



Statement of Hon. Mimi Tsankov
President, National Association of
Immigration Judges

October 18, 2023

*Preserving Due Process and the Rule of Law:
Examining the Status of Our Nation's
Immigration Courts*

Hearing Before the
U.S. Senate,
Judiciary Committee
Immigration, Citizenship, & Border Safety
Subcommittee



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INTRODUCTION

I am Mimi Tsankov, President of the National Association of Immigration Judges (NAIJ).¹ For nearly 17 years I have served as an Immigration Judge and am currently seated at the New York Federal Plaza Immigration Court. Chairman Padilla, Ranking Member Cornyn and members of the Subcommittee, thank you for the opportunity to testify.

I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of immigration judges. The NAIJ has represented immigration judges since its founding in 1979, and for much of that time served as its recognized collective bargaining unit. 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 immigration court system by educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating for the integrity and independence of the immigration courts and immigration court reform. We also promote the judicial independence of immigration judges through regular communications with the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) management and representation of immigration judges before the agency.

I am here today to discuss urgently needed immigration court reform and the unprecedented challenges facing the immigration courts and immigration judges. The immigration courts have

¹ I am speaking in my capacity as President of the NAIJ and not as an 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 U.S. 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 the NAIJ.

faced structural deficiencies, crushing caseloads, and unacceptable backlogs for many years.² Many of the “solutions” that have been attempted to address these challenges have in fact exacerbated the problems and undermined the integrity of the courts by compounding the backlog, encroaching on the independent decision-making authority of immigration judges, and compromising the integrity of immigration court proceedings overall through improperly influencing case outcomes. I will be focusing my discussion on the structural defects inherent in the immigration court system and the DOJ’s ineffective and counterproductive attempts to solve the immigration court backlog. To fix the backlog and other problems, Congress should remove the immigration courts from the DOJ and create an independent, Article I immigration court.

DOJ’S INEFFECTIVE AND POLITICIZED MANAGEMENT OF THE IMMIGRATION COURTS IS A PRIMARY CAUSE OF THE CURRENT IMMIGRATION COURT CRISIS

Four and a half years ago, my former colleague Immigration Judge Ashley Tabaddor testified before this subcommittee and explained how the immigration court suffers from an inherent conflict because it is housed within the DOJ— the nation’s preeminent law enforcement agency. That problem still exists, but the urgency with which we must address it is even more pronounced today than it was then. In early January 2020, the backlog was a little over 1 million cases.³ Today, it has swelled to over 2.6 million cases and is increasing daily.⁴ I am here to tell you that the immigration courts are in crisis.

Today, approximately 700 Immigration Judges are responsible for adjudicating these cases. That works out to be, on average, over 3,700 cases per judge. Some of my colleagues have so many cases in the queue at their courts that they could be setting trials into 2027 as they simply don’t have earlier space on their dockets. This increase in the backlog comes even as our judges have completed an astonishing 68% more cases as compared to the last fiscal year. At current staffing levels, the math is clear – the courts simply cannot bring down that backlog number under the current system for years into the future.

The placement of the immigration courts within the DOJ has created two fundamental problems, both of which have contributed to the backlog. First, because the DOJ is a law enforcement agency, it lacks the institutional expertise to manage an independent court and understandably prioritizes its law enforcement functions at the expense of the immigration courts. Second, the politics of immigration enforcement are routinely interjected into the adjudicatory functions of the immigration court system itself through the direct management of the immigration courts by

² Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings*, June, 2022, OIG Recommendation 12 at 36, available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>; Hon. Ashley Tabaddor, Hearing on “Strengthening and Reforming America’s Immigration Court System,” April 18, 2018, available at <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

³ Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *Pending Cases, New Cases, and Total Completions* (data generated October 19, 2021), available at <https://www.justice.gov/eoir/page/file/1242166/download>.

⁴ See TRAC Immigration, *Immigration Court Backlog*, August 2023, available at <https://trac.syr.edu/phptools/immigration/backlog/>.

the Office of the Deputy Attorney General, to which the EOIR Director reports.

The DOJ's management of the immigration courts during the pandemic is a clear example of its inability to effectively lead. The pandemic forced state and federal courts across the country to quickly pivot to online hearings to ensure they could continue to meet their missions. The immigration courts did not. It took seven months before the immigration courts began to allow even a handful of judges to conduct hearings remotely. When faced with the crisis of the pandemic, the DOJ appeared to have neither the ability nor the will to adjust.

Even aside from the court's pandemic failures, the immigration courts' technology failings have substantially contributed to the backlog. The DOJ has failed in its court technology modernization. In 2000, EOIR stated that the immigration courts would be implementing electronic filing by 2001.⁵ The reality for immigration court is that to this day, electronic filing using EOIR's ECAS (EOIR Courts & Appeals System) has yet to materialize for a substantial portion of the pending cases because they are still paper files and the system simply cannot accommodate the sheer number of cases and users accessing it. Further, ECAS does not fully interface with the agency's back-end legacy systems, requiring intensive and costly staff support.

