



**President A. Ashley Tabaddor
c/o Immigration Court
606 S. Olive Street, 15th Floor
Los Angeles, CA 90014
(213) 534-4491**

October 25, 2019

Submitted electronically via: www.regulations.gov

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
7107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

COMMENT BY THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Re: Interim Rule - Organization of the Executive Office for Immigration Review

84 Federal Register 44537

[EOIR Docket No. 18-0502; RIN 1125-AA85]

The National Association of Immigration Judges (NAIJ) is a non-profit, voluntary organization of United States Immigration Judges. The NAIJ was founded in 1971 and in 1979 was designated the recognized collective bargaining representative for this group. Our mission is to promote independence and enhance the professionalism, dignity, and efficiency of the Immigration Courts. The NAIJ speaks on behalf of the Immigration Judge Corps and this comment represents the opinions of our members.

NAIJ strongly advocates against the promulgation of this interim rule amending the regulations relating to the internal organization of the Executive Office for Immigration Review (EOIR), against the further delegation of authority from the Attorney General to the EOIR Director (Director) expanding the Director's authority to adjudicate cases, against the changes related to the establishment of an Office of Policy within EOIR, and against the changes as related to the organizational roles of the Office of General Counsel (OGC) and the Office of Legal Access Programs (OLAP).

Until recently, our immigration court system has witnessed a steady progression toward the recognition of fair, unbiased interpretation of our immigration laws by impartial adjudicators. Calls for judicial independence and legitimacy made significant strides in Congress and the legal community and have helped the immigration courts move into the 21st century. This interim rule is a pernicious attempt by DOJ to usurp this judicial independence, interfere with due process, and reverse decades of strides towards assuring neutral and fair adjudication for all.

This regulation, if allowed to stand, will fundamentally alter the character and mission of the EOIR. These changes conflict with the clearly stated intentions of Congress to maintain the decisional independence of immigration judges and guarantee a neutral, unbiased court system. Longstanding legislative intent regarding the role of the Immigration Court in our complex system of immigration law enforcement and the conferring of benefits to those who qualify require that these interim changes be reversed.

1. EOIR's August 26, 2019 Interim Rule is Inconsistent with a Consciously Nurtured Evolution of Our Immigration Court System Which Fosters Neutral, Non-Partisan Application of our Nation's Immigration Laws and Aspires to Ensure Judicial Independence.

The tensions between immigration law enforcement and adjudication of benefits is far from new, but to be properly understood, and for the insidious dangers to be exposed, a bit of history is required.

As far back as 1938 when immigration functions were housed with the Department of Labor, a committee titled "the Dimock Committee," reported, "the serious problem in deportation administration is bias or suppression of bias resulting from confusion of function," because the immigration inspector has "not only the duty of presiding over the hearing, but actually hearing it."¹ In other words, an inspector was expected, at the time, to act as both a prosecutor and judge. The Committee urged the implementation of a "public guarantee of real insulation and independence of the inspectors who sit as trial examiners," which included a recommendation to convert the duties of the examiners into "duties customary for a judge," noting that, "[t]o assure to every alien in a contested proceeding a fresh hearing before an official with special

¹ .REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME, 156 (1953) [hereinafter *Whom Shall We Welcome*].

experience, standing, and point of view, an administrative judge would do much to minimize the dangers of abuse.”²

Criticism in the years following the passage of the Administrative Procedures Act (APA) led to significant changes in the stature of special inquiry officers (“SIOs”) in the immigration system by removing their office from the INS (in the spirit of APA §5) , changing their qualification requirements (in the spirit of APA §11), and transitioning them into immigration judges (also in the spirit of APA §11). While the Immigration Courts are not governed by the APA, the removal of immigration judges from the INS in 1983 allowed for the tensions and influence from policy makers in the INS that were “repugnantly clear ” to ease.³ As the Secretary of Labor’s Committee on Administrative Procedure noted, the present proposed shift would cause a “confusion of function” as power would again be housed under the same roof.⁴

