

**RESOLUTION ON IMMIGRATION COURT REFORM**  
**AILA Board of Governors**  
**Winter 2018**

**PROPONENT:** *AILA Executive Committee and AILA EOIR Liaison Committee*

**Introduction:** Our immigration court system does not meet the standards which justice demands. 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>1</sup> As a component of the Department of Justice (DOJ), EOIR has been particularly vulnerable to political pressure. Immigration judges, who are currently appointed by the Attorney General and are DOJ employees, have struggled to maintain independence in their decision making. In certain jurisdictions, the immigration court practices and adjudications have fallen far below constitutional norms. Years of disproportionately low court funding levels - as compared to other components of the immigration system such as ICE and CBP - have contributed to an ever-growing backlog of cases that is now well over 600,000.

Despite the well-documented history of structural flaws within the current immigration court system, DOJ and EOIR have failed to propose any viable plan to address these concerns. In fact, instead of working to improve the system, DOJ recently announced initiatives that severely jeopardize an immigration judge's ability to remain independent and impartial.<sup>2</sup> These new policies are designed only to accelerate deportations, further eroding the integrity of the court system.

**RESOLUTION:** *The Board hereby reaffirms and clarifies its position on immigration court reform as follows:*

In its current state, the immigration court system requires a complete structural overhaul to address several fundamental problems. AILA recommends that Congress create an independent immigration court system in the form of an Article I court, modeled after the U.S. Bankruptcy Court. Such an entity would protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court system.

Below is an outline of the basic features that should be included in the Article I court.

**Independent System:** Congress should establish an immigration court system under Article I of the Constitution, with both trial and appellate divisions, to adjudicate

<sup>1</sup> See 2017 AILA Fall Board of Governors Meeting Materials, Sept. 16, 2017, pgs. 4-14, available at [http://www.aila.org/about/leadership/bog/schedule/agendas-materials/2017-aila-fall-board-of-governors-meeting-material?utm\\_source=aila.org&utm\\_medium=InfoNet%20Search](http://www.aila.org/about/leadership/bog/schedule/agendas-materials/2017-aila-fall-board-of-governors-meeting-material?utm_source=aila.org&utm_medium=InfoNet%20Search).

<sup>2</sup> See U.S. DOJ, EOIR, "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," Dec. 5, 2017, available at <https://www.justice.gov/opa/press-release/file/1015996/download>; U.S. DOJ, EOIR "Backgrounder on EOIR Strategic Caseload Reduction Plan," Dec. 5, 2017, available at <https://www.justice.gov/opa/press-release/file/1016066/download>; and U.S. DOJ, EOIR, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017, available at <https://www.justice.gov/eoir/file/oppm17-01/download>.

immigration cases. This structural overhaul advances the immigration court's status as a neutral arbiter, ensuring the independent functioning of the immigration judiciary.

**Appellate Review:** AILA recommends that the new Article I court system provide trial-level immigration courts and appellate level review, with further review to the U.S. Circuit Courts of Appeals and the U.S. Supreme Court. To prevent overburdening Article III courts, it is necessary to include an appellate court within the Article I court system.

**Judicial Appointment Process:** AILA recommends the appointment of trial-level and appellate-level judges for a fixed term of no less than 10 years, with the possibility of reappointment. These judges would be appointed by the U.S. Court of Appeals for the federal circuit in which the immigration court resides.

The traditional Article I judicial appointment process, which relies on Presidential appointment with Senate confirmation, would be unworkable for the immigration court system and could easily create a backlog in judicial vacancies. The U.S. Bankruptcy Court system, which uses a different appointment process than other Article I courts, is a better model for the immigration court system, due to the comparable size and the volume of cases. Like the U.S. Bankruptcy Court System, which has 352 judges, the immigration court currently has over 300 judges. Traditional Article I courts have far fewer judges than that of the U.S. Bankruptcy Court System. Therefore, AILA recommends a judicial appointment system that closely resembles that of the U.S. Bankruptcy Court.

