



## **AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts September 28, 2018<sup>1</sup>**

The U.S. immigration court system suffers from profound structural problems that have severely eroded both its capacity to deliver just and fair decisions in a timely manner and public confidence in the system itself.<sup>2</sup> At a time when funding has skyrocketed for immigration enforcement agencies, chronic underfunding of the court system has left it without the resources to effectively manage its ballooning caseload.<sup>3</sup> Most troubling of all, the immigration court has an inherent structural conflict of interest, the Attorney General is responsible for overseeing both the judges who decide immigration cases and the Department of Justice (DOJ) attorneys that prosecute immigration cases at the federal level.

These weaknesses in the system have enabled Attorney General Sessions to implement severe policies that will expel immigrants or block their entry in massive numbers not seen in decades. Under his leadership, our immigration courts are being transformed into an enforcement agency rather than a fair and neutral arbiter, turning immigration judges, as head of the National Association of Immigration Judges (NAIJ) Judge A. Ashley Tabaddor put it, into “prosecutors in ... judge’s robe[s].”<sup>4</sup> Through the policies described in this brief, EOIR and the Attorney General are undermining the independence of immigration judges and weakening due process. Judges are being pressured to render decisions at a break-neck pace at the cost of accuracy. At the same time these policies are stripping judges of their ability to control their docket, which will almost certainly slow down the processing of cases and reduce efficiency.

If these policies are fully implemented, our immigration judges are at risk of becoming little more than cogs in the Trump Administration’s vast and growing deportation machine.<sup>5</sup> In order to protect and advance America’s core values of fairness and equality, the immigration court must be restructured outside of the control of DOJ, in the form of an independent Article I court.<sup>6</sup>

### **I. INHERENTLY FLAWED STRUCTURE**

The Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is currently housed under DOJ. While trial-level immigration

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<sup>2</sup> ABA Commission on Immigration, *Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), available at [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report_authcheckdam.pdf) [hereinafter “ABA Report”].

<sup>3</sup> AILA Policy Brief, *Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts*, (Oct. 13, 2017), AILA InfoNet Doc. No. 17101234, available at <https://www.aila.org/infonet/aila-policy-brief-imposing-numeric-quotas-judges>, [hereinafter “AILA IJ Quota Brief”].

<sup>4</sup> Patt Morrison, *How the Trump administration is turning judges into 'prosecutors in a judge's robe'*, LOS ANGELES TIMES, (Aug. 29, 2018), available at <http://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-judge-ashley-tabaddor-20180829-htlstory.html>.

<sup>5</sup> AILA Report, *Cogs in the Deportation Machine*, (March 12, 2018), AILA InfoNet Doc. No. 18031237, available at <https://www.aila.org/deportationmachine>.

<sup>6</sup> AILA Statement, *Strengthening and Reforming America's Immigration Court System Hearing*, (April 18, 2018), available at <https://www.aila.org/advo-media/press-releases/2018/aila-statement-on-strengthening-and-reforming>.

prosecutors are housed under the U.S. Department of Homeland Security (DHS) within Immigration and Customs Enforcement (ICE), the Attorney General supervises the Office of Immigration Litigation (OIL) which defends immigration cases on behalf of the government in the circuit courts of appeals.<sup>7</sup> This inherent conflict of interest is made worse by the fact that immigration judges are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them at the whim of the Attorney General. The judges do not enjoy many of the protections of Article III federal judges, such as life-tenure. In fact, immigration judges have no fixed term of office and can be fired by the Attorney General or be relocated to another court.<sup>8</sup>

In addition to its fundamentally flawed structure, a history of chronic and systemic problems have resulted in a severe lack of public confidence in the system's capacity to deliver just and fair decisions in a timely manner.<sup>9</sup> Stakeholders have expressed concerns about issues such as inadequate staffing and training, lack of transparency into hiring and discipline, a shortage of technological resources, perceived bias, and perhaps most frequently, the ever-growing backlog of cases.<sup>10</sup> For over a decade, the immigration courts have been severely under-funded when compared to the skyrocketing budget increases that Congress has provided to immigration enforcement.<sup>11</sup> This disparity in funding led to a massive backlog of pending immigration court cases which was up to 542,411 pending cases at the end of January 2017, when President Trump took office.<sup>12</sup> Under the Trump administration's policies, the pending case backlog has increased by 41 percent and as of August 31, 2018, the number had reached 764,561.<sup>13</sup> While purporting to be committed to eliminating the backlog, the Attorney General's own policies are contributing to this considerable rise in cases on the docket. Sessions' decision in *Matter of Castro Tum*, discussed below, will eventually result in the addition of some 355,835 cases that are currently administratively closed to the docket.<sup>14</sup>

