

**Statement of Jeremy L. McKinney
Immediate Past President and Member of the Board of Governors
American Immigration Lawyers Association**

**Submitted to the U.S. Senate Committee on the Judiciary
Hearing on “Preserving Due Process and the Rule of Law: Examining the Status of Our
Nation’s Immigration Courts”**

October 18, 2023

Thank you, Chairman Durbin, Ranking Member Graham, Subcommittee Chairman Padilla, and Subcommittee Ranking Member Cornyn for the invitation to speak before you all today.

My name is Jeremy McKinney, I practice immigration law and am a North Carolina Board Certified Immigration Law Specialist. I taught immigration law at Elon University School of Law and have litigated immigration matters before the Board of Immigration Appeals, and Federal District Courts in North Carolina, South Carolina, and Georgia, and before the Fourth, Fifth, Seventh, and Eleventh Circuit Courts of Appeal. I am also the immediate past president of the American Immigration Lawyers Association (AILA) and continue to serve on its national Board of Governors. My views represent those of AILA, the national bar association of 17,000 attorney and law professors who practice, research, and teach immigration law.

Today’s hearing offers the opportunity to examine systemic problems of due process that are widespread in current immigration court proceedings. I come before you to urge immediate action to reform the immigration courts to ensure that core principles of judicial independence and due process are restored and protected.

I. Independent Immigration Court

A necessary component of ensuring fair adjudications in cases that determine life or death for some immigrants, permanent family unity or separation for others, is to tackle the glaringly inadequate independence from political interference of immigration trial and appellate judges. Separation of powers is understood in bipartisan fashion to be a cornerstone of our republic, underpinned by the distinct roles of three federal-government branches.

Many lawyers outside the immigration field echo members of the public in expressing shock when I explain that in immigration cases judges are *not* insulated from executive branch interference. Rather, those judges are exposed to constant meddling by the very federal officials whose administration is also one side of purportedly adversarial proceedings occurring before them.

To remedy this flaw, AILA urges Congress to enact legislation that would create an independent immigration court system under Article I of the Constitution. The establishment of an independent immigration court would separate it from the Department of Justice (DOJ), which currently exercises authority over its operations, personnel, and legal decisions. There is an inherent conflict of interest built into the current immigration court system. Simply put, the chief prosecutor oversees the judges that hear the cases. The creation of an Article I immigration court system is the best way to ensure the courts are fair and independent.

II. The Government Must Provide Legal Counsel for Indigent Respondents

While federal law ensures the right to legal counsel in removal proceedings, the law still does not guarantee the government will pay for counsel if the person is unable to afford one. Having legal counsel is among the most decisive factors in determining whether someone will obtain legal relief in removal proceedings. According to a 2016 study by the American Immigration Council, people were five times more likely to obtain legal relief if they were represented by counsel.¹ People who were detained were ten-and-a-half times more likely to succeed.² In the absence of a universal right to counsel, a significant portion of people in removal proceedings — over 75 percent³ — had no legal representation in non-detained cases.⁴ The representation rate is much lower for people held in detention.⁵ In 2022, the ACLU published a report detailing how severely access to counsel is limited in ICE detention facilities.⁶ During the fiscal year of 2022, about 79 percent of detained people in removal proceedings did not have access to counsel.⁷

In addition to making proceedings fairer, providing legal representation advances the government's interest in ensuring due process and efficiency in the legal system, reducing the detention of immigrants, and reducing the court backlog.⁸ Ensuring legal representation would dramatically reduce the government's costs for detention and court proceedings. One study found that motions to reopen cases that were ordered *in absentia* will likely rise as *pro se* Respondents find counsel later.⁹

AILA urges Congress and the Biden administration to establish federally funded legal representation programs for people facing removal. Critical to the success of this effort is the appropriation of funding for legal counsel programs. Only by ensuring legal counsel for everyone facing removal will the Biden administration be able to fulfill its commitment to fairness and due process.

¹ Ingrid Eagly and Steven Shafer, *Access to Counsel In Immigration Court* (Washington, DC: American Immigration Council, September 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

² Other studies have found that legal representation increases a person's likelihood of winning relief by 11 times, and for women with children by as much as 14 times. Jennifer Stave et al., *ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY*, 28, Vera Institute of Justice, 2017, <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>; TRAC, *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court 'Women with Children' Cases*, July 15, 2015, <https://perma.cc/7NBM-BNXW>.

³ This data was collected from October 2022 to April 2023, TRAC Immigration, *Despite Efforts to Provide Pro Bono Representation, Growth Is Failing to Meet Exploding Demands*, May 12, 2023, <https://trac.syr.edu/reports/716/>.

⁴ *Id.*

⁵ TRAC, *Who Is Represented in Immigration Court?*, October 16, 2017 (finding that detained individuals were represented at a rate of about 30 percent from 2015 to 2017), <https://trac.syr.edu/immigration/reports/485/>.

