A Battle for the Soul of Our Courts:  
The Case for a Biden Administration Article I Independent Immigration Court System

I. Introduction

It is widely understood across party lines that our immigration court system is failing. The cause of this failure, however, is much more contentious. There are some who attribute the courts’ failure to the staggering case backlog caused by former President Donald Trump’s exclusionary immigration policy, others to the abuse of summary removal processes, and still others who identify the root issue as a fundamental flaw in the bureaucratic structuring of the immigration court system itself. This paper will focus on the latter case, and provide legal, empirical, and anecdotal evidence to support the claim that the creation of an Article I independent immigration court system is the most essential change proposed in modern immigration reform. Most pressingly, an Article I court system would reinstate due process in immigration adjudication and restore public faith in the legal immigration system by creating a just separation of powers rather than assigning purportedly impartial adjudicators as executors of the transient political whims of the Executive office. Although the creation of an Article I court system will not undo the immediate issues exacerbated by President Trump’s immigration reforms, if implemented, it will serve as a long-term ideological and structural safeguard against a future replication of the disastrous state of our present courts.
II. Present Immigration Conditions

A recent opinion article by The New York Times editorial board lays bare the dire circumstances of immigration courts. The board reports that “[e]very day, hundreds of immigration judges slog through thousands of cases, unable to keep up with a crushing backlog that has more than doubled since 2016” (The New York Times Editorial Board, 2021). More precisely, over the course of Donald Trump’s presidency, the number of pending immigration cases rose from 516,031 in the 2016 fiscal year to 1,322,938 in the 2021 fiscal year (TRAC, 2021). As journalist Val Ellicott recounts, according to the Transactional Records Access Clearinghouse (TRAC), “[e]ven if the [current] administration halted immigration enforcement entirely, it would still take more than...Biden's entire first term in office...for the cases now in the active backlog to be completed” (Ellicott, 2021). Some immigration reformers see this unprecedented backlog as a call for more adjudicators and court staffers. Chief among them is President Biden, who has pledged to double the present number of immigration adjudicators during his presidency (Ellicott, 2021). However, while Biden’s early term promise offers a fix for the sheer volume of pending cases, it is a tenuous one. The problems with the current immigration system are much more insidious than a simple oversaturation of the courts, and cannot be eradicated by policy alone.

III. Failings of the Current Immigration Court System

Multiple legal scholars and high-profile legal organizations and unions including the American Bar Association (ABA), Federal Bar Association (FBA), National Association of Immigration Judges (NAIJ), and American Immigration Lawyers Association (AILA) affirm that the most devastating failing of the current immigration court system is not administrative, but bureaucratic (ABA, 2019). They argue that the root of the courts’ problems is that they are
housed under the Executive Branch rather than under the Judicial Branch, unlike every other prominent American court system [See Figure 1]. As the following sections will illuminate, rather than being structurally shielded from political and legislative influence, as all adjudication must necessarily be, through the systemic potential for presidential abuse of legal channels, immigration courts fall into the unique trap of political abuse at the price of legal integrity.

Figure 1

*American Immigration Court System*

*Note.* Icons courtesy of Point of View, 2019

A. Undue Executive Influence

Because the immigration courts are housed under the Executive Branch, purportedly politically neutral immigration courts are not truly independent from presidential influence, raising critical worries about the impartiality and legal trustworthiness of immigration adjudication. These worries are well founded. In a recent empirical study of the extent of executive control over immigration adjudication, results concluded that “the presidential administration in control at the time of the [immigration] decision is a statistically significant predictor of removal rates in certain circumstances” (Kim and Semet, 2020, 579). In other words, in analysis controlled for over a dozen variables such as immigrants’ country of origin and judge’s gender, it has been empirically proven that the identity of the sitting president holds influence over immigration adjudicators’ decisions irrespective of the validity of the defendant’s legal claims to citizenship (Kim and Semet, 2020, 579). Although Kim and Semet acknowledge that the exact mode of Executive influence is unknown, they raise the possibility that in the Trump administration, President Trump’s immigration ideology may have impacted adjudication “through less legitimate means, such as threatening the job security of [adjudicators] who [were] viewed as too sympathetic to immigrants” (Kim and Semet, 2020, 630). However, these orders do not come directly from the president. First, they are filtered through the attorney general, whose intimate political ties to the president and wide discretionary power over the outcome of immigration rulings has long sat at the forefront of immigration court reform debate.

