



Policy Brief: Facts About the State of Our Nation's Immigration Courts

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On May 8, 2019, the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) distributed a document to journalists that contained misleading material related to our nation's immigration courts.¹ The document, which purports to list "myths" and "facts", is also filled with political rhetoric.² America's courts are meant to be impartial, dedicated to fairly and efficiently adjudicating the cases brought before them. Together, the document's deceptive information and polarizing rhetoric further undermines the court system's ability to be a neutral arbiter of justice and comes at a time when there is a severe lack of public confidence in its capacity to deliver fair and timely decisions.³ EOIR's skewed portrayal only demonstrates the urgent need for Congress to create an independent court, separate from DOJ.

- **The immigration court structure is inherently flawed**

Unlike many judicial bodies, the immigration courts lack independence from the executive branch because they are administered by EOIR, which is housed under DOJ – the same agency that prosecutes immigration cases at the federal level.⁴ This inherent conflict of interest is made worse by the fact that immigration judges (IJs) are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them under the control of the U.S. Attorney General (AG), the chief prosecutor in immigration cases.

Because of this structural flaw, the immigration court system has long been vulnerable to political pressure from the executive branch. For example, the courts have been repeatedly subject to "aimless docket reshuffling" based on politically motivated priorities.⁵ President Obama's administration prioritized the adjudication of "family unit" cases which EOIR recently determined "coincided with some of the lowest levels of case completion productivity in EOIR's history."⁶ President Trump ordered IJs deployed to detention facilities on the border where they reported that they had very few cases to adjudicate. Over 20,000 cases were rescheduled as a result of the Administration's deployment.⁷

- **EOIR imposed unprecedented case completion quotas on judges, pressuring them to rush through cases at the expense of well-reasoned decisions**

Despite opposition from immigration judges,⁸ EOIR imposed unprecedented case completion quotas, tying judges' individual performance reviews to the number of cases they complete.⁹ Under the new requirements, IJs must complete 700 removal cases in the next year or risk losing their jobs.¹⁰ A strict time frame for completion of cases can interfere with a judge's ability to ensure that a person's right to examine and present evidence is respected, to provide adequate time to obtain an attorney, secure various expert witnesses, and obtain evidence from overseas.¹¹ This kind of rushed, assembly-line justice is unacceptable to impose on IJs who are making important, often life-or-death, decisions.

During a March 7, 2019 congressional hearing, the director of EOIR asserted that several other agencies also utilize "case completion goals."¹² However, other agencies' goals are used to determine resource allocation, while EOIR's case completion quotas are tied directly to an IJ's performance evaluations.¹³

AILA, the American Immigration Council, and other legal organizations and scholars oppose the quotas that have been described by the National Association of Immigration Judges (NAIJ) as a “death knell for judicial independence.”¹⁴ In fact, recommendations made by an independent third party in a report commissioned by EOIR itself propose a judicial performance review model that “emphasizes process over outcomes and places high priority on judicial integrity and independence.”¹⁵

- **Scholars have concluded that immigrants represented by attorneys fare better at every stage of the court process**

While Federal law guarantees immigrants facing deportation the right to be represented by an attorney, it does not provide immigrants with an attorney at the government’s expense if they cannot afford representation.¹⁶ Only 37 percent of all noncitizens and 14 percent of detained noncitizens are represented.¹⁷ However, the American Immigration Council has found that “immigrants with attorneys fare better at every stage of the court process” – people with attorneys are more likely to be released from detention during their case, they are more likely to apply for some type of relief, and they are more likely to obtain relief from deportation.¹⁸ The consequences for people who face removal without representation are severe: detained immigrants in removal proceedings who lack representation are about ten times less likely to obtain relief.¹⁹ Despite statistics that show the assistance of counsel has a significant positive impact on outcomes, thousands of families and unaccompanied children fleeing persecution and violence at home have appeared in immigration court over the years without a lawyer at their side.

