



**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

VICTORIA F. NEILSON
CHAIR
42 W. 44TH STREET
NEW YORK, NY 10036
Phone: (917) 499-8869
Vickie.neilson@gmail.com

October 23, 2019

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Submitted via www.regulations.gov

**Re: RIN No. 1125-AA85 or EOIR Docket No. 18-0502, Comments in Response to the
Interim Rule Reorganizing the Executive Office for Immigration Review**

Dear Assistant Director Alder Reid:

On behalf of the New York City Bar Association (“City Bar”), we are writing in response to the Justice Department’s Interim Rule (“Interim Rule”) that became effective on August 26, 2019 and changes the organization of the Executive Office for Immigration Review (“EOIR”).

The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The City Bar’s Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff members of legal services organizations providing immigration assistance, private immigration attorneys, staff members of local prosecutor’s offices, staff members of immigrant advocacy organizations, academics, and law students. Many of our Committee members work for DOJ-recognized organizations that employ DOJ-accredited representatives.

The City Bar opposes the Interim Rule because it improperly politicizes EOIR’s adjudicative function and appears to marginalize the crucial role of the Office of Legal Access Programs (“OLAP”). Specifically, we oppose the establishment of the Office of Policy as an official component of EOIR, the transfer of OLAP to this Office of Policy, and the delegation of authority from the Attorney General to the Director of EOIR, allowing him or her to adjudicate certain Board of Immigration Appeals (“BIA”) cases. The City Bar has expressed concern previously about the potential for politicizing the adjudicative process in immigration court and

has called for the establishment of an independent Article 1 court.¹ Recognizing that such a change would require legislative action, we respectfully request that the Interim Rule be rescinded.

I. WE OPPOSE THE FORMALIZATION OF THE OFFICE OF POLICY UNDER EOIR.

The City Bar opposes formalizing the Office of Policy as part of EOIR and making it permanent via regulation. As an initial matter, having an Office of Policy within EOIR is highly problematic because the mission of EOIR is to adjudicate individual cases, not to make policy. Our concern is compounded by the fact that the Trump administration created the Office of Policy in 2017 and, prior to and following its creation, has repeatedly expressed animosity towards immigrants in public statements.² As an administrative court, EOIR should be dedicated to the fair application of the law on an individual, case-by-case basis. Placing the Office of Policy on an equal level with this essential adjudicative function politicizes EOIR and threatens judicial independence within the immigration system. An Office of Policy has no place within EOIR.

II. WE OPPOSE MOVING OLAP UNDER THE OFFICE OF POLICY.

OLAP serves the important function of increasing access to legal counsel in immigration proceedings for low-income immigrants. This is a critical role because deportation devastates individual immigrants, families and communities, yet there is no right to government-appointed counsel in immigration court. When noncitizens are forced to represent themselves in removal proceedings, the chance of a favorable outcome declines dramatically.³ Unrepresented noncitizens in removal proceedings must oppose highly trained attorneys arguing for the government. They lack guidance about how to present their case and are not connected with tools to manage trauma that may have led to their decision to enter the United States. Detained noncitizens in removal proceedings face even worse odds of success without representation and, for many, an OLAP coordinated know your rights presentation is their only contact with a legal professional.⁴ OLAP also benefits EOIR and the Department of Homeland Security because noncitizens who know their rights and can access quality representation contribute to efficiency of adjudications, saving immigration judges valuable time on the bench during which they would otherwise be explaining basic processes.

¹ New York City Bar Association, Written Testimony Respectfully Submitted By The Immigration And Nationality Law Committee And The Task Force For The Independence Of Lawyers And Judges to the Senate Judiciary Committee Subcommittee On Border Security And Immigration, Apr. 18, 2018, https://s3.amazonaws.com/documents.nycbar.org/files/2017367-Senate_Testimony_Imm_Court_Quotas.pdf. (All links in this report were last visited on October 23, 2019.)

² See, e.g., *Here's Donald Trump's Presidential Announcement Speech*, Time (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>; Jefferson B. Sessions III, Att'y General, *Attorney General Sessions Delivers Remarks on Sanctuary Jurisdictions* (Mar. 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>; 'Angel Families,' *Trump Aides Rally Against Illegal Immigrant Crime*, Fox News (Sept. 7, 2018) <https://www.foxnews.com/politics/angel-families-trump-aides-rally-against-illegal-immigrant-crime>.

³ Steering Comm. Of the N.Y. Immigrant Representation Study Report, *Accessing Justice the Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo Law Review 357, 363-64 (2011).

⁴ See *id.*

We are concerned that the shift of OLAP under the Office of Policy signals an erosion of OLAP's commitment to "improve the efficiency of immigration court hearings by increasing access to information and raising the level of representation for individuals appearing before the immigration courts and BIA." The Trump administration – which created the Office of Policy – has openly attacked immigration lawyers and indicated an intention to end know your rights presentations for detained noncitizens.⁵ In light of these actions which conflict with OLAP's mission, the Office of Policy is a concerning location to house OLAP. OLAP should be returned to a separate office within EOIR.

III. WE WOULD OPPOSE ANY CHANGES THAT THREATEN THE ABILITY OF THE RECOGNITION AND ACCREDITATION PROGRAM TO HELP ADDRESS THE REPRESENTATION CRISIS.

The Department of Justice's Recognition and Accreditation (R&A) Program, a key component of OLAP, "aims to increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice."⁶ There are currently 1,077,155 pending removal cases nationwide.⁷ There are not enough immigration attorneys to address the need for representation in these proceedings. Accredited representatives help to provide competent representation to those who would otherwise not be able to afford representation, thereby protecting the due process rights of noncitizens as well as increasing the efficiency of the immigration court system.

