Statement of
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Hearing on "*Strengthening and Reforming America's Immigration Court System*"

INTRODUCTION

I am Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ), and an Immigration Judge.[1] For the past twelve years I have served in the Los Angeles Immigration Court. My current pending case load is approximately 2000 cases. Chairman Cornyn, Ranking Member Durbin and members of the Subcommittee, thank you for the opportunity to testify before the Subcommittee.

I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of United States Immigration Judges. Since 1979, the NAIJ has been the recognized representative of Immigration Judges for collective bargaining purposes. Our mission is to promote the independence of Immigration Judges and enhance the professionalism, dignity, and efficiency of the Immigration Courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our court system through: educating the public, legal community and media; testimony at congressional oversight hearings; and advocating for the integrity and independence of the Immigration Courts and Immigration Court reform. We also seek to improve the Court system and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining. In addition, we represent Immigration Judges in disciplinary proceedings, seeking to protect judges against

[1] I am speaking in my capacity as President of the NAIJ and not as employee or representative of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent my personal opinions, which were formed after extensive consultation with the membership of NAIJ.

unwarranted discipline and to assure that when discipline must be imposed it is imposed in a manner that is fair and serves the public interest.

I am here today to discuss urgently needed Immigration Court Reform and the unprecedented challenges facing the Immigration Courts and Immigration Judges. Immigration Courts have faced structural deficiencies, crushing caseloads and unacceptable backlogs for many years. Many of the "solutions" that have been set forth to address these challenges have in fact exacerbated the problems and undermined the integrity of the Courts, encroached on the independent decision-making authority of the Immigration Judges, and further enlarged the backlogs. I will be focusing my discussion on the inherent structural defect of the Immigration Court system, the Department of Justice's (DOJ) misguided "solutions" to the current court backlog, and proposed solutions to the challenges facing the court, including the only enduring solution: restructuring of the Immigration Court as an independent Article I Court.

THE FUNDAMENTAL FLAW

• <u>The Placement of a Neutral Court in a Law Enforcement Agency</u>

The inherent conflict present in pairing the law enforcement mission of the DOJ with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities, has seriously compromised the very integrity of the Immigration Court system and may well lead to the virtual implosion of this vital Court.

Immigration Judges make the life-changing decisions on whether or not non-citizens are allowed to remain in the United States. Presently, approximately 330 Immigration Judges in the United States are responsible for adjudicating almost 700,000 cases. The work is hard. The law is complicated; the labyrinth of rules and regulations require expertise in an arcane field of law. The stories people share in court are frequently traumatic and emotions are high because the stakes are so dire. The proceedings are considered "civil" cases, in contrast to "criminal" cases. Thus, people are not provided attorneys and must either pay for one, find a volunteer, or represent themselves. Last year, approximately 40 percent of the individuals who appeared in our courtrooms represented themselves, a figure that rises to 85 percent when only detained cases are considered. Further complicating the situation, only 15 percent of immigration cases are conducted in the English language. Finally, our courtrooms and systems lack modern technology and unlike federal courts, the Immigration Courts still rely on paper records.

But here's the core of the problem: Immigration Judges wear two hats. On the one hand, we are statutorily recognized as "Immigration Judges," wear judicial robes, and are charged with conducting ourselves consistently with canons of judicial ethics and conduct, in order to ensure our role as impartial decision-makers in the cases over which we preside. In every sense of the word, on a daily basis, when presiding over our case in our courts, we are judges: we rule on the admissibility of evidence and legal objections, make factual findings and conclusions of law, and

decide the fate of thousands of respondents each year. Last year, our decisions were final and unreviewed in 91% of the cases we decided.

In addition, and in contrast to our judicial role, we are considered by the DOJ to be government attorneys, fulfilling routine adjudicatory roles in a law enforcement agency. With each new administration, we are harshly reminded of that subordinate role and subjected to the vagaries of the prevailing political winds.

