



Submitted via <http://www.regulations.gov>

April 24, 2020

Lauren Alder Reid, Assistant Director  
Office of Policy, Executive Office for Immigration Review  
5107 Leesburg Pike, Suite 2616  
Falls Church, VA 22041

**Re: 85 FR 18105; EOIR Docket No. 20–0010, A.G. Order No. 4663–2020; RIN 1125–AB00; Comments in Opposition to Expanding the Size of the Board of Immigration Appeals**

Dear Assistant Director Alder Reid:

The Catholic Legal Immigration Network Inc. (CLINIC)<sup>1</sup> submits these comments opposing the Department of Justice’s (DOJ) Interim Final Rule (IFR) expanding the number of Board of Immigration Appeals (BIA) members from 21 to 23, and urges DOJ to rescind this rulemaking.

Embracing the Gospel value of welcoming the stranger, CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of immigration legal services programs. This network includes approximately 370 programs operating in 49 states and the District of Columbia. CLINIC’s network employs roughly 1,400 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. In addition to affirmative applications for benefits, CLINIC affiliates have increasingly begun to represent clients in removal proceedings. In 2019, CLINIC established a section, Defending Vulnerable Populations, which focuses on training and mentoring in several areas, including: asylum, removal defense, post-order removals, and appeals.

As discussed more fully below, CLINIC opposes the addition of these Board members. CLINIC has submitted past comments opposing the creation of the Office of Policy within the Executive Office for Immigration Review (EOIR) and the increasing politicization of EOIR whose mission should be adjudicative.<sup>2</sup> The addition of this politicized office within EOIR was strongly denounced by the National Association of Immigration Judges, calling the rule, “a blatant attempt

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<sup>1</sup> These comments were primarily authored by Victoria Neilson, Managing Attorney of CLINIC’s Defending Vulnerable Populations (DVP) Program.

<sup>2</sup> See CLINIC, *CLINIC Submits Comment Opposing EOIR’s Reorganization Interim Rule, Calls for Withdrawal*, Oct. 18, 2019 <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comment-opposing-eoirs-reorganization>.

to use EOIR as an enhanced immigration law enforcement tool.”<sup>3</sup> CLINIC is concerned that DOJ is adding more BIA members to continue to shift the ideology of the BIA’s members towards limiting access to relief and speedy removals<sup>4</sup> at the cost of due process and fairness for noncitizens appearing before EOIR.

### **This Interim Final Rule (IFR) contradicts the reasoning of DOJ’s rule expanding the number of BIA members in 2018**

This administration has already expanded the number of BIA members from 17 members to 21 members through an IFR dated February 27, 2018.<sup>5</sup> At that time, DOJ explicitly acknowledged the balancing necessary between adding more people who could address a growing backlog, and the need for the BIA to be a manageable size that could address issues coherently. The 2018 IFR stated:

Keeping in mind the goal of maintaining cohesion and the ability to reach consensus, but recognizing the challenges the Board faces in light of its current and anticipated increased caseload, the Department has determined that four additional members should be added to the Board. The Department acknowledges the potential impact of the expansion to 21 members upon the Board’s ability to provide coherent direction and to issue precedential decisions, which require approval of a majority of the Board, and will continue to consider means to improve the Board’s operations over time. But the interim rule’s logic—balancing efficiency with administrability—supports increasing the size of the Board in the final rule to 21. These changes will help support an efficient system of appellate adjudication in light of the increasing caseload.<sup>6</sup>

In balancing these competing factors just two years ago, DOJ determined that 21 BIA members was the optimum number. Now, with no explanation about why DOJ’s analysis of the optimum number was wrong before, DOJ again seeks to expand the number of BIA members. Using the exact same language as the 2018 rulemaking, DOJ now states, “Keeping in mind the goal of maintaining cohesion and the ability to reach consensus, but recognizing the challenges the Board faces in light of its current and anticipated increased caseload, the Department has determined that

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<sup>3</sup> National Association of Immigration Judges (NAIJ), *Comments on the Department of Justice’s Regulation Radically Changing the Structure of the Immigration Court* (Aug. 2019), [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Comments\\_on\\_the\\_Department\\_of\\_Justice%E2%80%99s\\_Regulation\\_Radically\\_Changing\\_the\\_Structure\\_of\\_the\\_Immigration\\_Court.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Comments_on_the_Department_of_Justice%E2%80%99s_Regulation_Radically_Changing_the_Structure_of_the_Immigration_Court.pdf) [hereinafter “NAIJ Office of Policy Comments”] (“With the ability to overturn any immigration judge’s decision, the Director has the power to pressure immigration judges to issue decisions in line with the Director’s political view as opposed to established law, since the percentage of cases remanded counts against a judge in his or her individual performance review plan under the current Agency’s quotas and deadline system.”).

