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Ms. Zoe Lofgren
Chair
Subcommittee on Immigration and Citizenship
United States House Committee on the Judiciary
2138 Rayburn House Office Building
Washington DC 20515
202-225-3951

Dear Ms. Lofgren,

We hope this letter finds you well. We, a group of five students from The George Washington University Law School's Immigration Clinic, write to advocate for the introduction of legislation creating a politically independent immigration court system. We are aware that you have previously held a hearing regarding the lack of independence of the immigration courts, and that you are currently working on legislation aimed at rectifying this problem. We hope you will take the ideas we express in this letter into consideration in constructing this important legislation.

As you well know, the immigration courts currently form part of the Department of Justice,[1] an agency headed by the nation's top prosecutor in the Attorney General, whose core mission is to represent the interests of the United States by *enforcing* the law. This mission directly conflicts with that of an immigration court, which is charged with neutrally *administering* the law between the United States and noncitizens, affording noncitizens the due process to which they are entitled. This conflict of interest is not merely theoretical—it has led to a systemic infection of the immigration courts by politics, from the judicial appointment process, to judges' ability to make decisions independently, to the finality of those decisions once they have been made.

The only way to remedy this situation is to free the immigration courts from Department of Justice control—to make them answerable to the law alone, not to whoever might happen to be in the White House. This can be done by creating an Article I court

[1] *See* 6 U.S.C. § 521(a).

system, completely independent from any other federal agency, to administer the immigration laws. This will ensure the fair and impartial determination of noncitizens' fates that the American people expect and the Constitution requires.

Current Lack of Independence

Under the existing immigration court structure, the Attorney General (AG) appoints immigration judges, thereby delegating to the judges the ability to exercise the AG's authority. Former AG Alberto Gonzales put safeguards in place in 2007 to minimize the influence of politics in the hiring process. However, former AG Jeff Sessions changed this process in 2017,[2] to facilitate quickly packing the bench with judges loyal to the Trump administration.

The numbers bear this out. An overwhelming 88% of judges appointed in 2018 were former Department of Homeland Security (DHS) or other government attorneys, rather than attorneys with experience advocating for noncitizens.[3] This shows the administration's clear ideological bias in choosing judges to appoint. Also, 61% of judges on the bench as of June 2020 were hired by the Trump administration,[4] and the administration increased the number of judges on the Board of Immigration Appeals (BIA) from 17 to 23,[5] demonstrating its determination to pack the immigration courts. The only way to prevent future administrations from taking similar action through the AGs they appoint is to remove the AG's control over judges.

Just as politics infects the judicial hiring process, it affects the outcomes of cases, and the fates of the hundreds of thousands of noncitizens whose proceedings are completed each year.[6] Outcomes in asylum cases are notoriously disparate, varying based on legally irrelevant factors such as the location of the immigration court,[7] the sex of the judge,[8] and the size of the judge's docket.[9] But a key reason that cannot be ignored is the appointment of politically-motivated ideologues as judges, resulting in wide swings as administrations change. For example, the judges appointed to the BIA by the Trump administration had ruled against the noncitizen 87% of the time in their prior cases, and the other judges appointed by the administration did so 69% of the time, compared to 58% for all other judges.[10] Disparities

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[2] *See* HUMAN RIGHTS FIRST, IMMIGRATION COURT HIRING POLITICIZATION (2018), https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf.
[3] *See id.*
[4] *See* TRAC IMMIGRATION, MORE IMMIGRATION JUDGES LEAVING THE BENCH (2020), https://trac.syr.edu/immigration/reports/617/.
[5] *See* Reade Levinson, Kristina Cooke & Mica Rosenberg, *How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, REUTERS, Mar. 8, 2021, https://www.reuters.com/article/us-usa-immigration-trump-court-special-r-idUSKBN2B0179.
[6] *See* THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ANNOUNCES CASE COMPLETION NUMBERS FOR FISCAL YEAR 2019 (2019), justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019.
[7] *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 303 (2007).
[8] *See id.* at 342.
[9] *See id.* at 373.
[10] *See* Levinson, Cooke & Rosenberg, *supra* note 5.

in outcome this great can only be explained by "the substitution of a political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law."[11]

Even if a judge takes office with the intention of acting independently, the influence exerted on them by the AG ensures that their decisions will be tainted by politics. Most significantly, the AG maintains a sweeping authority over the immigration courts branded the "referral and review power." Once a case reaches the BIA level, DHS or the BIA itself may refer cases to the AG. The AG may also, *sua sponte*, request that the BIA refer cases to them for review. The AG frequently decides referred cases without briefings or oral argument.[12] Often, parties do not even know of the AG's review until the opinion is handed down.[13] Regardless of how a case gets into the AG's hands, their decision not only settles the matter for the parties before them, but also sets binding precedent for all immigration judges and the BIA. Thus, the country's top law enforcement official constructively decides immigration matters, which are, of course, civil in nature.