At first glance, this may not seem too damaging; after all, our government structure is resilient and must respond to changes demanded by the public. However, this organizational structure is the fundamental root cause of the conflicts and challenges that have plagued the Immigration Court system since its inception and now threatens to cripple it entirely because the very mission of a neutral court is to maintain balance despite political pressures.

• **Politicization of the Immigration Courts**

Examples of where this conflict of interest has led to the infringement on the independence of the Immigration Court are numerous throughout the past decades and under administrations of both political parties. It is no secret that the DHS, whose attorneys appear before the Court, regularly engages in ex-parte communication with the DOJ. On the macro level, these communications have directly led to the use of the Immigration Court system as a political tool in furtherance of law enforcement policies.

One common use of the Courts as a political tool has been the incessant docket shuffling in furtherance of various law enforcement "priorities." For example, during the last administration, the mandated "surge" dockets prioritized recent arrivals, such as unaccompanied minors and adults with children, over pending cases before the Court. Similarly, this administration uprooted approximately one third of all Immigration Judges in the 2017 calendar year to assign them temporarily to "border courts" to create the "optics" of a full commitment to law enforcement measures, even at the expense of delaying hundreds of cases at each home. The DOJ claimed that the border surge resulted in an additional completion of 2700 cases. This number is misleading as it does not account for the fact that detained cases at the border are always completed in higher numbers than non-detained cases over a given period. Thus, the alleged 2700 additional completions was a comparison of apples to oranges, equating proceedings completed for those with limited available relief to those whose cases by nature are more complicated and time consuming as they involve a greater percentage of applications for relief. Moreover, many questioned the veracity of the Agency's reported numbers because so many judges who went to the border courts had no work to do and faced malfunctioning equipment, often with no internet connection, or files. Meanwhile the dockets of these Immigration Judges at their home courts were reset to several years later, not to mention the unnecessary additional

financial costs of these details. Such docket shuffling tactics have led to further increases in delays and to the backlog of cases before the Immigration Court system as a whole.

On the micro level, individual judges have been tasked with responding to complaints voiced by DHS to the Executive Office for Immigration Review (EOIR) management about how a particular pending case or cases are being handled, in disciplinary proceedings without the knowledge of the opposing party.

• <u>DOJ Priorities</u>

One of the most egregious and long-standing examples of the structural flaw of the Courts' placement in the DOJ is that Immigration Judges have never been able to exercise the congressionally mandated contempt authority statutorily authorized by Congress in 1996. This is because the DOJ has never issued implementing regulations in an effort to protect DHS attorneys (who it considers to be fellow federal law enforcement employees). However, as Congress recognized in passing contempt authority, misconduct by both DHS and private attorneys has long been one of the great hindrances to adjudicating cases efficiently and fairly. For example, it is not uncommon for cases to be continued due to private counsel's failure to appear or be prepared for a hearing, or DHS' failure to follow the Court's orders, such as to conduct pre-trial conferences to narrow issues or file timely documents and briefs. Just a couple of months ago, when I confronted an attorney for his failure to appear at a previous hearing, he candidly stated that he had a conflict with a state court hearing, and fearing the state court judge's sanction authority, chose to appear at that hearing over the immigration hearing in my court. Similarly, when I asked a DHS attorney why she had failed to engage in the Court mandated pre-trial conference or file the government's position brief in advance of the hearing, she defiantly responded that she felt that she had too many other work obligations to prioritize the Court's order. These examples represent just a small fraction of the problems faced by Immigration Courts, due to the failure of the DOJ, in over 20 years, to implement the Congress approved even-handed contempt authority..

Similarly, Immigration Judges are subject to regulations that provide a one-sided veto of a judge's decision by DHS. Title 8 C.F.R. section 1003.19 provides that the DHS, who appears as a party before the Immigration Court, can effectively vacate an Immigration Judge's bond decision through automatic stay powers that override an Immigration Judge's decision to set or reduce bond for certain individuals.