Attorneys also help facilitate more efficient court proceedings. NAIJ’s President, Judge A. Ashley Tabaddor, stated, “when noncitizens are represented by competent counsel, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly.”²⁰ Recent studies have also confirmed that immigrants with representation are far more likely to comply with court appearance requirements.²¹ A recent report by Syracuse University’s Transactional Records Access Clearinghouse (TRAC) found that, as of December 2017, 97 percent of mothers in immigration court represented by counsel were in compliance with their immigration court obligations over a three year period.²²

- **The Legal Orientation Program improves judicial efficiency and fundamental fairness**

EOIR has operated the Legal Orientation Program (LOP) in immigration detention centers since 2003.²³ While not a substitute for legal counsel, LOP is often the only source of basic legal information that assists detained immigrants in navigating a complex court process. In fact, LOP has been proven to increase court efficiency and save taxpayer dollars. A 2012 study commissioned by DOJ demonstrated that the program decreased the average length of time a person is detained by an average of six days, saving approximately \$17.8 million each year.²⁴ EOIR’s own website publicly endorsed the LOP program in 2017, stating that “[e]xperience has shown that the LOP has had positive effects on the immigration court process,”²⁵ and an independent report commissioned by EOIR recommended that DOJ “consider expanding know your rights and legal representation programs, such as ... LOP.”²⁶ Despite this overwhelming support, DOJ attempted to end the program in April 2018 and removed content on its website that endorsed the program.²⁷ After significant criticism, it rescinded its proposed termination, but continues to undermine the program by releasing flawed evaluations of its efficacy.²⁸

- **Court statistics demonstrate that asylum grant rates vary widely depending on the judge**

It is well-documented that the disparity in asylum grant rates is an endemic problem.²⁹ The grant rates for cases vary widely depending on the judge—asylum grant rates are less than 5 percent in some jurisdictions yet higher than 60 percent in others—and give rise to criticism that outcomes may turn on which judge is deciding the case rather than established principles and rules of law.³⁰ EOIR has not taken adequate

corrective action to address this problem and ensure that court proceedings are conducted in a fair and consistent manner. The agency's inadequate response illustrates the weakness of a court system not overseen by an independent judicial agency whose primary function is to ensure the rule of law, impartiality, and due process in the adjudication of cases.

- **Use of video conferencing (VTC) undermines the quality of communications during immigration hearings and threatens due process**

For years, legal organizations have opposed the use of VTC to conduct in immigration merits hearings, except in matters in which the noncitizen has given consent.³¹ An empirical study published in the Northwestern University Law Review revealed that detained respondents appearing via VTC were more likely to be deported than those with in-person hearings.³² In April of 2017, a separate EOIR-commissioned report explained that VTC technology does not provide for the ability to transmit nonverbal cues, which can impact an immigration judges' assessment of an individual's demeanor and credibility.³³ The report concluded that proceedings by VTC should be limited to procedural matters because appearances by VTC may interfere with due process."³⁴

Additionally, technological glitches such as weak connections and bad audio can make it difficult to communicate effectively via VTC. An EOIR-commissioned study revealed that 29 percent of EOIR staff reported that VTC caused meaningful delay, a finding that is supported by accounts from courts including Omaha, which reported that VTC technology works "sometimes," Salt Lake City, where observers stated that "technical delays are common," and New York City, where immigration attorneys describe a VTC connection that "often stops working."³⁵ While EOIR claims that few cases are continued due to VTC malfunction, in reality, judges are only allowed to record one reason for a case being continued even if VTC issues contribute to a delay, which means that EOIR's data is far from precise.³⁶ Despite these concerns, EOIR has expanded its use of VTC for substantive hearings, going as far as to create two immigration adjudication centers where IJs adjudicate cases from around the country from a remote setting.³⁷

- **Congress must establish an Article I immigration court system to ensure functioning courts**

Congress should conduct rigorous oversight into policies that have eroded the court's ability to ensure that decisions are rendered in a timely manner and consistent with the law and the Constitution's guarantee of due process. However, given its political dysfunction, years of underfunding, and inherently flawed structure, our immigration court system must be restructured into an Article I court system in order to restore the most important guarantee of our legal system: the right to a full and fair hearing by an impartial judge.³⁸ For more information, go to www.aila.org/immigrationcourts.