<sup>4</sup> In addition to establishing the Office of Policy within EOIR, DOJ leadership has implemented performance metrics for immigration judges, forcing them to complete cases quickly or face possible disciplinary action. These performance quotas have been strongly denounced by the American Bar Association. See American Bar Association, *Statement of ABA President Hilarie Bass Re: Mandatory Case Completion Quotas for Immigration Judges*, Oct. 17, 2017, [https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement\\_of\\_abapre1/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement_of_abapre1/). See also, National Institute for Trial Advocacy, *Immigration Court and Due Process—NITA’s Official Position*, Nov. 16, 2017, <https://www.nita.org/blogs/immigration-court-and-due-processnitas-official-position>.

<sup>5</sup> See 83 Fed. Reg. 8321 (Feb. 27, 2018).

<sup>6</sup> *Id.* at 8322.

two positions should be added to the Board at this time.”<sup>7</sup> The IFR never explains why it suddenly believes that 23 members will be able to “provide coherent direction.” Furthermore, it does not address the fact that after these new additions, it will have added six new Board members in two years—increasing the number of Board members by 26% over a short period of time, again, without even seeking to address the issues the IFR itself raises of “coherent direction” and “administrability.”

**DOJ should add staff attorneys to address the backlog not BIA members**

DOJ recently issued a notice of proposed rulemaking seeking to dramatically increase fees for EOIR filings, particularly increasing the fee for BIA appeals by more than 800%. CLINIC filed comments strongly opposing these proposed fee increases.<sup>8</sup> As part of the fee increase rulemaking, DOJ broke down the costs of adjudicating BIA appeals based on the salaries of personnel responsible for various stages of the adjudication.<sup>9</sup> The table for BIA appeal decisions is pasted below.<sup>10</sup>

6. EOIR–26, Notice of Appeal From a Decision of an Immigration Judge

Staff level	Total cost, by staff level
Legal Assistant (GS–05/06/07) .....	\$5.42
Legal Assistant (GS–08/09) .....	66.64
Admin Staff (GS–08/09) .....	198.23
Paralegal .....	83.12
Attorney .....	537.52
Board Member .....	76.38
Digital Image Processor .....	7.75
Total .....	975.05

It is clear from this cost breakdown, that attorneys employed by EOIR, and even paralegals, and administrative staff, do more work on each BIA appeal than BIA Board members do. The cost of a Board member’s work on each case is roughly 1/7 the cost of an attorney’s work on a case. Given that the Board member has the highest salary among these positions,<sup>11</sup> and appears to do the least amount of substantive work on the case, it would be more efficient for EOIR to hire more attorneys, paralegals, and administrative staff rather than expanding the size of the BIA, if its goal is to reduce

<sup>7</sup> 85 Fed. Reg. 18106 (Apr. 1, 2020).

<sup>8</sup> CLINIC, *CLINIC Submits Comments in Opposition to Proposed EOIR Fee Rule, Urges the Justice Department to Rescind*, Mar. 30, 2020, <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-opposition-proposed-eoir-fee-rule>.

<sup>9</sup> CLINIC strongly opposed these fee increases, primarily because they appear designed to prevent the most vulnerable litigants from pursuing applications for relief, motions, and appeals before EOIR. CLINIC also strongly opposed DOJ issuing an NPRM that did not provide all of the data on which its calculations were based. See CLINIC, *CLINIC Submits Comments in Opposition to Proposed EOIR Fee Rule, Urges the Justice Department to Rescind*, Mar. 30, 2020, <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-opposition-proposed-eoir-fee-rule>.

<sup>10</sup> 85 Fed. Reg. 11866, 11873 (Feb. 28, 2020).

<sup>11</sup> In 2018, BIA members’ starting salaries ranged from \$132,606 to \$174,500 per year. See Appellate Immigration Judge (Board Member), <https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member>.

the backlog of cases. Adding to attorney and support staff would also not have to be weighed against the goals of “maintaining cohesion and the ability to reach consensus” discussed above.

### **Irregularities and lack of transparency in appointment of BIA members**

Furthermore, even assuming *arguendo* that DOJ is now correct and 23 members is the optimum number of BIA members rather than 21, DOJ has increasingly politicized EOIR, lacked transparency in its hiring process, and promoted to the BIA members whose primary qualification appears to be high rates of asylum denial.<sup>12</sup>

Thus, in 2018, a 25-year veteran attorney of United Citizenship and Immigration Services and legacy Immigration and Naturalization Services attorney who specialized in asylum issues, had her offer of a position with the BIA unexpectedly revoked.<sup>13</sup> Her offer was withdrawn shortly after DOJ last expanded the number of BIA members to 21 in February of 2018, making the motivation behind the decision to revoke the offer even more suspicious.

In August 2019, the attorney general added six sitting immigration judges as permanent members of the BIA, the first time Board members have been permitted to simultaneously conduct hearings and make appellate rulings. If DOJ’s primary motivation in adding Board members was to increase capacity to hear more cases, there would be no justification to elevate sitting immigration judges to the BIA and have them simultaneously conduct hearings and review appellate files. It is basic common sense that a Board member who is performing two jobs simultaneously will have less time to devote to each. Furthermore, by hiring Board members who are not physically located in Falls Church, VA, EOIR has decreased efficiency and added costs because every file that these Board members review must be physically shipped to and from the member’s remote location.

