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United States Senate
WASHINGTON, DC 20510–3905

http://whitehouse.senate.gov
(202) 224–2921
TTY (202) 224–7746
170 WESTMINSTER STREET, SUITE 200
PROVIDENCE, RI 02903
(401) 453–5294

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).[1] The Trump administration also has released a series of rules that will allow for increased political influence over individual cases.[2] 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.[3] The Fifth Amendment guarantees the right to due process in deportation proceedings,[4] including "the right

[1] 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.
[2] 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).
[3] 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.").
[4] E.g., Reno v. Flores, 507 U.S. 292, 306 (1993).

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

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."[11] 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."[12] This principle is vitally important when deportation—"a drastic measure, often amounting to lifelong banishment or exile"—is at stake.[13]

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.[14]

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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[5] 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)).

[6] 18 U.S.C. § 1229a(b)(4)(A).

[7] Id. § 1229a(b)(4)(B).

[8] 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).

[9] 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").

[10] 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 . . . .").

[11] Address of John Marshall, PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830 616 (1830).

[12] Williams v. Pennsylvania, 136 S.Ct. 1899, 1909 (2016).

[13] Sessions v. Dimaya, 138 S.Ct. 1204, 1213 (2018) (internal citations and quotations omitted).

[14] 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.[15] EOIR is led by a Director who is appointed by the Attorney General. The Director sets policy and supervises and evaluates immigration judges' performance.[16] Among those policies are case management procedures that have historically balanced the timely determination of appeals with the requirements of due process.[17]

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.[18] 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.[19] In other words, no single judge or EOIR official could make a BIA decision binding.[20]

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."[21]

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[22] and eliminating judges' ability to administratively close cases,[23] 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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[15] See 8 C.F.R. § 1003.1(a).
[16] 8 C.F.R. § 1003.0(b).
[17] 8 C.F.R. § 1003.1(e)(8)(i).
[18] 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.
[19] 8 C.F.R. § 1003.1(g) (2018).
[20] Decisions by the Attorney General, which were previously rare, see infra, were also binding.
[21] 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).
[22] 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.
[23] 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.[24] And in at least one instance, EOIR officials have apparently reassigned cases away from a judge because the Attorney General disagreed with his rulings.[25]

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.[26] 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."[27] However, DOJ has changed the qualifications for immigration judges to favor those with law enforcement experience over those with other types of experience.[28] 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.[29] All six were immigration judges known for their high asylum denial rates:[30] over 80 percent, compared to the national average of 57 percent.[31] 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.[32] Although these issues raise significant questions about these individuals' performance as judges, they were omitted from the memos recommending that these judges be hired.[33] 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.[34]

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[24] 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.

[25] 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.

[26] 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).

[27] 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.

[28] Am. Bar Assoc., supra note 26, at 22.

[29] Misra, supra note 1.

[30] 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.

[31] Misra, supra note 1.

[32] Id.

[33] Id.

[34] 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."[35] 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."[36] 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."[37]

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,[38] 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.[39] Trump administration Attorneys General have exercised this power 16 times in just two and a half years.[40] These decisions "substantially rewrit[e] immigration law . . . unilaterally and with an undeniably ideological bent."[41] You also finalized a rule that gave himself unilateral authority to make any decision by the BIA binding.[42] 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.[43] 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."[44]

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[35] Innovation Law Lab & Southern Poverty Law Center, supra note 26, at 18.
[36] Id.
[37] Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS, Feb. 13, 2019, https://perma.cc/24XF-QMDP.
[38] 8 C.F.R. § 1003.1(h)(1).
[39] Available on request.
[40] 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).
[41] Am. Bar Assoc., supra note 26, at 17.
[42] Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, supra note 2.
[43] Interim Rule, supra note 2.
[44] 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.[45] 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."[46] Immigration courts still rely exclusively on voluminous paper files, and lack sufficient support staff or translators to function efficiently.[47] The administration has also repeatedly redirected judges to focus on new "priority cases," causing chaos.[48] When particular cases are expedited, pre-scheduled cases are moved months or years into the future.[49] 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.[50]

As a result, the immigration case backlog has only increased, ballooning from 504,394 cases in 2016[51] to over 1.3 million by September 2019.[52] 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.[53]

Even as the administration has requested—and Congress has appropriated—additional funds,[54] EOIR cannot "answer simple budgetary and oversight questions" from the Senate Committee on Appropriations to justify how they are spending their money.[55] 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.[56]

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[45] 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.

[46] Innovation Law Lab & Southern Poverty Law Center, supra note 26, at 20.

[47] Id.

[48] Id. at 19.

[49] Id.

[50] Id. at 20.

[51] 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.

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

[53] *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 (last visited Sept. 30, 2019).

[54] 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.

[55] 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.

[56] 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.[57]

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

[57] Williams, 136 S.Ct. at 1909.

Mazie K. Hirono
United States Senator

Richard Blumenthal
United States Senator

Kamala D. Harris
United States Senator

Amy Klobuchar
United States Senator

Cory A. Booker
United States Senator

Patrick Leahy
United States Senator

Christopher A. Coons
United States Senator