AGs from both Democratic and Republican administrations have used this power of self-referral to reach their political goals. Between March 2003 and January 2021—a period spanning two Republican administrations and one Democratic administration—28 of 29 immigration cases referred to the AG were self-referred. The Trump Administration exercised its referral power more often than any previous administration—17 times in just one four-year term.[14] Each and every one of these cases was self-referred. This is more than President George W. Bush—ten cases over two four-year terms, all but one self-referred, and President Barack Obama—four cases over two four-year terms, all self-referred.[15]

From the AG's ability to directly change the law judges apply via self-certification of cases, to their ability to promulgate regulations changing the way the immigration courts work, their influence pervades the entire system. The Trump administration aggressively used this influence to further its political goals of restricting immigration and dismantling asylum.[16]

More informally, but with consequences just as dangerous, judges have reported feeling threatened by the AG's level of power over their proceedings. They are fearful that their decisions will be overturned for political reasons, or that they will be removed from their position outright, if their judgments do not conform to the wishes of the AG.[17] These

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[11] *See* Stephen H. Legomsky, *Learning To Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 Stan. L. Rev. 413, 462 (2007).
[12] *See* SARAH PIERCE, MIGRATION POLICY INSTITUTE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 11 (2021).
[13] *See id.*
[14] *See id.* at 12.
[15] *See id.*
[16] *See* Brittany Stevenson, *Building Legal Walls: Limiting Attorney General Referral Authority over Immigration Cases*, 81 Ohio St. L.J. 315 (2020).
[17] *See* Christine Lockhart Poarch, *Immigration Court Reform: Congress, Heed the Call*, THE FEDERAL LAWYER, Oct./Nov. 2016, at 10.

very legitimate concerns can only be addressed in a sustainable way by removing the AG's power over judges entirely.

The Federal Bar Association's Proposal

As you know, the Federal Bar Association (FBA) has drafted a proposed bill that creates an Article I Immigration Court. The FBA proposal introduces a two-level court structure—the trial division and the appellate division—to replace the immigration courts and the BIA, respectively. Trial immigration judges are chosen by the appellate division, with mechanisms for evaluating each candidates' qualifications,[18] and serve for a term of fifteen years. The appellate division consists of 21 appeals judges,[19] each appointed by the President with advice and consent of the Senate (just like Article III judges),[20] serving 15-year terms. One-third of the appeals judges would be replaced every five years. Appointments would be based on merit and qualifications, like the trial judges. Both trial and appeals judges would be removable only for good cause.

The FBA's proposed bill establishes an immigration court system with judicial independence comparable to the Article III courts. By staggering appellate judicial appointments across several administrations, vesting the hiring of the trial judges in that appellate body, and establishing merit-based qualifications at both levels, neither one AG nor one administration can improperly and disproportionately fill the immigration courts. Additionally, judges being removable only for cause allows them to decide cases independently of threats to their job security. Although there are ways that we think the FBA's proposed bill could be improved, we believe that it would go a long way toward remedying the lack of independence within the current immigration court structure.

Immigration Judge Appointment

President Biden's newly introduced immigration reform bill, the U.S. Citizenship Act of 2021 (Citizenship Act), proposes that the AG appoint judges who are "highly qualified experts on immigration law" and "trained to conduct fair, impartial adjudications in accordance with due process requirements."[21] Also, it requires that the AG "strive to achieve an equal numerical balance in the hiring of candidates with Government experience in immigration and candidates with sufficient knowledge or experience in immigration in the private sector, including nonprofit, private bar, or academic experience."[22] Similar principles are also incorporated into the FBA's proposed bill.[23]

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[18] *See* FEDERAL BAR ASSOCIATION, A BILL TO ESTABLISH AN INDEPENDENT UNITED STATES IMMIGRATION COURT UNDER ARTICLE I OF THE CONSTITUTION § 112(b)(1) (2019).
[19] *See id.* at § 112(a)(1).
[20] *See id.* at § 112(a)(2).
[21] *See* U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 4102(b) (2021).
[22] *See id.* at § 4102(b)(2).
[23] *See* FEDERAL BAR ASSOCIATION, *supra* note 18, at § 112(c)(3).

We agree with these general principles and believe that they will foster judicial independence, as well as improve diversity and competency among judges. We do, however, take issue with the Citizenship Act continuing to vest the appointment power in the AG, as well as its caveat that the judges appointed must reflect a mix of government and private experience only "to the extent practicable."[24] The FBA proposal does not contain this weakening language, but even that proposal could be strengthened by *requiring* a certain number of appeals judges to have experience representing noncitizens, to counter the historical bias toward judges with government experience. This would be similar to how some independent agencies require a certain number of their members to be Democrats or Republicans. As the Senate must consent to the appointment of all appeals judges under the FBA proposal anyway, this addition to the legislation would merely serve as an agreement with the House and a message to the President indicating the circumstances under which the Senate will confirm nominees.