Among these recent appointees, five had asylum denial rates of over 90 percent of their cases, with one having a 96 percent asylum denial rate and another having a 98.7 percent denial rate.<sup>14</sup> One of the judges rewarded with permanent membership on the BIA had defied a prior order by the Board to complete background checks and grant asylum in the case of Ms. A-B-. Instead the judge held the decision, without legal cause, and ultimately referred it to Attorney General Jeff Sessions<sup>15</sup> who used it as a vehicle to overturn *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014) through an

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<sup>12</sup> Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Oct. 29, 2019, CQ ROLL CALL <https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/>; Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, SAN FRANCISCO CHRONICLE, Aug. 23, 2019, <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php>.

<sup>13</sup> Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her Over Politics*, CNN June 21, 2018, <https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html>.

<sup>14</sup> See Statement Of Innovation Law Lab, Southern Poverty Law Center, Las Americas Immigrant Advocacy Center, Santa Fe Dreamers Project, And Catholic Legal Immigration Network, Inc. (CLINIC), Submitted to the House Judiciary Committee, Hearing on “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts,” at 4-5, Jan. 29, 2020 <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD009.pdf>.

<sup>15</sup> Jane Fonda and Karen Musalo, *Her Husband Beat Her and Raped Her. Jeff Sessions Might Deport Her.*, N.Y. TIMES, May 17, 2018, <https://www.nytimes.com/2018/05/17/opinion/jeff-sessions-asylum-domestic-violence.html>.

attorney general precedential decision. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).<sup>16</sup> Shortly after the appointment of these new BIA members, a long-time, BIA member retired “with heavy heart.”<sup>17</sup> Three other senior career officials had also departed over the summer.<sup>18</sup>

Fearing that the hiring of these sitting judges was politically motivated, the American Immigration Council (AIC) filed Freedom of Information Act (FOIA) requests to understand the hiring policy of BIA members. On March 17, 2020, AIC sued DOJ in federal district court over its failure to provide adequate disclosures about its appellate hiring practices through FOIA.<sup>19</sup>

In the past three years, the BIA’s role has become to narrow eligibility for virtually every form of relief through its precedential decisions and decisions issued by the attorney general.<sup>20</sup> The attorney general has issued nine precedential decision in the past three years, all of which have constricted eligibility for relief for noncitizens with an additional three self-certified decisions pending.<sup>21</sup> By way of contrast, in the eight years of the prior administration, the attorney general issued only four precedential decisions.<sup>22</sup> During the past three years, 83 percent of published BIA decisions have found against respondents whereas 56.5 percent found against respondents in the prior eight years.<sup>23</sup>

With the changes to the composition of the BIA that this administration has implemented, CLINIC believes that the primary reason for seeking to add more members to the Board of Immigration Appeals at this time is to increase the number of BIA members who are ideologically aligned with the administration’s goals of prioritizing speed over due process, and prioritizing deportation over fairly adjudicated cases.

For all of these reasons, CLINIC urges DOJ to withdraw this IFR and leave the number of BIA members at the current level of 21. If DOJ wishes to proceed with this rule, CLINIC urges the agency to fully explain why the additional two Board members are necessary and to commit to a transparent hiring process that does not favor specific ideological perspectives.

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<sup>16</sup> That judge also made headline news, prior to being elevated to the BIA, by threatening a 2-year old that his dog would bite him if he was not quiet. Marina Pitofsky, *Immigration Judge Told 2-Year-Old To Be Quiet Or A Dog Would 'Bite You': Report*, THE HILL, Sep. 10, 2019, <https://thehill.com/blogs/blog-briefing-room/news/460739-immigration-judge-told-2-year-old-to-be-quiet-or-his-dog-would>.

<sup>17</sup> Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. Times, Sep. 13, 2019, <https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html>.

<sup>18</sup> *Id.*

<sup>19</sup> American Immigration Council, *Lawsuit Seeks to Uncover Problematic Board of Immigration Appeals’ Hiring Procedures*, Mar. 19, 2020, <https://www.americanimmigrationcouncil.org/news/lawsuit-seeks-uncover-problematic-board-immigration-appeals%E2%80%99-hiring-procedures>.

<sup>20</sup> DOJ, AG / BIA Decisions Listing, <https://www.justice.gov/eoir/ag-bia-decisions>. The case outcome analysis cited in the text is based on analysis of precedential decisions over the past 11 years performed internally by CLINIC.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Jill Marie Bussey, CLINIC's Advocacy Director, at [jbussey@cliniclegal.org](mailto:jbussey@cliniclegal.org) should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Anna Marie Gallagher". The signature is written in a cursive, flowing style.

Anna Marie Gallagher  
Executive Director