B. Executive Policy Reinforcement

Due to their housing under the DOJ, immigration courts are under the direct control of the U.S. attorney general. As part of the Cabinet, the attorney general is directly appointed and overseen by the president, who holds the discretionary power to remove the attorney general at
any time, for any reason. As such, the president holds the leverage to directly impose their political agenda upon the attorney general. The attorney general is subsequently beholden to the president, and, in order to ensure their job security, seeks to further the president’s political agenda through legal channels. One of the most prominent ways an attorney general might do this is through the unique discretionary power of self-referral.

The power of “referral and review,” more commonly known as “self-referral,” is, in essence, the power to “review and overrule decisions made by the Board of Immigration Appeals (BIA)” (Pierce, 2021, 1). The BIA is also housed under the Department of Justice, and serves as the second tier of the immigration court system, where defendants dissatisfied with the adjudicator’s original decision may appeal their case. In practice, the power of self-referral means that any immigration case that is appealed to the BIA may be personally selected by the attorney general to overturn or affirm, resulting in either the deportation or citizenship of the noncitizen defendant. Past application of this power was used sparingly, often over “inter-departmental disputes or complicated legal questions” that appeal courts were unable to settle (Migration Policy Institute, 2021). However, since the passage of the 2002 Homeland Security Act which moved the immigration court system under the Department of Justice (and therefore the attorney general), “the attorney general has increasingly used this channel to help implement the executive branch’s immigration agenda” (Migration Policy Institute, 2021). As Jeremey McKinney, Second Vice President of the AILA attests, this discretionary power is virtually limitless, allowing the attorney general to “single handedly pull the removal case of any person from any court, anywhere nationwide and issue a sweeping decision, making that person an example” (AILA, 2020). Although this power and its potential for political abuse is not new,
its blatantly politicized application under President Trump has only bolstered the case for immediate reform.

Over the course of the Trump administration, the deep structural risks of the inseparable tie between presidential political agendas and an attorney general’s unrestrained use of self-referral were revealed with blatant clarity. During this time, Attorneys General Jeff Sessions and William Barr, and Acting Attorneys General Jeffrey Rosen and Matthew Whittaker employed self-referral for the specific goal of furthering President Trump’s political agenda rather than to enforce preexisting legal protections or provide advanced legal insight into immigration cases, as the power was originally intended. Over the short course of four years, Trump’s Attorneys General employed self-referral seventeen times (Migration Policy Institute, 2021). In contrast, self-referral was used four times during the eight years of the Obama presidency and a previous high of eleven times during the combined sixteen years of Bill Clinton and George W. Bush’s presidencies (Migration Policy Institute, 2021). Not only were the Trump administration’s self-referrals more plentiful, but they also “stretched beyond the norms and traditional boundaries of the exercise of [self-referral] power” and made “substantive changes to legal regimes—such as the U.S. asylum system—as well as to court procedures” to align with President Trump’s political agenda (Migration Policy Institute, 2021, 1). In a report on the modern dangers of the unrestricted powers of U.S. attorneys general, Policy analyst and lawyer Sarah Pierce affirms that the cases that Attorneys General Sessions and Barr plucked for self-referral “were carefully selected to achieve a particular policy goal, instead of responding to legal issues that arose organically and needed resolution” (Pierce, 2021, 12). This blatant misuse of power once again affirms the inherent structural dangers of housing a court system under such highly politicized officials. Enabled by the unchecked and politicized power of self-referral, the
recent actions of President Trump’s attorneys general only clarify the immediate need for significant structural change.

