

FEDERAL BAR ASSOCIATION LEGISLATIVE PROPOSAL FOR A UNITED STATES IMMIGRATION COURT

The Federal Bar Association, with the aid of its Section on Immigration Law, has drafted model legislation to create an Article I immigration court and provide for more timely and effective adjudication of immigration matters. The proposed legislation and supporting material may be found on the FBA website at www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx.

Since 2013, the Federal Bar Association has urged Congress to establish a specialized, Article I “United States Immigration Court” to replace the Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice as the principal adjudicatory forum under the Immigration and Nationality Act. The federal courts in the United States include the courts established in and under Article III of the Constitution, as well as the adjudicative entities established by Congress under its Article I legislative powers.

An Article I Immigration Court Would Provide Faster, More Efficient Adjudication

Our country deserves an immigration adjudication system that works. Court experts, stakeholders and the Government Accountability Office all have pointed to faster and more efficient adjudication of immigration matters that would be available through an Article I court.

The FBA legislative proposal would not expand the size of the federal government. It would reposition EOIR’s current quasi-judicial responsibilities in an independent, professionally managed Article I tribunal, staffed with merit-appointed judges replacing the current immigration courts at the trial level, and Presidentially nominated, Senate-confirmed appellate judges replacing the current Board of Immigration Appeals. These appointments would be consistent with the Appointments Clause of the Constitution and follow the local merit- selection process successfully used for decades to appoint bankruptcy judges and magistrate judges in the federal court system.

The top-down, inefficient structure of today’s EOIR – with the existing immigration courts and Board of Immigration Appeals – is inefficient and costly. EOIR’s bureaucracy and inefficiency have been overwhelmed by a backlog of over 1 million cases, according to the most recent estimates, with some cases not scheduled for hearings until 2024.

EOIR today represents a pale reflection of the kind of professionally administered adjudicative system that Congress and the American expect. A key example is EOIR’s failure to make effective use of technology. Since 2001 the agency has failed to fulfil its pledge to establish an electronic case filing system. It continues to rely on paper files that contribute to storage and retrieval costs, greater space needs, lost filings, and added delay. Its less-than-functional implementation of courtroom technology, including video-teleconferencing of

immigration proceedings, has led to difficulties in maintaining connectivity, adequately hearing the participants, exchanging paper documents, conducting accurate foreign language interpretation, and assessing the demeanor and credibility of respondents and witnesses.

Simply hiring additional immigration judges and imposing judicial performance metrics represent band aids for the treatment of fundamental, longstanding management and operational deficiencies. The June 2017 Government Accountability Office (GAO) report documented EOIR case backlogs of epic size, costly and ineffective case management, and reliance on outdated technologies.

Immigration Court Experts and Stakeholders Support an Independent Article I Immigration Court

The GAO in its June 2017 report found that a majority of immigration court experts and stakeholders favored EOIR replacement with an independent Article I immigration court. Establishing an Article I court would substitute for an overstuffed, bloated bureaucracy a new structure, modeled on the federal courts, their case management expertise, and their demonstrated record for delivering prompt, effective justice.

History is on the Side of a Specialized, Article Immigration Court

An independent Article I Immigration Court would properly take its place beside other Article I courts established by Congress. In fact, congressional creation of an Article I immigration court would comport with past Congressional practice in the establishment of Article I courts in other specialized areas of federal law –tax administration, veterans benefits, and military justice – that involve executive branch policy-making and priority-setting but also require fair, impartial adjudication.

The origins of the three existing Article I courts are similar to that of today's immigration courts. Much like those courts, the United States Tax Court, United States Court of Appeals for Veterans Claims, and United States Court of Appeals for the Armed Forces started out as internal components of civilian or military bureaucracies, with little or no separation from those responsible for executive leadership. In each instance, initial attempts at reform sought to separate the executive and adjudicative responsibilities, yet retain both within the same agency structure, reporting to the same higher-level management. Ultimately, concerns over fairness and impartiality led Congress to extract the adjudicative responsibilities and reposition them in an independent Article I court. This history demonstrates repeated recognition by Congress that independent review by "real" judges is the *sine qua non* of faithfully adjudicating rights and responsibilities in matters governed by public law.

Benefits of a Specialized, Independent Immigration Court

The transfer by statute of EOIR's adjudicative components (trial and appellate judges and support) to a specialized tribunal would produce distinct benefits:

- Fairness in the administration of the immigration laws;
- Adjudication independent of political decision-making; and
- Fixed judicial terms of office, enabling judges to make decisions without fear or favor.

Managed by the judges themselves rather than bureaucrats, an Article I Immigration Court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect. Cheaper, faster, better justice is possible through an Article I immigration court.

Significant efficiencies and cost savings could be achieved through the hearing of alien removal and employer sanction cases by the same immigration judges, without the need to maintain a duplicate system as now exists in the separate Office of the Chief Administrative Hearing Officer (OCAHO) within EOIR. An independent court would continue to provide necessary due process for U.S. employers facing substantial potential fines, with the functions of OCAHO's single administrative law judge handled at the new court's trial level by as many judges as needed. Eliminating the administrative expenses of a separate court with a separate oversight bureaucracy represents true savings.

While the political branches of government would still participate in appointments to the appellate division, the court would be insulated from undue political influence and policy shifts by staggering the terms of office of the appellate judges and requiring all the judges to be appointed without regard for political ideology or affiliation based on solid professional credentials and attributes, and to reflect a balance of public and private sector legal experience. Also, judges in both the appellate and trial divisions would serve for renewable 15-year terms, enabling them to focus solely on their judicial responsibilities, free of daily concerns about continued employment.

In an Article I court, trial judges would gain control over their dockets and no longer be subject to shifting decisions by political superiors to prioritize case A over case B (and vice-versa) or send judges off to border areas to handle a few cases while their regular dockets are further backlogged. The new court itself would establish and modify administrative and procedural rules as needed free of EOIR's current byzantine requirements for consultation with numerous, disparate offices and agencies.

Judicial Independence Would Restore Respect for the Immigration Courts

Board of Immigration Appeals members and immigration judges are currently treated by the Department of Justice as mere "attorneys representing the United States in litigation" – not independent, fully empowered judicial officers. They are responsible for carrying out

formal adjudications yet, due to bureaucratic resistance within DOJ and DHS, have been deprived of the judicial authority – expressly conferred by Congress – to impose contempt sanctions upon noncompliant parties when necessary. They also lack independence to freely decide the matters before them and, indeed, are subject to discipline if the Attorney General disagrees with their decisions.

In addition, because numerous immigration judges and Board of Immigration Appeals members are former DOJ or U.S. Department of Homeland Security (DHS) attorneys, and some immigration courts are co-located with Immigration and Customs Enforcement offices, there is a broad perception that immigration judges and DHS attorneys work together and that immigration courts act merely as “rubber stamps” to approve and uphold DHS actions. This perception deprives the immigration courts of the respect of aliens appearing before them, and, prompted by fear and a belief that the system is rigged, results in increased absences from court proceedings. Without active participation and respect, the rule of law is undermined and justice suffers. Also, the court’s ability to determine the truth is compromised when merit hearings are delayed for years.

The transfer to an Article I structure would alleviate the perception that immigration judges are not independent, fair adjudicators, and that DHS and individual respondents are not parties of equal standing in immigration cases. This would also cure the perception that the immigration courts and the Board of Immigration Appeals have become so politicized that their decisions are based not on the established law but on the changing views of successive administrations. Moreover, as an Article I court begins to operate, and individual cases start to receive fair, prompt, and accurate attention, respect for that court’s authority and decisions should grow over time, lessening delays caused by parties’ dilatory actions as well as the volume of appeals and remands.