⁶ American Civil Liberties Union, *No Fighting Chance*, ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers, (June 9, 2022), https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf.

⁷ *Id.* at 10.

⁸ TRAC, *Historical Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/ (last updated through Jan. 2023).

⁹ Ingrid Eagly and Steven Shafer, *Measuring In Absentia Removal In Immigration Court*, Vol 168, U. Pa. L. Rev. 817 (2020), https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf.

III. Executive Reforms to Restore Integrity and Fairness to the Immigration Court

In the past, nearly, three years, AILA and EOIR have engaged in open and productive stakeholder dialogues; these engagements have helped make important strides to reform and improve immigration courts. Still, until Congress creates an Article I immigration court, the Executive Branch should take immediate steps to restore the integrity and fairness of the court. Stakeholders have long expressed concerns about issues such as inadequate staffing and training, lack of transparency in the court's practices, a shortage of technological resources, perceived bias, and, perhaps most frequently, the ever-growing backlog of cases which is estimated at 2,097,244 cases as of fiscal year 2023.¹⁰ With mounting pressure on the executive branch to reduce the excessively high case backlog and manage cases more expeditiously, the courts have been and will continue to compromise the protection of due process.

A. The Court Should Publish Procedures to Ensure Transparency and Fairness

AILA recommends EOIR provide greater transparency regarding court practices and procedures. Improvements in these practices will not only enable courts to run more efficiently for the courts and all parties but also greatly improve fairness and overall access in the judicial process.

1. EOIR Should Inform Practitioners on All Available Specialized Dockets

Since 2021, EOIR has implemented additional docketing tools intended to manage judges' caseloads and ultimately reduce the backlog.¹¹ AILA supports the use of docket tools to shift cases off the court's calendar when they are not suitable for adjudication.¹² EOIR, however, has not published guidance explaining the procedures for the dockets and which types of dockets are implemented across jurisdictions. In some cases, AILA attorneys have found specialized dockets unhelpful because immigration judges have applied the same legal analysis to multiple cases without specific consideration of the facts unique to each case.

2. EOIR Should Terminate the Family Dedicated Dockets

AILA is deeply concerned about the current administration's implementation of expedited dockets such as dedicated dockets that accelerate the court process without taking steps to ensure proceedings are fair. People with cases on these dockets who are unable to afford counsel are not guaranteed counsel paid for by the government and nonetheless face expedited time frames in their cases.¹³ AILA recommends DOJ end the use of dedicated dockets for families.

3. EOIR Needs to Clarify Virtual and In-person Hearing Procedures

Another area of court practice that lacks transparency and consistency is whether the hearing will be conducted in-person or virtually. Since the COVID-19 pandemic, immigration courts have expanded

¹⁰ TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/, (last visited on Oct. 4, 2023).

¹¹ Press Release, Dep't of Homeland Security, DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021), <https://www.dhs.gov/news/2021/05/28/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

¹² AILA & Cardozo Law School recommendations for removing non-priority cases from the Immigration Court Backlog (February 11, 2021), <https://www.aila.org/infonet/remove-non-priority-cases>.

¹³ TRAC Immigration, *A National Assessment of the Biden Administration's Dedicated Docket Initiative*, Dec. 2, 2022, <https://trac.syr.edu/reports/704/>.

their use of virtual hearings.¹⁴ Currently the court lists the default practice for each judge – for in-person hearing or a virtual hearing -- but frequently this list is not accurate. Moreover, practitioners receive contradictory information when they call immigration courts to verify this information. If Respondent or Respondent’s counsel attends a hearing in an incorrect medium, there can be serious consequences, including an order of removal *in absentia*. If a hearing is scheduled with little notice, this requires the Respondent and their counsel to travel, potentially, great distances to appear in person for a hearing.

Next, the court does not provide instructions regarding whether a Respondent must file a motion to appear in a different medium to obtain such a change. This lack of guidance leaves counsel and Respondents in an untenable position if a judge does not rule on a motion in a timely manner. In cases where a judge does not rule timely on a motion to appear virtually, Respondents and counsel are forced to travel to the physical immigration court to appear for the hearing. Immigration practitioners accept cases to represent noncitizens all over the country. The cost of traveling for many hours to attend a hearing, which lasts only minutes, is unsustainable for practitioners and Respondents. For *pro se* Respondents this presents a greater challenge. After entering the United States, many noncitizens move while their cases stay at immigration courts in cities where they entered. This means being prepared to spend hundreds of dollars to travel to appear in person for a hearing that could also be completed virtually. The lack of transparency is also an issue in cases when they appear at immigration courts for their hearings, only to be told that they will be held virtually instead.