## II. ATTACKS ON JUDICIAL INDEPENDENCE

### A. Case Completion Quotas

Beginning Monday, October 1, 2018, Attorney General Sessions will subject all immigration judges to individual case completion quotas and time-based deadlines as a basis for their performance reviews.<sup>15</sup> This unprecedented policy requires judges to adjudicate a certain number of cases or face discipline which may

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<sup>7</sup> Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, Bender's Immigration Bulletin (Jan. 1, 2008), available at <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf>.

<sup>8</sup> ABA Report, *supra* note 2.

<sup>9</sup> ABA Report, *supra* note 2. See also AILA IJ Quota Brief, *supra* note 3.

<sup>10</sup> AILA IJ Quota Brief, *supra* note 3.

<sup>11</sup> ABA Report, *supra* note 2. See also *Cogs in the Deportation Machine, How Policy Changes by the Trump Administration Have Touched Every Major Area of Enforcement* (Mar. 12, 2018), AILA InfoNet Doc. No. 18031237, available at <https://www.aila.org/deportationmachine>.

<sup>12</sup> TRAC, *Immigration Court Backlog Jumps Again in August*, (Sept. 26, 2018), available at <http://trac.syr.edu/whatsnew/email.180926.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

<sup>15</sup> Memorandum from James McHenry, Director, Executive Office for Immigration Review on Immigration Judge Performance Metrics to All Immigration Judges, (March 30, 2018), available at <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>; *Imposing Quotas on Immigration Judges will Exacerbate the Case Backlog at Immigration Courts*, National Association of Immigration Judges, Jan. 31, 2018, available at [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Imposing\\_Quotas\\_on\\_IJs\\_will\\_Exacerbate\\_the\\_Court\\_Backlog\\_1-31-18\\_.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf); See also Department of Justice, *Immigration Judge Performance Measures Overview*, June 7, 2018, available at <https://www.aila.org/infonet/eoir-legal-training-prgm-ij-performance-measures>.

result in termination of employment. The policy was described by NAIJ as a “death knell for judicial independence” and will undoubtedly pressure judges to rush through decisions to protect their own jobs.<sup>16</sup> Disturbingly, it has even been reported that the DOJ unveiled new software, resembling a “speedometer on a car,” employed to track the completion of immigration judges’ cases.<sup>17</sup> The quotas are also at odds with recommendations made by an independent third party in a report commissioned by EOIR itself, which recommends a judicial performance review model that “emphasizes process over outcomes and places high priority on judicial integrity and independence.”<sup>18</sup>

Imposing numeric quotas on immigration judges will contribute to the Administration’s broader agenda to streamline removal procedures and deport massive numbers of people at the expense of due process. Courts will be pressured to accommodate the quotas at the cost of potentially excluding essential facts from their consideration. Given that most respondents do not speak English as their primary language, a strict time frame for completion of cases will interfere with a judge’s ability to assure that a person’s right to examine and present evidence is respected.<sup>19</sup> This policy will profoundly impact asylum seekers, who may need more time to gather evidence that is hard to obtain from their countries of origin, as well as unrepresented individuals, who may need more time to obtain an attorney. The purported argument for quotas is that it will speed the process up for the judges hearing the more than 750,000 pending cases. However, applying this kind of blunt instrument will compel judges to rush through decisions and may compromise a respondent’s right to due process and a fair hearing. Poorly reasoned decisions or gross errors will lead to an increase in appeals and federal litigation, further slowing down the process.

#### *B. Attorney General Certifications*

Under the INA, the Attorney General has authority to re-open and refer cases previously decided by the BIA to himself for a new decision.<sup>20</sup> Known as “certification,” this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. Under the previous administration, Attorneys General Eric Holder and Loretta Lynch employed this power only four times over the course of eight years.<sup>21</sup> In just the last year, Attorney General Sessions has certified six cases to himself and issued five decisions that are transforming immigration law in ways that run contrary to decades of judicial practice and established law. Overall, the decisions are aimed at minimizing the role of judges in immigration courts by restricting their authority to manage their dockets or make decisions based on the

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<sup>16</sup> NAIJ, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (October 2017), available at [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Quotas\\_in\\_IJ\\_Performance\\_Evaluation\\_10-1-17.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf).