**Hiring Criteria for Judges:** Trial and appellate judges that are selected should be highly qualified, and well-trained, and should represent diverse backgrounds. In addition to ensuring racial ethnic, gender, gender identity, sexual orientation, disability, religious, and geographic diversity, AILA advocates for a recruitment and selection process that is designed to ensure that the overall corps of immigration judges is balanced between individuals with a nongovernment, private sector background, and individuals from the public sector. We believe this balance best promotes the development of the law in the nation's interest.

## **Background Materials Related to Immigration Court Reform**

See below for additional information about the U.S. Bankruptcy Court System as well as various organizational positions on immigration court reform.

- **Independent System**: EOIR has been particularly vulnerable to political pressures and sway. Unlike other judicial bodies, the immigration courts lack meaningful independence from the executive branch because EOIR is a component of the DOJ. By regulation, immigration judges are currently appointed by the Attorney General and are employees of DOJ.<sup>3</sup> They 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>4</sup> The creation of an Article I court for immigration law would protect the courts from political influences and safeguard judicial independence.
- **U.S. Bankruptcy Court Structure**: Bankruptcy courts are contained within the judiciary and are effectively Article I extensions of Article III courts. The district courts have jurisdiction over bankruptcy matters but are empowered to “refer” the matters to the bankruptcy court, with most districts having a standing referral order so that all bankruptcy cases are handled by the bankruptcy court.
- **National Association of Immigration Judges** (NAIJ) (2013): NAIJ recommends reorganizing the current immigration courts under Article I of the Constitution, and assigning them to the Executive Branch. Administration of the individual Courts will be supervised through an independent Executive Branch agency, such as the Department of State (DOS) or the Department of Labor (DOL). The Courts will, collectively, be designated “United States Immigration Courts” (USIC). The judges will collectively be granted the title of “United States Immigration Judges” (USIJ).
- **American Bar Association** (2010): ABA favors Article I but would accept the alternative independent agency model.<sup>5</sup>
  - **Article I**: The ABA supports the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases.
  - **Independent Agency**: As an alternative to an Article I court, the ABA supports the creation of an independent agency for both trial and appellate functions. Such an agency should include the Office of Immigration Hearings (“OIH”) at the trial level and a Board of Immigration Review for administrative appeals.
- **Federal Bar Association** (9/18/2017): FBA recommends replacing EOIR with an Article I immigration court system.

<sup>3</sup> See 8 U.S.C. § 1101(b)(4); 5 C.F.R. § 213.3102. Immigration Judges are career attorneys appointed by the AG as administrative judges within EOIR under Schedule A of the excepted service.

<sup>4</sup> See American Bar Association, *Executive Summary of Reforming the Immigration System: Proposal to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (February 2010), available at [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_executive\\_summary.uthcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.authcheckdam.pdf).

<sup>5</sup> See ABA Resolution 114F, 2010, available at <https://www.naij-usa.org/images/uploads/publications/ABA-Article-I-Resolution-114F-adopted-2-8-10-%281%29.pdf>.