The Immigration and Nationality Act of 1952 (INA) did provide for bifurcation within the department of officers with prosecutorial duties from the officers with adjudicative responsibilities, and the mandate that special inquiry officers (“SIOs”) who participated in the prosecutorial or investigative functions be forbidden from adjudicating the controversy.⁵ These changes were the first major steps taken to enhance the appearance that the SIO acted as a semi-autonomous decision maker,⁶ and this framework became a crucial predecessor to the eventual design of independent immigration judges in the system. These changes in the INA mirrored the growing consensus embodied in the APA that the commingling of prosecutorial and judicial functions at the individual level was impermissible.⁷

In 1973, the INA formally announced the term “immigration judge” was interchangeable with the term “special inquiry officer.” (SIO)⁸ In doing so, DOJ implicitly recognized what had always been clear to the higher courts: that these sorts of adjudications should take place before a neutral and qualified immigration judge.⁹ However, despite the title change, these judges remained under the supervision of the INS, and were viewed by other INS personnel “as pushy intruders whose demands in the name of due process only obstruct the Service mission.”¹⁰ Tensions between INS personnel and immigration judges continued to rise and judges noted “[t]he strong desire [of enforcement personnel] to influence the judges directly or indirectly is repugnantly clear,” affecting the judges’ ability to have fair and impartial hearings.¹¹

² Id.

³ INNOVATION LAW LAB ET AL, THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL, 6 (2019) [hereinafter *Attorney General’s Judges*].

⁴ *Whom Shall We Welcome*, supra note 1, at 809.

⁵ Dory Mitros Durham, *Note: The Once and Future Judge: The Rise and Fall (and Rise?) Of Judicial Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 672 (Jan. 2006) [hereinafter *Durham*].

⁶ Id. at 672.

⁷ Id. at 672.

⁸ Importation of Fruits and Vegetables, 38 Fed. Reg. 64,8590, 64,8590 (Mar. 30, 1973) (to be codified at 8 C.F.R. § 1.1).

⁹ Id.

¹⁰ *Attorney General’s Judges*, supra note 3, at 6.

¹¹ *Durham*, supra note 12, at 23.

The Executive Office for Immigration Review (EOIR) was created by regulation in 1983 with the clear purpose of enhancing adjudicatory independence from the Immigration and Naturalization Service (INS). 48 FR 8,038 (Feb. 25, 1983). Rather than being at the mercy of INS as a mere component of the agency, the regulation was enacted to provide much needed separation between the prosecutor and judges in Immigration Court. Multiple directors of EOIR have referenced independence as a driving force behind the move. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824-01 (Feb. 28, 2003) (to be codified at 8 C.F.R.) (stating in the Background that “EOIR was created by the Attorney General in 1983 to combine the functions of immigration judges and the Board of Immigration Appeals into a single administrative component of the Department of Justice under the Attorney General. . . This administrative structure separated the administrative adjudication functions from enforcement and service functions of the INS, both for administrative efficiency and to foster independent judgment in adjudication”). INS Oversight and Budget Authorization for FY 85 before H. Subcom on Immigration, Refugees, and International Law, Comm. on Judiciary, 98th Cong. 352 (1984) (statement of David Milhollan, Director, EOIR) (describing EOIR creation as establishing “the separation of the Immigration Judges from the INS has underscored the fact that the Immigration Judges are independent decision makers, treating both parties equally and fairly.”); Operation of the EOIR, Hr’g before the House Subcommittee on Immigration & Claims of the Committee on the Judiciary, 107th Cong. at 22 (Feb. 6, 2002) (statement of Kevin Rooney, Director, EOIR) (“The functional move of cases from INS to EOIR was to ensure impartiality in the immigration adjudication context by having cases decided by a different entity than the one that prosecuted them.”).

