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Attorneys for *Amici Curiae*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; ASYLUM SEEKER ADVOCACY PROJECT; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; INNOVATION LAW LAB; SANTA FE DREAMERS PROJECT; AND SOUTHERN POVERTY LAW CENTER,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; WILLIAM BARR, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; AND JAMES MCHENRY, in his official capacity as EOIR Director of the United States,

Defendants.

Case No. 3:19-cv-02051-IM

BRIEF OF *AMICI* FORMER IMMIGRATION JUDGES AND MEMBERS OF BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The immigration court system lacks independence. An agency within the Department of Justice, the Executive Office for Immigration Review (EOIR) houses the immigration court system, which consists of trial-level immigration courts and a single appellate tribunal known as the Board of Immigration Appeals (BIA). Immigration judges, including appellate immigration judges, are viewed by EOIR "management" not as judges, but as Department of Justice attorneys who serve at the pleasure and direction of the Nation's prosecutor-in-chief, the Attorney General.

As former immigration judges, we offer the Court our experience and urge that corrective action is necessary to ensure that immigration judges are permitted to function as impartial adjudicators, as required under the Immigration and Nationality Act. The INA and its implementing regulations set forth procedures for the "timely, impartial, and consistent" resolution of immigration proceedings. See 8 U.S.C. §§ 1103, 1230; 8 C.F.R. § 1003.1(d)(1) (charging the Board with appellate review authority to "resolve the questions before it in a manner that is timely, *impartial*, and consistent with the [INA] and regulations") (emphasis added); 8 C.F.R. § 1003.10(b) (similarly requiring "immigration judges . . . to resolve the questions before them in a timely and *impartial* manner") (emphasis added).

Although housed inside an enforcement agency and led by the Nation's chief prosecutor, immigration judges must act neutrally to protect and adjudicate the important rights at stake in immigration cases and check executive overreach in the enforcement of federal immigration law. Applying a detached and learned interpretation of those laws, judges must correct overzealous bureaucrats and policy makers when they overstep the bounds of reasonable interpretation and the requirements of due process.

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But that is not how the immigration courts work today, and that is not the role that immigration judges have been directed to undertake. Instead, the immigration judge corps repeatedly is reminded by the EOIR Director and the Attorney General, of whom they serve and, therefore, where their loyalties should lie. Addressing a new class of immigration judges in March 2019, then-Deputy Attorney General Rod Rosenstein reminded the group that they are "not only judges," but also employees of the Department of Justice, and members of the Executive branch. As such, Rosenstein admonished them to "follow lawful instructions from the Attorney General, and . . . share a duty to enforce the law."[1] EOIR and Department of Justice memos recently obtained through a Freedom of Information Act request also demonstrate bias in the hiring process of new immigration judges and appellate immigration judges, affording preference to individuals with government backgrounds and, for appellate immigration judges, preference to immigration judges with high denial rates.[2]

Recent agency actions in particular immigration cases give special cause for alarm. In January 2020, the U.S. Court of Appeals for the Seventh Circuit issued a published opinion expressing disbelief at the BIA's decision to ignore the Seventh Circuit's binding remand order

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[1] U.S. Dep't of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges* (Washington, D.C., March 15, 2019), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly.

[2] American Immigration Lawyers Association, *AILA and the American Immigration Council Obtain EOIR Hiring Plan via FOIA Litigation* (May 5, 2020), available at https://www.aila.org/EOIRHiringPlan; Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, ROLL CALL (May 4, 2020), available at https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/?utm_source=AILA+Mailing&utm_campaign=feb9599445-AILA8-05-04-2020&utm_medium=email&utm_term=0_3c0e619096-feb9599445-292022685.

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because the Attorney General had disagreed with it. The Seventh Circuit, having "never before encountered defiance of a remand order," warned that the BIA must count themselves lucky not to have been held in contempt. *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035–36 (7th Cir. 2020). Similarly, in December 2019, the U.S. Court of Appeals for the Third Circuit expressed concern that the BIA was operating not as an impartial appellate tribunal but as a mechanism to ensure deportation: "For reasons I will explain below, it is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring [the petitioner's] removal rather than as the neutral and fair tribunal it is expected to be. That criticism is harsh and I do not make it lightly." *Quinteros v. Att'y Gen. of United States*, 945 F.3d 772, 789 (3d Cir. 2019) (McKee, J., concurring).

