

**Policy Brief: The Weaponization of the Immigration Court System
April 2018**

Nearly a century ago, the Supreme Court of the United States described deportation as a deprivation of liberty that “may result ... in loss of both property and life, or of all that makes life worth living.”¹ Today, the gravity of an immigration judge’s decision to order deportation is no less weighty, determining whether an asylum seeker will be returned to the hands of her persecutor or whether a decades-long American resident will be torn from his family. Yet these cases are heard in a broken court system frequently described by the immigration judges’ union representative as “death penalty cases in a traffic court setting.”²

The immigration court system’s dysfunction is largely due to its position within the Department of Justice (DOJ), where it is vulnerable to the political whims of the executive. Over the past year, the Trump administration has explicitly attempted to subvert the mission of the immigration court system, trading the safeguarding of due process for the politics-driven pursuit of increasing deportations. At the National Immigrant Justice Center (NIJC),³ we witness the severe harms that follow, including sham hearings and erroneous deportations.

In written testimony submitted in April 2018 for a Senate Judiciary Committee Hearing regarding Judicial Independence of the Immigration Courts, NIJC encouraged Congress to consider the merits of creating an Article I immigration court system, and to engage in robust oversight of DOJ to reverse its unacceptable incursions on the court system’s integrity.

This policy brief: 1) provides a brief overview of the vulnerability of the Executive Office for Immigration Review (EOIR) to political sway; 2) outlines the current administration’s attacks on the fairness and independence of the immigration court system; and 3) provides a brief set of principles that must be fulfilled to ensure fairness in the system.

I. The Executive Office for Immigration Review: a brief history of political sway

The Executive Office for Immigration Review (EOIR) is a component of the Department of Justice that includes the immigration courts and their appellate body, the Board of Immigration Appeals (BIA). Unlike other judicial bodies, the immigration courts and the BIA

¹ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

² Bryan Schatz, *Mother Jones*, “Our Immigration Courts Aren’t Ready to Handle Millions of Deportations,” Mar. 31, 2017, <https://www.motherjones.com/politics/2017/03/immigration-court-deportations-trump-asylum/>.

³ NIJC is a non-governmental organization (NGO) dedicated to safeguarding the due process rights of noncitizens. We are unique among immigrant advocacy groups in that our advocacy and impact litigation are informed by the direct representation we provide to approximately 10,000 clients annually. Through our offices in Chicago, Indiana, and Washington D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, NIJC provides legal counsel to immigrants, refugees, unaccompanied children, and survivors of human trafficking.

lack meaningful independence from the executive because immigration judges and BIA members are appointed by the Attorney General.⁴

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 BIA members orchestrated by Attorney General John Ashcroft’s leadership team.⁵ Only a few years later, in 2008, the DOJ 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].”⁶

The past decade has hardly been kinder, as judges have been repeatedly forced to rearrange their dockets by executive branch officials driven by political expediency, rather than evidence-based, impartial judicial administration.⁷ As a result, the immigration court system today is extremely fragile, crippled by backlogs⁸ and unacceptable disparities in decision making.⁹ The deck is stacked against immigrants, who frequently speak to judges through interpreters, more often than not representing themselves in the face of a maze of complex laws,¹⁰ and often in the immediate aftermath of having survived torture or severe persecution. When Jeff Sessions was appointed as Attorney General, the system already stood on the brink of chaos, unable to bear additional layers of incompetence and political machinations.

Perhaps no story demonstrates this reality better than that of NIJC client Roberto (pseudonym), who fled to the United States with his wife, daughter, mother, and brother and brother’s family, scared for their lives after a cartel murdered his father and uncle and threatened the rest with death. Most of the family settled in the Chicago area and received hearing notices

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

⁵ 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, <http://articles.latimes.com/2003/mar/12/nation/na-immig12>.

⁶ See Eric Lichtblau, *New York Times*, “Report Faults Aides in Hiring at Justice Dep’t,” July 29, 2008, <https://www.nytimes.com/2008/07/29/washington/29justice.html>; 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, <https://oig.justice.gov/special/s0807/final.pdf>.

