

**CHANGES AT THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW:
A Guide for Members of Congress
Seeking to Hold the Agency Accountable to Due Process**

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The Department of Justice has recently announced a series of policy changes aimed at expediting the removal of immigrants with few if any attendant due process protections. All players in the immigration system – immigration attorneys, government prosecutors, immigration judges, and immigrants themselves – have begun to observe concerning consequences flowing from these policies. This document provides background regarding the little we know as to these changes and suggests questions Members of Congress may ask to hold the agency accountable to its obligation to ensure due process protections in immigration proceedings.

Background: the Executive Office for Immigration Review

The Executive Office for Immigration Review (EOIR) is a component of the Department of Justice that includes the immigration courts and their overseeing appellate body, the Board of Immigration Appeals (BIA). Unlike other judicial bodies, the immigration courts and the Board lack meaningful independence from the executive because immigration judges and Board members are appointed by the Attorney General of the United States.¹

History has shown EOIR to be particularly vulnerable to improper political pressures and sway. In 2003, five members of the BIA were dismissed in what is now widely considered a politically motivated “purge” of left-leaning members of the Board orchestrated by Attorney General John Ashcroft’s leadership team.² Only a few years later in 2008 the Department of Justice Office of the Inspector General found that high ranking officials under Attorney General Alberto Gonzales “committed misconduct, by considering political and ideological affiliations in soliciting and selecting [Immigration Judges].”³

¹ 8 U.S.C. 1101(b)(4); 8 CFR 1003.1(a)(1).

² See Ricardo Alonso-Zaldivar and Jonathan Peterson, *Los Angeles Times*, “5 on Immigration Board Asked to Leave; Critics Call It a ‘Purge,’” Mar. 12, 2003. The Hon. Paul Wickham Schmidt, one of the Board members improperly fired, recounted his experience last year for the blog “The Asylumist,” online here: <http://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/>.

³ See Eric Lichtblau, *New York Times*, “Reports Faults Aides in Hiring at Justice Dep’t,” July 29, 2008; U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, “An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General,” July 28, 2008.

Due process rights and impartiality must be paramount in immigration court, where judges adjudicate asylum requests for men and women who fear life-threatening harm in their countries of origin as well as discretionary relief requests that determine whether families will endure permanent separation. The immigration court system is already fragile, crippled by backlogs⁴ and unacceptable disparities in decision making.⁵ The system cannot bear additional layers of incompetence and political machinations.

Recent developments and announcements from EOIR

EOIR has issued several policy announcements under the new administration, accompanied by little in the way of transparency or assurances that due process rights will be respected.

- *New case processing priorities*: On January 31st, the Chief Immigration Judge issued a memo instructing all immigration judges and court staff to implement new case processing priorities.⁶ The new priorities include: 1) detained individuals; 2) unaccompanied immigrant children in the care and custody of the Department of Health and Human Services with no identified sponsor; and 3) individuals released from custody on the basis of the Ninth Circuit Court of Appeals decision in *Rodriguez* requiring a bond hearing after six months of detention. This memo rescinded the policies of the previous administration which had prioritized processing of all unaccompanied children, non-detained adults with children, and recent border crossers subsequently released from custody. No guidance has been made public regarding how these changes will be implemented.
- *Immigration judges detailed to detained dockets in remote locations*: EOIR issued two short press releases⁷ in March announcing that—as part of EOIR’s implementation of the President’s January 25th Executive Orders—immigration judges would begin to

⁴ As of February 2017, the immigration courts were backlogged by 542, 411 cases with an average wait time of 677 days. See TRAC, Immigration Court Backlog Tool, Feb. 2017, available at http://trac.syr.edu/phptools/immigration/court_backlog/.

⁵ It is well known among immigration attorneys that the most determinative factor in case outcome in immigration court is the immigration judge assigned. A recent study showed that the particular judge assigned to an individual seeking asylum changes his or her odds of receiving asylum by over 56 percentage points. In the New York City immigration court, for example, the rate by which individual judges grant asylum varies from 41% to 97.8%. Compare this variance to the Atlanta court, where the grant rate spans from 29.2% to 2.3%. See TRAC, “Asylum Outcome Increasingly Depends on Judge Assigned,” Dec. 2, 2016, available at <http://trac.syr.edu/immigration/reports/447/>. Immigration judges in Atlanta have been accused of overt bias against asylum seekers. See Christie Thompson, *The Marshall Project*, “America’s Toughest Immigration Court,” Dec. 12, 2016.

⁶ Memo from MaryBeth Keller, Chief Immigration Judge, Re: Case Processing Priorities Memo, Jan. 31, 2017.

⁷ Executive Office for Immigration Review, EOIR Provides New Hearing Location Details, Mar. 7, 2017; Executive Office for Immigration Review, EOIR Provides Information for Two New Hearing Locations, Mar. 24, 2017.

“serve details” to eight remote detention facilities.⁸ No information has been released publicly regarding what these details entail or what policies will govern recalendering for dockets left behind by judges assigned on detail.

- *Institutional Hearing Program expansion:* On March 30th, Attorney General Jeff Sessions issued a statement announcing the anticipated expansion of the Institutional Hearing Program into 20 Bureau of Prison facilities.⁹ The Institutional Hearing Program is intended to facilitate the commencement and completion of removal proceedings for individuals while they complete their criminal sentence. Individuals processed through the Institutional Hearing Program face daunting challenges to asserting their due process rights. Only nine percent of respondents in the program are represented, compared to a 37 percent representation rate for all adults facing removal.¹⁰ This expansion similarly lacks in transparency; the agency has refused requests from advocates simply to identify the 20 facilities where the expansion will take place.¹¹
- *Shutdown of stakeholder engagement:* Advocates and immigration practitioners have observed a disturbing pattern by EOIR officials of discontinuing any engagement with stakeholders. On April 3rd, EOIR unexpectedly cancelled via email a national stakeholder engagement scheduled for two days later, on April 5th. That same week, EOIR leadership withdrew its scheduled participation in an engagement at the American Immigration Lawyers’ Association’s spring conference.

