

Human Rights at Risk: The Immigration Courts Are in Need of an Overhaul

The views expressed here do not represent the official position of the United States Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.



“While immigration courts reside within the executive branch, they should not be merely a tool to achieve desired

policy outcomes.”

—*Senator Sheldon Whitehouse*

So wrote Senator Sheldon Whitehouse (D-RI) in his [February 13, 2020, letter to Attorney General William Barr](#), in which he and eight members of the Senate Judiciary Committee called upon Barr to take action against, what he termed, an increasingly troubling politicization of the immigration court adjudication process.

The stakes couldn't be higher for those seeking human rights protection in the form of asylum and other forms of relief from persecution and torture. Individual liberty and personal safety interests are often at stake in immigration court proceedings where immigration judges have the authority to grant protection from persecution. *Id.*; see also, 8 U.S.C. 1158.

Whitehouse gave voice to what is becoming an alarming trend—the increasing political influence over individual immigration cases. This action, he explained, is undermining the public's confidence in the immigration courts and creating an 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.” Whitehouse Letter, *supra*, at 5; see also, 8 U.S.C. Section 1229a(b)(4)(A) and (B); 8 C.F.R. 1003.10(b).

Whitehouse recounted a sentiment articulated previously by a host of legal community leaders for more than a decade, not the least of which was ABA President Judy Perry Martinez, who in a [recent statement before the U.S. Congress](#) explained that housing a court within a law enforcement agency has exacerbated an inherent conflict of interest undermining “the basic structural and procedural safeguards that we take for granted in other areas of our justice system.” See, [Am. Bar. Assoc., 2019 Update Report: Reforming the Immigration System, Proposals to Promote Independence](#),

[Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases](#) (Mar. 2019). As she explained, "this structural flaw leaves Immigration Judges particularly vulnerable to political pressure and interference in case management." Martinez Testimony, *supra*, at 1.

It is important to note that these concerns are being expressed on the heels of what some see as growing impunity within the executive branch, focused almost single-mindedly on the speed of removal hearings at the risk of diminished due process. See Statement of Jeremy McKinney, Secretary, American Immigration Lawyer's Association, NPR, [Justice Department Rolls Out Quotas for Immigration Judges](#) (April 3, 2018). The Justice Department is being charged with implementing a host of policies that diminish the primary responsibility of ensuring a fair hearing. For the past three years, the attorney general has used a process known as "certification," a power historically used sparingly, to overrule decisions made by the Board of Immigration Appeals and set binding precedent. *Id.* Some have argued that the frequency with which this procedure has recently been employed borders on abuse as it seeks to severely limit the number of immigrants who can remain in the United States. Whitehouse Letter, *supra*, at 5. Equally troubling is the charge that the attorney general is using certification as a way to overrule immigration judges whose decisions don't align with the administration's immigration agenda. *Id.*

One area of particular concern is the recent encroachment by the agency into judicial independence. The National Association of Immigration Judges (NAIJ), which is the union representing sitting immigration judges, argues, alongside many others in the legal community, that these incursions into judicial independence are part of a broader effort to fundamentally alter how immigration removal cases are adjudicated, and that such actions are having deleterious effects. See [Statement of Judge A. Ashley Tabaddor](#), President of the National Association of Immigration Judges, Before the

Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" 2 (Apr. 18, 2018).

Among the new measures implemented by the Justice Department are unrealistic and impractical one-size-fits-all case quotas and deadlines that squeeze immigration judges where they are most vulnerable—their status as "employees." If an immigration judge provides one too many case continuances, even though related to a valid due process concern, she risks being terminated. Every pause for judicial reflection, or break for much needed legal research, risks slowing down the "deportation machinery" that the adjudication process is veering toward and threatens to eviscerate procedural due process, even though such due process is mandated by the U.S. Constitution. *Id.*

These controversial new policies have become so pervasive and so threatening to judicial independence that they have raised alarms. What began in 2018 as a few dramatic instances involving the abrupt removal and reassignment of cases from an immigration judge's docket previewed the agency's more recent alarming actions where the shuffling of scores of cases and entire dockets sometimes multiple times within a single day has become the norm. The endless docket shuffling, and the chasing of performance "completions" that correspond to a job-preserving metric, seems designed to make political statements rather than ensuring victims of human rights abuses are afforded due process. A complex, multi-witness, multi-issue hearing is afforded the same value as an order of removal for failure to appear at a hearing. See Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration System Reeling*, 55 Cal. W. L. Rev. 2 (2019).

The political backdrop couldn't be more fraught with last year's highly

politicized standoff between President Donald Trump, who has expressed hostility toward the Immigration Judge Corps, and Congress, over how to fund immigration-related border security, including the provision of Immigration Court funding. [H.R.J. Res. 31 116th Cong.](#) (2019). That impasse culminated in an unprecedented 35-day shutdown of the Justice Department, with appropriations not finalized until four months into fiscal year 2019. See Mallory Moench, [Immigration Courts in New York Stymied by Government Shutdown](#), TimesUnion (Jan. 22, 2019).

During the shutdown, most immigration courts were closed, and it is estimated that some 80,000 immigration court cases, which were scheduled to be heard during that period, were essentially “shelved” until they could be rescheduled some time in the next few years. The courts have still not fully recovered from this shock to the workload and are running the highest backlogs that have ever been recorded. See Ashley Tabaddor, [Insight: Immigration Courts Face More Than 80,000 Canceled Hearings in Federal Shutdown](#), Bloomberg Law (Jan. 29, 2019, 4:01 PM). As Judge Ashley Tabaddor, NAIJ president, has testified, despite funding allocations at record levels, the immigration courts have been hobbled by politically motivated docket shuffling and a heavy focus of resources skewed toward supervisory judges at the expense of trial judges and their support teams, which are critical to maintaining an efficient active docket. See [Statement of Judge A. Ashley Tabaddor](#), Jan. 29, 2020, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts.”

The ABA has renewed its commitment to taking a leadership role in calling for an independent Article I Immigration Court. In Perry Martinez’s recent testimony before the House of Representatives Committee on the Judiciary, Subcommittee on Immigration and Citizenship, she acknowledged that

while there are incremental reforms that the ABA could recommend within the current structure, the only way to resolve systemic issues within the immigration adjudication system is through the creation of an independent Article I court. See Martinez Testimony.

From unrealistic performance measures imposed on immigration judges, the unprecedented certification of cases to the attorney general for decision, to allegations of partisanship in the appointment of judges to the Board of Immigration Appeals, and the unparalleled regulatory schema now imposed whereby the director of the Executive Office for Immigration Review, itself a political appointment, will now serve as an appellate judge in addition to his prior responsibilities enabling political influence over individual cases, concern is mounting about the administration's apparent efforts to undermine the independence of immigration courts. *Id.*