



The National Association of Immigration Judges (NAIJ) Comments on the Department of Justice’s Regulation Radically Changing the Structure of the Immigration Court

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Background:

In an unprecedented attempt to dismantle the immigration court, the Department of Justice’s Executive Office for Immigration Review (EOIR) on August 23rd published a new interim rule, effective August 26th. The Department of Justice’s (DOJ) action ends any transparency or assurance of independent decision making over individual cases. This paper briefly highlights the problematic nature of DOJ’s bold attempt to cripple the immigration court.

Discussion:

The new regulation provides unfettered power to the Director of EOIR by merging the EOIR “policymaking” role with the EOIR adjudication role, and having both powers of the Attorney General not subject to the checks and balances of the Department at large. The new rule will allow the Director to unilaterally and singularly control every element of all policy, regulations, case adjudications, oversight, and trainings of all judges. The impact of this regulation is to elevate the policy directives of a single unconfirmed *de facto* political appointee¹ over the legal analysis of non-political, independent adjudicators. The regulation provides the EOIR Director with powers currently vested in the Attorney General of the

¹ While the position of the EOIR Director is technically identified as a “career” appointment (<https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>), it is widely recognized to have evolved into a *de facto* political appointee without Senate confirmation.

United States. Furthermore, by giving the Director of EOIR a direct line of supervision and oversight over adjudicatory functions, the regulation eviscerates any veneer of independent decision making in the immigration court. With the ability to overturn any immigration judge's decision, the Director has the power to pressure immigration judges to issue decisions in line with the Director's political view as opposed to established law, since the percentage of cases remanded counts against a judge in his or her individual performance review plan under the current Agency's quotas and deadline system.

The regulation is a blatant attempt to use EOIR as an enhanced immigration law enforcement tool. In 1995, the DOJ separated the functions of the Director of EOIR and the Board of Immigration Appeals Chair because of the conflict of interest presented by having the Director directly responsible to the AG while also having judicial responsibilities as the Board of Immigration Appeals (BIA) Chair. Last week's DOJ action directly contradicts and disavows the Department's previous corrective action in separating these roles.

The regulation also creates an Office of Policy within EOIR under the Director's authority, designed to formulate, coordinate, and implement the executive branch's immigration law enforcement policies. The new Office of Policy will have very broad powers through the merging of what heretofore were independent offices within EOIR. For example, the regulation moves key functions and authority, including the training of judges and the issuance of policy memoranda from the Office of Chief Immigration Judge (OCIJ) and BIA to the new Office of Policy. Furthermore, the regulation removes the development of regulations from the Office of General Counsel (OGC) to the new Office of Policy. The drafting and review of regulations have traditionally been legal in nature and executed by DOJ attorneys free from political influence, not a matter of "policy" directed by a political appointee.

The regulation also eliminates the Office of Legal Assistance Programs (OLAP) and moves its functions deep into the bowels of the Office of Policy. OLAP's primary mission is to enhance and ensure maximum representation for individuals in immigration court proceedings. This move is intended to slowly eliminate

OLAP's functions in assisting unrepresented individuals and providing them with information. For example, self-help materials provided to individuals explaining the immigration court process are likely to be reduced or eliminated. The current OLAP personnel is already under duress, in spite of strong funding for the OLAP program. The Agency has not authorized any backfill of staff and OLAP is expected to be further cut by the end of the fiscal year to 60% capacity. In reality, the Office of Policy will make the immigration courts as non-user-friendly as possible for pro se respondents, discourage representation and expedite removals of unrepresented individuals.

The Office of Policy's primary role appears to ensure that EOIR functions as an adjunct of DHS Enforcement and that any adjudication trends that are perceived as counter to the Administration's law enforcement policies are quickly identified so that they can be wiped out by adjudication of appeals, precedents or policy changes. This is why the regulation's creation of an Office of Policy is so problematic as it creates a court system with a "policy making" arm- essentially a formal recognition of the executive branch's law enforcement role in the court.

Solution:

While this paper highlights the many problems with the recent DOJ regulation and its impact on the immigration court we also have a solution that fixes many, if not all the problems outlined above. NAIJ urges Congress to establish an independent Article I Immigration Court separated from the Department of Justice.

This paper has demonstrated that administering a court system is incongruous with the DOJ's role as a law enforcement agency. This inherent conflict of interest precludes the judicial independence of immigration judges and ultimately compromises due process protection provided by the Constitution and our nation's laws to the parties appearing before the court. Furthermore, the disparate missions of the DOJ and the immigration court create an unmanageable tension resulting in the DOJ's lack of commitment and skill to properly administer the court in an efficient and effective manner. The U.S. Department of Justice's troubling and indefensible administrative mismanagement of the immigration court must end.