Of the many policy-oriented changes Attorneys General Sessions and Barr made via self-referral, Pierce identifies the following as the most blatantly politically charged: In 2018, Sessions attempted to self-refer a case to rule that asylum seekers were ineligible for bond. However, before his decision was released, the case was “rendered moot” by the non-citizen’s deportation (Pierce, 2021, 12). In response, Sessions “quickly identified a different case for self-referral on the same issue” under which to render his policy decision (Pierce, 2021, 12). From this instance, it is clear that Sessions’ motives were not to render legal rulings on relevant immigration issues, as self-referral traditionally dictates, but to further politically enforce President Trump’s anti-immigration rhetoric through unchecked legal channels. Similarly, in 2019, Attorney General Barr self-referred a case to reinforce the exclusion of victims of domestic abuse as individuals eligible for asylum. Despite the fact that the defendant “had already been denied asylum on a different legal basis, meaning the decision did not alter the outcome,” Barr pressed on, intent on reinforcing President Trump’s exclusionary political rhetoric (Piece, 2021, 12). In his tenure as attorney general, Barr also self-referred a case relevant to a Supreme Court hearing set to take place only five days later and another that had been closed for fourteen years (Pierce, 2021, 13). It is clear from these erratic timelines that, like Sessions, Barr’s motivations were chiefly to enforce and influence President Trump’s agenda on immigration policy. From this evidence alone, it is undeniable that the political ties of the attorney general to the president are deeply problematic for a system that purports to operate independently from the political realm.

C. Politicized Court Operations
The potential for an attorney general’s politically-motivated influence does not only extend to inappropriate policy rulings. The attorney general’s wide discretion allows for radical politicized reshaping and control of court proceedings. In the case of the Trump administration, the dangers of this wide discretionary power were revealed by the blatantly political court changes instituted by Attorney General Sessions. Among other actions taken to limit the autonomy of immigration adjudicators during his tenure, Sessions further restricted individual immigration adjudicators’ control over their own case dockets. Put simply, Sessions removed immigration adjudicator’s power to choose what types of cases they wanted to hear, and in what order, eliminating their judicial discretion to select and pursue what they perceived to be relevant, pressing legal questions. This drastic change has resulted in what Judge Paul W. Schmidt, Former Chairman of the Board of Immigration Appeals (BIA) calls “a system that...has really lost any semblance of independence” caused by “aimless docket reshuffling” (AILA, 2020). Judge Ashley Tabaddor, President of the NAIJ added that this reprioritization of certain types of immigration cases within an adjudicator’s docket is specifically designed to “send a political message consistent with [an administration’s] law enforcement policy,” meaning that the attorney general’s case choices reflect the arbitrary political will of the president rather than the case’s relative legal priority (AILA, 2020). For instance, following the political lead of the president, an attorney general might choose to prioritize the hearings of immigrants from a certain subset of countries and issue mass deportation rulings to send the implicit politicized message that individuals from those countries are unwelcome in the United States. Importantly, Tabaddor also notes that this political partiality is not an occurrence unique to the Trump administration, but rather is an ongoing side effect of the inappropriate political ties between the immigration court system and the Executive Branch (AILA, 2020).
Not only was adjudicator freedom virtually eliminated under Sessions, but in 2018, he effectively ended administrative closure. In short, administrative closure “suspends removal proceedings by taking a case off the court’s docket,” and was generally employed if an immigrant was “granted deferred action, or if ICE considered them a low priority for enforcement action” (Piece, 2021, 17). Sessions’ action was unequivocally political in nature, as its practical consequences were to expedite the removal of previously de-calendared immigrants, meaning that it reopened active removal proceedings for immigrants who had previously been administratively ruled low-priority for either practical or logistical reasons. This is directly in line with President Trump’s political rhetoric, as there is no practical reason why these cases needed to be reopened other than to increase deportation rates, thereby strengthening his “hard line” immigration agenda. Only a year after Sessions’ ending of administrative closure, “the administration had filed more than 18,000 motions to re-calendar in an effort to restart administratively closed deportation cases” (Pierce, 2021, 18). In comparison, during President Obama’s final two years in office, less than half the number of motions were filed, ending at just under 8,400 (Pierce, 2021, 18).

In another clear act of political partisanship, Sessions annulled a 2014 BIA ruling that granted non-citizens applying for asylum a full evidentiary hearing. Policy analyst Sarah Pierce comments that in this case, “[t]he clear intention was to give immigration judges the ability to rule on asylum applications before applicants have a chance to testify or even present evidence,” as “the decision had no bearing on other regulations, statutes, or case law supporting the right to a full evidentiary hearing” (Pierce, 2021, 14). The thinly veiled goal, once again, was to expedite removal proceedings in accordance with the presidential political agenda.