When the Homeland Security Act reshuffled various national security agencies in the aftermath of the 9/11 attacks, the Immigration and Naturalization Service (INS) was abolished, and its enforcement elements were moved into the new Department of Homeland Security (DHS). Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C., 18 U.S.C., 42 U.S.C., and 50 U.S.C.). Congress deliberately acted at that time to statutorily recognize EOIR and made the conscious choice to separate it from DHS enforcement functions by positioning it within the DOJ. *Id.* at 1101. This definitive step was the first unequivocal move to clearly separate the immigration system’s adjudicatory and enforcement wings from the court functions, by housing them in entirely separate departments. *See generally* Dory Mitros Durham, Note: The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts, 81 Notre Dame L. Rev. 655 (2006).

The preamble for the regulations implementing the Homeland Security Act explicitly hold that the separation of enforcement and adjudicatory functions was “both for administrative efficiency *and to foster independent judgment in adjudication.*” 68 FR 9,824 (Feb. 28, 2003) (emphasis added). In this Act, Congress did not place EOIR in the benefits-adjudicating United States Citizenship and Immigration Service (USCIS) within DHS, but rather took the further step of

maintaining EOIR's placement within DOJ. Pub. L. No. 107-296, 116 Stat. 2135. Congress's decision to explicitly leave the EOIR within the DOJ rather than transfer it to the DHS demonstrates conscious legislative intent to separate prosecutorial and adjudicative functions.

This interim rule inappropriately delegates adjudicatory authority to the Director of EOIR to coordinate more closely with DHS, which violates the spirit under which the EOIR was created and the Homeland Security Act of 2002 was passed.

The clear Congressional message remains true to this day: the role of the immigration judge should not and cannot be subservient to the interests of an agency whose primary task is to expeditiously remove as many aliens as possible, yet that is what this regulation embraces. The deliberate decisions made over decades by Congress and regulators to protect the integrity and independence of the immigration court system cannot be allowed to be compromised and undermined by this regulation. This clear effort to turn back the clock and relegate the immigration court system as window dressing or a mere adjunct of the DHS enforcement structure must be reversed.

2. Recent Decisions Limiting Immigration Judges' Independence Belie the Notion that this Reorganization is Merely Administrative or Ministerial in Nature

Despite the historical trend toward greater independence for immigration judges, recent decisions of the Attorney General (AG) demonstrate attempts to restrict the ability of immigration judges to independently adjudicate the cases which come before them. Such case law developments show how closely related administrative and substantive rulings can be in the immigration courts and just how far their impact and collateral consequences can reach.

In 2018, Attorney General Jefferson B. Sessions limited the discretion of immigration judges and the Board of Immigration Appeals ("BIA") to administratively close cases in *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018), "eliminating an important docket tool."¹² Further limiting the independence of immigration judges to determine how to proceed with their cases, AG Sessions decided *Matter of L-A-B-R-et al.*, 27 I&N Dec. 405 (AG 2018), effectively preventing immigration judges from allowing cases to benefit from a "brief pause," the alternative to administrative closure. Thus immigration judges are now severely limited in their ability to grant *both* administrative closure and, in the alternative, continuances, which compromises their ability to decide cases independently and fairly. Finally, *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018) prevented immigration judges from terminating or dismissing cases except in very narrow, pre-defined circumstances. In the past, immigration judges used termination and dismissal to increase judicial efficiency by prioritizing certain cases over others.¹³

¹² AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts, 4 (September 28, 2018); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

¹³ *Matter of S-O-G & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).; AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts, 4 (September 28, 2018).

These decisions represent systematic encroachment on judicial independence by limiting tools available to immigration judges to fairly manage their dockets. Moreover, they reveal the disturbing trend of which this regulation is a part, the desire to restore an old regime in which immigration judges are, at best, semi-autonomous, and returned to the role of SIOs at the mercy of law enforcement policy agendas.