In a separate failure to safeguard the Immigration Courts, the DOJ has consistently proven to be ineffective in the timely appointment of judges. Historically, this was due, in part, to the Court's placement in a law enforcement agency where for years, the Court was treated as an afterthought in DOJ, receiving scraps instead of full allotments of needed resources. However, even after the 9/11 tragedy, the DOJ has still visibly struggled with filing Immigration Judge positions, many

of which have taken almost two years to fill. Hiring practices by the Agency have a demonstrated history of politically motivated appointment practices, as evidenced by the Office of the Inspector General and Office of Professional Responsibility reports exposing political concerns and nepotism that have crept into the hiring process.[2] And now, the DOJ surreptitiously has made substantive changes to the qualification requirements for judges, over-emphasizing litigation experience to the exclusion of other relevant immigration law experience. This has created even more skewed appointment practices that largely have favored individuals with law enforcement experience over individuals with more varied and diverse backgrounds, such as academics and United States Citizenship and Immigration Service attorneys, who are perceived as not sufficiently law enforcement oriented.

Another example of the structural problem of placing a Court in the DOJ has been the application of federal employee performance evaluations on Immigration Judges. Many courts have performance reviews for Judges, but the overwhelming majority of these reviews follow a judicial model – a transparent, public process where performance is evaluated by input from the stakeholders (attorneys, witnesses, and court staff) based on quality and temperament, not quantity, and is not tied to discipline. However, despite strenuous objections and warnings of conflicts of interest from the NAIJ, the EOIR has chosen to use a traditional federal employee performance review system. These evaluations are not public and are conducted by a management official who is often not located in the same court and does not consider input from the public, and can result in career-ending discipline to a Judge who makes a good faith legal decision that his or her supervisor considers to be insubordinate. This is the flawed *current* performance evaluation model for Immigration Judges, without the added, soon to be implemented, disastrous production quotas and time-based deadlines that were recently announced by the Department, which I will discuss shortly.

• <u>EOIR's Decision to Halt the LOP Program</u>

Another stark example of the mismanagement of the Immigration Court due to its placement in an agency with a competing mission is the recently announced EOIR decision to halt the Legal Orientation Program (LOP), despite its proven track record of increased efficiency and enhanced fundamental fairness for *pro se* respondents in detention facilities. This population of respondents, who are being held in custody, are frequently in extremely remote locations, and often lack the resources or the means to secure counsel or even to properly represent themselves due to language access issues. The lack of assistance in these areas delays their proceedings, often needlessly for those who seek merely a brief legal consultation before making an informed and timely decision to accept an order of removal. Thus in cases where the respondents lack

[2] *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General,* DOJ OIG and OPR, July 28, 2008; *Report Regarding Investigation of Improper Hiring Practices by Senior Officials of the Executive Office for Immigration Review,* DOJ OIG, November 2014.

viable relief, the LOP can be instrumental in helping respondents make an informed decision to accept a final order of removal, dramatically minimizing costly detention time and expense.

Competent counsel, when available, can assist the Court in efficiently adjudicating cases before it. In the absence of competent counsel, the LOP provides the necessary bridge to ensure a minimum standard of due process is quickly and efficiently provided. The LOP helps respondents better understand the nature of these proceedings and the steps they need to take to present their cases when in court, understand and complete their applications for relief, and obtain evidence in their case. Without such assistance, judges are required by regulation to spend time and resources explaining these proceedings, soliciting the necessary information for the case, and providing respondents the opportunity to obtain evidence once they become aware it is needed.

Ironically, even the DOJ website has publicly supported the LOP program, citing the positive effects on the Immigration Court process, and the fact that cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention. However, once again without consultation with NAIJ, EOIR has made a decision seemingly ignoring the ramifications of how this will likely play out in the remote court locations, further undermining the structural integrity and the smooth functioning of the Court.

• **EOIR's Recent Severe Restriction of Immigration Judge Speaking Engagements**

In September 2017, the Agency issued a new memorandum almost eliminating personal capacity speaking engagements for Immigration Judges on any matters relating to the Court or immigration law.