¹ EOIR, [Myths vs. Facts About Immigration Proceedings](#), May 8, 2019.

² The National Association of Immigration Judges (NAIJ) stated that "DOJ's key assertions under both the "myths" and the "facts" either mischaracterize or misrepresent the facts." See NAIJ Statement, [National Assn. of Immigration Judges Say DOJ's "Myths v. Facts" Filled with Errors and Misinformation](#), May 13, 2019. Furthermore, twenty-seven retired immigration judges (IJ) and former members of the Board of Immigration Appeals (BIA) deemed the document to be "political pandering" and proclaimed that "American Courts do not issue propaganda implying that those whose cases it rules on for the most part have invalid claims." Round Table of Former Immigration Judges, EOIR "[Myth vs. Fact](#)" Memo, May 13, 2019.

³ Catherine Shoichet, *CNN Politics*, [The American Bar Association says US immigration courts are 'on the brink of collapse'](#), Mar. 20, 2019.

⁴ DOJ, [Organization Chart](#), Feb. 5, 2018.

⁵ Retired Immigration Judge Paul Schmidt, Speech to the ABA Commission, [Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in Our Captive Dysfunction U.S. Immigration Courts!](#), May 4, 2018; NAIJ, [Letter to House CJS Appropriations Subcommittee](#), Mar. 12, 2019.

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- ⁶ Eric Katz, *Government Executive*, [‘Conveyor Belt’ Justice: An Inside Look at Immigration Courts](#), Jan. 22, 2019; EOIR, Tracking and Expedition of “Family Unit” Cases, Nov. 11, 2018
- ⁷ National Immigrant Justice Center (NIJC), [Internal DOJ Documents Reveal Immigration Courts’ Scramble to Accommodate Trump Administration’s “Surge Courts](#), Sept. 27, 2017.
- ⁸ NAIJ, [Misunderstandings about Immigration Judge “Quotas” in Testimony Before House Appropriations Committee](#), May 2, 2018.
- ⁹ EOIR, [Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges](#), Mar. 30, 2018; *See also* [Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts](#), NAIJ, Jan. 31, 2018; [Misunderstandings about Immigration Judge “Quotas” in Testimony Before House Appropriations Committee](#), NAIJ, May 2, 2018; and [EOIR’s Strategic Caseload Reduction Plan](#), Oct. 23, 2017.
- ¹⁰ EOIR, [Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges](#), Mar. 30, 2018.
- ¹¹ INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence. *See* [AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts](#), Oct. 12, 2017.
- ¹² House Committee on Appropriations, Commerce, Justice, Science, and Related Agencies (116th Congress), [Executive Office for Immigration Review](#), Mar. 7, 2019.
- ¹³ In fact, Congress “specifically exempted ALJs from individual performance evaluations as a mechanism to ensure their independence from such measures and protect the integrity of their decisions.” *See* NAIJ, [Letter to House CJS Appropriations Subcommittee](#), Mar. 12, 2019.
- ¹⁴ AILA and the American Immigration Council Statement, [DOJ Strips Immigration Courts of Independence](#), Apr. 3, 2018. *See also* NAIJ, [Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges](#), Oct. 2017.
- ¹⁵ AILA and The American Immigration Council FOIA Response, [Booz Allen Hamilton Report on Immigration Courts](#), Apr. 6, 2017.
- ¹⁶ 8 U.S.C. §1362 (West 2018).
- ¹⁷ Ingrid Eagly and Steven Shafer, [Access to Counsel in Immigration Court](#), American Immigration Council, Sept. 28, 2016.
- ¹⁸ *Id.*
- ¹⁹ AILA and the American Immigration Council, [DOJ Strips Immigration Courts of Independence](#), Apr. 3, 2018.
- ²⁰ Sen. Mazie Hirono, [Written Questions for the Record](#), U.S. Senate Committee on the Judiciary, Apr. 18, 2018.
- ²¹ Human Rights First, [Immigration Court Appearance Rates](#), Feb. 9, 2018.
- ²² Retired Immigration Judge Paul W. Schmidt, [Immigration Courts: Reclaiming the Vision](#), May 2017.
- ²³ The American Immigration Council, [Legal Orientation Program Overview](#), Sept. 2018.
- ²⁴ DOJ, [Cost Savings Analysis - The EOIR Legal Orientation Program](#), Apr. 4, 2012.
- ²⁵ The Wayback Machine, [EOIR Legal Orientation Program](#), as of Dec. 24, 2017.
- ²⁶ AILA and The American Immigration Council FOIA Response, [Booz Allen Hamilton Report on Immigration Courts](#), Apr. 6, 2017.
- ²⁷ Maria Sacchetti, *The Washington Post*, [Justice Dept. to halt legal advice-program for immigrants in detention](#), Apr. 10, 2018; The Wayback Machine, [EOIR Legal Orientation Program](#), as of May 5, 2018.
- ²⁸ U.S. Department of Justice, [Opening Statement of Attorney General Jeff Sessions Before the Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies](#), Apr. 25, 2018. *See also* Vera Institute of Justice, [Statement on DOJ Analysis of Legal Orientation Program](#), Sept. 5, 2018.
- ²⁹ *See* Ingrid Eagly and Steven Shafer, [Access to Counsel in Immigration Court](#), American Immigration Council, Sept. 28, 2016; *See also* GAO Report, [Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges](#), Nov. 16, 2016, “For fiscal years 1995 through 2014, EOIR data indicate that affirmative and defensive asylum grant rates varied over time and across immigration courts, applicants’ country of nationality, and individual immigration judges within courts.”
- ³⁰ AILA Statement, [Submitted to the Senate Judiciary Subcommittee on Border Security and Immigration Hearing on “Strengthening and Reforming America’s Immigration Court System”](#), Apr. 18, 2018.
- ³¹ AILA Comments, [ACUS Immigration Removal Adjudications Report](#), May 3, 2012; ABA Comments to ACUS, [Responds to Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication](#), Feb. 17, 2012.
- ³² Ingrid Eagly, *Northwestern Law Review*, [Remote Adjudication in Immigration](#), 2015.