⁷ See Hon. Paul Wickham Schmidt, The Federal Lawyer, “Immigration Courts: Reclaiming the Vision,” May 2017, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/May/Features/Immigration-Courts-Reclaiming-the-Vision.aspx?FT=.pdf; see also United States Government Accountability Office, Report to Congressional Requesters, “[Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges.](#)” p. 124, June 2017.

⁸ As of February 2018, the immigration courts were backlogged by 684,583 cases with an average wait time of 711 days. See TRAC, Immigration Court Backlog Tool, last accessed Apr. 8, 2018, http://trac.syr.edu/phptools/immigration/court_backlog/.

⁹ 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 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.

¹⁰ Nationally less than 40% of immigrants are able to obtain representation in their immigration court proceedings. *Access to Counsel in Immigration Court*, *supra* n. 13.

in the Chicago Immigration Court, but at different times and before different judges, all while Roberto remained detained with his case scheduled before the Omaha (Nebraska) Immigration Court. NIJC's representation of Roberto and his family included the filing of a parole (release) petition for Roberto with two different ICE offices in two different states, motions to consolidate the family's cases in two different courts, a motion to change venue, and a special motion to allow for an NIJC attorney to appear telephonically in the Omaha Immigration Court. When every single one of the motions were denied, NIJC reached out to the Assistant Chief Immigration Judge to note the prejudice that Roberto and his family would suffer if their cases were heard separately, not to mention the significant judicial inefficiency. Eventually, the family's cases were consolidated and in late 2017, Roberto and his family were granted asylum.

NIJC encourages members of Congress to consider how Roberto and his family would have fared without counsel, as the vast majority of immigrants facing deportation must, and more urgently how they would have fared in the wake of Attorney General Sessions' continued efforts to turn the immigration courts into an assembly line toward inevitable deportation, regardless of cost.

II. The Trump Administration: a case study in the need for judicial independence for the immigration court system

Over the past year, Attorney General Sessions and other administration officials have issued a series of policies that aggressively threaten the integrity and independence of the immigration courts. The intent behind these policies is to engage the immigration court system to produce as many deportations as quickly as possible, as demonstrated by the administration's own rhetoric.¹¹ This section provides an overview of the most egregious of these policies; viewed together, they are the strongest possible evidence supporting the need for the judicial independence and integrity that an Article I structure would provide for our nation's immigration courts.

A. Termination of basic legal service programs

On April 10, 2018, NIJC and immigration legal service providers across the country learned that the Department of Justice intends to terminate the Legal Orientation Program (LOP) and the Immigration Court Helpdesk program. The goals of these bipartisan programs are to improve judicial efficiency and help immigrants in detention navigate the immigration court process. Today, LOP services reach 38 detention facilities and over 50,000 detained people in

¹¹ In August 2017, for example, the Department of Justice issued a press statement touting statistics released by EOIR as a demonstration of the "return to rule of law" under the Trump administration. See Department of Justice Press Release 17-889, "Return to rule of law in Trump administration marked by increase in key immigration statistics," Aug. 8, 2017, <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>. The data included a showing of a 27.8 percent increase in total orders of removal over a six month period in 2017 as compared to the same period in 2016 and a finding that over 90 percent of cases decided by immigration judges engaged in "details" to border facilities (see Section II *infra*) resulted in deportation or removal. The statement equates an uptick in deportations with a "return to rule of law," a concerning conflation given that the mission of the immigration court system should be the fair adjudication of cases, whether they result in a removal or a grant of relief from deportation.

desperate need of legal services.¹² LOP has long received bipartisan support from Congress, including a specific directive accompanying the 2018 government spending bill to sustain the program at existing funding levels.¹³