Although these recent decisions by the Attorney General address what are commonly considered “case management tools,” their usage has a disproportionately high impact on the lives of individuals.¹⁴ These decisions can drastically alter the outcomes of individual immigration cases, cause potential discipline or performance evaluation repercussions for immigration judges and do not achieve their stated purpose of facilitating improved case management.

The impact of case completions pressures coupled with the decisional encroachment on the procedural tools available to immigration judges greatly threatens due process and ultimately have an extremely prejudicial effect on judges’ ability to effectively and fairly manage their dockets. The regulatory changes wrought by this regulation in the guise of efficiency serve to further diminish the ability of immigration judges to independently decide cases before them and base their decisions on the individual facts presented. Rather than safeguarding the independence of immigration judges, these regulations allow the continued prioritization of enforcement policies, which runs contrary to the spirit and purpose of the agency’s mandate to independently review cases consistent with the principles of procedural due process.

3. Statutory and Legislative History Demonstrate that the Director of EOIR was not Intended to Have an Adjudicatory Role, and was Specifically Excluded from Influencing the Independence of the Immigration Judges and the BIA. The New Rule is a Reversal of that Embedded Principal.

The interim regulation also dramatically departs from the long-accepted and carefully crafted structure of the immigration court system. By vesting in the Director the ability to decide cases pending before the Board of Immigration Appeals (BIA)—which are then binding on all immigration judges—the Director is granting himself the ability to rewrite immigration law in conformance with the politically motivated policy agenda of any Administration, which thwarts the Congressional scheme established by the Immigration and Nationality Act.

a. The Director’s Role was Never Intended to have Adjudicatory Functions

When the position of Director of EOIR was created in 1983, it was done so under the specific mandate that the Director *not* have any authority to adjudicate cases or to interfere with the decision-making of immigration judges (or SIOs), or members of the BIA.

¹⁴ See Jeffrey S. Chase, Lecture at Cornell Law School: The Immigration Court: Issues and Solutions (March 28, 2019) (stating that the current administration “views independent judges as an unwanted obstacle to enforcing its own anti-immigration agenda,” and is “attempting to roll back immigration judges to a state more closely resembling their INS special inquiry officer origins.”).

The position of Director was created by regulation 8 C.F.R. Part 3.¹⁵ The Director’s role at its inception was limited to “the *general* supervision of the Board of Immigration Appeals and the Office of the Chief Special Inquiry Officer in the execution of their duties.”¹⁶ Additionally, the 1983 regulation limited the ability of the Director to delegate authority granted to the Director by the Attorney General.¹⁷ The Director could only delegate that authority to the Chairman of the BIA or to the Chief SIO.¹⁸ Furthermore, the regulation did not grant the Director power to issue or review immigration decisions with precedential effect.¹⁹ The regulation stated that the BIA had the ability to issue precedential decisions, but only the Attorney General and the BIA itself could modify or overrule those decisions.²⁰

The Director’s lack of adjudicatory power was codified in 8 C.F.R. 1003.0 (Oct. 27, 2007). Language was then added to the regulation controlling the Director’s role to state that “[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the [BIA], an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.”²¹ Here, the authors of the regulation specifically prevented the Director of EOIR not only from interfering in the decision-making of the BIA members and immigration judges, but also from adjudicating cases arising under the INA.²²

b. The Interim Rule’s Stated Purpose of Case Efficiency is Pre-Textual and Specious

The Attorney General has justified this latest rule, in part, by citing administrative efficiency. This proposed justification is misleading and contradicted by the composition of EOIR. There are 21 Board members and roughly 80 –100 BIA Attorney Advisors working exclusively on adjudicating immigration appeals. Divesting these cases from over 100 individuals with specialized knowledge and training and then vesting them into one person (the Director) is on its face inefficient and runs contrary to the Attorney General’s own justification for the proposed rule. A look at the BIA’s recent history supports this.