<sup>17</sup> *Federal Immigration Court System*, C-SPAN, (Sept. 21, 2018), available at <https://www.c-span.org/video/?451809-1/federal-immigration-court-system&start=348>. [hereinafter “C-SPAN NAIJ”] (“[t]his past week or so, they [EOIR] unveiled what’s called the IJ dashboard...this mechanism on your computer every morning that looks like a speedometer on a car,” said Ashley Tabaddor, and ‘it has all of the numbers there and 80% of it is red and there is a little bit of yellow and a little bit of green. The goal is for you to be green but of course you see all of these reds in front of you and there is a lot of anxiety attached to that.”).

<sup>18</sup> AILA and The American Immigration Council FOIA Response, *Booz Allen Hamilton Report on Immigration Courts* (4/6/17), available at <https://www.aila.org/infonet/foia-response-booz-allen-hamilton-report> [hereinafter “Booz Allen Report”].

<sup>19</sup> INA §240(b)(4)(B) requires that a respondent be given a “reasonable opportunity” to examine and present evidence.

<sup>20</sup> 8 U.S.C. § 1103(g)(2) (West 2018) (“The Attorney General shall establish such regulations . . . [and] review such administrative determinations in immigration proceedings . . .”).

<sup>21</sup> Sophie Murguia and Kanyakrit Vongkiatkajorn, *Jeff Sessions Is Executing Trump’s Immigration Plans With a Quiet, Efficient Brutality*, MOTHER JONES, (Sept. 7, 2018), <https://www.motherjones.com/politics/2018/09/jeff-sessions-is-executing-trumps-immigration-plans-with-a-quiet-efficient-brutality/> [hereinafter “Murguia”].

facts of each case. In the words of Judge Tabaddor, “[w]hen you provide a prosecutor with a super veto power, that’s a design flaw.”<sup>22</sup>

- **Bloating the Docket by Limiting Use of Administrative Closure.** In *Matter of Castro-Tum*, the Attorney General severely limited the discretion of judges and the BIA to administratively close cases, eliminating an important docketing tool.<sup>23</sup> An April 2017 report independently commissioned by EOIR had identified administrative closure as a helpful tool, specifically recommending that EOIR work with DHS to implement a policy to administratively close cases awaiting adjudication in other agencies or courts.<sup>24</sup>
- **Limiting Continuances and the Opportunity to Obtain Counsel.** In *Matter of L-A-B-R- et al.*, the Attorney General made it more difficult for judges to grant continuance requests and implemented procedural hurdles that will also make it harder for people to request and immigration judges to grant continuances.<sup>25</sup>
- **Restricting Discretion to Terminate Cases.** In *Matter of S-O-G- & F-D-B-*, the Attorney General prevents judges and the BIA from terminating or dismissing cases except in very narrow circumstances, a tool judges have used to increase efficiency by removing prioritizing which cases should move forward on their dockets.<sup>26</sup>
- **Foreclosing Asylum for Victims of Domestic Violence and Gangs.** In *Matter of A-B-*, the Attorney General made it far more difficult—in many cases impossible—for survivors of domestic violence and gang persecution to apply for and qualify for asylum.<sup>27</sup>
- **Denying Hearings to Asylum Seekers.** In *Matter of E-F-H-L-*, the Attorney General appeared to open the door for judges to deny asylum without first conducting a full evidentiary hearing, depriving asylum seekers of an opportunity to fully present their case.<sup>28</sup>

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<sup>22</sup> C-SPAN NAIJ, *supra* note 17.

<sup>23</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1064086/download>.

<sup>24</sup> Booz Allen Report, *supra* note 18.

<sup>25</sup> *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1087781/download>. EOIR also issued guidance for judges discouraging the use of continuances and encouraging judges to sanction counsel that request continuances. Memorandum MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 17-01: Continuances to All Immigration Judges, et al. (July 31, 2017), available at <https://www.justice.gov/eoir/file/oppm17-01/download> [hereinafter OPPM 17-01: Continuances]. The Attorney General also issued guidance directing judges to expedite. Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice on Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

<sup>26</sup> *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1095046/download>.