My own experience confirms this reality: I have been scolded by an immigration judge for not appearing in person after being told by the judge’s clerk I could appear virtually. Conversely, I have prepared a client to travel and appear before an immigration court only to be told by the judge’s clerk that the client could appear virtually. To be clear, the incorporation of virtual appearances for most master calendar hearings and some individual hearings is a positive development which makes the process more efficient and less costly for Respondents. The stakeholders simply need clear rules and clear communication.

4. EOIR Should Expand Its Technology to Include More Cases and Accept Filing Fees

In 2018, EOIR introduced a system called ECAS (Electronic Case Access System). It was designed “to phase out paper filing and processing, and to retain all records and case-related documents in electronic format.”¹⁵ Five years later, many pending removal matters are not included in ECAS, limiting Respondents and their attorneys to paper filing. Paper filings limit Respondents’ ability to timely obtain copies of their administrative record, especially when the immigration judge does not work out of a physical immigration court. For example, I have had cases where I needed to review

¹⁴ Fredric I. Lederer & Center for Legal & Court Technology, “Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings” (2021). *Faculty Publications*. <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3081&context=facpubs>.

¹⁵ Dep’t of Justice, Frequently Asked Questions, Attorneys and Accredited Representatives, <https://www.justice.gov/eoir/ecas/attorney-and-ar-FAQs#:~:text=Q%3A%20What%20is%20the%20EOIR,related%20documents%20in%20electronic%20format> (last updated Oct. 5, 2022).

the charging document, called a Notice to Appear (NTA), prior to entering pleadings on behalf of my client. Because the NTA was not in ECAS, I was unable to timely obtain it, resulting in a needless continuance of the hearing.

Additionally, EOIR could follow the example of the Public Access to Court Electronic Records (PACER) system. Federal courts utilize PACER to port a user from PACER to “pay.gov” for payment of filing fees. ECAS has no such portal even though most application forms and motions require a filing fee; immigration courts do not accept filing fees.¹⁶ Therefore, stakeholders need a robust ECAS and payment system, especially during this unprecedented EOIR case backlogs.

B. ICE OPLA Should Elevate Their Level of Preparation for Cases and Hearings

The tools EOIR has implemented to reduce the backlogs require greater cooperation from OPLA attorneys. While we appreciate the efforts which ICE OPLA have made to reduce EOIR dockets, the unprecedented size of the current docket requires additional effort.

1. ICE OPLA Should Be Prepared for Hearings

In my experience and that of other AILA attorneys, OPLA attorneys frequently are not fully prepared for substantive hearings and even worse, do not appear for the hearings. In fact, OPLA issued a memorandum to attorneys indicating that appearances are not required at hearings and that their lack of appearance is of no consequence to their position in the case.¹⁷ This is unacceptable. If the government deems a case worthy of bringing before the court, its attorneys must actively engage in hearings and pre-trial conferences¹⁸ and be prepared to stipulate undisputed matters and negotiate toward a resolution of the case the case. These OPLA practices are inefficient, waste the Respondent’s and government’s resources, and erode the integrity of the court system.

AILA appreciates the September 2023 memorandum¹⁹ EOIR issued to trial and appellate judges to clarify how it will prioritize cases in light of the Department of Homeland Security’s (DHS) prosecutorial discretion policies. Importantly, the guidance specifies that *both* parties – Respondent and government’s counsel -- should come prepared for hearings and must be clear in their positions. The memorandum bears the promise of elevating the practice by all parties before the courts, which will facilitate fairer proceedings. AILA urges OPLA to issue similar instructions to its attorneys requiring they appear at hearings and come prepared.

2. ICE Should Improve the Biometrics and Security Background Checks

The lack of interagency coordination on biometrics is causing severe delays and hardship for people appearing before the immigration courts. All relief applications before the Court require the completion of security and criminal background checks.²⁰ Even though ICE is the agency

¹⁶ Dep’t of Justice, 3.4 – Filing Fees, <https://www.justice.gov/eoir/reference-materials/ic/chapter-3/4> (last updated Jun. 27, 2023).

¹⁷ Memorandum from Kerry E. Doyle, Principal Legal Advisor, DHS, ICE, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

¹⁸ U.S. Dep’t of Justice, *Pre-hearing Conferences in Immigration Proceedings Program*, AILA Doc. No. 22061608 (June 3, 2022), available at <https://www.aila.org/infonet/eoir-issues-guidance-on-pre-hearing-conferences>.

¹⁹ Memorandum from David L. Neal, Director, EOIR, DOJ, *Dep’t of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives* (Sept. 28, 2023), <https://www.justice.gov/eoir/book/file/1596081/download>.