Many legal services organizations that provide immigration assistance employ partially and fully DOJ- accredited representatives and depend upon these legal professionals' help to meet the extremely high demand for immigration legal services. Immigration law is notoriously complex and difficult to navigate. Indeed, the forms required by United States Citizenship and Immigration Services ("USCIS") to apply for affirmative immigration benefits grow ever longer as more detailed information is required and inquiries into the immigration history of applicants become more searching. Likewise, defending noncitizens from removal grows ever more challenging as new policies and legal decisions attempting to limit availability of asylum are issued.⁸ Noncitizens should not have to face such a high-stakes, complicated system without the assistance of a legal representative. If the R&A Program is altered or deprioritized because of its new location under the Office of Policy, many low-income immigrant families will have to face

⁵ See Justice News, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>; Vanessa Romo, *Justice Department Will Pause A Legal Advice Program For Detained Immigrants*, NPR (Apr. 12, 2018, 6:33 PM), <https://www.npr.org/sections/thetwo-way/2018/04/12/601642556/justice-department-will-pause-a-legal-advice-program-for-detained-immigrants>.

⁶ *Recognition & Accreditation (R&A) Program*, DEP'T OF JUSTICE, <https://www.justice.gov/eoir/recognition-and-accreditation-program> (last accessed October 23, 2019).

⁷ Transaction Records Access Clearinghouse, Syracuse University, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

⁸ See, e.g., Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. 208, 10003, 1208) (barring migrants at the southern border of the United States from eligibility for asylum if the migrants passed through a third country en route to the United States without applying for asylum in that third country and being denied).

these processes alone and would therefore have their chance of a favorable outcome severely diminished.

IV. WE OPPOSE THE DIRECTOR OF EOIR BEING GRANTED THE POWER TO ISSUE PRECEDENTIAL DECISIONS.

We believe that vesting the EOIR Director with the power to issue precedential decisions threatens the independence of immigration judges and BIA members. BIA members are career government employees with extensive knowledge of and experience in immigration law. Currently, pursuant to regulation, three BIA members must adjudicate a case in order to issue a precedential decision. This process places value on careful thought and deliberation and allows for multiple perspectives to inform precedential decisions. It is entirely appropriate because precedential decisions have tremendous impact – they are binding on every immigration judge and Department of Homeland Security officer throughout the country.

We have several grave concerns about the Interim Rule which instead values swift adjudication over careful deliberation and would enable the EOIR Director, acting alone, to assign a case to him or herself and issue a precedential decision within 14 days if the BIA members have not reached a final decision in 90 days for detained cases or 180 days for non-detained cases. First, a single, unconfirmed political appointee should not hold this much power in an adjudicative process that is intended to be fair and impartial. Indeed, the National Association of Immigration Judges has publicly stated its strong opposition to the rule, specifically focusing on the problematic combination of adjudication and policy-making within the EOIR Director role.⁹ A panel of three BIA members should continue to be required for precedential decisions. Second, this rule will put pressure on BIA members to complete cases quickly even though immigration cases before the BIA are extremely complex and their impact on noncitizens' lives is profound. BIA members need the ability to fully analyze the complex issues that each case presents without being cabined by one-size-fits-all time limits. Third, this prioritization of swift adjudication over careful consideration will also impact the independence and autonomy of immigration judges. Indeed, immigration judges already face quotas that impinge on their ability to fully and fairly adjudicate cases and this rule will exacerbate those pressures.¹⁰ The Interim Rule should be rescinded and precedential decisions should be made by a panel of three BIA members.

⁹ Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ), Statement by Immigration Judges Union on Major Change Announced to Immigration Courts (“By collapsing the policymaking role with the adjudication role into a single individual, the Director of EOIR, an unconfirmed political appointee, the Immigration Court system has effectively been dismantled.”) https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Speaks_on_Major_Change_Announced_to_the_Immigration_Court_System.pdf.

¹⁰ Written testimony of Ashley Tabaddor, President of NAIJ, before the Senate Subcommittee on Border Security and Immigration, May 8, 2019, *At the Breaking Point: The Humanitarian and Security Crisis at our Southern Border* (stating that noncitizens “deserve to stand before an independent court and an impartial judge who is not placed in a conflict of interest position of honoring her oath of office or risking her source of livelihood”) https://www.naij-usa.org/images/uploads/publications/NAIJ_Written_Testimony_Before_Senate_Subcommittee%2C_May_2019.pdf

V. EOIR’S REORGANIZATION THROUGH AN INTERIM RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

Where no urgent need exists to implement regulations quickly, the Administrative Procedure Act requires regulations to go through a Notice of Public Rule-Making (“NPRM”) process, which allows the public to comment, and requires the agency to respond substantively to the comments. This process should have been followed with respect to the Interim Rule. EOIR asserts that these regulations do not need to pass through the usual notice and comment processes because they do not affect the general public. We disagree. As set forth above, these changes will have a profound and far-reaching impact on organizations providing immigration legal services and on the lives of immigrant families and communities. There is no justification for accelerating the implementation of this regulation and the public should have been heard prior to EOIR making these significant changes.

VI. CONCLUSION

For the above stated reasons, the City Bar opposes the Interim Rule because it weakens the independence of the immigration courts and the BIA and marginalizes access to counsel for low-income immigrants. Thank you for the opportunity to submit these comments. We appreciate your consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Victoria Neilson".

Victoria Neilson
Chair, Immigration and Nationality Law Committee