The primary role of a court is to be a neutral and transparent arbiter, and this perception is reinforced when the court is accessible to the community it serves. Public access and understanding of what courts do is essential to build the understanding and trust needed for the judicial system to function smoothly. Judges are the face of that system and serve as role models who should be encouraged to engage with the community to inspire, educate and support civic engagements. Many of our Immigration Judges are active members of the legal and civil community who are sought out to speak in schools, universities, and bar associations as role models and mentors. They help the community better understand our Immigration Courts and their function in the community, helping to demystify the system and bring transparency about our operations to the public. In the past, the DOJ had permitted Immigration Judges to publicly speak in their personal capacity on issues related to the Court and their Immigration Judge roles, (with the use of their title and a disclaimer that they are not speaking on behalf of the Agency).

This new policy brought a 180-degree reversal on many existing programs that included participation of Immigration Judges, from the Model Hearing Program, the Stakeholder

Meetings, to appearing as guest lecturer at one's Alma Mater, etc. Judges who have been engaged in the community are now being deprived of the opportunity to fulfil those roles. This ill-advised move is yet another example of the misguided instincts of a law enforcement agency, which endeavors to keep its operations opaque, leading to an absolutely wrong result for a court system where transparency is essential to build public trust and confidence. This is yet another example which underscores the structural flaw that plagues our courts.

MISGUIDED SOLUTIONS TO THE BACKLOG

• IJ Production Quotas and Deadlines

Based on a completely unsupported assertion that this action will help solve the Court's backlog, DOJ has taken an unprecedented move that violates every tenet of an independent court and judges, and has announced that it will subject all Immigration Judges to individual production quotas and time-based deadlines as a basis for their performance reviews. A negative performance review due to failure to meet quotas and deadlines may result in termination of employment. This is despite the legal duty of Immigration Judges, codified by regulation, to exercise independent judgement and discretion in each of the matters before them. The havoc this decision will wreak cannot be understated or underestimated.

To fully understand the import of this approach, one must make the critical distinction between court-wide "case completion goals" or "benchmarks" versus *individual* production quotas and time-based deadlines for judges. The Immigration Court system has had "case completion goals" of some sort for over two decades. These are tools used as resource allocation metrics to help assess resource needs and distribute them nationally so that case backlogs are within acceptable limits and relatively uniform across the country. In fact, when individual performance evaluations were first applied to Immigration Judges over a decade ago, the EOIR agreed to a provision that prevented any rating of the judges based on number or time based production standards, in recognition of the fact that quotas or deadlines placed on an individual Immigration Judge are inconsistent with his or her independent judicial role. The public comments at that time made clear that otherwise quantitative priorities or time frames could abrogate the party's right to a full and fair hearing. At that time, the DOJ assured the public that case completion goals would not be used this way and that judges would maintain the discretion to set hearing calendars and prioritize cases in order to assure they had the time needed to complete the case.

This tool of court-based evaluation metrics stands in stark contrast to the *individual* production quotas and completion deadlines which are now being proposed by EOIR. Introduction of individual Immigration Judge production quotas is tantamount to transforming a judge into an interested party in the proceedings. It is difficult to imagine a more profound financial interest than one's very livelihood being at stake with each and every ruling on a continuance or need for additional witness testimony which would delay a completion. Yet production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse

herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.

This basic principle is so widely accepted that the NAIJ is not aware of a single state or federal court across the country that imposes the type of production quotas and deadlines on judges like those that EOIR has now announced. A numeric quota or time-based deadline pits the judge's personal livelihood against the interests both the DHS and the respondent. Every decision will be tainted with the suspicion of either an actual or subconscious consideration by the judge of the impact his or her decision would have regarding whether or not he or she is able to fulfill a personal quota or a deadline.

