



## **An Article I Immigration Court - Why Now is the Time to Act A Summary of Salient Facts and Arguments**

Prepared by the National Association of Immigration Judges  
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The comprehensive immigration reform bill recently announced by the Biden administration includes numerous proposals to overhaul the nation's immigration system. The plan fails to include, however, critical structural reforms to our nation's immigration courts. This summary explains the current state of the immigration courts and describes the urgent need for the creation of an independent immigration court established by Congress under Article I of the United States Constitution.

### **The Current Immigration Court System**

The immigration court is a component of the U.S. Department of Justice, under an entity called the Executive Office for Immigration Review (EOIR). The Director of EOIR, though nominally a career appointee, serves to implement the administration's immigration priorities and reports directly to the Deputy Attorney General. In the past four years, however, this position became increasingly politicized.

Presently, the immigration court is composed of approximately 500 trial immigration judges and 23 immigration appeals judges (sometimes referred to as Board of Immigration Appeals (BIA) members). Decisions by the BIA can create binding precedent for immigration courts across the nation. Under recently promulgated regulations, the EOIR Director, who is not required to be either a judge or even an attorney, now has the authority to issue her own precedential decisions. In addition, the Attorney General has the authority to issue precedential decisions, overruling both the EOIR Director and BIA.

### **The Need for Structural Immigration Court Reform**

In its current form, the immigration courts are pulled from one political priority to another every time a new administration comes into office, crippling its efficiency and due process. Under the prior administration, the immigration courts were weaponized to prioritize immigration enforcement. In furtherance of politicized law enforcement priorities, the past administration implemented production quotas and deadlines on immigration judges. Under these quotas and deadlines, judges who failed to complete 700 cases a year or granted too many continuances placed their jobs at risk. This judicial evaluation system incentivized -- even required -- judges to take shortcuts, deny continuances, and order removals. The encroachment on judicial independence has been severe.

The prior administration also stripped immigration judges of tools to manage their own dockets and exerted centralized control through a team of recently hired supervisory immigration judges, many without any prior judicial experience. These supervisory Assistant Chief Immigration Judges handled few cases on their own and were tasked with making sure immigration judges followed the

enforcement priorities of the administration. As part of the prior administration's efforts to speed deportations, immigration judges were barred from administratively closing cases and forced to shuffle their dockets to prioritize cases based on political priority rather than judicial efficiency. The principles of efficient court management do not always coincide with an enforcement perspective, which is why no criminal court would allow the police department to control its docket. The current structure does just that, thereby tainting the neutrality of the court's management decisions.

Because immigration court management was focused on enforcing the administration's deportation priorities, it failed to provide the basic court infrastructure needed to operate a court. Immigration courts are now dramatically understaffed with regard to clerical staff. Despite the mandate in several recent appropriations bills that judge teams be hired (composed of a judge, a judicial law clerk, an interpreter and two legal assistants), EOIR disregarded that and instead focused on hiring supervisors and judges without concomitant staff.

EOIR has also been unable to keep pace with the training, administrative, and technological needs of the court's expanding caseload. Technical problems with videoconferencing frequently impact hearings. EOIR has been unable to adequately address the changing operational needs created by the pandemic because, despite the promise of electronic filing and case files made in 2001, the immigration courts are not uniformly paperless, as EOIR refused to embrace the federal courts' PACER system and opted to build their own electronic case management system. It is still very much an unfinished work in progress.

When widespread stay-at-home orders were imposed, EOIR did not have laptop computers to provide to all immigration judges and judicial law clerks. And it refused to institute remote hearing capability to let judges conduct hearings outside of the courthouse. In fact, while courts across the country pivoted quickly to the use of remote virtual hearings to protect the workforce and the public, immigration courts continued with in-person court hearings, causing unpredictability and exposure to COVID.

The result of this political control and gross mismanagement was foreseeable. Caseloads are at an all-time high. Approximately, 1.3 million cases are now pending before approximately 500 immigration judges nationwide. This is an average of over 2600 pending cases per judge, compared to an average of 440 per U.S. District Court Judge.

### **The Article I Solution**

Understandably, public faith in the immigration courts has been undermined by the placement of these tribunals in a law enforcement agency. For years, concerns have been raised about impartiality of the immigration courts. The lack of public trust has been exacerbated by both real and perceived bias towards enforcement concerns and an inappropriately deferential relationship with the Department of Homeland Security.

Establishing an immigration court under Article I of the Constitution is the only enduring solution to these concerns. It would provide transparency to the public regarding removal proceedings, transparency regarding judge conduct and discipline, and transparency regarding funding to assure that the immigration courts are appropriately funded. This idea has been endorsed by two bipartisan commissions in the last 30 years and by more than 120 prestigious bar associations and legal organizations, including the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association. No immigration reform will be complete without reform of our court.

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