Terminating the LOP and help desk programs is a deliberate attempt to eliminate due process from the deportation process. Because more than four out of every five detained immigrants are unable to access legal representation,¹⁴ LOP staff are the last and only line of defense for many detained individuals trying to understand how to represent themselves in their claims to asylum and other forms of protection in immigration court. Beyond the human impact, terminating the LOP program is fiscally irresponsible and will serve to *worsen* rather than ameliorate the immigration court backlog. A 2012 study conducted by the Department of Justice found that detained immigrants who received LOP completed their court proceedings more quickly and therefore remained detained for an average of six fewer days, yielding the government a net annual savings of more than \$17.8 million.¹⁵

Stories like that of NIJC client James (pseudonym) demonstrate the innumerable individual harms that will arise from terminating these programs, in addition to the fiscal and systemic efficiency setbacks. James, a West African medical student, was detained by ICE in a county jail where NIJC provided LOP services. Through LOP, James was able to meet with NIJC staff at the jail in early 2017. During the consultation, he explained his fears of being killed were he to return to his country. NIJC staff recognized that he was eligible for asylum and referred him to *pro bono* legal services, and he was granted asylum in later 2017. ICE released him from detention, and James has started a new life, safe from harm and free to pursue his medical vocation.

B. Immigration judge quotas

The DOJ is also moving forward with plans to impose case completion goals on immigration judges, requiring judges to complete at least 700 cases per year while meeting other numerical goals.¹⁶ Immigration judges have voiced fierce resistance to this plan.¹⁷ Ashley Tabaddor, an immigration judge and President of the National Association of Immigration Judges, has referred to the plan as “a recipe for disaster,” noting that it will “impact the

¹² For more information on the LOP program, visit: <https://www.justice.gov/eoir/legal-orientation-program>.

¹³ See H. Rept. 115-231, 2018 Commerce, Justice, Science and Related Agencies Appropriations Bill, <https://www.congress.gov/congressional-report/115th-congress/house-report/231/1>, as adopted by the Explanatory Statement accompanying the 2018 Appropriations Bill, <https://www.congress.gov/crec/2018/03/22/CREC-2018-03-22-bk2.pdf>.

¹⁴ Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁵ U.S. Department of Justice, *Cost Savings Analysis - the EOIR Legal Orientation Program*, Apr. 4, 2012, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

¹⁶ See Betsy Woodruff, *The Daily Beast*, “New Quotas for Immigration Judges are ‘Incredibly Concerning,’” Critics Warn, Apr. 2, 2018, <https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn?source=articles&via=rss>.

¹⁷ National Association of Immigration Judges, “Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges,” Oct. 1, 2017, <http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration>.

perception of the integrity of the court.”¹⁸ Her fellow immigration judge Lawrence Burman, secretary of the association, warns that the quota system will “slow down the adjudications” and make delays even worse.¹⁹ Bruce Einhorn, who served as an immigration judge from 1990 to 2007, refers to the plan as an “affront to judicial independence and the due process of law.”²⁰

In the complex and harried immigration courts, the pressure of a quota system will inevitably require immigration judges to choose between their own job security and ensuring that cases are processed fairly. In recommending against the imposition of such quotas, *The Washington Post* editorial board forewarned that, “Judges would end up rushing through complex cases that require more time to reach a quota. If the hurry were extreme enough, a judge’s brisk handling of a case might not meet the minimum standards for constitutionally required due process.”²¹ Furthermore, because there is no right to counsel in removal proceedings and representation rates are already critically low (more than 60% of all immigrants in immigration court are unable to find counsel),²² it is imperative that immigration judges be able to use their discretion to grant continuances so immigrants can find representation and, if they cannot, gather their evidence and prepare their cases.²³ The Association of Pro Bono Counsel—a membership organization of pro bono practice leaders—states that the imposition of quotas “will inevitably reduce our ability to provide pro bono representation to immigrants in need of counsel” for these very reasons.²⁴