Under the current Administration, the Department of Justice consistently has shown evidence of bias, including by releasing public statements and inaccurate propaganda that undermine the immigration courts' neutrality and independence. In a speech to EOIR staff, including immigration judges, in October 2017, then-Attorney General Jeff Sessions denounced "case law that has expanded the concept of asylum," complained that "vague, insubstantial, and subjective [asylum] claims have swamped our system," proposed there be "cost or risk for those who make a baseless asylum claim," and suggested there should not be "a court hearing on every asylum application."[3] The Attorney General made similar statements in several other speeches.[4]

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[3] U.S. Dep't of Justice, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[4] U.S. Dep't of Justice, "Attorney General Jeff Sessions Statement on Central American 'Caravan'" (Apr. 23, 2018), available at https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-statement-central-american-caravan; U.S. Dep't of Justice, *Attorney General Sessions*

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However, as former immigration judges, every day we heard cases of legitimate refugees fleeing persecution. While not all applications were granted because the asylum standard is complex and rigid, this in no way means that cases were "baseless." Such statements by the Attorney General undermine the immigration courts' integrity and clearly reveal the agency's bias.

In May 2019, under the leadership of current Attorney General William Barr, EOIR published a document entitled "Myths v. Facts About Immigration Proceedings."[5] The "facts" as set forth in the document implied that most immigrants do not appear for their court hearings, that most asylum applications are denied, and that representation by an attorney has no significant impact on a respondent's case outcome. A number of groups, including the National Association of Immigration Judges (NAIJ), the immigration judges' union, responded to refute the statements in the EOIR document.[6] The *Washington Post* printed an analysis of four of EOIR's statements, concluding that, "[t]aken individually, each of the four claims . . . relies on a dubious read of the data or tells only part of the story, which tips the scale toward Two

Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out Its Immigration Priorities (Dec. 12, 2017), available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry.

[5] Executive Office for Immigration Review, *Myth v. Facts About Immigration Proceedings* (May 2019), available at https://www.justice.gov/eoir/page/file/1161001/download.

[6] National Association of Immigration Judges, *National Assn. of Immigration Judges Says DOJ's "Myths v. Facts" Filled With Errors and Misinformation* (May 13, 2019), available at https://www.naij-usa.org/images/uploads/newsroom/NAIJFacts_vs_Fiction2.pdf.

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Pinocchios. The effect is more pernicious when considering all four claims together, which is an argument for Three Pinocchios."[7]

Unsurprisingly, there have been calls for the creation of an independent immigration court for decades.[8] Now more than ever, it is clear that an immigration court system controlled by the Attorney General is both unsustainable and fundamentally unfair. The Attorneys General serving the present administration systematically have attempted to erode due process and neutrality under the guise of efficiency, with the goal to incentivize deportation orders.[9] They have responded to criticism of such efforts from the immigration judges themselves by seeking to decertify the NAIJ.[10] The impact of such efforts is reflected in the above-cited circuit court decisions.

Under the current administration, EOIR has imposed on the immigration courts a series of policies that have even further undermined immigration judges' independence and neutrality.

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7 Salvador Rizzo, *Fact-Checking the Trump Administration's Immigration Fact Sheet*, WASHINGTON Post (May 10, 2019), available at https://www.washingtonpost.com/politics/2019/05/10/fact-checking-trump-administrations-immigration-fact-sheet/.

8 *See, e.g.*, Bill McCollum, *Immigration Courts Need an Upgrade*, WASHINGTON TIMES, June 17, 2013, available at https://www.washingtontimes.com/news/2013/jun/17/immigration-courts-need-an-upgrade/ (mentioning in which McCollum's sponsorship in 1999 of H.R. 185 ("United States Immigration Court Act of 1999") to create an Article I Immigration Court). McCollum introduced a similar bill, H.R. 4258 (104th Congress), in 1996.

9 U.S. Dep't of Justice, *Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics* (Aug. 8, 2017), available at https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics (equating an increase in the number of deportation orders as a "return to the rule of law").

10 Hon. Amiena Khan and Hon. Dorothy Harbeck, *DOJ Tries to Silence the Voice of the Immigration Judges—Again!*, THE FEDERAL LAWYER (March/April 2020), at 9 (reposted on immigrationcourtside.com at https://immigrationcourtside.com/wp-content/uploads/2020/04/Immigration-TFL_Mar-Apr2020.pdf).

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Those policies, which we discuss in more detail below, serve the Administration's deportation agenda and clearly demonstrate and propagate systemic bias across the immigration court system. The policies include:

- The imposition of strict case completion quotas on all immigration judges;
- The creation of Family Unit "rocket dockets" with strict timelines for scheduling and adjudicating cases;
- The elimination of administrative closure as a docketing tool for judges to maintain efficiency in adjudicating cases;
- The limitation of judges' ability to grant continuances despite good cause;
- The prioritization of speed over due process, even in cases involving unrepresented children; and
- The EOIR Director's review of individual cases for purposes of disciplining immigration judges and modifying case outcomes.