In a 2011 Senate hearing, Juan P. Osuna, Director of EOIR, testified as to the BIA’s success in managing increased caseloads. As evidence of the BIA’s improved performance, he stated that “[t]here [were] approximately 530 fewer appeals from BIA decisions into the Federal courts today as opposed to a year ago, and overall, the number of BIA appeals to the Federal courts are about half today as what they were at the high-water mark in 2006.”²³ He also added that “the Federal courts are affirming BIA decisions at a higher rate. So far in 2011, the courts are affirming almost 90 percent of the Board’s decisions nationwide. We believe that the good

¹⁵ 8 C.F.R. Part 3 (Feb. 25, 1983).

¹⁶ *Id.* (emphasis added).

¹⁷ *See, Id.*

¹⁸ *Id.*

¹⁹ *See* 8 C.F.R. Part 3.3 (Feb. 25, 1983).

²⁰ 8 C.F.R. Part 3.3(g) (Feb. 25, 1983).

²¹ 8 C.F.R. § 1003.0(c) (Oct. 27, 2007).

²² *Id.*

²³ Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on Judiciary, 112th Cong. 112-936 (2011).

work of the immigration courts and the BIA is worth noting and that with congressional support, it can continue to improve.”²⁴

Director Osuna did not share any of the concerns the current administration has expressed over the BIA’s efficiency in resolving cases. Director Osuna even suggested that greater independence would further promote the Agency’s goals of swift adjudication.

At the time of Director Osuna’s testimony, the BIA consisted of seventeen members. In 2018, 8 C.F.R. 1003.1 was amended by 83 FR 8321 to increase the Board to 21 members. If the prior Director felt that the Board was succeeding in managing an increased caseload with a smaller board, it stands to infer that the addition of four additional members would best address the current Director’s concerns regarding case completion goals. Removing cases from a robustly staffed Board and delegating those cases instead to *one* individual does not assist the agency in reaching its own stated goal of administrative efficiency. It strains credulity to suggest that it does.

c. As Written, the Position of “Director” of EOIR Does not Need to be an Attorney

There is no statutory language that explicitly requires that the Director of EOIR be an attorney. The statute only requires that “[w]ithin the [DOJ], there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General.”²⁵ This is in sharp contrast to the language describing the Board of Immigration Appeals (BIA) which states that the “Board members shall be attorneys appointed by the Attorney General.” Similarly, the term “immigration judge” is defined by statute as “an attorney whom the Attorney General appoints as an administrative judge....”²⁶ The fact that the description of the Director does not include this specific language or any such requirement is presumed to be intentional, meaning that the Director does not need to be an attorney. There are no subsequent regulations, rules, or amendments to the contrary.

Moreover, the fact that the Director was severely limited in his ability to adjudicate cases himself further supports that idea that the Director is not required to be an attorney. The statute states that “[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the [BIA], an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge...”²⁷ As compared to the stringent requirements that adjudications in the immigration system be appealed to the BIA, comprised of attorneys, this contradicts the spirit for fair, impartial, and specialized adjudication by allowing review by the Director, who presumably is not required to be an attorney with sufficient expertise to adjudicate immigration requests.

²⁴ Id.

²⁵ 8 C.F.R. § 1003.0.

²⁶ 8 U.S.C. § 1101(b)(4)

²⁷ 8 C.F.R. § 1003.0(2)(c).

d. The Congressional Delegation of Authority to the Attorney General was not Intended to Include the Director

Though the interim final rule is purportedly promulgated by EOIR with the consent of DOJ, this is a transparent attempt by the Director to eliminate regulations which had expressly limited his ability to influence the outcome of cases pending before the agency. Congress delegated to the Attorney General the authority to “establish such regulations [. . .] as he deems necessary for carrying out his authority under the provisions of the [INA].”²⁸ But Congress has not delegated any authority to the Director of EOIR to establish such regulations, much less regulations which expand his own power beyond those his position was intended to command.