The imposition of case quotas is exactly the sort of political chicanery from which immigration judges—or any judge—must be protected. As former Immigration Judge Einhorn explains: “The Trump administration’s intention is clear: to intimidate supposedly independent judges to expedite cases, even if it undermines fairness—as will certainly be the case for pro se respondents. Every immigration judge knows that in general, it takes longer to consider and rule in favor of relief for a respondent than it does to agree with ICE and order deportation. The administration wants to use quotas to make immigration judges more an arm of ICE than independent adjudicators.”²⁵

¹⁸ *Id.*

¹⁹ See Joseph Tanfani, *Los Angeles Times*, “Judges say Sessions’ plan to speed up immigration courts won’t work,” Apr. 6, 2018, <http://www.latimes.com/politics/la-na-pol-immigration-courts-20180406-story.html>.

²⁰ Bruce Einhorn, *Washington Post*, “Jeff Sessions wants to bribe immigration judges to do his bidding,” Apr. 5, 2018, https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html?noredirect=on&utm_term=.7f1894acd488.

²¹ Editorial Board, *Washington Post*, “Sessions’s plans for immigration courts would undermine their integrity,” Oct. 22, 2017, https://www.washingtonpost.com/opinions/sessions-plan-for-immigration-courts-would-undermine-their-integrity/2017/10/22/ce000df6-b2aa-11e7-9e58-e6288544af98_story.html?utm_term=.a872b75eb400.

²² See *Access to Counsel in Immigration Court*, *supra* n. 13.

<https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

²³ The Board of Immigration Appeals has explicitly held that “[c]ompliance with an Immigration Judge’s case completion goals . . . is not a proper factor in deciding a continuance request. . . .” *Matter of Hashmi*, 24 I. & N. Dec. 785, 793-94 (BIA 2009); see also *Hashmi v. Att’y Gen.*, 531 F.3d 256, 261 (3d Cir. 2008).

²⁴ The letter is available at https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-10/APBCo_Letter_to_Congress_re_Immigration_Court_Quotas_2017.pdf.

²⁵ See Einhorn op-ed, *supra* n. 19.

C. Policies that curb immigration judge discretion to manage their dockets through the use of continuances and administrative closure

The imposition of case quotas heightens already urgent concerns among immigrants and their attorneys that cases will be rushed through the immigration court system as judges respond to policy pronouncements encouraging them to move quickly. In July 2017, EOIR issued an Operating Policies and Procedures Memorandum (OPPM) on the “efficient handling of motions for continuance,” requiring judges to exercise caution in granting continuances to allow immigrants time to find counsel or for attorney preparation.²⁶ The policy memo casts blame on respondents’ attorneys for case delays, despite recent findings by the Government Accountability Office (GAO) that attribute the majority of case delays in immigration court to the Department of Homeland Security (DHS) and the courts’ own “operational-related” factors.²⁷

The focus of EOIR leadership on speed is exacerbated by ICE’s now routine refusal to join in almost any motion to the court for prosecutorial discretion, including previously routine requests for administrative closure.²⁸ As a result, noncitizens are squeezed from both sides, as EOIR pressures immigration judges to limit continuances and ICE refuses to support administrative closure of non-priority cases likely to end in relief from removal. Under the Trump administration, the immigration courts have seen a 64% decrease in the total rate of administrative closure grants.²⁹

These actions have already dramatically exacerbated the court’s backlog. Recent statistics show that the backlog has grown by 145,000 cases since President Trump took office, compared to the average approximately 41,000-case growth each year under the Obama administration.³⁰

D. Detailing immigration judges to detained dockets in remote locations, scrambling the docket

Purportedly pursuant to the White House’s January Executive Order regarding border security, EOIR began scrambling in early 2017 to remove immigration judges from already-backlogged immigration courts to be sent on one- to two-week “detail” assignments in courts in at least a dozen detention centers around the country.³¹ Internal EOIR documents obtained by the

²⁶ U.S. Department of Justice, Executive Office for Immigration Review, “[Operating Policies and Procedures Memorandum 17-01: Continuances](#),” July 31, 2017.