**D. Direct and Indirect Control of Adjudicators**
Finally, in 2018, Sessions circulated a memo to all immigration adjudicators instating an annual case quota of 700 rulings in order to receive a “satisfactory” performance rating (NPR, 2018). While Sessions and conservative immigration professionals argue that the quota allows for a quicker progression through the backlog of the 1.3 million pending cases as it forces adjudicators to make quicker decisions, for advocates of legally reputable immigration court processes, these quotas mean something entirely different (NPR, 2018). There are two main concerns here. The first is primarily logistical. The imposition of annual quotas inherently prioritizes speed and fast resolution over careful, thoughtful consideration of the law and an immigrant’s personal circumstances in adjudication. As Jeremy McKinney, second Vice President of the AILA gravely notes, “[d]ecisions in immigration court have life-or-death consequences and cannot be managed like an assembly line” (NPR, 2018). In a damning yet powerful condemnation of case quotas, Dana Marks, President of the NAIJ posed the haunting truth that “we are conducting death penalty cases in a traffic court setting’” (Benson, 2017, 333). This example of case quotas indicates that any structural changes instituted by a highly politicized administration invariably have disastrous consequences for the legal integrity of immigration adjudication.

The second concern regarding quotas centers on the threat to impartiality in the immigration court system. As the NAIJ commented in a 2019 immigration policy report, “the unprecedented move...to tie individual performance evaluations to case completion quotas and deadlines has shattered any veneer of judicial independence” (ABA, 2019, 160). Under quotas, not only are adjudicators pressured to meet numerical goals, but because they lack fixed terms and protection against discretionary removal without cause, the looming threat of their job security if they refuse to comply renders adjudicators unable to exercise proper legal processes
and deliberations, as the pursuit of justice is often time consuming (Baibak, 2018, 1004). As NAIJ President Ashley Tabaddor testified to a Senate Judiciary Committee, “[i]f judges have to be mindful of case production quotas and deadlines to keep their job, they cannot possibly be viewed as impartial” (Senate Judiciary Committee Hearing on Strengthening and Reforming America's Immigration Court System, 2018). This is perhaps the most clear structural issue when it comes to direct control of the immigration courts by an executive-adjacent power. As a result of a politicized attorney general’s structural changes to the immigration court, adjudicators now are fearful for their job security if they refuse to comply with blatantly legally immoral processes.

Not only must adjudicators contend with the threat of their job security if they do not meet politicized case quotas, but due to their position in a court system overseen by the DOJ, their legal authority and integrity is severely, irreparably compromised. At the end of the day, under a court system overseen and thereby beholden to the Executive Branch and its policies, immigration adjudicators are unable to exercise the full extent of their independent legal discretion precisely because they are not truly independent. As AILA Second Vice President Jeremey McKinney candidly comments that “[w]e call it immigration court, but it’s not really a court. The judges aren’t actual judges. They’re employees of the Department of Justice” (AILA, 2020). In essence, McKinney argues that immigration courts are sham courts because they are under the direct influence of the politics of the Executive Branch. Therefore, the unbiased and independent deliberations of a typical court do not apply. Ashley Tabaddor candidly testified that “once I walk out of the courtroom, the department views me as a government attorney subject to the whims of management” (Senate Judiciary Committee Hearing on Strengthening and Reforming America's Immigration Court System, 2018). By extension, immigration adjudicators
are not truly working to further the rule of law as their position requires, and instead serve as
mouthpieces of the attorney general and the president. If they refuse to do so, using the power of
self-referral, the attorney general “may vacate or substitute [the adjudicator’s] decisions for his
or her own” (Baibak, 2018, 1004). Further, as adjudicators lack fixed terms or any formal job
security, the attorney general “can politicize the [immigration court system] by directly firing
members or indirectly threatening to reverse their opinions” (Baibak, 2018, 1005). This
unrestrained discretionary power of a single, highly politicized individual is a direct threat to the
integrity of our immigration courts.

E. The Chief Prosecutor

Finally, there is something deeply troubling in the fact that the current immigration
system is under the direct, virtually unchecked control of the nation’s chief prosecutor: the
attorney general. One of the core responsibilities of the U.S. attorney general is to represent the
legal interests of the country. In the matter of immigration cases, the plaintiff must always be the
Federal Government (Baibak, 2018, 1007). Therefore, the attorney general, and by extension,
individual immigration adjudicators, are already predisposed to favor the interests of the United
States over those of non-citizen defendants. By virtue of housing the immigration courts within
the DOJ, the system is already inherently biased against immigrant interests and, given the
attorney general’s aforementioned widespread influence over immigration adjudication, presents
an unavoidable conflict of interest. As Judge Ashley Tabaddor, President of the NAIJ notes,
“[t]he true solution [in immigration court reform] is to make sure that the immigration court is no
longer run by a prosecutor” (AILA, 2020).

F. Politicians’ Concerns
Legal experts and scholars are not the only parties deeply troubled by court conditions borne of an attorney general’s political partisanship. In a 2020 open letter to Attorney General Barr, Senator Sheldon Whitehouse (D-RI) and a cohort of eight fellow Democratic senators including presidential hopefuls Kamala Harris (D-CA), Amy Klobuchar (D-MN), and Cory Booker (D-NJ), expressed their deep concerns and discontent with the blatantly politicized abuse of the discretionary powers afforded to the attorney general. The senators hint at the deep issues intrinsic in the housing of the immigration court system under the highly politicized Executive Branch, writing, “while immigration courts reside within the executive branch, they should not be merely a tool to achieve desired policy outcomes” (Whitehouse et al., 2020, 7). After rehashing many of the preceding concerns regarding undue executive influence over adjudication, they close by identifying a crucial facet of American law: due process. They write, “[t]he United States deserves an immigration court system that is independent, impartial, and functional. Parties appearing in immigration court are equally entitled to a timely hearing in front of a neutral arbiter, consistent with the requirements of the [Immigration and Nationalization Act] and the Constitution” (Whitehouse et al., 2020, 7). Although not directly named, by mention of Constitutional rights afforded to immigrants, the senators pinpoint the essential understanding that upholding due process of the law is the most sacred duty of any court system.

IV. Due Process

Granted in the Fifth Amendment of the Constitution, among other things, due process affords people the right “to contest an action proposed by the government in front of a neutral decision maker” (Benner and Savage, 2018). Importantly, as Democratic Senator Richard Durbin clarified in a 2018 Senate Judiciary committee hearing, “the Supreme Court has consistently held that...due process protection extends to all persons in the United States,” regardless of legal
status or citizenship (Senate Judiciary Committee Hearing on Strengthening and Reforming America's Immigration Court System, 2018). It therefore follows that in the case of immigration hearings, aside from those individuals marked for expedited removal, all immigrants are legally afforded the right to a fair, impartial trial in front of a neutral party such as an immigration adjudicator. As identified in the preceding sections, it is strikingly clear that under the current organization of immigration courts, adjudication is neither fair nor impartial, resulting in the routine denial of immigrants’ constitutional rights to due process. The political biases and pressures inherent in the immigration court system’s bureaucratic placement render any hope for application of due process irrevocably null. As French judge and philosopher Charles de Montesquieu eloquently summarized, “there is no liberty if the power of judging be not separated from the legislative and executive powers” (Baibak, 2018, 1018). At present, the American immigration court system is utterly devoid of structural independence, or, as Montesquieu would call it, “liberty.” As a result, true liberty is denied to the system’s adjudicators and its immigrant defendants.

Due to the immigration court system’s inherent susceptibility to bias and undue political influence, the ABA has deemed it “irredeemably dysfunctional and on the brink of collapse” (ABA, 2019, 62). Many legal scholars and organizations agree that the only way to avoid this collapse and sever the exploitative tie between executive political agendas and purportedly neutral legal adjudication is to unhouse immigration courts from under the Executive Branch and reinstate them as an independent Article I court system. As the ABA attests, “this approach is the best and most practical way to ensure due process and insulate the courts from the capriciousness of the political environment” (ABA, 2019, 63).
V. Article I Courts

Provided for by Article I, Section 8, Clause 9 of the Constitution, which reads, “[t]he Congress shall have power...to constitute tribunals inferior to the Supreme Court,” (U.S. Const. art. I, § 8, cl. 9), Article I courts are classified as “specialized subject matter courts” such as the United States Tax Court and Court of Appeals for Veterans Claims. In essence, they are meant to deal with a specific, narrow issue rather than Article III courts (the Supreme and Inferior Courts), which have a much broader perview (Administrative Office of the U.S. Courts, 3). Unlike Article III courts, the chief purpose of Article I courts is to “maintain a certain degree of independence and to operate impartially and without political influence” (Administrative Office of the U.S. Courts, 3). To ensure this separation from political influence, the courts are created through Congress, but housed independently of both the Executive and Legislative Branches. Therefore, they are structurally far less susceptible to the political will and transient whims of the president than those housed under executive departments like the DOJ. Due to these courts’ necessary structural independence from political and legislative influence, restructuring immigration courts as an Article I court system offers the most pertinent, comprehensive solution to the deep structural inequalities inherent in the present immigration court system.

VI. The Benefits of an Article I Immigration Court System

Due to the structural nature of an Article I court system in comparison to that of the current immigration court system, all of the aforementioned barriers to due process (undue executive influence, executive policy reinforcement, politicized court operations, politicized control of adjudicators, and inherent loyalty to the interests of the United States over those of immigrants) would be significantly lessened if not fully resolved under an Article I immigration court system. Because the courts would no longer be housed under the Executive Branch and the
DOJ, it would be significantly harder for the president or attorney general to exert direct influence over immigration adjudication. The courts would be truly independent entities, insulated from political and legislative control. Adjudicators’ loyalty to the rule of law and a fair decision making process would no longer be linked to their performance reviews or beholden to overbearing political pressures. Attorneys general would be structurally barred from instating politically motivated court policies, swaying case rulings by threatening adjudicators’ job security, and abusing their discretionary power to overturn legitimate cases for political benefit. Therefore, not only would immigrant’s foundational rights to due process be restored, but the public’s perception of fairness and reliability of the courts’ judgements would be reinstated. As Judy Martinez, President of the ABA testified in a House Judiciary Subcommittee on Immigration and Citizenship, “[p]erceived fairness...should lead to greater acceptance of the decision without the need to appeal to a higher tribunal. When appeals are [emphasis added] taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands,” thereby streamlining the timelines of case resolution (House Judiciary Subcommittee on Immigration and Citizenship, 2020).

This call for the creation of an Article I court system is not a recent development, nor is it based on purely theoretical conceptions of justice. As Judy Martinez also noted in her House Judiciary testimony, “proposals to create an Article I court...are not new or novel” (House Judiciary Subcommittee on Immigration and Citizenship, 2020). Rather, she notes, they have roots in an 1981 congressional committee report, and were part of numerous bills reviewed by the House of Representatives in the late 1990s (House Judiciary Subcommittee on Immigration and Citizenship, 2020). It is clear from this long history as well as the present overwhelming
support for the creation of an Article I court system that the benefits of an independent immigration court have long been considered a viable and effective option to restore due process and the rule of law to the American immigration court system.

Not only is the call for an independent immigration court system the direct continuation of decades worth of legal analysis and advocacy, but it is backed in promising historical trends. The FBA has noted that “[t]he history of existing Article I courts...demonstrates repeated recognition by Congress that independent review by “real” judges is the sine qua non [essential condition] of faithfully adjudicating rights and responsibilities in matters governed by public law” (ABA, 2019, 161). Following this pattern in history, it is almost certainly guaranteed that by creating an Article I court system, the pressing problems of due process will be resolved. As AILA Second Vice President Jeremey McKinney reminds us, “[w]e already have an appellate body. We already have a core of immigration judges. So the foundations of the system are already in place. What it needs is independence” (AILA, 2020). The avenue to this independence is clear. President Biden must push Congress to create an independent Article I immigration court system.

VII. Objections to an Article I Immigration Court System

Despite the undeniable structural appeals of instating Article I immigration courts for ensuring due process and unbiased adjudication, critics of the proposal hold reservations about the practicality of the systemic overhaul necessary to establish an Article I court system. There are three common objections that critics raise in the face of the Article I proposal: the economic, the practical, and the political. While each valid to varying extents, they are nonetheless insufficient in proving that the Biden administration should reject an Article I immigration court system.
A. The Economic Objection

Lawyer Rebecca Baibak has noted that “Congress lacks the political will to create legislative courts because many representatives believe restructuring the immigration courts and the BIA would require additional funding” (Baibak, 2018, 1013). Similarly, the EOIR specifies that the financial burden of funding “an entire new cadre of judges that must be appointed, confirmed, and trained” is too “monumental” (ABA, 2019, 162). There are three responses to this objection.

First, in response to EOIR’s critiques, the ABA countered that “[n]o responsible proposal has called for the replacement of all current immigration judges” (ABA, 2019, 163). This is true. There are no prominent reform plans that propose a restaffing of the courts, at least not before they are comfortably established as an independent entity. Thus, the misplaced worries regarding the funds required to hire and train new adjudicators are immediately solved.

Second, if this concern is merely a flimsy cover for political resistance to putting any resources into an overhaul of the court system (as it most likely is, given the virtual nonexistence of the plans the EOIR cites), Judge Paul W. Schmidt counters that although instating an Article I court system is “not necessarily easy,” an Article I system would “solve the problem that what’s being done now spends money making things worse” (AILA, 2020). In short, Schmidt argues that there are already significant funds going into the present system, but they are clearly not doing any good. Instead, they must be reallocated towards a systemic overhaul for the purposes of establishing a more reliable, just, and perhaps even less economically taxing court system.

Finally, even if it was true that the new system requires a significant increase in funding for reasons still unarticulated by the proposal’s critics, the long-term benefit of creating a system that a) upholds due process in trying cases, b) thereby leads to more ethical and legal confidence
in results, c) therefore results in less case appeals, and d) therefore less money spent on increased
court time per case, is much more fiscally responsible.

**B. The Practical Objection**

The second objection to creating an Article I court system is of a more practical nature. The EOIR argues that instating an Article I system “would do nothing to address the pending backlog of cases; rather, the backlog would likely grow even faster with less accountability and less oversight” (ABA, 2019, 162). However, as Senator Whitehouse and his peers pointedly reminded Attorney General Barr in their open letter, in 2020, Congress approved increased funding for EOIR, yet EOIR has failed to both “answer simple budgetary and oversight questions” from the Senate Committee on Appropriations to justify how they are spending their money” or “[implement] basic procedural improvements that would speed the resolution of cases and reduce the immigration court backlog” (Whitehouse et al., 2020, 6). Clearly, the EOIR is doing very little with the resources it has requested, and is in no place to deny the same funding to or pass judgment on another system’s predicted efficiency. Despite this, the EOIR does raise an important point. It is true that an Article I immigration court system would not directly address the current backlog—it would do something potentially much more important.

Because an Article I court system would necessarily require adherence to due process and therefore lead to more trustworthy and generally accepted case decisions, case adjudication would take significantly less time, as there would be fewer appeals (*House Judiciary Subcommittee on Immigration and Citizenship*, 2020). Further, the courts operations themselves would run much more smoothly, as they would be insulated from political influence, putting an end to ceaseless adjudicator docket reshuffling to reinforce a particular political agenda. The combination of these two guaranteed byproducts of an Article I system would help to combat, if
not altogether eliminate another backlog of this magnitude. While a system overhaul is a longer-term investment than the immediate solutions the Biden administration has sought in hiring more adjudicators, looking to the future, it is a crucial one in ensuring the operational efficiency of the immigration courts.