In addition to putting the judges in the position of violating a judicial ethical canon, such quotas pits their personal interest against due process considerations. Recently, the Seventh Circuit Court of Appeals noted in a case addressing imposition of case completion goals – *not quotas* - that there may be situations that such goals, even though they are *not* tied to a judge's performance evaluation, could so undermine decisional independence as to create a serious issue of due process.

If allowed to be implemented, these measures will take the Immigration Courts out of the American judicial model and place it squarely within the model used by autocratic and dictatorial countries, such as China, which began instituting pilot quota programs for their judges in 2016.[3] NAIJ does not believe that such courts should serve as a good blueprint for EOIR or for any court in a democratic society.

• **<u>Unintended Consequences of Misguided Solutions</u>**

The DOJ has touted the imposition of a quota system on judges as a solution to the crushing backlogs facing the Immigration Courts. It is critical to recognize that the current backlog of cases is *not* due to lack of productivity of Immigration Judges; it is due, in part, to the Department's consistent failure, spanning more than a decade to hire enough judges to keep up with the caseload. In 2006, after a comprehensive review of the Immigration Courts by Attorney General Gonzales, it was determined that a judge corps of 230 Immigration Judges was inadequate for the caseload at that time (approximately 168,853 pending cases) and should be increased to 270. Despite this finding, there were less than 235 active field Immigration Judges at the beginning of FY 2015. Even with a recent renewed emphasis on hiring, the number of Immigration Judges nationwide as of April 2018 stood at approximately 330 sitting judges, well below authorized hiring levels of 384. From 2006 to 2018, while the caseload has quadrupled (from 168,853 to 684,583 as of March 1, 2018), the number of Immigration Judges has not even doubled! Additionally, up to 40 percent of the Immigration Judge Corps are retirement eligible

[3] *See* www.chinadaily.com.cn/china/2017-02/27/content_28361584_6.htm.

and are exercising that right at a much higher rate than previously seen. Thus, hiring by the Agency has also failed to keep pace with the loss of judges by retirement or attrition.

Moreover, the 2017 GAO report on *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Changes* (GAO-17-438) shows that Immigration Judge related continuances have decreased (down 2 percent) in the last ten years. GAO Report at 124. The same report shows that continuances due to "operational factors" and details of Immigration Judges were up 149% and 112%, respectively. GAO Report at 131, 133. These continuances which occurred primarily due to politically motivated changing court priorities, forced Judges to reset cases that were near completion in order to address the cases which were the priority "du jour," and have had a tremendous deleterious effect on case completion rates. The same report shows that continuances attributed to the needs of the judge was responsible for only 11% of the continuances granted, clearly debunking the myth that Immigration Judges are significantly contributing to the backlog.

The cause of the increasing backlog is obvious: the ever-ballooning budget for immigration law enforcement which has not been accompanied by concomitant resources to the Immigration Courts. In the period that the budget for DHS saw an increase of 300 percent, the Immigration Court's budget was only modestly increased by 70 percent. This is tantamount to increasing the lanes in a highway from one to three but failing to increase the number of exit ramps for everyone, then claiming that the exit ramps are the cause of the increased congestion and traffic. Simple common sense tells us otherwise.

Finally, the imposition of numeric quotas and time-based deadlines will have the unintended consequence of further adding to the backlog. A similar measure proposing to "streamline" the adjudications of immigration removal cases was introduced post 9/11 during the Attorney General John Ashcroft era. In the face of a ballooning backlog (which pales in comparison to the current one), the DOJ implemented streamlining measures at the Board of Immigration Appeals that significantly increased the number of case completions at the expense of reasoned decisions. This action caused a flood of appeals to the circuit courts, to a five-fold increase, from 1764 filings in 2002, when the program was announced, to 8446 in 2003 and onwards. Many of these cases were ultimately reversed or remanded all the way back to the trial court level, due to actual or perceived insufficiencies of the process or paucity of reasoning in the decisions. The "streamlining" program was quietly put to rest many years later when its failure was no longer deniable. If Immigration Judges are subjected to production quotas and time-based deadlines, the result will be the same: appeals will abound, repeating a history which was proven to be disastrous. Rather than making the overall process more efficient, this change will encourage individual and class action litigation, creating even longer adjudication times and greater backlogs.

