2020), <https://trac.syr.edu/immigration/reports/611/>.

⁸⁶ *Id.*

⁸⁷ Letter from James R. McHenry III, Director, Executive Office for Immigration Review to Susan B. Long & David Burnham, TRAC Immigration Project Co-Directors (June 12, 2020) <https://trac.syr.edu/immigration/reports/614/include/EOIR.McHenry.Response.--.TRAC.Letter.Response.6.12.20.pdf>.

⁸⁸ TRAC Immigration Project, *After EOIR Fixes Most Egregious Data Errors, TRAC Releases New Asylum Data— But with a Warning* (Sept. 16, 2020), <https://trac.syr.edu/immigration/reports/624/>.

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⁹⁰ E.g., DOJ EOIR (@DOJ_EOIR), Twitter (Sept. 17, 2020, 4:28 PM), https://twitter.com/DOJ_EOIR/status/1306691484142448643 (“Due to civil unrest, the New York – Broadway, New York – Federal Plaza, and New York

– Varick Street Immigration Courts closed at 3 p.m. today.”); DOJ EOIR (@DOJ_EOIR), Twitter (Mar. 24, 2020, 6:12 PM) (deleted) (“Effective tomorrow, the below immigration courts reopen for the limited purpose of accepting filings. All filings due during the closures and today are now due.”). *See also* Suzanne Monyak, *6 Immigration Courts Reopened For Filings Amid Pandemic*, Law360 (Mar. 25, 2020), <https://www.law360.com/articles/1256947/6-immigration-courts-reopened-for-filings-amid-pandemic>.

⁹¹ U.S. Dep’t of Homeland Security, Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador (2019) https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.

⁹² U.S. Customs and Border Protection, Migrant Protection Protocols (Jan. 28, 2019), <https://www.cbp.gov/document/guidance/migrant-protection-protocols>.

⁹³ Mica Rosenberg, Kristina Cooke, & Reade Levinson, *Hasty rollout of Trump immigration policy has 'broken' border courts*, Reuters (Sept. 10 2019), <https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115>; Krista Kshatriya & S. Deborah Kang, *Walls to Protection: The Grim Reality of Trump’s “Remain in Mexico” Policy*, U.S. Immigration Policy Center (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-walls-to-protection-final.pdf>.

⁹⁴ According to an independent analysis of data obtained from the Executive Office for Immigration Review (the office that oversees the immigration courts), less than 5% of asylum seekers in MPP have a lawyer. Through the end of December 2019, just 2,765 people subject to MPP had secured lawyers out of 59,241 people who had been placed in court proceedings. American Immigration Council, Fact Sheet: Policies Affecting Asylum Seekers at the Border (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

⁹⁵ Michelle Hackman, *U.S. Opens Immigration ‘Tent Courts’ to Public*, WSJ (Dec. 29, 2019), <https://www.wsj.com/articles/u-s-opens-immigration-tent-courts-to-public-11577620801?mod=searchresults&page=1&pos=2>.

⁹⁶ *See* <https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful>.

⁹⁷ *See* American Immigration Lawyers Association, Policy Brief: Public Access to Tent Courts Now Allowed, but Meaningful Access Still Absent, AILA Doc. No. 20011061 (Jan. 10, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/public-access-tent-courts-allowed-not-meaningful>. “Individual Merits Hearings only at the brick-and-mortar courtrooms where the judges appearing by VTC were located. However, remote observation is not an adequate substitute for access to the tent courts because observers are not able to assess how the proceedings are operating from the vantage point of the individual respondent, who is the most gravely impacted by these proceedings.” *See Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Adolfo Flores, *Immigration “Tent Courts” Aren’t Allowing Full Access To The Public, Attorneys Say* (Jan. 13, 2020), <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>.

¹⁰¹ INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (2018).

¹⁰² Human Rights Watch, *Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement* (May 19, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.



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January 21, 2021

Via email

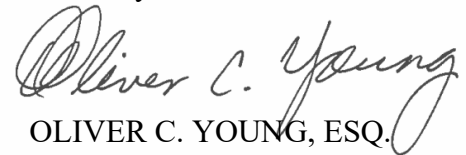
Thomas Richards
trichards@nysba.org

Dear Mr. Richards:

The Board of Directors for the Bar Association of Erie County and our Human Rights Committee have reviewed the report of the New York City Bar Association recommending the creation of an independent Article I immigration court outside of the Department of Justice. It is our understanding that NYSBA's Committee on Immigration Representation is in support of this recommendation.

Please be advised that the BAEC is also in support of the report and recommendation of the NYC Bar Association. We thank the Committee on Immigration Representation for championing this issue and hope that the House of Delegates will support this initiative as well.

Sincerely,


OLIVER C. YOUNG, ESQ.
President

cc: Anne M. Noble, BAEC Executive Director



COMMITTEE ON LEGAL AID

January 12, 2021

RE: Report and Recommendations of the Committee on Immigration Representation

The Committee on Legal Aid enthusiastically supports the recommendation to establish an independent Article I federal immigration court. The independence of such a court would safeguard against abusive immigration control policies, validate the integrity of our immigration and naturalization system, and, for the benefit of our clients, ensure that all those seeking citizenship or residency in the United States are able to do so with dignity, respect, and the support of the rule of law.

Thank you.

Very truly yours,

Sally Curran
Co-Chair, Committee on Legal Aid

Adriene Holder
Co-Chair, Committee on Legal Aid