<sup>27</sup> *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1070866/download>.

<sup>28</sup> *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1040936/download>.

- *Matter of M-G-G*. The Attorney General has certified *Matter of M-G-G*, where the BIA held that judges may conduct bond hearings for certain types of asylum seekers.<sup>29</sup> The decision could result in longer period of detention for asylum seekers and families.

Three of the decisions (*Matter of Castro-Tum*, *Matter of L-A-B-R*, *Matter of S-O-G- & F-D-B*) will force judges to proceed in cases in which the person is eligible for some kind of relief. These are cases that could be resolved by other agencies and result in a grant of legal status. To compel the courts to move forward in such cases is an efficient and wasteful expenditure of the court's resources.

### C. Docketing Interference

In August of 2018, EOIR removed an immigration judge from a case due to the judge's decision to delay the case in the interest of due process.<sup>30</sup> Judge Steven A. Morley had decided to continue the high-profile case, *Matter of Castro-Tum*, to ensure adequate time for proper notice.<sup>31</sup> EOIR personally interceded in the case and sent an Assistant Chief Immigration Judge to Philadelphia to conduct a single preliminary hearing.<sup>32</sup> Subsequently, EOIR transferred dozens of other cases from the judges' docket, allocating them to an immigration judge that would be more likely to deny relief.<sup>33</sup> NAIJ filed a formal grievance against DOJ and EOIR seeking redress for the unwarranted removal of cases.<sup>34</sup>

### D. Politicization of Immigration Judges

Under the leadership of Attorney General Sessions, the DOJ has faced recent allegations of politicized hiring based on candidates perceived political or ideological views.<sup>35</sup> On April 11, 2017, Attorney General Sessions announced that he "implemented a new, streamlined hiring plan" to reduce the time it takes to hire immigration judges.<sup>36</sup> While a copy of this plan has not been made publicly available, reports indicate that DOJ "surreptitiously has made substantive changes to the qualification requirements for judges, over-

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<sup>29</sup> *Matter of M-G-G*, 27 I&N Dec. 469 (A.G. 2018), available at <https://www.justice.gov/eoir/page/file/1095056/download>.

<sup>30</sup> Press Release, National Association of Immigration Judges, *Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts* (Aug. 8, 2018), available at <https://www.aila.org/infonet/judges-union-grievance-violation-due-process-right>

<sup>31</sup> *Id.*

<sup>32</sup> NAIJ, *Judges' Union Grievance Seeking Redress for the Unwarranted Removal of Cases from IJ*, (Aug. 8, 2018), available at <https://www.aila.org/infonet/naij-grievance-redress-removal>. [hereinafter "NAIJ Grievance"].

<sup>33</sup> *Id.*

<sup>34</sup> NAIJ Grievance, *supra* note 32.

<sup>35</sup> In April of 2017, House Democrats submitted a letter to the Attorney General expressing concern about reports that the DOJ "may be using ideological and political considerations to improperly and illegally block the hiring of immigration judges." *House Democrats Demand DOJ Respond to Allegations of Politicization in the EOIR Hiring Process*, (April 17, 2018), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/house-democrats-demand-doj-respond-to-allegations>. A month later, top Senate and House Democrats submitted a letter to the Inspector General requesting an investigation into the allegations that DOJ has targeted candidates and withdrawn or delayed offers for immigration judge and BIA positions based on their perceived political or ideological views. *Senate and House Democrats Request IG Investigation of Illegal Hiring Allegations at DOJ*, (May, 8, 2018), available at <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senate-and-house-democrats-request-ig-investig>.

<sup>36</sup> Department of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement, (Apr. 11, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

emphasizing litigation experience to the exclusion of other relevant immigration law experience.”<sup>37</sup> NAIJ has opposed this policy and alleged that it will lead to even more skewed appointment favoring former prosecutors or those with law enforcement backgrounds.<sup>38</sup> Since January of 2017, the Trump administration has hired 128 new judges and “EOIR anticipates two additional hiring classes this fall which will make for over 100 immigration judges hired during 2018.”<sup>39</sup>

### III. EOIR POLICIES UNDERMINING DUE PROCESS

Under the leadership of Attorney General Sessions, EOIR has also issued policies that erode due process. These policies have a singular focus on speed and efficiency, and strike at the heart of a person’s ability to have a full and fair hearing. Those policies include:

- **Dark Court Room Policies.** EOIR implemented a “no dark court room” policy, which directs immigration judges to reschedule and advance hearings to any period in which there is no case scheduled in their court room.<sup>40</sup> In addition to reducing the amount of time for judges to prepare and review cases, this policy led some judges to advance hearings with little notice to counsel, sometimes as little as 48 hours before a hearing.<sup>41</sup> Despite widespread concerns around utilizing Video Conferencing for immigration hearings, EOIR has piloted use of Video Conferencing (VTC) immigration adjudication centers (IACs), where IJs will adjudicate cases from around the country.<sup>42</sup> An EOIR Commissioned report recommended that EOIR limit the use of VTC to procedural matters only due to concerns about how difficult it is for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC.<sup>43</sup>
- **Discouraging Continuances.** In July of 2017, EOIR issued a memorandum that discourages the use of continuances by judges and even encourages judges to consider sanctions for attorneys who request too many continuances.<sup>44</sup> Continuances are often a necessary means to ensure due process is afforded in removal proceedings. For example, the number one reason respondents request

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<sup>37</sup> Strengthening and Reforming America’s Immigration Court System, Hearing Before Subcommittee on Border Security and Immigration, of the Senate Committee on the Judiciary, 115th Cong. 5 (2018) (A. Ashley Tabaddor, President, National Association of Immigration Judges), *available at* <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> [hereinafter “Tabaddor”].

<sup>38</sup> *Id.*; Strengthening and Reforming America’s Immigration Court System, Hearing Before Subcommittee on Border Security and Immigration, of the Senate Committee on the Judiciary, 115th Cong. 5 (2018) (A. Ashley Tabaddor, President, National Association of Immigration Judges), *available at* <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> [hereinafter “Tabaddor”].; *See also* Booz Allen Report, *supra* 18 (As of April of 2017, 41% of the immigration judges on the bench previously worked for DHS Immigration and Customs Enforcement (ICE) and nearly 20% of immigration judges previously worked at other DOJ branches).

<sup>39</sup> Department of Justice, EOIR Announces Largest Ever Immigration Judge Investiture, (Sept. 28, 2018), *available at* <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture>.

<sup>40</sup> Hoppock Law Firm Blog, “No Dark Courtrooms” is the Secret EOIR Policy That Might Ruin Your Summer, (June 1, 2018), *available at* <https://www.hoppocklawfirm.com/no-dark-courtrooms-is-the-secret-eoir-policy-that-may-ruin-your-summer/>.

<sup>41</sup> *EOIR Open Forum Notes*, American Immigration Lawyers Association, (June 16, 2018), on file with author.

<sup>42</sup> DOJ Backgrounder, *EOIR Strategic Caseload Reduction Plan*, (Dec. 5, 2017), *available at* <https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction>.

<sup>43</sup> Booz Allen, *supra* note 18.

<sup>44</sup> OPPM 17-01: Continuances, *supra* note 25. (“[I]t may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. §1003.102.”).

continuances is to find counsel, who play a critical role in ensuring respondents receive a fair hearing.<sup>45</sup>

- **Restricting Change of Venue.** In January of 2018, EOIR issued a memorandum that limited the authority of judges to grant change of venue motions, stating the changes of venue “create problems in caseload management and operational inefficiencies.”<sup>46</sup>
- **Expedited Adjudications at the Cost of Due Process.** In December of 2017, the Attorney General issued a memorandum encouraging judges to adjudicate cases as quickly as possible, with no mention of the need to ensure due process.<sup>47</sup>
- **Establishing Arbitrary Deadlines for Court Proceedings.** In January of 2018, EOIR issued new case priorities and immigration court performance metrics.<sup>48</sup> These metrics established various deadlines for the immigration court to complete tasks, including completion of cases, adjudication of motions, and completion of credible fear interviews.<sup>49</sup> The metrics work hand-in-hand with the quotas to speed cases towards a resolution.