Another unintended consequence if these quotas and deadlines are applied, is that judicial time and energy will be diverted to documenting performance rather than deciding cases. Immigration Judges will become bean-counting employees instead of fair and impartial judges, and their supervisors will become traffic cops monitoring whether the cases are completed at the correct speed. What a waste of skilled professional expertise! Judges' job security will be based on whether or not they meet these unrealistic quotas and their decisions will be subjected to increased appeals based on suspicion regarding whether any actions they take, such as denying a continuance or excluding a witness, are legally sound or motivated to meet a quota. It is difficult to find a shred of practical justification in this approach.

SHORT TERM SOLUTIONS

• <u>Clarify the Definition of the Immigration Judge Position</u>

The most pressing matter threatening the integrity and efficiency of the Immigration Court system which can quickly and easily be remedied is the DOJ's decision to impose Immigration Judge production quotas and deadlines. If permitted to be implemented, as planned, on October 1, 2018, the Immigration Courts as we know them will cease to exist. Immigration Judges will no longer be able to serve as impartial and independent decision-makers over the life-altering cases before them.

To preserve the judicial independence of Immigration Courts Congress can:

(1) Amend the Immigration and Nationality Act to clarify the definition of an Immigration Judge as follows:

> **"The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title, whose position shall be deemed to be judicial in nature and whose actions shall be reviewed only under rules and standards pertaining to judicial conduct."**

This definitional change was offered by Senators Gardner and Bennet as part of their bipartisan immigration amendment earlier this year. Senator Hirono's recent immigration amendment also included this language;

(2) Alternatively, Congress can add Immigration Judges to the short list of federal government employees whose positions are exempt from performance evaluation due to the nature of their duties, as are Administrative Law Judges (ALJs). 5 U.S.C. § 4301(2)(D). Recognizing that federal employee performance evaluations are antithetical to judicial independence, Congress exempted ALJs from performance appraisals and ratings by including them in the list of

occupations exempt from performance reviews. To provide that same exemption to Immigration Judges, all that would be needed is **an amendment to 5 U.S.C. § 4301(2) to add a new paragraph (I) including Immigration Judges as an additional category in the list of exempt employees.**

Extension of 5 U.S.C. § 4301(2)(D) to Immigration Judges is not an indication that NAIJ is opposed to performance evaluation of Immigration Judges. To the contrary, NAIJ fully supports performance evaluations that are based on judicial models, such as those recommended by the American Bar Association. These models stress judicial improvement as the primary goal, emphasizes process over outcomes, and places a high priority on maintaining judicial integrity and independence. Moreover, to the extent that any numeric metrics are included in such models, they would not and "should not be used for judicial discipline."[4] We encourage EOIR to abandon its myopic focus on numerical metrics and instead institute a judicial performance evaluation based on these models.

Continued enhancement of resources will be an exercise in futility and will fail to reduce the crippling backlogs plaguing the Immigration Courts if the integrity and independence of the Immigration Judge decision-making authority is not protected. Without much needed protection, the inevitable increase in individual and class action litigation and the circuit court backlash (similar to the "streamlining" era) is virtually certain to ensue.

• **Additional Resources**

NAIJ appreciates the additional judges and staff that Congress has provided and the recent allocation of an additional 100 Immigration Judge teams in the appropriations bill. This is a welcome move in the right direction. However we would be remiss if we failed to point out that even if all the appropriated judge positions are filled promptly (which is a task the DOJ has been unable to accomplish for decades), the pressing crisis of the backlog will not be resolved. The backlog of pending cases has almost quadrupled in the last twelve years. Yet, the number of judges has not even doubled (even with the inclusion of the recently allocated 100 judges). Thus, it is not unreasonable to conclude that with the continued flood of cases being filed with the Court due to increased law enforcement action, the need to match that rate of increased resources with the Courts is a necessary condition of addressing the challenge of the backlog.

