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May 13, 2025

Stephanie Gorman,
Acting Assistant Director,
Office of Policy,
Executive Office for Immigration Review,
5107 Leesburg Pike, Suite 2500,
Falls Church, VA 22041

Re: Department of Justice: Executive Office for Immigration Review; RIN 1125-AB34 or EOIR Docket No. 25-AB34

Dear Acting Assistant Director Gorman:

The National Immigration Project of the National Lawyers Guild (National Immigration Project)¹ submits the following comment in response to the Executive Office for Immigration Review's (EOIR) interim final rule (IFR), RIN 1125-AB34 or EOIR Docket No. 25-AB34, reducing the size of the Board of Immigration Appeals (BIA) from 28 members to 15.

The National Immigration Project strongly opposes this IFR² which appears to be a post hoc justification for firing competent BIA members who were appointed by the prior administration. The National Immigration Project further objects to the IFR because reducing the size of the BIA while there is a significant backlog of cases is arbitrary and capricious and likely to lead to expedited decisions with even less due process for noncitizens.

The National Immigration Project is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. The National Immigration Project focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system. Additionally, we fight for fairness and transparency in immigration adjudication systems and believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States. Although the National Immigration Project believes that the immigration system, including the EOIR adjudication system, is fundamentally flawed and does not provide noncitizens due process, we strongly oppose the removal of qualified BIA

¹ The author of this comment is National Immigration Project Supervising Attorney, Victoria Neilson with input from National Immigration Project Director of Legal Support and Training, Michelle N. Méndez.

² The IFR can be found at 90 Federal Register 15525 (Apr. 14, 2025) <https://www.govinfo.gov/content/pkg/FR-2025-04-14/pdf/2025-06294.pdf>.

members which will only make a bad system worse. The likelihood that the agency will later claim the backlog as justification for providing diminished due process to appellants, such as through affirmances without opinions, only makes the reduction in the number of BIA members more egregious.

1. The Reduction in the Number of BIA Members Appears to Be a Post Hoc Justification for Firing Qualified Members

Shortly after the Trump administration took office, it began firing immigration judges who were hired under the Biden administration.³ By definition, judges who were within their two-year probationary period were hired under the prior administration when judges have fewer protections under federal hiring laws. However, the firings came with no allegation of wrongdoing, indeed in many cases with no explanation at all.⁴ Then, the administration turned to firing judges who were beyond the two-year probationary period but were hired by the Biden administration. Signaling the political nature of these firings, every one of the fifteen BIA members who remain on the BIA were hired during or before the first Trump administration.

Some of the fired BIA appellate judges were on conservative “hit lists” prior to their firings. One of the BIA appellate judges hired under the Biden administration who summarily lost their position even after serving as a BIA member for more than two years was Appellate Judge Andrea Saenz. Judge Saenz had been listed in a New York Post “hitlist” in the fall of 2024 as a “radical leftist” because she previously worked at a public defender’s office.⁵ Thus, before President Trump was even elected, conservative groups had placed her, and other federal employees who once defended immigrants, on a list of federal staff to fire on ideological grounds. Similarly, at least two other BIA members, Judge Homero Lopez,⁶ and Judge Beth Liebmann⁷ were designated as “targets” on a Heritage Foundation DHS Bureaucrat Watchlist; Judge Lopez and Judge Liebmann were also summarily terminated by the Trump administration.

A review of the Wayback Machine, shows that in November of 2024, there were 28 BIA members, the number provided for by regulation.⁸ By March 20, 2024, three weeks, before the instant IFR was even issued, the number of BIA members had dropped to 14.⁹ Clearly, the reduction of BIA members was not a reasoned regulatory decision, but rather a move to insulate the administration from litigation for ideological firings, otherwise the agency’s decision to

³ Kate Morrissey, Trump Administration Fires Immigration Judges as It Tries to Ramp Up Deportations, Feb. 25, 2025, <https://capitalandmain.com/trump-administration-fires-immigration-judges-as-it-tries-to-ramp-up-deportations/>

⁴ Ximena Bustillo, Trump fires more immigration judges even as he aims to increase deportations, NPR, Apr. 22, 2025, <https://www.npr.org/2025/04/22/nx-s1-5372681/trump-immigration-judges-fired>. (“The judges who received the notices weren’t given a reason for the terminations.”)

⁵ Ryan King, Conservative watchdog unveils list of ‘radical leftist’ officials it wants Trump to fire if elected, New York Post, Oct. 23, 2024, <https://nypost.com/2024/10/23/us-news/american-accountability-foundation-unveils-list-of-radical-leftist-officials-it-wants-trump-to-fire-if-elected/>.