C. The Political Objection

Finally, and perhaps most prominently is the political objection to instating an Article I system. As Val Ellicott summarizes in his overview of modern immigration reform, “passing most major legislation requires 60 votes to overcome the threat of a filibuster, so Biden will need support from at least 10 Senate Republicans. It is unclear that support exists, especially since the GOP became more anti-immigrant under Trump” (Ellicott, 2021). While this argument holds undeniable merit, it does not immediately follow that this means that legal advocates or even President Biden himself should refrain from pushing for the structural changes that the system necessarily demands. Reinstating due process in immigration adjudication and providing immigrants a forum to exercise their constitutional rights to the fullest extent, and adjudicators the freedom to exercise their full legal discretion in deciding those cases, unencumbered by undue political pressure, should not be a partisan issue. Rather, it is paramount to the survival of the system, which, in and of itself, should be nonpartisan. A fear of insufficient political support or a misguided sense of political partisanship should not inhibit those who believe in the necessity of Article I changes from advocating for what they believe is structurally, legally, and morally right. President Biden has begun this necessary dialogue and demonstrated that it is possible to, at the very least, propose and direct political discourse to a bill that acknowledges the deep injustices inherent in the present court system.
VIII. Compatibility with President Biden’s Current Immigration Agenda

Recently, Biden released his US Citizenship Act of 2021. In a press release summarizing the contents of the bill, the Briefing Room asserts that the Act “restores fairness and balance to our immigration system by providing judges and adjudicators with discretion to review cases and grant relief to deserving individuals” (The White House Briefing Room, 2021). In particular, it calls for “hiring of additional immigration judges...and Board of Immigration Appeals (BIA) members” and “requires EOIR to conduct mandatory continuing legal and diversity training for IJs and BIA members” (National Immigration Law Center, 2021). Clearly, the Biden administration has heard reformers’ calls that there is a distinct absence of due process in the present court system. This is an encouraging start, as he has taken the first step of partially acknowledging the deep structural biases and opportunities for corruption inherent in the system. Yet while he has sought to enact preventative measures against these biases, they fall disappointingly short of the structural change necessary to truly address the issues the bill enumerates.

Although the bill claims to restore adjudicator discretion, as the preceding sections have clearly shown, as long as the immigration courts remain under the executive branch and the DOJ, adjudicators are structurally inhibited from exercising their full discretion. Further, the two specific actions named, hiring more adjudicators and BIA staff and requiring diversity training are a far cry from the necessary reforms. As already discussed, while a short-term fix for the pressing but arguably unique case backlog, hiring more adjudicators and staff does nothing to change the structural issues at the heart of the courts’ most prominent failings of due process. Similarly, the call for diversity training, while symbolic, is structurally useless. Diversity training will do nothing to stem the political biases and influences of the executive branch on attorney
general and adjudicator conduct, especially for future attorneys general like Jeff Sessions. It appears that through these proposals, Biden has chosen to focus on general efficiency and individual bias, rather than the same issues applied to the structure itself. The problem is not with individual adjudicators, but with the system they operate under.

Nonetheless, the intent behind Biden’s proposed actions are a hopeful sign for Article I advocates. Drawing upon the common principles Biden himself no doubt considered in constructing the Act, namely those of respect for due process and unbiased adjudication, advocates have an opening to present an Article I court system as a more long-term solution that encompasses those very ideals. Biden has proven that he is open to change, or, at the very least, understands the impetus behind it. It is now the job of the many aforementioned legal advocates and their allies to push for the structural reform that this chronically broken system demands.

IX. Conclusion

The unchecked power of the Executive Branch over immigration court adjudication is one of the most pressing legal catastrophes our nation faces. It undermines not only the integrity of the court system itself, but the lives and futures of immigrants themselves, who are thrust, powerless, into an unjust and irrevocably broken system. America prides itself on its fair and impartial justice system, yet it fails those who are most convinced by our myths of American fairness and freedom—immigrants. Immigrants are not political pawns. They do not exist to make policy statements. They are deserving of each due process right constitutionally afforded to them, all of which have been overlooked and dismissed for far too long. At the very least, the basic constitutional rights of immigrants must be respected and structurally upheld if we are to claim to have any semblance of legal justice. It is therefore imperative to create a system that prioritizes due process and reliable, unbiased forms of immigration adjudication, unaffected by
the transient political whims of the Executive Branch. As this paper has illustrated, the only true way to ensure this justice is through the creation of a fully independent immigration court system. It is time that the Biden Administration takes the necessary initiative to do what has long been morally, empirically, and legally identified as the most pressing action the current system requires. It is time for a new era of independent Article I immigration courts.
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