²⁷ United States Government Accountability Office, Report to Congressional Requesters, “[Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges](#),” p. 124, June 2017.

²⁸ Human Rights First, *Tilted Justice: Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts* (Oct. 2017), at pp. 18- 19, <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>.

²⁹ Reade Levison, *Reuters*, “Exclusive: Under Trump, prosecutors fight reprieves for people facing deportation,” Mar. 29, 2018, <https://www.reuters.com/article/us-usa-immigration-court-exclusive-under-trump-prosecutors-fight-reprieves-for-people-facing-deportation-idUSKBN1H5187>.

³⁰ *Id.*

³¹ These details were preliminarily announced via press release. See Executive Office for Immigration Review, “EOIR Provides New Hearing Location Details,” Mar. 17, 2017, https://www.justice.gov/sites/default/files/pages/attachments/2017/03/17/noticeresixhls_03172017_1.pdf; Executive Office for Immigration Review, “EOIR Provides Information for Two New Hearing Locations,” Mar. 24, 2017, <https://www.justice.gov/sites/default/files/pages/attachments/2017/03/24/noticenewhearinglocations03242017.pdf>.

National Immigrant Justice Center through FOIA³² reveal that in the first months of the so-called “surging” of judges, more than 20,000 non-detained immigration court hearings were rescheduled when judges were sent on details. In many of the cases bumped from “home court” dockets, volunteer attorneys and clients traveled long distances to court only to learn from the court staff that their cases would not be heard that day. The human costs of these delays can be tragic; a delayed case can mean delayed protection and delays in reunification with spouses and children waiting abroad in dangerous conditions.³³

The scrambling of judges in pursuit of political ends has resulted in what former immigration judge and former Board of Immigration Appeals Chairman Paul Schmidt refers to as “aimless docket reshuffling,” leaving the court in chaos.³⁴ “[T]he idea of the prioritization,” Judge Schmidt writes, “was to remove most of those recently crossing the border to seek protection, thereby sending a ‘don’t come, we don’t want you’ message to asylum seekers. But, as a deterrent, the program has been *spectacularly* unsuccessful. . . . There must be structural changes so that the immigration courts are organized and run like a *real* court system, *not* a highly bureaucratic agency. This means that *sitting immigration judges*, like in all other court systems, must control their dockets. The practice of having administrators in Falls Church, Va., and bureaucrats in Washington, D.C.—none of whom are sitting judges—be responsible for daily court hearings and manipulate and rearrange local dockets in a vain attempt to achieve policy goals unrelated to fairness and due process for individuals coming before the immigration courts, must *end*.”³⁵

E. The Attorney General’s misuse of his certification power to reshape the federal immigration laws

Amidst the scrambling of dockets and pressure cooker atmosphere for immigration judges, the Attorney General is now taking dramatic steps to undermine rights through the

³² Meredith Hoffman, *Politico Magazine*, “Trump sent judges to the border. Many had nothing to do,” Sep. 27, 2017, <https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649>. The FOIA documents are available on the National Immigrant Justice Center website at <http://immigrantjustice.org/immigration-surge-courts>.

³³ The Department of Justice issued a Press Statement last fall presenting statistics intended to support a conclusion that the “surge of immigration judges” had been successful. See Department of Justice Press Release, 17-1100, “Justice Department Releases Statistics on the Impact of Immigration Judge Surge,” Oct. 4, 2017, <https://www.justice.gov/opa/pr/justice-department-releases-statistics-impact-immigration-judge-surge>. The statistics provided in this statement, however, presented a misleading picture of the actual functioning of the immigration court system. For example, the statement claimed that “the mobilized immigration judges have completed approximately 2,700 more cases than expected if the immigration judges had not been detailed.” A DOJ spokesperson clarified to the press that this number was calculated “by using historical data to compare the cases judges were projected to complete at their home courts with those they completed at the surge courts.” Allegra Kirkland, “What Trump’s DOJ’s numbers don’t say about immigration court backlog,” Oct. 20, 2017, <https://talkingpointsmemo.com/muckraker/doj-numbers-dont-tell-full-story-immigration-judge-surge>. But this comparison of detained to non-detained court processing is, according to National Association of Immigration Judges’ President Emeritus Dana Marks, “comparing apples to oranges” because “detained dockets always have a higher volume and a greater percentage of cases where people are not eligible to seek some reprieve from removal or are not inclined to because they don’t want to remain in custody.” *Id.*