#### IV. ATTACKS ON IMMIGRATION COUNSEL AND ACCESS TO REPRESENTATION

Federal law guarantees noncitizens facing removal the right to counsel but does not entitle those who are unable to pay for counsel to have one appointed at the government’s expense.<sup>50</sup> In fact, only 37 percent of all noncitizens and 14 percent of detained noncitizens are represented.<sup>51</sup> However, unrepresented people often face hurdles in court that can cause case delays, and the American Immigration Council has found that “immigrants with attorneys fare better at every stage of the court process.”<sup>52</sup> Despite the well-documented benefits of counsel, the administration has repeatedly attacked immigration lawyers by referring to them as “dirty immigration lawyers”<sup>53</sup> and accusing attorneys of engaging in fraud.<sup>54</sup> Most

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<sup>45</sup> GAO Report, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, (June 2017), available at <https://www.aila.org/infonet/gao-report-actions-needed-to-reduce-case-backlog>.

<sup>46</sup> Memorandum Mary Beth Keller, Chief Immigration Judge, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 18-0 1: Change of Venue to All Immigration Judges, et al. (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026726/download>.

<sup>47</sup> Memorandum from Jeff Sessions, Attorney General, U.S. Department of Justice, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to Executive Office for Immigration Review* (Dec. 5, 2017), available at <https://www.justice.gov/eoir/file/1041196/download>.

<sup>48</sup> Memorandum from James R. McHenry III, Director, Executive Office for Immigration Review on Case Priorities and Immigration Court Performance Measures to The Office of the Chief Immigration Judge, et al, (Jan. 17, 2018), available at <https://www.justice.gov/eoir/page/file/1026721/download>.

<sup>49</sup> *Id.*

<sup>50</sup> 8 U.S.C § 1362 (West 2018).

<sup>51</sup> Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council, Sept. 28, 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

<sup>52</sup> Booz Allen, *supra* note 18.

<sup>53</sup> OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, (Oct. 12, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

<sup>54</sup> OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF JUSTICE, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR), (Sept. 10, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

recently, the Attorney General compared immigration lawyers and federal criminal defense lawyers to “water seeping under an earthen dam,” and concluded that they have no duty or interest in upholding the integrity of the system. These are sweeping allegations from the nation’s chief law enforcement officer that reflect an improper bias against immigration lawyers.

DOJ also attempted to end the Legal Orientation Program (LOP), a program that provides a basic legal orientation for immigrants in deportation proceedings, proven to increase court efficiency and save taxpayer dollars.<sup>55</sup> After universal condemnation, DOJ rescinded its proposed termination of LOP, but continues to undermine the program by releasing flawed evaluations of LOP’s efficacy.<sup>56</sup> These assertions are contradicted by several studies showing that the LOP program has a positive impact, including an independent report commissioned by EOIR that recommends that DOJ “consider expanding know your rights and legal representation programs, such as the Legal Orientation Program(LOP).”<sup>57</sup>

## V. CONCLUSION

In its current state, the immigration court system is too easily manipulated. The Attorney General, with the full support of the administration, is taking advantage of system’s structural flaws to distort immigration law, undermine judicial independence, and speed through cases at the expense of due process. These problems can only be solved through a structural overhaul. The creation of an independent immigration court system outside the control of DOJ would protect and advance America’s core values of fairness and equality by safeguarding the independence and impartiality of the immigration court.

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<sup>55</sup> Maria Sacchetti, *Justice Dept. to halt legal-advice program for immigrants in detention*, THE WASHINGTON POST, (April 10, 2018), available at [https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html); See also Press Release, Vera Institute of Justice, *Statement on DOJ’s Decision to Halt Legal Orientation Program* (April 11, 2018), available at <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program> [hereinafter “Vera”]. (“The Department of Justice concluded in a 2012 study that this essential work is a cost-effective and efficient way to promote due process and cut through the large backlog of cases, the most significant issue facing the immigration courts today. The same study found that the program created a net savings for the government of nearly \$18 million—meaning, every \$1 the government spent on LOP saved \$4.”).

<sup>56</sup> Lorelei Laird, *DOJ review finds immigrant legal education program ineffective; provider calls study flawed*, ABA JOURNAL, (Sept. 21, 2018), available at [www.abajournal.com/news/article/doj\\_review\\_finds\\_immigrant\\_legal\\_education\\_program\\_ineffective\\_provider](http://www.abajournal.com/news/article/doj_review_finds_immigrant_legal_education_program_ineffective_provider); See also Vera, *supra* note 55 (“There are insurmountable methodological flaws in EOIR’s analysis. Our own analysis, which will be submitted to EOIR next week at their request, has starkly different findings that prove the efficiencies LOP yields, to say nothing of the other benefits of this program.”).

<sup>57</sup> Booz Allen Report, *supra* note 18.