As an agency that exists solely to house the immigration courts, EOIR's function should be to protect the independence and integrity of the hundreds of judges who preside over those courts and of the BIA. As former immigration judges, we observe that other U.S. courts, including this one, do not issue propaganda prejudging the outcomes of the proceedings before them, devaluing the participation of attorneys in those proceedings, undermining their own pro bono attorney assistance program, or casting unsuccessful litigants as deceitful or not credible. Such statements demonstrate a bias that is unacceptable and, frankly, shocking.

II. ARGUMENT

The immigration courts and Board of Immigration Appeals lack independence. The process by which cases are managed, oversight is provided, and decisions are made within EOIR demonstrates a broken and politically motivated system that lacks justice.

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A. THE ATTORNEY GENERAL AND EOIR DIRECTOR HAVE EXTENSIVE POWER OVER IMMIGRATION JUDGES, CREATING A SYSTEM THAT LACKS INDEPENDENCE.

Immigration judges are attorneys appointed by the Attorney General "to conduct specified classes of proceedings." 8 C.F.R. § 1003.10(a). "Immigration judges *shall* act as the Attorney General's delegates in the cases that come before them." *Id* (emphasis added). The immigration courts are housed within the Office of the Chief Immigration Judge ("OCIJ"), a component of EOIR, which is an administrative agency in the Department of Justice. As a part of the executive, rather than judicial, branch of government, immigration courts and the BIA are controlled by the Attorney General, a political appointee whose policies are guided by the political priorities of the administration he or she serves.

Under the current administration, the President and Attorney General have used the immigration courts to carry out their anti-immigrant agenda. Because of the lack of independence in the immigration court system, the changes the administration has implemented have removed discretion, neutrality, and basic tools for administrative efficiency and docket management from immigration judges. Some clear examples are described below. These changes impact the day-to-day work of sitting judges.

1. IJ Performance Metrics

On January 17, 2018, James McHenry, the current EOIR Director, issued a memorandum setting forth several metrics for evaluating the performance of immigration judges.[11] In March 2018, Director McHenry sent a memorandum to the immigration judge corps instructing that

[11] Memorandum from James McHenry to The Office of the Chief Immigration Judge, *et al*. (Jan. 17, 2018), available at https://www.justice.gov/eoir/page/file/1026721/download.

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each immigration judge complete at least 700 cases per year to receive a satisfactory performance review. The result of the performance metrics is to force immigration judges to cut corners, to push them to adjudicate cases more quickly, and to incentivize deportation orders. NAIJ repeatedly has pushed back on the performance metrics, urging that a one-size-fits-all approach is inappropriate for immigration judges who are supposed to be impartial arbiters in immigration cases.[12] In response, the administration has sought to decertify the union.[13] Although Director McHenry has stated that the case quota was set after reviewing court statistics, it is clear that considerations for individual courts like San Francisco and New York, courts with lower adjudication rates, were disregarded in an effort to increase the pace of deportations. Instead, the quotas reflect case completion rates in courts like Atlanta—a highly "efficient" court with one of the highest asylum denial rates in the country.[14]

The performance metrics appear on each immigration judge's "dashboard," an animated odometer on their computers complete with "needles" that must be kept in the "green" zone for

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[12] National Association of Immigration Judges, *Imposing Quotas on Immigration Judges Will Exacerbate the Case Backlog at Immigration Courts* (Jan. 31, 2018), available at https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18._.pdf; National Association of Immigration Judges, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (Oct. 2017), available at https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

[13] *See* Jacqueline Thomsen, *Immigration Judges, Joined by Latham & Watkins, Fight DOJ Effort to Decertify Union*, LAW.COM (Jan. 7, 2020), available at https://www.law.com/therecorder/2020/01/07/immigration-judges-joined-by-latham-watkins-fight-doj-effort-to-decertify-union/?slreturn=20200403153441.

[14] *See* TRAC Immigration, *Asylum Decisions*, available at https://trac.syr.edu/phptools/immigration/asylum/ (data through March 2020).

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each designated category.[15] The dashboard acts as a real-time reflection of the judge's performance, reminding the judge to complete cases within expedited timeframes and adjudicate motions expeditiously. If they fail to meet their performance metrics, the judges may be subject to discipline, reassignment, or even termination. The performance metrics thus actively disincentivize judges from issuing continuances, require that all asylum cases be expedited, irrespective of the individual due process considerations in each case, and give each immigration judge a pecuniary interest in the cases they decide.