³⁴ Hon. Paul Wickham Schmidt, The Federal Lawyer, “Immigration Courts: Reclaiming the Vision,” May 2017, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/May/Features/Immigration-Courts-Reclaiming-the-Vision.aspx?FT=.pdf.

³⁵ *Id.*

manipulation of the immigration law itself. The Attorney General possesses the authority to refer cases of the Board of Immigration Appeals to himself for review.³⁶ Long criticized as an unusual and potentially dangerous grant of judicial authority to the executive branch,³⁷ this authority has become a weapon in the hands of Attorney General Sessions. Historically the practice has been sparingly used, with an average of 1.7 certified decisions annually between 1999 and 2009.³⁸ In just over a year in office, however, the Attorney General has certified four cases to himself, all signaling an intent to massively curtail the rights of asylum seekers and migrants in removal proceedings:

- i. *Matter of L-A-B-R*:³⁹ In this case, the Attorney General will render his own decision as to when “good cause” supports an immigration judge in granting a continuance so that an immigrant facing removal proceedings may obtain complete adjudication of a collateral matter that will impact her eligibility for relief from removal. Such continuances are necessary in a variety of circumstances, such as when an individual is facing deportation proceedings in immigration court while awaiting a decision by United States Citizenship and Immigration Services on her application to adjust status to lawful permanent resident through a United States citizen family member. In an unexplained cloak-and-dagger move, DOJ refuses to provide any information about the underlying case, an unpublished BIA decision. This means that anyone wishing to respond to the Attorney General’s call for briefing from *amici curiae* must proceed in total ignorance of the facts of the case and the underlying decision’s analysis.
- ii. *Matter of A-B*:⁴⁰ In this case, the Attorney General will review the question of whether and under what circumstances victims of “private criminal activity” merit protection under the United States asylum laws. Because the underlying case in *A-B* is that of a woman seeking protection from the devastating physical and emotional violence she suffered at the hands of her domestic partner in her country of origin, there is grave reason to fear that the Attorney General may use this decision to “turn back the clock on the protections we offer survivors of domestic violence” or, even more broadly, strip the immigration court system of its capacity to offer legal protection to wide swaths of refugees who have suffered gender-based and other harms at the hands of non-state actors unchecked by their own governments.⁴¹

³⁶ See 8 C.F.R. § 1003.1(h).

³⁷ See, e.g., Laura S. Trice, “Adjudication by fiat: the need for procedural safeguards in Attorney General review of Board of Immigration Appeals decisions,” 85 New York Univ. Law Rev. 1766, Nov. 2010, <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-85-5-Trice.pdf> (“In this context, the lack of procedural requirements for Attorney General certification results in haphazard, secretive, and sometimes politicized review, with process determined by the Attorney General in an ad hoc, case-by-case manner.”).

³⁸ See *id.*

³⁹ *Matter of L-A-B-R*, 27 I. & N. Dec. 245 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1045661/download>.

⁴⁰ *Matter of A-B*, 27 I. & N. Dec. 277 (AG 2018), <https://www.justice.gov/eoir/page/file/1041481/download>.

⁴¹ Tahirih Justice Center, “Asylum Under Threat: the AG’s Review of *Matter of A-B*,” Mar. 14, 2018, <http://www.tahirih.org/wp-content/uploads/2018/03/Background-on-Asylum-for-Survivors-of-Violence-1.pdf>.