⁶ Heritage Foundation, DHS Bureaucrat Watchlist, <https://www.dhswatchlist.com/targets/homero-lopez>.

⁷ Heritage Foundation, DHS Bureaucrat Watchlist, <https://www.dhswatchlist.com/targets/beth-liebmann>.

⁸ Wayback Machine, <https://web.archive.org/web/20241208082446/https://www.justice.gov/eoir/board-of-immigration-appeals#board>.

⁹ Wayback Machine, <https://web.archive.org/web/20250323082049/https://www.justice.gov/eoir/board-of-immigration-appeals#board>.

reduce the size of the BIA would have pre-dated the firing of BIA members. Nowhere does the IFR discussion mention that the agency purged BIA members hired under Biden before it issued this rule.¹⁰

2. Reducing the Size of the BIA When There Are Record EOIR Backlogs Is Arbitrary and Capricious

In addition to the highly irregular process EOIR used to remove qualified BIA members, it is also arbitrary and capricious to downsize the administrative appellate court when there are record backlogs before EOIR. In the last quarter of 2024, there approximately 4 million cases pending before EOIR.¹¹ Indeed, the acting director of EOIR has used the backlog to attempt to justify denying asylum seekers the right to a hearing on their cases by pretermittting their cases, in disregard of their rights under domestic and international law.¹² This approach—of reducing the number of required adjudicators rather than increasing it—seems to be aligned with President’s Trump preferred tactic of simply curtailing noncitizens’ rights rather than ensuring the federal government has the resources to adjudicate cases¹³ and provide due process as required under the U.S. Constitution.¹⁴ As the National Immigration Project continues to hear about Immigration and Customs Enforcement agents removing noncitizens with cases pending at an Immigration Court and at the BIA, this move to limit the size of the BIA suggests that the goal is to keep noncitizens in legal limbo long enough for ICE to remove them. This legal limbo goal is also reflected in the administration’s pause on all pending benefit requests for parolees under the Uniting for Ukraine process (U4U), Cuban Haitian Nicaraguan and Venezuelan (CHNV) Parole Programs, and the Family Reunification Parole (FRP) process.¹⁵

The IFR includes no statistical analysis about how the number of BIA members has affected the number of cases adjudicated. Instead, it makes a vague and wholly unsupported statement that “the data available do not conclusively demonstrate that the increased Board size will lead to

¹⁰ 90 Fed. Reg. 15525-28.

¹¹ EOIR, Adjudication Statistics, Apr. 4, 2025, <https://www.justice.gov/eoir/media/1344791/dl?inline>.

¹² Sirce Owen, Pretermission of Legally Insufficient Applications for Asylum (Apr. 11, 20205)

<https://www.justice.gov/eoir/media/1396411/dl?inline>

¹³ Ximena Bustillo, Trump fires more immigration judges even as he aims to increase deportations, NPR, Apr. 22, 2025, <https://www.npr.org/2025/04/22/nx-s1-5372681/trump-immigration-judges-fired>. (“We cannot give everyone a trial, because to do so would take, without exaggeration, 200 years,” Trump posted on social media on Monday. “We would need hundreds of thousands of trials for the hundreds of thousands of Illegals we are sending out of the Country. Such a thing is not possible to do.”)

¹⁴ See John Kruzel, Trump says he's unsure whether people in the US are entitled to due process, REUTERS (Mar. 5, 2025) <https://www.reuters.com/world/us/trump-says-hes-unsure-whether-people-us-are-entitled-due-process-2025-05-04/>. (“President Donald Trump said he was unsure whether people in the U.S. are entitled to due process rights guaranteed in the U.S. Constitution as his administration pushes aggressively to deport immigrants who are in the country illegally and other non-citizens.”).

¹⁵ USCIS, Administrative Hold on All USCIS Benefit Requests filed by Parolees Under the Uniting for Ukraine (U4U) Process, Processes for Haitians, Cubans, Nicaraguans, and Venezuelans (CHNV) Process, or Family Reunification Parole (FRP) Process (Feb. 14, 2025) https://www.uscis.gov/sites/default/files/document/foia/AdministrativeHoldonAllUSCISBenefitRequestsFiledbyParoleesUnderU4U_CHNVorFRP.pdf.

increased case adjudications.”¹⁶ Yet, in 2024,¹⁷ 2020,¹⁸ and 2018,¹⁹ EOIR took the opposite position—that adding more BIA members was necessary to address backlogs. EOIR’s only explanation for taking a completely different position now from its prior three rulemakings, is that it did not adequately consider several comments from prior rulemakings which stated that “expanding the Board’s size would do little to address its pending caseload.”²⁰ The current IFR does not explain why EOIR previously found these comments unconvincing, how many such comments there were, who the commentators were, and what the countervailing arguments were. Nonetheless, it arbitrarily relies on those comments to adopt a completely different position from the one it has advanced during the past three rulemakings. This unjustified reversal in the position the agency has taken over the past ten years is arbitrary and capricious.

