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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 24, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Attorney General Garland:

We urge you to reverse the prior Administration's attacks on the National Association of Immigration Judges (NAIJ) and the independence of immigration judges more broadly. As we work to improve the efficiency, fairness, and stability of our immigration system and repair the untold damage caused by the Trump Administration, it is crucial that you take steps to restore the independence of immigration judges. The NAIJ – the immigration judges' longstanding union – must be allowed to retain its full authority as the judges' recognized representative for collective bargaining purposes.

As you are aware, on November 2, 2020, one day before the Presidential election, two Trump Administration appointees to the Federal Labor Relations Authority (FLRA) issued a decision that effectively decertified the NAIJ.¹ This decision overturned a prior decision from July 31, 2020, that rejected a petition from the Executive Office for Immigration Review (EOIR) to decertify the NAIJ. The November decision reversed two decades of precedent by holding that immigration judges are "management officials" who may not form a union.² The Trump Administration's petition to decertify the NAIJ and the FLRA's eleventh-hour decision appear politically motivated and threaten the independence of our immigration courts.

For the majority of former President Trump's tenure in office, immigration judges were severely constrained in their ability to speak publicly about immigration issues.³ Immigration judges opposed not only the restriction on their speech but also many of the Administration's attempts to control and reshape the immigration court system.⁴ In this context, the Trump

¹ Erich Wagner, *FLRA Overturns Its Own Regional Director, Busts Immigration Judges' Union*, GOVERNMENT EXECUTIVE (Nov. 3, 2020), <https://www.govexec.com/management/2020/11/flra-overturns-its-own-regional-director-busts-immigration-judges-union/169769/>.

² U.S. DOJ, Executive Office for Immigration Review and National Association of Immigration Judges, 71 FLRA 1046 (2020).

³ Cristian Farias, *The Trump Administration Is Gagging America's Immigration Judges*, THE ATLANTIC (Feb. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195/>.

⁴ Priscilla Alvarez, *Immigration judges accuse Justice Department of muzzling them*, CNN (July 1, 2020), <https://www.cnn.com/2020/07/01/politics/immigration-judges-lawsuit/index.html>.

Administration's petition to decertify the NAIJ and the FLRA's decision appear to have been part of a deliberate attempt to muzzle immigration judges and stifle opposition to the Administration's anti-immigrant agenda.

Without collective bargaining rights and the protection of the NAIJ, immigration judges will be less independent and more susceptible to political pressure. The Trump Administration demonstrated the gravity of this threat by attempting to impose a political agenda on the immigration courts.⁵ We appreciate your commitment to restoring the efficiency and integrity of our immigration court system. Without the additional protections NAIJ offers, however, the court system will remain susceptible to actions by future administrations that would further undermine its fairness and efficiency.

Please respond to the below questions by June 14, 2021.

1. What plans are in place or are being developed to alter EOIR's stance toward the NAIJ? How will your Department alter or undo EOIR's petition to the FLRA and the subsequent effective decertification of the NAIJ?
2. We understand that EOIR is undertaking a full review of the "speaking-engagement policy" for immigration judges.⁶ How do you intend to alter this policy to ensure that immigration judges are able to engage in protected First Amendment speech?

We appreciate your prompt attention to this important request.

Sincerely,


RICHARD J. DURBIN
Chair


ALEX PADILLA
Chair, Subcommittee on
Immigration, Citizenship, and
Border Safety

⁵ Reade Levinson, Kristina Cooke, and Mica Rosenberg, *Special Report: How Trump administration left indelible mark on U.S. immigration courts*, REUTERS (Mar. 8, 2021), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179>.

⁶ Press Release, *National Association of Immigration Judges v. McHenry*, THE KNIGHT FIRST AMENDMENT INSTITUTE (April 2020), <https://knightcolumbia.org/cases/naij-v-mchenry>.



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