Moreover, the Courts are woefully behind the times in technology. The Courts' computer systems and printers are outdated. The software programs are several generations behind and lag in processing speed. Also, we depend on digital audio recording to capture our hearing audio in lieu of in-person transcribers, and in many locations we function with heavy reliance on tele video equipment. Yet these technologies are no longer state of the art, causing not infrequent

[4]https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.authcheckdam.pdf.

delay and malfunctions. We have yet to arrive in the 21st century in technology at EOIR. Unlike other courts who have embraced electronic filings and records, we are still under the weight of hardcopy files, some of which can weigh up to 10 to 15 pounds per case. Increasingly adequate space for Court locations has become an issue, leaving many Courts bursting at the seams due to thousands of files, with staff having to share cubicles, and cramped, unhealthy and unsafe spaces that were never intended to be used as work space.

ENDURING SOLUTION

• **<u>An Article I Immigration Court is the Clear Consensus Solution that is Urgently Needed</u>**

While it cannot be denied that the short term solutions cited above are needed immediately, Band-Aid solutions alone cannot solve the persistent problems facing our Immigration Courts. The problems compromising the integrity and proper administration of a court highlighted above underscore the need to remove the Immigration Court from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. The DOJ has been provided years of opportunity to forestall the impending implosion at the Immigration Courts. Instead of finding long term solutions to our problems, DOJ's political priorities and law enforcement instincts have led our Courts to the brink of collapse. With the latest misguided initiative to impose Immigration Judge production quotas and deadlines, DOJ has put accelerant on the fire; if these changes are implemented the integrity of the Immigration Court will be all but destroyed and paralyzing dysfunction will ensue.

Since the 1981 Select Commission on Immigration and Refugee Policy, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced. Such a structure solves a myriad of problems which now plague our Court: removing a politically accountable Cabinet level policy maker from the helm; separating the decision makers from the parties who appear before them; protecting judges from the cronyism of a too close association with DHS; assuring a transparent funding stream instead of items buried in the budget of a larger Agency with competing needs; and eliminating top-heavy Agency bureaucracy. In the last 35 years, a strong consensus has formed supporting this structural change. For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now most immigration judges and attorneys agree the long-term solution to the problem is to restructure the immigration court system. Examples of those in support include the American Bar Association, the Federal Bar Association, the National Association of Women Judges, and the American Immigration Lawyers Association. These are the recognized legal experts and representatives of the public who appear before us. Their voices deserve to be heeded.

To that end, the Federal Bar Association has prepared proposed legislation setting forth the blueprint for the creation of an "Article 1" or independent Immigration Court. This proposal will remove the Immigration Court from the purview of the DOJ to form an independent Court. The legislation would establish a "United States Immigration Court" with responsibility for functions

of an adjudicative nature that are currently being performed by the judges and Board members in the Executive Office for Immigration Review. The new court would consist of appellate and trial level judges. The appellate judges would be appointed by the President and confirmed by the Senate, and the immigration trial judges would be appointed by the appellate judges. The substantive law of immigration and corresponding enforcement and policy-determining responsibilities of the DHS and DOJ under the INA would be unchanged. Final decisions of the new court would be subject to review in the circuit court of appeals similar to the current model. However, in the new court, the Department of Homeland Security would be able to seek review of the court's decisions to the same extent as the individuals against whom charges were filed. Practically, the transition to the new "United States Immigration Court" would involve minimal transitional or financial challenges as much of the physical structures and personnel would already be in place.

NAIJ has endorsed this bill[5] and urges you to take immediate steps to protect judicial independence and efficient resolution of cases at the Immigration Courts by enacting legislation as described above. Failure to act will result in irreparable harm to the immigration law community as we know it. Action is needed now!

[5] https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf