

Why Should Congress Establish An Article I Immigration Court?

The Executive Office for Immigration Review (EOIR) in the Department of Justice and its existing immigration courts and Board of Immigration Appeals are costly and inefficient. EOIR is a bureaucracy, masquerading as a court system. It is the weakest link in our nation's enforcement of its immigration laws.

Congress' expectations for an efficient Immigration adjudicatory system are not being satisfied. Skyrocketing immigration court caseloads continue to generate larger immigration hearing backlogs, even with the hiring of additional immigration judges. Hearing scheduling of immigration cases now extends into 2022. This is "justice delayed," contrary to public expectations for timely and efficient judicial administration.

Reforms are Possible. The most comprehensive solution lies in legislation transforming EOIR from a bureaucracy into a true judicial system. Congress should transfer EOIR's adjudicative components (trial and appellate judges and administrative support) from the Department of Justice to a separate Article I Immigration Court with trial and appellate divisions. The U.S. Immigration Court would take its place beside other Article I courts (like the Court of Appeals for Veterans Claims and the Tax Court) as an independent, specialized tribunal.

An Article I Immigration Court would discharge its judicial and administrative functions in a manner independent of political decision-making. Immigration judges would have fixed terms of office that facilitate judicial decisions without fear or favor. Currently, Board of Immigration Appeals members and Immigration Judges are considered to be "attorneys representing the United States in litigation" – not as independent judicial officers. They are subject to discipline if the Attorney General disagrees with their decisions, and thus lack of independence to freely adjudicate the matters before them. The potential for political influence puts due process at risk. Managed by its own judges, an Article I Immigration Court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect. By affording both sides to an immigration case the right to appeal to the regional circuit courts of appeals, the Article III courts could develop guiding precedents in a more balanced manner.

The Transitional Process Can Be Smooth. Under the FBA's legislative proposal, current immigration judges and Board of Immigration Appeals members would be retained for a time to provide continuity of operation and experience until fresh judicial appointments can be made. The new court's trial and appellate divisions would operate under their own self-management, like other federal courts, eliminating the massive "supervisory" bureaucracy of EOIR. Future appellate judges would be presidential appointees and trial judges would be chosen through a merit selection process, similar to the way bankruptcy judges and magistrate judges are selected.

True Savings Are Possible. Significant efficiencies and cost savings could be achieved through the hearing of employer sanction cases by immigration judges, without the need for the duplicate system now in EOIR's separate Office of the Chief Administrative Hearing Officer. For U.S. employers who could be subject to substantial fines in employer sanction cases, an independent court would provide the necessary due process protections. A more efficient, responsive system should not necessarily entail additional expense and should achieve savings. Start-up expenses may be required, but additional costs could be offset by updating the EOIR fee schedule and replacing EOIR's antiquated case filing and docketing processes with automated systems equal to those of the Article III federal courts.