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Submitted via <https://www.regulations.gov/document?D=EOIR-2019-0003-0001>

**Re: Comments in Response to Organization of the Executive Office for
Immigration Review, Dkt. No. EOIR-2019-0003-0001, 84 Fed. Reg. 44,537**

Dear Ms. Reid:

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to the interim final rule (IFR) Organization of the Executive Office for Immigration Review. The IFR, which was published in the Federal Register on August 26, 2019, broadly makes five types of changes to the Executive Office for Immigration Review (EOIR): It (1) imposes strict timelines on the Board of Immigration Appeals; (2) allows the EOIR Director to resolve appeals not decided in accordance with that timeline; (3) formalizes the establishment of the Office of Policy within EOIR; (4) moves the Office of Legal Access Programs (OLAP) into the Office of Policy; and (5) redesignates members of the Board of Immigration Appeals as “appellate immigration judges.”

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) throughout the past twenty-one years. Our clients endure unimaginable atrocities such as human trafficking, domestic violence, forced marriage, honor crimes, and sexual assault.

As explained in detail below, the IFR violates the due process rights of Tahirih’s clients and countless other asylum seekers, continues the unwarranted transformation of EOIR from an essentially judicial system into a political tool used to speed removals from the United States, and was issued in violation of the notice-and-comment requirements of the Administrative Procedure Act (APA). In short, the IFR is both illegal and ill-conceived. It should therefore be withdrawn immediately and in its entirety.

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I. The Timelines Imposed on the BIA, and the Newfound Authority of the EOIR Director to Decide Appeals, Violate Due Process, and Turn the BIA Into a Sham Court

The IFR imposes strict deadlines on BIA members and gives the EOIR Director the authority to decide individual cases if those timelines are not met. Both of these features severely undermine any notion that the BIA is composed of independent judicial decision-makers, and both violate the due process rights of immigrants who bring appeals before the BIA. In addition, the delegation of decision-making authority to the EOIR Director represents a policy about-face that is not adequately explained in the IFR.

A. The timeline in the IFR is inappropriate and illegal

The IFR imposes a strict timeline on the BIA's adjudication of appeals—single member have only 90 days to decide cases, while three-member panels have 180 days. 84 Fed. Reg. at 44,539. Such strict timelines have no place in a court system. Judicial independence requires that judges be able to take whatever time is necessary to reach the correct and just result in each individual case before them. Arbitrary deadlines, however, force judges to premise speed over accuracy and justice. It is therefore no wonder that, to our knowledge, no federal court in the United States has previously been subject to deadlines for acting in all of its cases.¹

The timeline in the IFR also violates fundamental principles of due process. The Supreme Court made clear decades ago that all immigrants “within the territory of the United States,” a category that includes anyone in lawful proceedings before the immigration courts, are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). And “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Kaley v. United States*, 571 U.S. 320, 357 (2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (emphasis added). The IFR's assembly-line approach to appellate adjudication will significantly impair the ability of asylum seekers and others to receive a meaningful hearing on appeal by preventing judges from devoting significant time and thought to any case, no matter how complex.

Survivors of GBV will be particularly disadvantaged by this approach, because their cases are notoriously complicated and require thorough and careful analysis. This is the result of a historically cis-male centered lens through which all asylum cases have inappropriately been, and continue to be, viewed. On average, *pro bono* attorneys representing survivors in defensive

¹ To be sure, Congress occasionally imposes timelines that cover narrow classes of cases. See, e.g., 28 U.S.C. § 1453(c)(2) (review of remand orders under the Class Action Fairness Act). But that simply chooses certain cases for prioritization—and, as a legislative body, Congress is entitled to implement its priorities in this way.

asylum cases through Tahirih spend 300 hours during their first year of representation. These cases often involve persecution inflicted by family members such as honor crimes, forced marriage, and domestic abuse. Judges frequently misconstrue or dismiss these forms of persecution as “personal” or “private” in nature that applicants can readily flee from internally, even where a government routinely refuses to protect survivors from these harms. Pervasive social stigmas around reporting GBV are also common, which further complicates survivors’ ability to obtain objective corroboration for their claims.

Unsurprisingly, an application of the governing test for due-process challenges demonstrates that the IFR’s timeline violates immigrants’ due process rights. That test weighs (1) “the private interest that will be affected” by a government action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute procedural safeguards”; and (3) “the Government’s interest.” *Mathews*, 424 U.S. 319 at 334-35. Here, all the weight is on one side of the scale.

As an initial matter, because the BIA renders decisions on whether individual immigrants are removed from the United States, the private interest at stake is literally life or death. The Supreme Court has repeatedly recognized that removal “may result in poverty, persecution, and even death” (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and of “life” or “all that makes life worth living” (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is true of asylum seekers, who are, by definition, seeking protection from persecution. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). And it is particularly true of survivors of gender-based violence, who form a vulnerable population not protected by the governments of many countries. See, e.g., U.S. Dep’t of State, Guatemala 2018 Human Rights Report 16 (2018) (“Guatemala Report”), <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>; U.S. Dep’t of State, El Salvador 2018 Human Rights Report 16 (2018), <https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf>; Amnesty International, Mexico 2017/2018, <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>; U.S. Dep’t of State, Haiti 2018 Human Rights Report 19-20 (2018), <https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf>; U.S. Dep’t of State, Saudi Arabia 2018 Human Rights Report 44 (2018), <https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf>; U.S. Dep’t of State, Kenya 2018 Human Rights Report 23 (2018), <https://www.state.gov/wp-content/uploads/2019/03/KENYA-2018.pdf>.

Decisions with such life-or-death consequences must include appropriate safeguards. The timeline imposed by the IFR does not.² Because that timeline will rush members of the BIA to ill-

² Far from constituting a safeguard, the use of the EOIR Director to decide cases not otherwise disposed of in the IFR’s timeframe represents an additional violation of due process. See Section I.B, *infra*.

considered decisions, it will unquestionably result in increased error rates in BIA determinations. This, in turn, means that it will result in increased numbers of erroneous removals from the United States—*i.e.*, *refoulement*—in direct violation of our obligations as a signatory to the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees. And a simple, straightforward alternative would prevent this increase—the BIA could simply decide cases, as it has been deciding cases since its inception, without a mandatory timeline.

The IFR makes no effort at all to even enunciate countervailing interests, and any such interests are trivial. EOIR might believe that strict deadlines are necessitated by the current backlogs in immigration court and at the BIA. Those backlogs, however, have not been caused by immigrants seeking relief. Rather, they have been manufactured by the government itself. Most notably, the Attorney General added “330,211 previously completed cases” to “the ‘pending’ rolls” (TRAC, *Immigration Court Backlog Surpasses One Million Cases*, <https://trac.syr.edu/immigration/reports/536>) with the stroke of a pen by precluding immigration judges from administratively closing cases in *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). The Attorney General lacked the authority to do so: As the U.S. Court of Appeals for the Fourth Circuit recently held, DOJ’s own regulations expressly preclude his action. *See Zuniga Romero v. Barr*, 4th Cir. No. 18-1850, Dkt. 50 (Aug. 29, 2019). EOIR is thus responding to a problem caused by one illegal fiat restricting the authority of immigration judges to manage their dockets by issuing another illegal fiat restricting the authority of BIA members to manage their dockets.

EOIR might also believe that the timeline is necessary to reduce the costs associated with detaining individual immigrants during the entire pendency of their removal proceedings. But the practice of detaining immigrants for that period is itself unconstitutional. *See, e.g., Padilla v. ICE*, ___ F.3d ___, 2019 U.S. Dist. LEXIS 110755 (W.D. Wash. July 2, 2019). Any reasoning along these lines would therefore improperly invoke one due process violation to justify another due process violation. The timeline set forth in the IFR therefore should accordingly be revoked.

B. The arrogation of judicial authority to the EOIR Director is illegal and inappropriate

The IFR does contain an alternative mechanism for deciding cases if the BIA does not meet the IFR’s deadlines—but it is an alternative that hands decision-making authority to an unqualified functionary, further undermines both judicial independence and due process, and violates the APA. The IFR “delegates * * * to the Director” the authority “to adjudicate BIA cases that have otherwise not been adjudicated in a timely manner under the regulations.” 84 Fed. Reg. at 44,539-40. This arrogation of judicial authority to an administrator cannot stand.

BIA members, dependent though they are on the Attorney General, are judges and must be attorneys. 8 C.F.R. § 1003.1(a)(1). They have experience adjudicating cases and expertise in specific areas on immigration law. The EOIR Director, in contrast, is not a judge. To the contrary, the Director's core functions involve administering EOIR and communicating with Congress, the bar, and other stakeholders. EOIR, *Office of the Director*, <https://www.justice.gov/eoir/office-of-the-director>. Nothing about the core competencies necessary to carry out those functions so much as weakly implies that the Director is also able to decide individual appeals. In short, unlike BIA members, the Director is a mere administrative functionary unqualified to render decisions in individual cases.