³³ [Booz Allen Hamilton Report on Immigration Courts](#). In June of 2017, the GAO issued a [report](#) raising concerns that, “EOIR has not adopted the best practice of ensuring that its VTC program is outcome-neutral because it has not evaluated what, if any, effects VTC has on case outcomes.”

³⁴ [Booz Allen Hamilton Report on Immigration Courts](#).

³⁵ [Booz Allen Report on Immigration Courts](#); Tom Hals, *Reuters*, [Groups sue U.S. to stop deportation hearings by videoconference in New York](#), Feb. 13, 2019; Kelan Lyons, *Salt Lake City Weekly*, [Technical Difficulties](#), Oct. 10, 2018; Beth Fertig, *WNYC*, [Do Immigrants Get a Fair Day in Court When It’s by Video?](#) Sept. 11, 2018.

³⁶ EOIR, [Myths vs Facts About Immigration Proceedings](#), May 8, 2019; NAIJ Statement, [National Assn. of Immigration Judges Say DOJ’s “Myths v. Facts” Filled with Errors and Misinformation](#), May 13, 2019.

³⁷ U.S. Department of Justice, [EOIR Strategic Caseload Reduction Plan](#), Dec. 5, 2017. *See also* Katie Shepherd, American Immigration Council, [The Judicial Black Sites the Government Created to Speed Up Deportations](#), Jan. 7, 2019.

³⁸ AILA Statement, [The Need for an Independent Immigration Court Grows More Urgent as DOJ Imposes Quotas on Immigration Judges](#), Oct. 1, 2018. *See also* the NAIJ letter that joins AILA, the ABA, the Federal Bar Association, the American Adjudicature Society, and numerous other organizations endorsing the concept of an Article I immigration court. [NAIJ Letter, Endorses Proposal for Article I Court](#), Mar. 15, 2018.