The performance metrics impair respondents' ability to secure legal representation and present evidence in their cases—both clear requirements of the Immigration and Nationality Act (INA). *See* 8 U.S.C. §§ 1229a(b)(4)(A), 1230(b)(2), 1362; 8 C.F.R. §§ 1003.16(b), 1003.25(c), 1292.1. 1001.1(f). For example, the metrics require 85 percent of detained cases to be completed within 60 days of the filing of the charging document. Because respondents have no right to appointed counsel in removal proceedings, detained individuals who are not able to work and earn income generally must rely on limited pro bono resources or on family to pay private counsel. As a result, in 2017, only approximately 30 percent of detained individuals were able to secure legal representation in removal proceedings.[16] The performance metrics, and the limited, 60-day timeframe they impose in detained cases make it even more difficult to do so. That is

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15 A depiction of the dashboard is included in the Complaint at paragraph 127.

16 TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), available at https://trac.syr.edu/immigration/reports/485/.

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particularly true today, as pro bono legal service providers are overwhelmed by the current immigration court case load, recently reported as consisting of 1.4 million cases.[17]

Requiring judges to complete cases within 60 days reduces the likelihood that detained individuals will obtain representation, which also significantly reduces the likelihood that they will receive a favorable outcome in their case. A comparison of asylum denial rates in immigration court from Fiscal Years 2012 through 2017 by Syracuse University's TRAC Immigration research center showed a 26.7 percent difference in denial rates between unrepresented (95.1 percent) and represented (68.4 percent) asylum seekers from Guatemala. For asylum seekers from China, the difference in denial rate for unrepresented (78.7 percent) and represented (17.7 percent) asylum seekers was sixty percent.[18]

Many detained respondents in removal proceedings also request continuances to obtain documents to support their cases. Thousands of noncitizens in immigration detention have no criminal background, are seeking protection from persecution, and do not speak English.[19] Gathering documents, while representing oneself from detention, is exceptionally challenging and takes time. Detention facilities and jails limit access to phones and have under-resourced law libraries. Requiring immigration judges to complete cases within 60 days causes them to

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17 *See* TRAC Immigration, *Mapping Where Immigrants Reside While Waiting for Their Immigration Court Hearing* (Mar. 24, 2020), available at https://trac.syr.edu/immigration/reports/600/.

18 TRAC Immigration, Immigration Court Asylum Denial Rates by Nationality and Representation Status, FY 2012 - FY 2017 (Nov. 20, 2017), available at https://trac.syr.edu/immigration/reports/491/include/table2.html.

19 Asylum seekers with no criminal history may be denied bond and detained indefinitely upon a finding that they might be a flight risk. *See, e.g.*, *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (BIA 2020).

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deny continuances for respondents to secure counsel and to gather necessary documents. The result is a violation of the right to counsel and due process. The performance metrics show that speed and deportation are valued more than due process and justice.

Another particularly impactful metric is the requirement that 95 percent of hearings must be completed on the initial scheduled individual merits date. This metric similarly pushes immigration judges to deny continuances, even for legitimate reasons. It also pushes judges to rush through hearings to ensure cases are completed in one hearing. Coupled with the 700-case completion requirement, which necessitates scheduling at least three merits hearings a day, this metric forces judges to complete cases that are factually and legally complex, including those that require a foreign language interpreter, in under two hours. In practice, to meet this metric, immigration judges must deny continuances and limit in-court testimony, presentation of witnesses, and closing arguments. If they do not, they risk losing their jobs. Immigration judges are thus effectively prevented from providing full and fair hearings, a due process requirement that is also enshrined in the INA. *See* 8 U.S.C. § 1229a.

Despite pushback from NAIJ and some Assistant Chief Immigration Judges, EOIR Director McHenry has insisted that 700 cases annually is a reasonable completion number for all immigration judges. But it is impossible to reasonably set a single completion rate for courts that hear exclusively detained cases and courts that hear non-detained cases, as well as courts from different circuits. Some respondents on detained dockets request removal orders at their initial hearings. As a result, those cases are completed much more quickly than cases on non-detained dockets, where the majority of respondents apply for asylum. Despite vast docket disparities,

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EOIR Director McHenry has refused to make modifications based on docket types, instead imposing a one-size-fits-all directive.

The performance metrics were a focus at a national training for immigration judges in the summer of 2018. EOIR management hosted several sessions focused on reviewing the metrics and ways that immigration judges could hear cases more expeditiously. One recommendation was that judges deny cases without scheduling merits hearings at all.[20] EOIR management suggested that immigration judges consider reviewing applications for relief, many of which are filed without the assistance of counsel, and determine, without hearing any testimony, that applicants failed to meet their burden of proof. Because of that suggestion, many immigration judges deny applications for immigration relief without hearing any testimony. That practice is inconsistent with due process and impacts unrepresented respondents particularly harshly.[21]

Remarkably, EOIR has refused to hold case completion quotas in abeyance during the present COVID-19 pandemic. As a result, immigration judges hearing cases in detained courts (which have remained open in spite of the health crisis) wishing to grant continuances to avert

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[20] *See also Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018) (Attorney General certified to himself and vacated a BIA precedent decision from 2014 guaranteeing asylum seekers the right to a merits hearing).