The interim rule is circular in nature and invalid. It first reiterates the long-standing principle that the Director “shall have no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge” so as to not run afoul of prior regulations and express Congressional delegation. That same paragraph, however, qualifies that the Director has no authority to adjudicate cases “[e]xcept as provided by statute, *regulation*, or delegation of authority from the Attorney General”—which that very same new regulation then goes on to create. This is analogous to citing one’s own opinion piece in support of a proposition.

4. The Creation of the Office of Policy is a Transparent Politicizing of our Immigration Courts.

The mere concept of an Office of Policy as a high level component of any court system is offensive and antithetical to the inherent neutrality required of any fair and independent adjudicatory system. This novel and misguided effort thinly veils the true nature of this change: to bring the Immigration Courts in closer policy alignment with DHS, despite the distance Congress envisioned and implemented in law. This previously unimaginable corruption of the organizational structure which protects the Immigration Courts’ independence is a radical and unjustifiable overreach by DOJ’s management which impermissibly supplants the Congressionally mandated hearing process and decisional independence assured to immigration judges.

The Office of Policy (OP) was first created by Attorney General Sessions on July 26, 2017; it is under the supervision of the Director and Deputy Director of the EOIR.²⁹ According to the BIA Practice Manual, the OP was responsible for public relations for EOIR and housing the EOIR Law Library, Virtual Law Library, and Immigration Research Center.³⁰ Had it remained within those narrow confines, it might pass scrutiny as merely administrative in its role, despite the offensive name. However, this interim regulation formalizes and expands its reach far beyond these tasks, while misleadingly asserting that its role was simply to address the backlog in the

²⁸ Immigration and Nationality Act, 8 U.S.C. § 1103(a) (2019).

²⁹ U.S. DEPT. OF JUST., *Executive Office for Immigration Review Organization Chart* (2017), <https://www.justice.gov/eoir/eoir-organization-chart/chart>.

³⁰ U.S. DEPT. OF JUST., *Board of Immigration Appeals Practice Manual* (Sept. 23, 2019), 3, available at <https://www.justice.gov/eoir/file/1205211/download>.

immigration courts.³¹ Although it is indisputable that backlog reduction requires, at a minimum, targeted deployment of new personnel and support resources to reduce processing times and pending case numbers, the OP has shown it is a thinly disguised ruse to dismantle the due process and neutrality required of any court system and to open the back door to *ex parte* DHS enforcement influences.

Within days of this interim regulation, the true nature of the OP became clear. On October 1st, 2019 the Office of Policy issued a new directive on behalf of the Director that radically shortens and re-defines the BIA's processing times.³² Even before it was formalized by the interim rule, the Office of Policy was already identified as the component responsible in 2018 for the creation of the IJ quota of 700 case completions per year.³³ While the implementation of this mandate does not direct judges how to rule on a given case, they are penalized when they take the time to explore factual disputes, analyze complex or nuanced legal arguments, or delve into process issues of a given case and thereby fall behind the administration's speed requirements."³⁴ The quotas are punitive in nature and harm procedural due process by incentivizing truncated hearings, premissions of applications for relief, and the denial of continuances.³⁵ The establishment of an Office of Policy works to create a systemic and sanctioned "deportation assembly line" that favors speedy removals over a full and fair hearing.³⁶

An overarching concern of NAIJ is that the OP, newly charged with oversight and reduction of the backlog, is a natural fit for the Director's placement of Board of Immigration Appeals (BIA) cases that have not been expeditiously decided.³⁷ The BIA issues binding opinions and affirm removal orders. Furthermore, the BIA interprets immigration laws, and the BIA's interpretations may be entitled to *Chevron* or *Auer* deference.^{38, 39} The interim final rule would allow EOIR

³¹ In a statement before the Subcommittee on Immigration and Border Security in November 2017, James McHenry described that the "EOIR is also in the process of establishing a new component, an Office of Policy, in order to better coordinate initiatives to address the case load, to eliminate existing process redundancies across multiple components, and to more effectively oversee strategic planning, analytics, and internal communications." U.S. DEPT. OF JUST., *Statement of James McHenry Acting Director EOIR, U.S. Dept. of Just. Before the Subcomm. on Imm. and Border Sec. Comm. on the Judiciary U.S. H.R. for a Hearing Entitled "Overview Of the EOIR."* (Nov. 1, 2017), 5, available at <https://republicans-judiciary.house.gov/wp-content/uploads/2017/10/Witness-Testimony-James-McHenry-EIOR-11-01-2017.pdf>.