- iii. *Matter of E-F-H-L-*:⁴² In this case, the Attorney General referred to himself and then vacated as moot a previous Board decision holding that a respondent applying for asylum and withholding of removal is entitled to a full evidentiary hearing. This decision is baffling both in its cruelty and potential illegality considering that the governing regulations and myriad federal courts have upheld the right to asylum applicants to an evidentiary hearing to “resolve factual issues in dispute.”⁴³ Advocates fear that the decision will be used, in a system where approximately one in five asylum seekers are forced to submit their asylum application without the assistance of an attorney, to summarily deport refugees unable to properly document and articulate their asylum claims.⁴⁴
- iv. *Matter of Castro-Tum*:⁴⁵ In this case, the Attorney General has certified to himself the question of whether immigration judges and the BIA possess the authority to administratively close a pending removal proceeding. Administrative closure, despite its recent prominence as a political football, is in fact an ordinary “docket management tool” that gives immigration judges the often crucial authority to “temporarily remove a case from an Immigration Judge’s active calendar or from the Board’s docket.”⁴⁶ Administrative closure is often appropriate in the case of immigrants whose cases are likely to be resolved outside of the immigration court system through, for example, issuance of a visa or naturalization, or for long-time residents with pressing humanitarian issues against whom removal proceedings serve neither the public interest nor judicial efficiency. A judge’s ability to grant administrative closure can be a life or death matter, as in the case of Brenda DeLeon, a crime victim who spoke to NPR about the importance of the “pause” in her immigration court proceedings while she awaits issuance of a U visa, a visa for victims of crime who have cooperated with the prosecution of their assailant: “If I go back, then my life is in danger,” DeLeon said through a translator. “And not only mine, but my children’s lives too.”⁴⁷

III. Principles for reform

In considering proposals for immigration court reform, NIJC encourages members of Congress to prioritize the following principles:

- Ensure judicial independence by creating an Article I system.

⁴² *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1040936/download>.

⁴³ 8 C.F.R. § 1240.11(c)(3); see also Lory Rosenberg, ILW.com blog, “Much Sound and Fury: *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018),” [http://blogs.ilw.com/entry.php?10427-Much-Sound-and-Fury-Matter-of-E-F-H-L-27-I-amp-N-Dec-226-\(A-G-2018\)](http://blogs.ilw.com/entry.php?10427-Much-Sound-and-Fury-Matter-of-E-F-H-L-27-I-amp-N-Dec-226-(A-G-2018)).

⁴⁴ See Antonio Olivo, *Washington Post*, “Advocates say Sessions’s decision to toss rule on asylum hearings endangers thousands,” Mar. 7, 2018, https://www.washingtonpost.com/local/social-issues/advocates-sessions-decision-to-toss-rule-on-asylum-hearings-endangers-thousands/2018/03/07/24b63b24-2214-11e8-94da-ebf9d112159c_story.html?utm_term=.e193b5f85e49.

⁴⁵ *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1022366/download>.

⁴⁶ *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).

⁴⁷ Joel Rose, NPR, “Sessions Pushes to Speed Up Immigration Courts, Deportations,” Mar. 29, 2018, <https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold>.

- Give immigration judges true authority over their courtrooms by removing categorical bars to relief and ensuring that all immigrants have the opportunity to have a fair day in court.
- Promote judicial transparency at the trial court and appellate levels.
- Restore fairness to immigration adjudication by providing the jurisdiction necessary for the trial court and appellate body to ensure fairness and due process for everyone seeking immigration relief.
- Grant the appellate body the scope of review necessary for the fair administration of justice.
- Restore strong judicial review at the federal court level.
- Ensure that all individuals appearing before the immigration court have access to counsel by providing for the appointment of counsel for all indigent individuals.

These principles reflect the dire need for judicial independence and functional management of a court system that is in tragic disarray. NIJC calls on members of Congress to engage in robust oversight of the DOJ to protect the impartiality of immigration court system in the face of clear evidence of the administration's efforts to conscript it into furthering an agenda of mass deportations.