[21] Another presenter at the same conference, Appellate Immigration Judge Roger Pauley, instructed the judges not to apply binding Supreme Court precedent when doing so would not lead to a "sensible" result. Matthew Hoppock, *FOIA Results: Immigration Judges' Conference Materials for 2018* (Aug. 21, 2018), available at https://www.hoppocklawfirm.com/foia-results-immigration-judges-conference-materials-for-2018/.

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health risks do so at risk of not meeting their quotas, and possibly imperiling their own professional standing.[22]

2. FAMU Dockets

The "FAMU" (short for "Family Unit") docket was memorialized on November 16, 2018, in another policy memorandum issued by Director McHenry.[23] The memorandum requires that FAMU cases be docketed expeditiously and completed in one year or less (although internal memos have instructed judges in some courts to schedule cases after a single 40-day continuance to obtain counsel). The administration has created a narrative that family units traveling to the United States from Central America are "gaming" the United States asylum system and are not legitimate refugees.[24] As a result, Attorney General Sessions emphasized to the immigration judge corps at the 2018 training that individuals are abusing the asylum system, and that immigration judges must stop such abuse. That narrative plagues the FAMU docket.

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[22] Immigrant detention centers have also become hot spots for COVID-19 outbreaks. *See, e.g.*, Patricia Sulbarán Lovera, *Coronavirus: Immigration Detention Centres in Crisis*, BBC NEWS MUNDO (May 1, 2020), available at https://www.bbc.com/news/world-us-canada-52476131; Alejandro Lazo & Zusha Elinson, *Inside the Largest Coronavirus Outbreak in Immigration Detention*, THE WALL STREET JOURNAL (Apr. 30, 2020), available at https://www.wsj.com/articles/inside-the-largest-coronavirus-outbreak-in-immigration-detention-11588239002.

[23] Memorandum from James R. McHenry III to All of EOIR (Nov. 16, 2018), available at https://www.justice.gov/eoir/page/file/1112036/download.

[24] U.S. Dep't of Justice, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review ("The system is being gamed [by] dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.").

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Most families on the FAMU docket are fleeing actual persecution in Central America and have limited resources. The expeditious nature of the docket means that fewer families are represented by counsel, as they do not have sufficient time to find private counsel or make it through most nonprofit legal services' waitlists. Immigration judges must limit continuances for counsel despite the impossible situation the FAMU docket timeframe creates for respondents. Likewise, judges have limited authority to grant continuances for case preparation and document gathering. In addition, to meet performance metrics and complete the cases within the required timeframe, immigration judges must hear complex asylum cases—often for multiple family members, many of whom have suffered severe trauma—in less than two hours. This timeline is impossible when considering asylum cases for families of four or more, where multiple family members have their own stories to tell. Rapid adjudication without the opportunity to develop the record means that immigration judges are denying more cases, because it is simply impossible for applicants to prove their cases in such circumstances. Indeed, it is easier for a judge to deny rather than grant asylum on such a limited record, particularly for unrepresented respondents who will be unable to present technical legal arguments about due process violations on appeal.

Finally, because of the expedited timeline for FAMU cases, families sometimes fail to appear at their initial hearings because their hearing notices do not arrive timely or at all.[25]

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[25] The hiring of immigration court support staff has not kept pace with Immigration Judge hiring, causing delays in the processing of change of address forms received by the courts, and in the mailing of notices of hearing. Furthermore, cases are commonly transferred to the dockets of newly hired judges or visiting judges. Thus, an immigrant who was given a notice in court for a hearing years in the future might suddenly be calendared for a much sooner date by a newly assigned judge.

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Although many families appear if they are given a second opportunity to do so, most immigration judges do not afford them that opportunity. The expedited docket does not allow the judges the time to investigate reasons for respondents' failure to appear, but instead pushes them to issue removal orders *in absentia* to meet their performance goals.

3. Treatment of Unaccompanied Minors

The agency's prioritization of speed over due process extends to its treatment of unaccompanied minors appearing in immigration court. In December 2017, Attorney General Sessions issued a memorandum ordering IJs to adhere to the principles that the "timely and efficient conclusion of cases serves the national interest," "efficient and timely completion of cases and motions before EOIR is aided by the use of performance measures," and "any and all suspected instances of fraud should be promptly reported."[26] Fifteen days later, EOIR's Chief Immigration Judge released a memorandum specifically addressing minors who appear in immigration court. Echoing the Attorney General's concerns for efficiency, the Chief Immigration Judge instructed all immigration judges to familiarize children with the courtroom but only "[t]o the extent that resources and time permit" and "to resolve issues of removability and relief without undue delay."[27] Reiterating the mandate for skepticism, the memo twice reminded immigration judges of the "adversarial" nature of immigration court and twice invoked

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[26] Memorandum from Attorney General (Dec. 5, 2017), available at https://www.justice.gov/opa/press-release/file/1015996/download.

[27] Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges, *et al.* (Dec. 20, 2017) at 4, 6, available at https://www.justice.gov/eoir/file/oppm17-03/download.

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the importance of ensuring due process for the government.[28] The memo also advised judges that "legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents."[29] As for cases involving an Unaccompanied Alien Child (UAC), the memo noted that there is "an incentive to misrepresent accompaniment status or age in order to attempt to qualify for the benefits associated with UAC status," and that IJs "should be vigilant in adjudicating cases of a purported UAC."[30] The memo continues to inform proceedings today.

4. Attorney General Decisions

The Attorney General has the authority to "certify" decisions to himself pursuant to 8 C.F.R. § 1003.1(h). Attorneys General under all administrations have published decisions through the certification process. However, the Attorneys General under the current administration have systematically referred cases at a far greater pace than their predecessors in order to limit immigration judges' independence, control their dockets, and create new limitations on asylum and other forms of relief.[31]

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[28] *Id.* at 4, 6-7 (reminding immigration judges of the need for cross examination of children in immigration court and the credibility and burden of proof standards that apply to all respondents, including children).

[29] *Id.* at 7.

[30] *Id*. at 7-8.

[31] One case each was certified under the administrations of Presidents Reagan and George H.W. Bush. Four cases were certified under the Clinton Administration. While the Attorneys General serving under President George W. Bush certified a total of 15 cases, the number dropped to 4 under the Obama Administration; two of those certifications were simply to vacate decisions by Bush Attorney General Michael Mukasey. While the 15 certifications under Bush II occurred over 8 years, the Attorneys General under the Trump Administration have certified 13 cases in just over three years.

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a. Decisions limiting docket management tools

One major change in immigration court policy carried out through a certified decision of the Attorney General was the elimination of administrative closure, a crucial docketing tool used by immigration judges to prioritize active cases by removing from their active calendars cases with pending applications for seeking collateral immigration benefits that judges lack jurisdiction to adjudicate.[32] Administrative closure was also used in other special circumstances, including where the Department of Homeland Security (DHS), the prosecutor in immigration court, exercised its prosecutorial discretion not to pursue removal proceedings. In a system where there is now a backlog of over one million cases, judges relied on administrative closure as a tool to manage their dockets. On May 17, 2018, the Attorney General published *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018), in which he eliminated administrative closure as a docketing tool in all but very limited circumstances. 27 I. & N. Dec. at 271 (Holding that "immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.").

In addition to the decision's impact on judges' independence and ability to manage their dockets, *Matter of Castro-Tum* had a direct and notable impact on the judge who originally heard the case. A highly respected immigration judge in Philadelphia, Steven Morley, issued the eCastro-Tum had entered the United States as an unaccompanied minor. After his release from detention, he did not appear for his immigration proceedings. Judge Morley was concerned,

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[32] DHS maintains sole jurisdiction to adjudicate immigrant visas and certain waivers. For example, where a noncitizen in proceedings before the immigration court marries a U.S. citizen, it is DHS (and not the immigration judge) that must adjudicate the resulting immigrant visa application.

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based on his past experience, that Immigration and Customs Enforcement (ICE) had provided the court with an inaccurate address for the youth. Judge Morley thus felt it would be unfair to order him removed *in absentia* without first determining if he had received proper notice of the hearing, as required by law.

On remand, the Attorney General directed Judge Morley to proceed according to the section of the law that governs *in absentia* orders. That section also requires a finding of proper notice.[33] Judge Morley proceeded consistently with the Attorney General's order by granting a short continuance for briefing on the issue of notice. In response, EOIR management immediately removed the case from Judge Morley's calendar. EOIR then hand-picked a management-level supervisory judge known for following the agency line, who was sent from Virginia to Philadelphia to conduct a single five-minute hearing in which she ordered the youth removed *in absentia*.[34] Eighty-six similar cases were later removed from Judge Morley's calendar, sending a strong warning to the all immigration judges (many of whom were new hires still in their two-year probationary period) of what to expect should they choose to act as "only judges" and not as loyal employees of the Attorney General and executive branch.

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[33] 8 U.S.C. § 1229a(b)(5)(A) mandates the entry of a removal order where a noncitizen does not appear for their hearing "after written notice required under paragraphs (1) and (2) of section 1229(a) of this title."

[34] Judge Morley was also chastised by his supervisor who, according to a grievance filed by the NAIJ, incorrectly told Judge Morley that he was required to enter a final decision at the first hearing on remand, and falsely accused him of acting unprofessionally in purportedly criticizing the Attorney General's and the BIA's decisions. *See* Tal Kopan, *Immigration Judge Removed From Cases After Perceived Criticism of Sessions*, CNN (Aug. 8, 2018), available at https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html (containing a link to the NAIJ's grievance).

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The Attorney General similarly limited the use of continuances when he published *Matter of L-A-B-R-*, 27 I. & N. Dec. 504 (AG 2018). *Matter of L-A-B-R-* limits circumstances in which immigration judges may consider granting continuances. The decision, in conjunction with EOIR memoranda, pushes judges to deny continuances. A July 31, 2007, policy memorandum from then-Chief Immigration Judge MaryBeth Keller specifies that immigration judges must make clear the reason for adjournments through the use of the proper adjournment code.[35] But no similar requirement exists for the denial of continuances. Judges were advised that Director McHenry reviews cases and adjournment codes to ensure that judges are honest and accurate when documenting reasons for granting continuances—again sending a clear message that judges were being watched closely to ensure they did not deviate from the administration's emphasis on rapid adjudication to facilitate deportation.

b. Matter of A-B-

The Attorney General's decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018), raises several concerns for due process and neutrality. That case involved a BIA decision reversing an immigration judge's denial of asylum. The BIA had directed the judge to grant asylum on remand, pending a DHS background security check required by regulation. Instead of granting relief as ordered, the judge attempted to certify the case back to the BIA. *See* 27 I. & N. Dec. at 321–22.

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[35] Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges, *et al.* (July 31, 2017), available at https://www.justice.gov/eoir/file/oppm17-01/download (a specific adjournment code is required every time an immigration judge continues a case. The list of reasons for adjournments and the corresponding codes are issued by the EOIR Director).

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Before the file reached the BIA, however, the Attorney General had certified the case to himself—from a posture in which it was procedurally improper to do so. The Attorney General then unilaterally changed the issue on appeal, turning the case into a referendum on whether domestic violence could form the basis for asylum. That issue had been decided by the BIA in its 2014 decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), in which DHS, in its role as prosecutor, had stipulated to the holding that victims of domestic violence who were unable to leave their relationships constituted a cognizable particular social group for asylum purposes. 26 I. & N. Dec. at 395.

Consistent with that stipulation, in response to the Attorney General's request for briefs on the issue in *Matter of A-B-*, DHS stated that *Matter of A-R-C-G-* had been properly decided by the BIA in accordance with all applicable precedent and asked the Attorney General not to vacate that decision. In other words, both parties (and all *amici*, with the single exception of the anti-immigrant group FAIR) agreed that *Matter of A-R-C-G-* had been properly decided. Of course, the function of courts is to resolve disputes between the parties, and there was no dispute on this point.

While the case was still pending before him, the Attorney General stated in a radio interview that "We've had situations in which a person comes to the United States and says they are a victim of domestic violence; therefore, they are entitled to enter the United States. Well that's obviously false, but some judges have gone along with that."[36] Clearly, any judge making

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[36] *Jeff Sessions Wants to Close "Blatant Loopholes" in Immigration Law*, KTAR NEWS (May 7, 2018), available at http://ktar.com/story/2054280/ag-jeff-sessions-says-closing-loopholes-can-fight-illegal-immigration/.

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such a statement would have to recuse him or herself from the case. However, the Attorney General neither felt the need to be impartial, nor was he held accountable for his bias.[37]

Both issues—procedural irregularity and perceived bias—were raised in briefs submitted to the Attorney General, who brushed them aside in his decision. *Matter of A-B-*, 27 I. & N. Dec. at 324–25. Regarding the issue of bias, the Attorney General wrote that there is no "requirement that an administrator with significant policymaking responsibilities withdraw from 'interchange and discussion about important issues,'" adding "[i]f policy statements about immigration-related issues were a basis for disqualification, then no Attorney General could fulfill his or her statutory obligations to review the decisions of the Board." *Id*. at 325.

The next problem involved the BIA. Although the decision in *Matter of A-B-* did not preclude all victims of domestic violence from being granted asylum, the BIA chose to apply it that way, categorically denying pending asylum appeals that had relied on *Matter of A-R-C-G-*'s analysis without engaging in the individualized factual analysis required in such cases. Furthermore, there was no consideration by the BIA as to whether *Matter of A-B-* could properly be applied retroactively. It would seem that if *Matter of A-B-* was viewed as a policy shift undertaken by the Attorney General, it could be applied only to future cases. Even if applied retroactively, cases that were heard before *A-B-* was decided (and therefore had formulated their

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[37] As described in Section I, *supra*, the INA and its implementing regulations set forth procedures for the "timely, impartial, and consistent" resolution of immigration proceedings. See 8 U.S.C. §§ 1103, 1230; 8 C.F.R. § 1003.1(d)(1) (charging the Board with appellate review authority to "resolve the questions before it in a manner that is timely, impartial, and consistent with the [INA] and regulations"); 8 C.F.R. § 1003.10(b) (similarly requiring "immigration judges . . . to resolve the questions before them in a timely and impartial manner"). Those procedures—and the requirement that they be fairly and impartially administered—extends not only to the BIA and the immigration courts, but also to the Attorney General in the exercise of his refer and review authority under 8 C.F.R. § 1003.1(h).

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particular social groups under the *A-R-C-G-* standard) should have been remanded to allow respondents to reformulate their analysis and/or provide additional evidence or arguments in response to the superseding precedent.

The recent precedent decision of the U.S. Court of Appeals for the First Circuit in *De Pena Paniagua v. Barr*, No. 18-2100, 2020 WL 1969458, – F.3d – (1st Cir. Apr. 24, 2020), contains two additional points worth noting here: (1) in its rejection of the proposed particular social group, "*A-B-* itself cites only fiat"; and (2) nothing in *A-B-* provided "justification for categorically rejecting such a group without further consideration of the particulars of a given case." 2020 WL 1969458 at *4. *Matter of A-B-* is thus a prime example of how the Attorney General's abuse of power has resulted in ill-reasoned and biased precedent that discourages immigration judges from granting asylum in meritorious cases.

B. THE ATTORNEY GENERAL AND EOIR DIRECTOR HAVE CREATED AN ADMINISTRATIVE APPEALS SYSTEM THAT LACKS INDEPENDENCE

Federal regulations require that "[t]here shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them." 8 C.F.R. § 1003.1(a)(1).

Because the BIA lacks independence, just as the immigration courts do, the statutory right to appeal does not address the inherent due process violations that permeate the system. Respondents in removal proceedings have a right to appeal to the BIA. But the administration is stacking the BIA with judges who had particularly high asylum denial rates as immigration

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judges.[38] Recent federal court decisions have also expressed concerns about the BIA's lack of legal reasoning and anti-respondent bias.[39]

In addition, as described above, the Attorneys General have shown the ease with which they are willing to certify cases to themselves when they perceive the BIA to diverge from the administration's political priorities. The Department of Justice has also recently introduced new regulations allowing the Director of EOIR, a purely political appointee, to certify and decide cases himself. Organization of the Executive Office for Immigration Review, 84 FR 44537-01 (Aug. 26, 2019). Moreover, the standard of review at the BIA is highly deferential to the immigration judge who decided the case—the BIA applies a clearly erroneous standard to a judge's findings of fact, including credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i).[40] That standard results in the affirmance of many decisions that may nevertheless have been incorrect on their merits. Such decisions include affirmances without opinion, where the BIA need not provide any reasoning for its affirmance. 8 C.F.R. § 1003.1(e)(4).

In addition, while some respondents in removal proceedings can pursue petitions for review before the federal courts of appeals, such an appeal cannot correct systemic issues. If an asylum applicant is prevented from presenting her case in immigration court because the

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[38] American Immigration Lawyers Association, *AILA and the American Immigration Council Obtain EOIR Hiring Plan via FOIA Litigation* (May 5, 2020), available at https://www.aila.org/EOIRHiringPlan.

[39] *See Baez-Sanchez v. Barr*, 947 F.3d at 1035–36; *Quinteros*, 945 F.3d at 789; *Guzman Orellana v. Att'y Gen. of United States*, 956 F.3d 171, 175 (3d Cir. 2020) (reiterating evidentiary standards because "we are troubled by the BIA's apparent distortion of evidence favorable to [the respondent] in this case").

[40] *But see* 8 C.F.R. § 1003.1(d)(3)(ii) (the BIA applies a de novo standard of review to questions of law, discretion, judgment, and other issues).

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immigration judge is rushing the case and refuses to permit testimony, then the asylum applicant has no record on which to pursue her appeal. If she is unrepresented, it will be impossible for her to articulate the lack of due process she received during her hearing before the immigration judge.

III. CONCLUSION

The immigration court system is broken. It lacks independence, neutrality, and does a disservice to the individuals who must appear before it. The policies implemented by this administration have created a situation in which immigration judges have a pecuniary interest in rushing cases and issuing removal orders at a rapid pace. This violates the basic statutes that require impartiality and is not justice.

DATED this 8th day of May, 2020.

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