The limited electronic systems currently in place fail on a regular basis, with judges frequently unable to enter orders or access electronically filed documents. The system's public-facing ECAS filing system likewise has substantial down time,⁶ resulting in delays and frustrating judges and the practitioners interfacing with it.

The agency had previously made great progress in enabling judges to conduct hearings outside the courthouse through the acquisition of special laptop computers that could create an electronic record of immigration court hearings. These computers were used extensively during COVID and worked well. Unfortunately today, EOIR is reversing the initiative rather than expanding the program contravening an Office of Inspector General (OIG) recommendation.⁷

The immigration court's technology failings are particularly egregious because from 2001 to 2016, EOIR spent over \$80 million to modernize its paper-based case management system.⁸ Yet, the Office of Inspector General found that EOIR failed to comply with proper oversight techniques in violation of the Federal Acquisition Regulation (FAR), DOJ policies, and the

⁵ Government Accountability Office, Homeland Security and Justice, *Immigration Courts: Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges*, Statement of Rebecca Gambler, Director (April 18, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Gambler%20Testimony.pdf>.

⁶ Department of Justice, Executive Office for Immigration Review, *ECAS Outage Log*, available at <https://www.justice.gov/eoir/ecas-outage-log>.

⁷ Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings* (June, 2022), OIG Recommendation 12 at 36, available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>.

⁸ Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards* (November 2022), available at <https://oig.justice.gov/sites/default/files/reports/23-003.pdf>.

contract award terms and conditions.⁹

In sharp contrast, by 2007, our nation’s independently managed federal district courts had almost universally adopted an electronic case filing and docketing system called PACER and Case Management/Electronic Case Files.

DOJ’s management failures have also included its inability to anticipate the demand for immigration court services and submit budget requests for the needed staffing.¹⁰ The backlog is also a function of budgeting imbalances for immigration law enforcement which for years was not accompanied by concomitant resources for the immigration courts. With the immigration courts relegated to the proverbial basement office for years, the DOJ ignored congressional directives to hire immigration judge teams, and the critical shortage of support staff impedes the court’s ability to get the backlog under control.

Democrat and Republican administrations share the failure of the DOJ’s immigration court management. On the one hand, we are statutorily recognized as “immigration judges,” wear judicial robes, and are charged with conducting ourselves consistent 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 cases, 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 individuals appearing before us each year. Last year, our decisions were final and unreviewed in 91% of the cases we decided.¹¹

On the other hand, the DOJ considers immigration judges to be attorneys acting on behalf of the Attorney General, and has created layers of management judges and personnel who eventually report to the Deputy Attorney General. With multiple layers of management oversight and many manager judges even lacking in judicial experience, the trial immigration judges are not free to adopt effective streamlining techniques tailored to their particular jurisdictions and dockets. The immigration courts are run in a hierarchical fashion, and the trial immigration judges themselves have been marginalized by an agency that employs top-down edicts. Intense management-driven docket shuffling furthers shifting law enforcement “priorities,” which change from one administration to the next. Some administrations prioritize recent arrivals, such as unaccompanied minors and adults with children, over pending cases involving criminal convictions. One administration uprooted approximately one third of all immigration judges in a calendar year to assign them temporarily to “border immigration courts” to create the “optics” of a full commitment to law enforcement measures, even at the expense of delaying thousands of cases at each home court. Other administrations have done just the opposite, prioritizing “aged” cases that had been pending for many years. Regardless of the priorities and rationales behind

⁹ Id. at i.

¹⁰ Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review’s Fiscal Year 2019 Financial Management Practices* (June 9, 2020), available at <https://oig.justice.gov/sites/default/files/reports/a20068.pdf>.

¹¹ Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *New Cases, and Total Completions* (data generated July 13, 2023), available at <https://www.justice.gov/eoir/page/file/1060841/download>. Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *Case Appeals Filed, Completed, and Pending* (data generated July 13, 2023), available at <https://www.justice.gov/eoir/page/file/1248501/download>.

them, such docket shuffling tactics have been a hallmark of successive administrations and have exacerbated the backlog of cases pending before the immigration court system as a whole. The DOJ's ineffective management of the immigration court has been documented in multiple OIG¹² and Government Accountability Office (GAO)¹³ investigations, not to mention the almost doubling of the backlog despite significant increases in the number of immigration judges.