³² U.S. DEPT. OF JUST, EOIR Policy Memo: Case Processing at the BIA (Oct. 1, 2019).

³³ A formal announcement comes from EOIR Director James McHenry to the judges of the EOIR, McHenry establishing the new performance metrics to complete 700 cases per year and maintain a remand rate of fewer than 15 percent per year. This decision comes after an EOIR review finds the BIA and Circuit Courts to have an "unsatisfactory" performance. E-mail from James McHenry, EOIR Director, All of Judges (EOIR) (March 30, 2018), available at <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

³⁴ Alan Pyke, Shakeup of immigration court system threatens migrants' due process, ThinkProgress (Aug. 23, 2019), <https://thinkprogress.org/shakeup-of-immigration-court-system-threatens-migrants-due-process-7ffae9cab289/>.

³⁵ *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, S. POVERTY LAW CTR. (Jun. 25, 2019), at 18, available at https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

³⁶ Pyke, *supra* note 4.

³⁷ *Id.* at 2053.

³⁸ See *James v. Mukasey*, 522 F.3d 250, 253-54 (2d Cir. 2008) (holding that a BIA opinion is entitled to *Chevron* deference if the BIA is interpreting the definition of a phrase used in the INA, if Congress's intent is ambiguous and

employees, with no judicial or appellate experience, to carry out these important BIA functions, without being appointed by the Attorney General through the rigorous process applied to Immigration Judges and BIA members.

The interim final rule represents a *permanent* change in procedure; effective August 26, 2019, any EOIR employee may adjudicate an appeal (as long as the appeal has been pending for at least 60 days). Considering the size of the BIA's backlog and length of current adjudication times, EOIR employees will likely be tasked with adjudicating appeals permanently, regardless of any stated intent by the government.⁴⁰

The interim rule eviscerates the independence and integrity of the immigration appellate review system by inappropriately allocating adjudicatory duties previously reserved to the BIA or Attorney General to the Director and, in turn, to unqualified, unnamed employees within EOIR.

Conclusion

The historic progression and development of our immigration court system demands that our immigration laws be enforced in proceedings conducted by qualified, neutral arbiters. In order for immigration judges to perform their duties, they must be efficient and impartial. They must assure due process is provided in each hearing they conduct, without succumbing to any external influence, pressure, or personal gain. Yet this regulation seeks to make permanent and paramount the authority of a single individual and to make immigration judges subservient both to his decisions and to an Office of Policy rather than the law as passed by Congress. This is a clear effort by the Executive to expropriate decision-making authority from the courts, where it was rightly placed by Congress. Should the interim rule go into final effect, it would be ripe for litigation on account of its violation of constitutional norms, administrative procedure, requirements for appointment, and pretextual justification for the decision itself. We therefore strongly urge against the promulgation of this interim rule as a final regulation.

the BIA's construction of that phrase is reasonable). *See also* Delgado v. Holder, 648 F.3d 1095, 1097-98 (9th Cir. 2011) (finding that a BIA's precedential decision merited *Chevron* deference).

³⁹ *See* Buckley v. Valeo, 424 U.S. 1, 126, n. 162 (1976) (*per curiam*).

⁴⁰ *See* Arnold & Porter, Am. Bar Ass'n Comm'n on Immigration, 2019 Update Report: Reforming the Immigration System, Executive Summary and Summary of Recommendations 20 (2019) for more information on the Board of Immigration Appeals' backlog.