Critical questions for Members of Congress to ask the Department of Justice regarding due process protections within EOIR

1. *What guidance is the agency providing to immigration judges detailed to detention facilities to ensure due process protections and access to counsel?*

The administration has already begun detailing immigration judges to border facilities with the stated goal of expediting removal proceedings for detained individuals. However, the detained docket already moved quickly in most jurisdictions. Given the complexity of deportation defense and the remote nature of most detention facilities, it often takes weeks or months for individuals to find attorneys willing and able to

⁸ The facilities announced thus far are located in: Dilley, Texas; Jena, Louisiana; Karnes City, Texas; Laredo, Texas; Chaparral, New Mexico; Livingston, Texas; Adelanto, California; and Otay Mesa, California.

⁹ Department of Justice, “Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities,” Mar. 30, 2017.

¹⁰ See Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *Univ. of Pennsylvania Law Review*, Vol. 164 No. 1, Dec. 2015, at p. 24.

¹¹ On April 6, 2017, six immigration advocacy organizations submitted a letter to EOIR Director Juan Osuna requesting detailed information concerning the IHP expansion as well as a meeting to discuss due process concerns raised by the expansion. This request is currently pending.

represent them. Those who are not able to find attorneys—nearly four out every five detained individuals according to recent studies¹²—must be given ample time to familiarize themselves with dense immigration laws and gather critical evidence while in detention.

We encourage Members of Congress to seek assurances from the Department of Justice and EOIR leadership that case processing will not be inappropriately expedited at the expense of due process, and that immigration judges will be encouraged and incentivized to give numerous continuances for the purpose of finding counsel.

2. *What procedures are in place to ensure proper and timely service on individuals whose cases are recalendered because of new case processing procedures?*

As immigration judges are detailed to detained dockets, the agency has not shared any public plans or policies regarding coverage for the non-detained dockets they leave behind. These dockets include vulnerable populations such as children, families and asylum seekers. Immigration attorneys report that courts are canceling merits hearings on these dockets with only telephonic notice or *no notice* provided to immigrants and their attorneys. This makes it more challenging for attorneys to take on pro bono cases in a system that is already quite chaotic. Additionally, sloppy notice procedures will lead to a massive uptick in absentia deportation orders issued to individuals without representation who missed their hearings through no fault of their own. Once entered, reopening such in absentia orders can be challenging if not difficult even for those with viable claims to relief from removal.

We encourage Members of Congress to seek assurances from the Department of Justice and EOIR leadership that robust procedures will be put in place immediately to ensure that notice is provided with ample time for any individual whose case is rescheduled and their counsel, and that motions to reopen will be generously granted in the case of in absentia orders resulting from the new case processing procedures.

3. *Will the Department of Homeland Security and EOIR ensure that prosecutorial discretion continues to be exercised fairly?*

Immigration practitioners throughout the country have reported that the Immigration and Customs Enforcement Office of Chief Counsel now routinely refuses to join in almost any motion to the court for prosecutorial discretion, including previously routine requests for administrative closure. The prosecution of all cases docketed in immigration court without a meaningful and uniform consideration of prosecutorial discretion will tragically add to the court's already crushing backlog. In short order this will swamp the Board of Immigration Appeals and already overburdened circuit court of appeals judges.

¹² See Eagle and Shafer, *supra* n. 10.

We encourage Members of Congress to seek assurances from the Department of Homeland Security that it will continue to engage in robust and systematic consideration of exercises of prosecutorial discretion, with headquarters review available. We also encourage Members of Congress to seek assurances from EOIR that immigration judges will not face pressure to deny motions for administrative closure and will be encouraged to exercise their clear legal authority¹³ to grant such requests when appropriate, even in the face of opposition by the Department of Homeland Security.

4. *Will the Department of Justice provide assurances that the hiring process for immigration judges will be protected from political pressures?*

EOIR has confirmed publicly that immigration judges are exempted from the federal hiring freeze put in place earlier this year.¹⁴ The Hon. Dana Leigh Marks, president of the National Association of Immigration Judges, has spoken publicly about the grave need for additional judges and resources in the immigration system: “We are struggling with a caseload of over 540,000 pending cases with only a few more than 300 judges on staff now to handle those.”¹⁵ In the face of this crisis, hiring is notoriously slow and systemically biased toward candidates with government experience. In fact, of the 14 new immigration judges most recently sworn in to serve at EOIR, 12 had served as prosecutors for Immigration and Customs Enforcement.¹⁶

We encourage Members of Congress to seek assurances that the Department of Justice will prioritize the training and hiring of high quality immigration judges and support staff in a manner that ensures no undue political influence. We encourage Members of Congress to investigate the apparent bias in the hiring of immigration judges that persists in recent hires. Additionally, we encourage Members of Congress to ensure that the immigration judge candidates who were mid-way through the hiring process under the previous administration are proceeding through the hiring process apace.

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¹³ *Matter of Avetisyan*, 25 I.&N. Dec. 688 (BIA 2012).

¹⁴ Mica Rosenberg and Kristina Cooke, *Reuters*, “Immigration Judges Exempt from Trump’s Federal Hiring Freeze,” Mar. 3, 2017.

¹⁵ All Things Considered, *National Public Radio*, “Immigration Judge Considers Consequences of New Enforcement Rules,” Feb. 23, 2017.

¹⁶ Executive Office for Immigration Review, Executive Office for Immigration Review Swears in 14 Immigration Judges, Apr. 10, 2017.