

The Time Is Now for an Independent Immigration Court

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Recent events have created an urgent need for an independent Immigration Court separate from the Department of Justice. On October 17, Proskauer hosted a panel discussion in its New York office co-sponsored by Sanctuary for Families, the New York Immigration Coalition, and the Federal Bar Association's Immigration Law Section entitled, "Lives in the Balance: Eviscerating Asylum Protection for Victims of Gender Violence." The speakers included The Hon. Carolyn Maloney, U.S. Representative from New York's 12th Congressional District, the Hon. Amiena Khan, Executive Vice President, National Association of Immigration Judges, Lori Adams, Director, Immigration Intervention Project at Sanctuary for Families, and Lisa Koenig, a Partner at Fragomen.

The immigration lawyers on the panel provided different perspectives on [Matter of A-B](#), a consequential decision from last summer where the Attorney General purported to overrule Immigration Court precedent, and thereby limit the availability of domestic violence as a basis for asylum. Aside from placing the law on asylum in flux, the AG's action raises the important question of how a cabinet-level, executive branch official could claim the authority to reverse a court's decision.

The Immigration Court, in fact, defies this nation's fundamental tradition of separation of powers and checks and balances. The Court is housed within the Department of Justice, and immigration judges are DOJ employees hired by the Attorney General. According to [federal regulation](#), the Board of Immigration Appeals "shall refer to the Attorney General for review of its decision all cases . . . the Attorney General directs the Board to refer to him." Although the power to certify and review cases has been used sparingly in the past, Attorney General Sessions appears to be using this power [with more frequency](#) to implement the administration's policy objectives.

The lack of adjudicative independence has severely compromised the Immigration Court's ability to ensure due process. These judges do not have the power to hold lawyers who appear before them in contempt, and, at the direction of the Attorney General, are restricted in granting continuances, even where parties are in the process of obtaining legal counsel. Indeed, recently, after granting a continuance, a Philadelphia-based immigration judge was removed from a high profile case and replaced with a Virginia-based supervisor. In response, the National Association of Immigration Judges, which is the union representing immigration judges, [filed a grievance](#) claiming the action "subverted the judicial process." The integrity of the Court has been further threatened by the Attorney General's direction, as reported in [the New York Times](#), that each judge (despite serious resource limitations) must complete 700 cases per year in order to receive a "satisfactory" performance rating.

Why is this issue so important? The Immigration Court cannot simply serve, in the words of the [American Immigration Lawyers Association](#), as a "cog" in the Administration's "deportation machine." [The Supreme Court has made clear](#) that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent." The only effective means to ensure due process is to restructure the Immigration Court so that – like the Tax Court, for example – it can maintain its independence. Thus, [as recommended by the American Bar Association](#) and others, immigration judges should not be selected by the Attorney General and serve under his direction and control. They should serve on an independent Court and be given adequate resources to decide cases on the merits. (Currently there is a backlog of approximately [750,000 cases](#) for [350 judges](#).) Finally, their decisions should not be reviewed by the Attorney General but instead simply reviewed by an appellate level immigration court followed by the Federal Courts of Appeals.

An independent judiciary — especially as it relates to the life and death decisions of immigration judges — is essential to a free society. Anything less not only compromises basic fairness in individual cases but undermines public confidence in our institutions and threatens the rule of law.

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