This political control over immigration court proceedings yields extreme pendulum swings that leaves apolitical judges overwhelmed as they navigate judicial responsibilities amid heavy political scrutiny. For example, for the period October 2018 to October 2021, a primary focus of the EOIR management judges was overseeing a flawed performance evaluation model which emphasized a dashboard displaying production quotas and time-based deadlines over judicial competence. A negative performance review due to failure to meet quotas and deadlines could have resulted in termination of employment despite the legal duty of immigration judges, codified by regulation, to exercise independent judgment and discretion in each of the matters before them. This conflict enables political priorities to seep into the very fabric of our judicial process as a focus on quotas at the expense of due process is code for speed over fairness. For the more than 350 judges, approximately 75% of the immigration judge corps, that were on probation during the use of these metrics, we know it weighed heavily on them as they made decisions on the bench - "Should I grant a continuance and risk termination?"¹⁴ Those are the types of considerations that should never be contemplated in a judicial model. While these measures are no longer explicitly mentioned as points for evaluation, the dashboard is still in use capturing data under this flawed system of evaluation, and judges have been reminded at the end of the fiscal year to record their data for future reference. This is not to say the immigration court should not use metrics to monitor progress. Metrics play an important role in efficiently managing a court. Metrics, however, can not interfere with due process and a judge's ability to fairly hear cases, and the flawed metrics still in use continue to undermine the independent judgment of immigration judges across the country. This is particularly problematic for the over 200 judges who have been hired in the past two years and therefore have no protections from termination whatsoever.

Politics cannot be a factor in appointments, promotions, or judicial decision-making. Politics has no place in a discussion about adjudication if our system is to be considered apolitical and fair. In short, the mission of the DOJ does not align with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities. It seriously compromises the very integrity of the immigration court system.

¹² Department of Justice, Office of Inspector General, *Limited-Scope Review of the Executive Office for Immigration Review's Response to the Coronavirus Disease 2019 Pandemic* (April 22, 2021), available at <https://oig.justice.gov/reports/limited-scope-review-executive-office-immigration-reviews-response-coronavirus-disease-2019>; Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards* (November 2022), available at <https://oig.justice.gov/sites/default/files/reports/23-003.pdf>; Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings* (June 2022), available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>.

¹³ Government Accountability Office, *Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges* (April 26, 2023), available at <https://www.gao.gov/products/gao-23-105431>.

¹⁴ See TRAC Immigration, *More Immigration Judges Leaving the Bench* (July 13, 2020), available at <https://trac.syr.edu/immigration/reports/617/>.

THE ENDURING SOLUTION OF AN INDEPENDENT IMMIGRATION COURT

An Article I Immigration Court is the Clear Consensus Solution that is Urgently Needed

The solution to the crisis at the immigration courts is to remove the courts from the DOJ and create an independent, Article I immigration court. Under an Article I formulation, the immigration courts could more effectively and nimbly manage their own dockets, tackle their caseloads and implement an effective information technology system. This new immigration court would separate the politics of immigration enforcement from the needs of immigration adjudication.

Creating an independent, Article I immigration court is a good government solution. It will legitimize the integrity of immigration court outcomes and support the rule of law. An independent immigration court will refocus authority to the immigration judges hearing the cases so they can manage their own dockets. It will allow the immigration court to fulfill the role contemplated by Congress in the carefully crafted immigration enforcement structure, which created the immigration courts as a neutral balance between the interests of the individuals impacted by those laws and the American public. No longer will vacillating political priorities interfere with case adjudication, and the public that we serve will have greater confidence in the integrity of the process.

Band-Aid solutions cannot solve the persistent problems facing our immigration court. Experience has shown piecemeal solutions are inadequate. The problems compromising the integrity and proper administration of the immigration court underscore the need to remove it 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, the DOJ's political priorities and law enforcement instincts have led our courts to the brink of collapse. With the misguided initiative to frequently shuffle dockets and to impose immigration judge production quotas and deadlines, the DOJ put accelerant on the fire and the integrity of the immigration courts has been significantly compromised.

The idea of creating an Article I immigration court, similar to the U.S. Tax Court, has been advanced as far back as the 1981 Select Commission on Immigration and Refugee Policy. Such a structure solves myriad problems which now plague our court: reducing the impact of policy swings on docket management; separating the decision makers from the parties who appear before them; protecting immigration judges from the cronyism of too close an association with immigration enforcement by DHS; assuring a transparent funding stream instead of obscured general budget items buried within a larger agency with competing needs; and eliminating top-heavy agency bureaucracy. In the last 40 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 there is broad agreement that 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.

NAIJ urges you to take immediate steps to protect judicial independence and efficient resolution of cases at the immigration courts by enacting Article I legislation. Our nation's immigration courts are often the only face of American justice with which noncitizens interact. Our courts need to be an example of impartiality and due process which we would be proud for other countries to replicate. Failure to act will result in irreparable harm to the implementation of our nation's immigration laws as we know them.