Another way the FBA's proposal for appointing judges could be strengthened is by changing the way it proposes to transition from the current system to an Article I court. The existing proposal has a single President appoint (with advice and consent of the Senate) all 21 appeals judges at once;[25] then one-third would be replaced after five years, one-third after ten, and one-third after fifteen.[26] Allowing a single President to appoint the entire appellate division, with those judges continuing to command a majority of the court for the next ten full years, risks giving that President's party control over the immigration courts for those ten years (at least in the event that the Senate is controlled by the same party). This is puzzling, as the rest of the legislation is carefully crafted to ensure that a single administration can appoint only one-third of the appeals judges. Unless very strong language is added mandating that a diverse pool of judges be appointed, a wiser way to transition could be to replace one-third of the 21 most senior BIA members with appeals judges immediately at the time of passage of the legislation, another third in five years, and the final third in ten years, staggering the replacement of appeals judges just as the rest of the legislation does. In this way, no presidential administration would be given the power to appoint a majority of the appellate division, minimizing the chance that an administration will be able to impose its politics on the immigration courts.

The Attorney General's Role

Another problem with the FBA's proposed legislation is that it does not entirely remove the AG's power over immigration proceedings. If a question of law comes before the appellate division, and it is "appropriate to the resolution" of the question, the Division must refer the question to the AG to rule on it.[27] This requirement, combined with the existing provision in the Immigration and Nationality Act (INA) that "a ruling by the Attorney General with respect to all questions of law shall be controlling,"[28] means the AG still

[24] *See* H.R. 1177 at § 4102(b)(2).
[25] *See* FEDERAL BAR ASSOCIATION, *supra* note 18, at § 4(b)(1).
[26] *See id.* at § 4(b)(4).
[27] *See id.* at § 122(a)(2).
[28] *See* 8 U.S.C. § 1103(a)(1).

maintains power to interpret the law under the FBA's proposal. And the FBA's proposal, while (commendably) stripping the AG's rulemaking authority with respect to the immigration courts,[29] otherwise appears to leave in place the INA's separate statement of the AG's broad power over the interpretation and administration of the immigration laws, especially the power to "review...administrative determinations in immigration proceedings"[30]—that is, the referral power.

As we have explained, the maintenance of any of this power in the AG is unacceptable. We propose that the FBA's model legislation be amended to eliminate the AG's authority to resolve questions of law referred by the appellate division, and that the aforementioned provisions of the INA be updated to reflect that the new Article I Immigration Court has taken over control from the AG. The establishment of an independent immigration judiciary would be futile if the Executive branch still maintained authority to say what the law is and how it applies to individuals' cases.

Chief judge powers

The FBA's proposed legislation gives too much power to the chief judge of the appellate division in three areas: temporary designation of an immigration trial judge as an appeals judge, recall of retired judges, and publishing of appellate opinions. The chief judge may designate an immigration trial judge to serve with the appellate division "whenever the judicial business of that division so requires," and the designated judge may then "exercise all of the judicial powers and duties of an immigration appeals judge in regular active service."[31] This invites the chief judge to bend the appellate division to their will on close questions, by designating a judge similar in viewpoint to them to tip the balance in their favor, or by merely threatening to do so. Also, the chief judge may recall a retired judge to temporarily serve as a trial or appeals judge,[32] raising the same concerns. Finally, the appellate division may authorize the chief judge to "make such exceptions...as may be appropriate" to the requirement that decisions of the appellate division be published.[33] Although the chief judge may only do this if previously authorized to do so by the appellate division, this potentially enables the chief judge to prevent the publication of decisions they disagree with on policy grounds.

This is all too much power to vest in any single person. If that person should somehow become beholden to political stakeholders or otherwise corrupted, they could do some damage to the independence of the new court. One way to address these problems would be to give these powers to a two-person panel consisting of one judge with a background in government and one with a background in private practice. The small size of the panel would enable the agility that these functions envision, while protecting against the unconscious bias (at best) or political motivations (at worst) of a single judge.

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[29] *See* FEDERAL BAR ASSOCIATION, *supra* note 18, at § 3(b)(2).
[30] *See* 8 U.S.C. § 1103(g)(2).
[31] *See* FEDERAL BAR ASSOCIATION, *supra* note 18, at § 112(e).
[32] *See id.* at § 117(a)(1).
[33] *See id.* at § 129(a).

Conclusion

As we all know, the immigration courts suffer from a lack of political independence. We believe that the creation of an Article I Immigration Court is the best way to address this problem. We endorse the FBA's proposal for doing this, but we have also suggested some improvements that could be made to that proposal. We hope that you will take these views into consideration. Thank you for your time, and we wish you all the best in turning around our ailing immigration system.

Sincerely,

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