The IFR also includes vague references to the effect of the BIA’s size on “the cohesiveness of the Board’s decision-making process and the collegiality among Board members.”²¹ This statement appears to refer to the fact that some of the BIA members hired under the Biden administration came from a background of representing noncitizens, presumably making the BIA less “cohesive” since there may have been differing interpretations of various legal issues. However, it is not clear if that is what is meant by the IFR because, again, there is no comprehensible explanation for what is meant by the justification for reducing the BIA. In any event, as the BIA website says, the BIA is “directed to exercise its independent judgment in hearing appeals.”²²

The IFR goes on to blame the increased number of BIA members for a decrease in the number of published decisions issued by the BIA. But, again, it does not explain how, in a world that is fully connected by the internet, having several more voting members would lead to the inability to decide whether a specific opinion should be issued as a precedent. If what EOIR means is that there was some diversity of perspective on the BIA which led to some discussions about what opinions were well enough reasoned to become nation-wide precedent, EOIR should welcome such discourse. Scholars have emphasized that in addition to creating a judiciary²³ that reflects the demographics of the United States, judicial positions should be held by individuals from varying backgrounds who hold different beliefs to deepen the level of judicial decision-making.²⁴

¹⁶ 90 Fed. Reg. 15526.

¹⁷ 89 FR 22630 (Apr. 2, 2024).

¹⁸ 85 FR 18105 (Apr. 1, 2020).

¹⁹ 83 FR 8321, 8321–22 (Feb. 27, 2018).

²⁰ 90 Fed. Reg. 15526.

²¹ *Id.*

²² BIA website, (updated Apr. 21, 2025) <https://www.justice.gov/eoir/board-of-immigration-appeals>.

²³ The BIA is, of course, a division of the executive branch, and BIA members are not Article III judges, but the stakes in immigration law are so high that the public deserves a thoughtful and open-minded immigration adjudication system. *See, Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.” (Internal quotation marks omitted)).

²⁴ Iuliano, Jason and Stewart, Avery, *The New Diversity Crisis in the Federal Judiciary*, at 264-265 (January 26, 2017). TENNESSEE LAW REVIEW, SSRN: <https://ssrn.com/abstract=2906531>. (“Scholars believe that exposure to deep-level differences encourages group members to view problems from alternative perspectives and to reexamine their initial lines of thought. This, in turn, leads groups to reach better, more reasoned solutions.” (Internal citations omitted.)).

The IFR then claims that having an even number of appellate judges is problematic because an occasion may arise where there is a tie in a vote as to whether or not to issue a case as precedent.²⁵ Yet the IFR does not cite to a single instance where there actually has been an even split in voting since the BIA increased to 28 members. Furthermore, the IFR could have chosen an odd number closer to then current number of BIA members: 27 or 29. This minor change would have avoided the allegations and lawsuits that the administration is likely facing as a result of the firings.

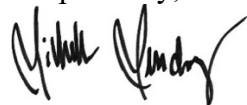
Another justification for decreasing the number of BIA members is that the BIA's hiring of attorney advisors and support staff has not kept up with its hiring of BIA members.²⁶ While it is logical that adding support staff could help decrease the backlogs, the agency is currently engaging in rulemaking—if the agency believes that more attorney advisors and support staff are needed, it should add those positions rather than cutting the adjudicator positions.

This IFR does not adequately explain how reducing the number of BIA members would increase productivity by the BIA. Instead, it relies on vague, unsubstantiated statements, with no analysis grounded in facts or numbers. The IFR appears to be completely results-driven: having already removed Biden-appointed BIA members, EOIR now seeks to justify that action. Rulemaking must be based in facts, sound reasoning, and analysis; this IFR is based on none of those things.

Conclusion

In closing, the National Immigration Project strongly opposes this IFR and urges EOIR to rescind it in its entirety and restore the prior BIA members who were unjustifiably dismissed. Please contact Michelle N. Méndez at michelle@nipnlg.org if you have any questions or need any further information. Thank you for your consideration.

Respectfully,



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²⁵ 90 Fed. Reg. at 15527.

²⁶ *Id.*