



May 28, 2021

VIA EMAIL to SRindependenceJL@ohchr.org

The Honorable Diego García-Sayán
Special Rapporteur on the Independence of Judges and Lawyers
United Nations Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10
Switzerland

Dear Honorable García-Sayán,

Thank you for the opportunity to respond to the Questionnaire on Gender Equality in the Judiciary.

I am writing in my capacity as Chair of the Diversity, Equity, and Inclusion Committee of the National Association of Immigration Judges (NAIJ). I am currently seated at the New York Federal Plaza Immigration Court. Hon. Brea Burgie and I co-chair the NAIJ Gender Diversity, Equity, and Inclusion Subcommittee.

Organizational Background

By way of introduction, NAIJ is a non-partisan, non-profit, voluntary association of United States Immigration Judges. Since 1979, the NAIJ has been the recognized representative of Immigration Judges for collective bargaining purposes. Our mission is to promote the independence of Immigration Judges and enhance the professionalism, dignity, and efficiency of the Immigration Courts, which are the trial-level tribunals where removal proceedings initiated by the United States Department of Homeland Security (DHS) are conducted. We work to improve our court system through: educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating for the integrity and independence of the Immigration Courts and Immigration Court reform. We also seek to improve the Court system and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining. In addition, we represent Immigration Judges in disciplinary proceedings, seeking to protect judges against unwarranted discipline and to assure that when discipline must be imposed it is imposed in a manner that is fair and serves the public interest.

The focus of the NAIJ Diversity, Equity, and Inclusion Committee is to identify underrepresented groups of association members and remove or reduce unconscious biases with respect to such underrepresented groups. We facilitate the ongoing and continuing effort to foster a culture and atmosphere of mutual respect and understanding for our judges.

Need for Judicial Independence

Our courts are in need of reform due to unprecedented challenges facing the Immigration Courts and Immigration Judges. This is particularly important, because achieving judicial independence is essential to ensuring a diversity of opinions and reducing bias in adjudications. Immigration Courts have faced structural deficiencies, crushing caseloads and unacceptable backlogs for many years. Many of the “solutions” that have been set forth to address these challenges have in fact exacerbated the problems and undermined the integrity of the Courts, encroached on the independent decision-making authority of the Immigration Judges, and further enlarged the backlogs.

The Immigration Court suffers from an inherent structural defect as it resides in a law enforcement, Executive branch agency - the U.S. Department of Justice (DOJ). The inherent conflict present in pairing the law enforcement mission of the DOJ with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities, has seriously compromised the very integrity of the Immigration Court system. Immigration Judges make life-changing decisions on whether or not non-citizens are allowed to remain in the United States. Presently, approximately 538 Immigration Judges in the United States are responsible for adjudicating almost 1,300,000 cases. The work is hard. The law is complicated; the labyrinth of rules and regulations require expertise in an arcane field of law. Many of the individuals brought into proceedings do not have attorneys to represent them despite the fact that the DHS is always represented by attorneys because they have no right to appointed counsel. In contrast to our judicial role, we are considered by the DOJ to be government attorneys, fulfilling routine adjudicatory roles in a law enforcement agency. With each new administration, we are harshly reminded of that subordinate role and subjected to the vagaries of the prevailing political winds.

The problems compromising the integrity and proper administration of a court underscore the need to remove the Immigration Court from the political sphere of a law enforcement agency and assure its judicial independence. Since the 1981 Select Commission on Immigration and Refugee Policy, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced. Such a structure solves a myriad of problems which now plague our Court: removing a politically accountable Cabinet level policy maker from the helm; separating the decision makers from the parties who appear before them; protecting judges from the cronyism of a too close association with DHS; assuring a transparent funding stream instead of items buried in the budget of a larger agency with competing needs; and eliminating top-heavy agency bureaucracy.

In the last 35 years, a strong consensus has formed supporting this structural change. For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now most Immigration Judges and attorneys agree the long-term solution to the problem is to restructure the Immigration Court system. Examples of those in support include the American Bar Association, the Federal Bar Association, the National Association of Women Judges, and

the American Immigration Lawyers Association. These are the recognized legal experts and representatives of the public who appear before us. Their voices deserve to be heeded. To that end, the Federal Bar Association has prepared proposed legislation setting forth the blueprint for the creation of an “Article 1” or independent Immigration Court. This proposal would remove the Immigration Court from the purview of the DOJ to form an independent Court. The legislation would establish a “United States Immigration Court” with responsibility for functions of an adjudicative nature that are currently being performed by the judges and appellate Board members in the Executive Office for Immigration Review.

Questionnaire Response

As of May 19, 2021, there are 538 Immigration Judges (including supervisory Immigration Judges). Of those 313 (or 58.2%) are male and 225 (or 41.8%) are female. Of the 40 Immigration Judges who serve in supervisory/leadership roles, 17 (or 43%) are female. There are 23 Appellate Immigration Judges. In line with international trends where there is more parity for judges overall, but less for high-ranking judicial officers, seven of the Appellate Immigration Judges (or 30%) are female. Currently, EOIR has a female acting agency Director, but the agency has never had a permanent female head. Therefore, while EOIR is approaching gender equality for Immigration Judges overall, there is still a deficit in female leadership at the highest levels.

During the period 2008 - 2013, the agency identified as a clearly articulated strategic objective the hiring of candidates reflecting gender diversity. We are not aware of an updated strategy for addressing this objective. It is our view that when an agency is helmed by largely homogeneous leaders, there is a lack of varied perspectives which inhibits innovation and insights, workers’ morale suffers, the organization becomes less able to attract and retain top talent, fewer diverse career officials are promoted to management positions, and the problem becomes self-perpetuating. This condition also provides fertile ground for implicit bias to take hold and flourish, infiltrating future recruitment, as well as implicating the decisions we render in the individual cases which come before us.

The Biden administration has made diversifying the federal workforce, including at DOJ, a top priority. We are hopeful that more work will be done in the months ahead to support greater gender parity in judicial roles throughout the agency and the Immigration Court. More flexible workplace options are needed, including expanded telework and flexible working hours, which have proven to be workable and effective during the pandemic. As numerous studies have shown, women bear an overwhelming majority of caretaking responsibilities: for children, elderly parents, and family members who need additional care. Ensuring continuation of the flexible policies the Department of Justice adopted during the pandemic would ensure that more women could take roles as Immigration Judges, or stay in that role long-term, and keep a healthy work-life balance.

In regard to promoting female leadership at the highest levels of EOIR, the agency needs to examine the work culture that is rigid rather than flexible in addressing the unexpected needs of employees, and expects individuals to work long hours and be available to work evenings and weekends. This culture excludes many women who may otherwise bring valuable contributions to top-level agency positions.

We appreciate your time, and attention to this issue.

Sincerely,

Mimi Tsankov

Hon. Mimi Tsankov

Chair, Diversity, Equity, and Inclusion Committee

Co-Chair Gender Diversity, Equity, and Inclusion Subcommittee