

# The Urgent Need to Restore Independence to America's Politicized Immigration Courts

by Gregory Chen

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The Trump administration has subjected America's courts to extreme politicization and relentless assaults in the past four years. At the highest level, the deeply partisan battle over the Supreme Court confirmation of Justice Amy Coney Barrett transfixed the nation. But an even more radical transformation has been occurring in America's immigration courts that has gone almost entirely unnoticed yet impacts hundreds of thousands of lives each year.

In a single term, Trump has filled the immigration courts with judges that hew to his [anti-immigrant agenda](#) and has implemented policies that severely compromise the integrity of the courts. Strained to the breaking point under a massive backlog of cases and a systemic inability to render consistent, fair decisions, the immigration courts require the urgent attention of the incoming Biden administration.

Most people apprehended by immigration enforcement authorities are removed from the United States without ever seeing a judge. The fortunate few who come before a judge are those seeking asylum or who need humanitarian relief that only an immigration judge can grant. Despite this critical role, these courts have suffered for years from underfunding, understaffing, and deep structural problems such as the fact that, unlike other courts, they operate under the jurisdiction of a prosecutorial agency, the Department of Justice, whose aims and political interests often conflict with the fundamental mission of delivering impartial and fair decisions. In recent years, the Justice Department has exercised its power to the maximal extent, stripping judges of fundamental authorities and rapidly appointing judges, to bend the courts toward political ends.

The intense public debates that accompany the Senate confirmation of Supreme Court nominees stand in sharp contrast to the lack of any public or congressional oversight into the appointments of immigration judges. During his time in office, President Donald Trump has [appointed](#) at least 283 out of a total of 520 immigration judges with no more fanfare than a public notice on the court's [website](#).

The Trump administration has not only chosen the majority of immigration judges but has also stacked the courts with appointees who are biased toward enforcement, have histories of poor judicial conduct, hold anti-immigrant views, or are affiliated with organizations espousing such views. Human Rights First [found](#), for example, that 88 percent of immigration judges appointed in 2018 were former Department of Homeland Security (DHS) employees or attorneys representing the department.

Especially egregious are the appointments of the [Chief Immigration Judge](#), who was previously the chief prosecutor for Immigration and Customs Enforcement and lacked any bench experience; the [Chief Appellate Judge](#), who was a Trump advisor on immigration policy and a former prosecutor; and an immigration judge who worked for the Federation for American Immigration Reform, a [known hate group](#). With the pace of appointments accelerating, it's likely that even more judges conforming to that mold will be appointed before the administration's term ends. In each of the most recent fiscal years, the administration has hired [progressively more judges](#): 81 in 2018; 92 in 2019; and 100 in 2020.

### **Packing the Board of Immigration Appeals**

The idea of packing the Supreme Court was heavily debated in the run-up to the election, but court-packing has already occurred on the Board of Immigration Appeals — the immigration appellate body — with the Trump administration's addition of six new positions that [raised](#) the total [size of the board](#) from 17 to 23. The two regulations expanding the board were promulgated in rapid succession, each on an [expedited basis](#) that afforded no opportunity for public comment.

The expansion of the Board was another brazenly transparent move to fill the bench with [judges unsympathetic](#) to those appearing before them. Data from 2019 reveal that six immigration judges whom Attorney General William Barr elevated to serve as Board members had [abysmal asylum grant rates](#) — an average of 2.4 percent — that were [far below the norm](#) of 29 percent. Two of those judges denied every asylum case that year. In a manner of speaking, these judges never met an asylum seeker they liked.

The next year, Justice Department leadership tried to cull the nine appellate judges appointed by previous administrations by offering them buyout packages if they resigned or retired early. None took the deal, and thereafter, changes were made to their positions to make them more vulnerable to pressure from above and further intimidate them into leaving.

A judicial system that is buffeted so wildly by political waves cannot retain the public's trust that it will deliver fair decisions. A similar attempt made at the end of the George W. Bush administration resulted in a [hiring scandal](#) that rocked the Justice Department. An [oversight investigation](#) found its leadership had violated federal law by considering immigration judge candidates' political and ideological affiliations. Monica Goodling, Attorney General Alberto Gonzales's White House Liaison, and other department staff had improperly screened candidates based on their political opinions by examining voter registration records and political contributions and asking about political affiliations during interviews. Now, at the request of eleven democratic senators, including Senator and Vice President Elect Kamala Harris, the [Government Accountability Office](#) has launched an investigation into the Trump administration's politicization of the immigration courts.

Political interference with the immigration courts rises to the very top of the Department of Justice. Both Attorneys General Jeff Sessions and Barr vigorously exercised an unusual authority that enables them to overturn and rewrite the Board of Immigration Appeals' decisions. In a series of opinions, Sessions divested judges of the powers they need to control their dockets, such as the authority to administratively close, continue, or terminate cases that are not suitable or ready for hearing. (*Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of L-A-B-R-, et al.*, 27 I&N Dec. 405 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).)

## Quota System

A similar move to pressure judges to decide cases quickly rather than fairly was the imposition of a quota system that requires immigration judges to decide a fixed number of cases every year and threatens their job security if they fail to meet the factory floor expectations. Ironically, but not surprisingly, by crippling judges' ability to manage their caseloads, the Trump administration has made courts less efficient. Since Trump entered office, the number of cases waiting to be heard has [more than doubled](#) from about 600,000 to 1.3 million.

The systemic harm caused by the administration's agenda is indisputable: in 2020, the courts [denied 72 percent](#) of all asylum cases, a historic record for denial rates. The administration's transformation of the courts into a conveyor belt for deportation is causing thousands of people to be unjustly removed from the country and forced back into harm's way. Like the Trump administration's Remain in Mexico program and its family separation policy, the sweeping changes in court policies have whittled away court procedures to achieve shameless political ends rather than fair and just results.

There is a powerful imperative for incoming President Joe Biden to act swiftly to restore the integrity of the immigration courts. That should start with choosing an Attorney General who pledges to respect, not interfere with, the courts' decisional independence. No less essential, that Attorney General's hiring of judges must be insulated from politics. The new AG should replace favoritism for prosecutors with emphasis on candidates who offer diverse skills, such as experience representing people appearing before the courts. The creation of a judicial appointments commission would increase public oversight into the hiring process and help improve diversity among candidates. Quotas and other counterproductive policies that turn courts into factory assembly lines should be rooted out. The new department leader should set standards of judicial conduct that ensure impartiality and require judges with strong ideological leanings to be trained to minimize improper biases.

Recognizing that legal representation helps ensure fundamentally fairer proceedings and improves the efficiency of the courts, the Biden administration should also expand the legal counsel programs for [unaccompanied children](#) and [detained people](#) with

mental disorders piloted during the Obama administration and create a universal system of representation.

In just one term, the Trump administration has laid bare the structural weakness of America's immigration courts as a judicial body that is subservient to a prosecutorial agency. With the courts being driven into crisis by its politically motivated leadership, my organization, the American Immigration Lawyers Association, has called upon Congress to pass legislation creating an Article I immigration court system that is independent of the Department of Justice. Only through legislation can truly lasting reform be assured. AILA is joined by the American Bar Association, the Federal Bar Association, and the National Association of Immigration Judges in making this call. Until Congress can deliver such a bill for President Biden's signature, he should do everything in his power to reestablish fairness, consistency, and efficiency in our nation's immigration court system.

*IMAGE: Recently apprehended migrants are escorted inside the El Paso County detention facility by a Customs and Border Protection agent on June 12, 2019 in El Paso. (Photo credit should read PAUL RATJE/AFP via Getty Images)*

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