



NEW YORK
CITY BAR

COMMITTEE ON IMMIGRATION &
NATIONALITY LAW

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Via email

United States House of Representatives
Committee on the Judiciary
Subcommittee on Immigration and Citizenship
6320 O'Neill House Office Building
Washington, DC 20515
Attn: Anthony Valdez (Anthony.Valdez@mail.house.gov)

**Re: January 20, 2022 Hearing: For the Rule of Law, An Independent Immigration Court;
New York City Bar Association's Report on the Independence of the Immigration
Courts**

Dear Members of Congress:

The New York City Bar Association's Immigration and Nationality Law Committee is grateful for the opportunity to submit this statement in support of any efforts to remedy the longstanding, systemic flaws within our current immigration court system.

In October 2020, our committee, in collaboration with the City Bar's Task Force on the Rule of Law and the Task Force for the Independence of Lawyers and Judges published a comprehensive report detailing our concerns about due process violations of individuals subject to immigration court proceedings.¹ Given the inherent conflict in housing a judicial body within the nation's top law enforcement agency, we call for the removal of the court from the Department of Justice and the creation of a truly independent Article I court. We submit our October 2020 report in its entirety (enclosed) and supplement it as follows.

¹ New York City Bar Association, "Report on the Independence of the Immigration Courts," Oct. 21, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/independence-of-us-immigration-courts> (All sites last visited Jan. 19, 2022).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

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The report details one overarching example of how flawed our current immigration court system is; that is, the Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is housed under the Department of Justice (DOJ), a federal agency primarily charged with law enforcement. While trial-level immigration 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. Furthermore, immigration judges are considered merely government attorneys, a classification that fails to recognize the significance of their judicial duties and puts them at the whims of the Attorney General or the President.

These flaws are exacerbated by various actions that the DOJ previously took to prioritize the administration's political agenda over fairness in the immigration court system. As highlighted in the report, the DOJ “has taken several steps to reorganize immigration courts and the [Board of Immigration Appeals] in a way that aligns them more closely with the [previous] administration's goals of enforcing harsher and more restrictive immigration policies.”²

Since the date we published our report, the current administration has taken some steps in the right direction. An example of this would be DHS’s Policy Memorandum calling for a 100-day moratorium on deportations, directing that DHS leadership conduct an internal review of policies and practices concerning immigration enforcement and, in the interim, returning to the enforcement priorities that pre-dated the Trump Administration, i.e., national security, border security, and public safety. Recent internal guidance directed at the EOIR are also welcome first steps towards improving the immigration court system.³ Then in September 2021, DHS issued the Civil Immigration Enforcement and Removal Priorities guidance. While this was a directive for ICE, it gave the two main players in the deportation process—Immigration Judges and the ICE trial attorneys—more authority to make decisions that directly pertain to the management of immigration court dockets.

The Immigration and Nationality Law Committee of the New York City Bar Association is grateful to Representative Zoe Lofgren for championing efforts to remedy the aforementioned due process and court reform concerns. We join the scores of legal and human rights organizations around the country that have declared the immigration court system hopelessly untethered to providing justice. We support Rep. Lofgren’s leadership and hope what results will restore due process and fundamental fairness at EOIR components, namely, the Immigration Courts and the BIA.

² For example, hiring practices that placed judges “with records of much higher than average asylum denial rates” on the BIA; implementation of restrictive performance metrics for immigration judges, made under the pretense of efficiency; illogical, large scale reassigning of cases; and a campaign to stifle immigration judges who speak up, including “efforts to decertify” the Immigration Judges’ union. *See generally id.*

³ For example, Policy Memorandum 21-27, enjoining the Immigration Court to stop using pejorative terms like “alien” and “illegal” in its communications, in favor of less offensive phrases like “noncitizen” and “undocumented;” Policy Memorandum 21-24, eliminating recent immigration fee hikes; and Policy Memorandum 21-17 rescinding a memo that would have eliminated master calendar (pre-trial) hearings in represented, non-detained cases, and replaced them with automatic pre-hearing scheduling orders that set extremely short filing deadlines.

We respectfully join in the call for Congress to establish an immigration court system that is independent of the DOJ so that it can guarantee due process and a fair hearing for immigrants. It is time—past time—to remedy this conspicuous failure in our legal system and this abuse of the fundamental rights of millions of people.

Respectfully,

Danny Alicea, Chair
Immigration & Nationality Law Committee

Enclosure