- **Appellate Review:** AILA’s recommendation on appellate review differs from most Article I courts. Generally, Article I courts consist only of a trial level, with appeals proceeding directly to an Article III appellate court without an intermediate level of review, or only an appellate level that reviews decisions of an administrative agency. Due to the complex nature of the statutes, regulations, and case law that governs U.S. immigration law, it is critical that the immigration court system provide a specialized tribunal of appellate review. Additionally, the inclusion of an appellate body helps to prevent Article III courts from becoming overburdened.
  - **U.S. Bankruptcy Court Structure:** An appeal of a ruling by a bankruptcy judge may be taken to the district court. Several courts of appeals, however, have established a Bankruptcy Appellate Panel (“BAP”) under 28 U.S.C. § 158(b) consisting of three bankruptcy judges to hear appeals directly from the bankruptcy courts. All parties must consent for the appeal to be heard by the BAP, and the judges hearing such appeals cannot preside over cases coming from their own districts. In either situation, the party that loses in the initial bankruptcy appeal may then appeal to the court of appeals.<sup>6</sup>
  - **National Association of Immigration Judges:** NAIJ recommends an Article I tribunal consisting of a trial level immigration court. An aggrieved party should have resort to the regional federal circuit courts of appeal. This model is based on the U.S. Tax Court.
  - **American Bar Association:** An Article I court for the entire immigration adjudication system would include an Appeals Division and a Trial Division. The leadership of the court would include a Chief Appellate Judge and Chief Trial Judge.
  - **Federal Bar Association:** FBA recommends that the new court is comprised of a trial division operating at various locations within the U.S. and an appellate division based in the Washington, D.C. area. Final decisions of the new court are subject to review in the regional U.S. courts of appeals under the same circumstances as EOIR’s administrative decisions had been reviewed by those courts, but only with respect to constitutional claims, issues of statutory or regulatory interpretation, or other questions of law. Findings of fact by the new court are not subject to further judicial review.
- **Judicial Appointments:** Most judges in Article I courts are appointed by the President and confirmed by the Senate, such as the U.S. Tax Court and the U.S. Court of Federal Claims. In these courts, the Judges are appointed for 15 years, subject to presidential removal during the term for inefficiency, neglect of duty, or malfeasance in office. The U.S. Tax Court is comprised of 19 judges and the U.S. Court of Federal Claims is comprised of 16 judges, whereas the U.S. Bankruptcy Court currently has 352 judges. The U.S. Bankruptcy Court has approximately the same number of judges as the current immigration court, therefore AILA recommends a judicial appointment system that closely resembles that of the U.S. Bankruptcy Court.
  - **U.S. Bankruptcy Court:** There are currently 352 Bankruptcy Judges, all appointed in their various judicial districts across the U.S.<sup>7</sup> The removal of any Bankruptcy Judge is controlled by the courts,

<sup>6</sup> See [28 U.S.C. §152\(b\)](#).

<sup>7</sup> See [28 U.S.C. §152\(a\)\(1\)](#). Each bankruptcy judge to be appointed for a judicial district, as provided in paragraph (2), shall be appointed by the court of appeals of the United States for the circuit in which such district is located. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the

not the President.<sup>8</sup>

- **National Association of Immigration Judges**: NAIJ recommends that judges be appointed by the President with advice and consent of the Senate. Recommends that the immigration court system follow the U.S. Tax Court model. All current immigration judges will initially be appointed to fourteen (14) year terms as USIJs. Selection will be automatic, unless the Head of the Executive Branch which will administer the USICs, determines that a particular candidate is unsuitable, based on a documented record of judicial incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability.
- **American Bar Association**: Due to the large number of immigration judges, the ABA believes that the typical Article I method of appointment for immigration judges would be difficult to manage. The ABA recommends that the President appoint the Chief Trial Judge, the Chief Appellate Judge and the other appellate judges, with the advice and consent of the Senate. The Assistant Chief Trial Judges (“ACTJ”) would be appointed either by the President or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge. The other trial judges would be appointed either (i) by the Chief Trial Judge or (ii) by the ACTJ responsible for the court in which the vacancy exists, subject to approval of the Chief Trial Judge.
- **Federal Bar Association**: FBA recommends that judges in the appellate division be appointed by the President subject to Senate confirmation. Trial-level judges should be appointed by the appellate division using a merit-selection process.
- **Hiring Criteria**: During the September 16, 2017 BOG meeting, AILA put forth hiring criteria for immigration judges.<sup>9</sup>

*With respect to judges, AILA has advocated that the Executive Office for Immigration Review (EOIR) select judges who are highly qualified, well-trained, and represent diverse backgrounds. In addition to ensuring racial, ethnic, gender, gender identity, sexual orientation, disability, religious, and geographic diversity, AILA has advocated for a recruitment and selection process that is designed to ensure that the overall corps of immigration judges is more balanced between individuals with a nongovernment, private sector background, and individuals from the public sector, because this best promotes the development of the law in the nation's interest.*

provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

<sup>8</sup> See 28 U.S.C. §152(e). A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

<sup>9</sup> See Immigration Court Reform and Funding (9/16/2017): The motion to adopt the resolution on immigration court reform and funding as amended passed by majority, Policy Index, AILA Doc. No. 06013017, available at <http://www.aila.org/File/Related/ImmigrationCourtReformAndFunding.pdf>.