²⁰ 8 C.F.R. § 1003.47.

representing the government and running the background checks, USCIS collects the biometrics. Respondents must request biometric appointments from USCIS, but USCIS does not consistently schedule and send out appointment notices.²¹ ICE OPLA is also inconsistent in "refreshing" checks on prints already provided—even though there is a 2016 agreement between ICE and USCIS addressing this procedure.²²

The unfortunate reality is Respondents have no power to make a biometrics appointment or refresh a security check, yet when the agencies fail to execute these steps, the Respondents suffer. In many cases, immigration judges determine that applications for relief are abandoned because the Respondent did not comply with the biometrics requirement. Immigration judges have also postponed hearings because ICE OPLA did not “refresh” prints or did not inform the Respondent to reappear before USCIS for fingerprinting.

For example, I have one complex removal matter that has been pending since 2012; my client submitted his relief application and submitted biometrics that same year. After more than a decade of litigation, the case was finally on for individual hearing. At hearing, the ICE OPLA attorney claimed background checks could not be refreshed because my client had not provided biometrics *again*. Over my objection, the immigration judge agreed with the ICE OPLA attorney and continued proceedings. That case is still pending.

ICE should establish improved procedures to implement timely biometrics appointments to remedy the hardships caused by these delays.

C. Attorney General Certification Authority

Under the Immigration and Nationality Act, the Attorney General has authority to re-open and adjudicate cases previously decided by the Board of Immigration Appeals.²³ Known as “certification,” this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. To be clear, this precise power creates an inherent conflict of interest which can only be remedied by the creation of an independent immigration court. However, it remains part of our system and so long as it remains, AILA urges the Attorney General to issue opinions on the following:

- ***Matter of L-A-B-R-***: Rescind *L-A-B-R-, et al.*, 27 I&N Dec. 405 (A.G. 2018) issued by former Attorney General Sessions which severely limited the circumstances that are

²¹ Even worse, some forms of removal relief do not require an application be filed with USCIS and therefore there is no event triggering the creation of a biometrics appointment. The waiver of removability at INA § 237(a)(1)(H) is a perfect example. Some ICE OPLA attorneys and immigration judges have suggested Respondents file Form I-601 with USCIS to trigger the creation of a biometrics appointment. This is a waiver of inadmissibility form not designed for a waiver of removability. A § 237(a)(1)(H) waiver also has no filing fee whereas Form I-601 has a \$1,015 filing fee with biometrics.

²² U.S. Immigr. and Customs Enforcement, Frequently Asked Questions (FAQs), *Agreement between U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration Customs and Enforcement (ICE): Fingerprint Check Refresh Requests*. AILA Doc. No. 16052303 (May 19, 2016), available at <https://www.aila.org/infonet/ice-faq-uscis-ice-on-fingerprint-refresh-request>.

²³ 8 U.S.C. § 1103(g)(2) (“The Attorney General shall establish such regulations...[and] review such administrative determinations in immigration proceedings ...”).

appropriate for immigration judges to grant continuances. Continuances are vital to ensure due process and enable judges to effectively manage their dockets.²⁴

- ***Matter of Thomas & Thompson***: Rescind *Thomas & Thompson*, 27 I&N Dec. 674, 674 (A.G. 2019) which holds that state court clarifications or modifications of sentences will not be recognized for immigration purposes, except in narrow circumstances. This decision breaks with a century of precedent that gives full effect to state court sentencing.²⁵
- ***Matter of Negusie II***: Vacate *Negusie*, 28 I&N Dec. 120 (A.G. 2020) (*Negusie II*) which held that asylum adjudicators may not consider duress as a defense to the persecutor bar to asylum and withholding of removal. *Negusie II* has led immigration officers and courts to deny protection to refugees based on acts for which they are not legally or morally culpable.²⁶
- **False Claims to Citizenship** - Issue an opinion clarifying the rule defining what constitutes a false claim to citizenship. The lack of guidance results in inconsistent results and causing unfair and unintended consequences. Thousands of noncitizens are denied admission every year because of this bar.²⁷

IV. Conclusion

The immigration court system, as it is currently functioning, is overburdened and cannot deliver fair and consistent decisions in the thousands of cases that come before it each year. To ensure an immigration court system that meets today's needs, Congress must enact legislation that moves the courts outside of the DOJ and under the Judiciary Branch where they can function as an independent court. In the short term, the Executive Branch should implement commonsense reforms designed to ensure that every individual appearing before the immigration courts receives a fair hearing.

²⁴ *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1087781/download>.

²⁵ *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), <https://www.justice.gov/eoir/page/file/1213201/download>.

²⁶ *Matter of Neguisse*, 28 I&N Dec. 120 (A.G. 2020), <https://www.justice.gov/eoir/page/file/1334881/download>.

²⁷ Policy Alert, U.S. Citizenship and Immigr. Services, *False Claim to U.S. Citizenship Ground of Inadmissibility and Matter of Zhang*, AILA Doc. No. 20042433, Apr. 24, 2020, available at <https://www.aila.org/infonet/uscis-issues-policy-alert-on-false-claim-to-us>.