The use of the Director to resolve cases also undermines the independence of BIA members in the same way as the timeline in the IFR. Like the timelines, the Director's novel authority renders BIA members less independent than any other federal judge; no other federal tribunal is overseen by an individual whose position is by definition administrative. The message to members is unmistakable: You have no special qualifications or purpose. As a result, if you fail to decide a case—no matter how complex, and no matter how significant the interests at stake—in a set time frame, a functionary will do the job for you.

The use of the Director to resolve cases also independently violates the due process rights of survivors and other immigrants. The private interest at stake is the same as when the BIA decides cases: individual lives and livelihoods. Further, there can be no question that having an administrative figure who is not experienced in adjudicating immigration cases decide those cases will result in a sharply increased rate of error. In particular, more asylum seekers who have satisfied all of the prerequisites for relief will be improperly removed to face persecution in their home countries. And this inevitable result can be avoided by the commonsense mechanism of simply allowing BIA members to do their jobs.

In addition to violating due process, the delegation of judicial decision-making authority to the Director also violates the APA. As the IFR acknowledges, prior 8 C.F.R. § 1003.0(c) expressly prohibited the Director from deciding individual appeals. And where, as here, an agency knowingly makes a change to preexisting regulations, it must provide a reasoned, non-arbitrary explanation for that change. *FCC v. Fox TV Stations, Inc.*, 566 U.S. 502 (2009). The IFR does not do so.

In fact, there is no reasoned explanation in the IFR at all. The IFR includes assertions intended to show that the Attorney General cannot decide pending cases. But those assertions cannot justify handing decision-making authority to the Director, because the Attorney General has already delegated his authority to decide individual cases to the BIA. See 8 C.F.R. § 1003.1. Further, the IFR includes no reasoning at all to explain why the Director, rather than a BIA member or anyone else, should be given that authority instead. In particular, although the IFR claims that

the Director, unlike the Attorney General, has the time to decide cases, that supposed rationale applies to any number of people. That failure to adequately explain the IFR's chosen method of adjudication renders arbitrary its arrogation of authority to the Director.

The IFR does suggest that the Director has previously decided cases in the form of "certain reconsideration decisions of the OLAP director." 84 Fed. Reg. at 44,540. The IFR does not, however, present this information as an affirmative reason for giving the Director authority over adjudications. Moreover, any attempt to do so would be improper. The Director has previously had authority only to make determinations concerning recognition and accreditation—*i.e.*, determinations concerning who may practice before EOIR. That authority is well within the administrative role in which the Director has previously served. The authority to decide individual immigration appeals on the merits, in contrast, lies far afield from that role. Any attempt to use the Director's preexisting authority to decide certain recognition and accreditation issues as a rationale for the expansion of his authority in the IFR would therefore be arbitrary.

Even the IFR's cursory statement as to why the authority to decide cases is being moved to *someone* other than the Attorney General fails to pass muster. The IFR claims that the Attorney General is too busy to decide cases. 84 Fed. Reg. at 44,539. But that says nothing about why someone else must have the authority to do so. Presumably, EOIR expects BIA member to follow the timelines added in the IFR. If they do so, the backstop of giving decision-making authority to the Director is entirely unnecessary. And nothing in the IFR explains why this seemingly unnecessary action is warranted under the circumstances.

II. The IFR's Changes to the Office of Policy Further Undermine Judicial Independence

The provisions in the IFR concerning non-adjudicatory EOIR components are no more appropriate than the provisions concerning the BIA. In particular, an agency whose core function involves judicial decision-making in individual cases has no need for—and should not have—an Office of Policy. And the placement of OLAP in that office improperly politicizes both the representation of immigrants and EOIR's recognition and accreditation decisions.

A. EOIR does not need, and should not have, an Office of Policy

According to the IFR, the role of the Office of Policy is to "issue operational instructions and policy, administratively coordinate with other agencies, and provide for training to promote quality and consistency in adjudications." 84 Fed. Reg. at 44,538. In particular, the IFR gives to the Office of Policy the tasks of "supervis[ing] all policy activities of EOIR," "oversee[ing] EOIR's regulatory development and implementation process," and "supervis[ing] and coordinat[ing]

EOIR’s internal development, dissemination, and implementation of policy guidance.” *Id.* at 44,541. These are not functions appropriately exercised by any judicial or quasi-judicial body.

The core of judicial independence is that judges must be free to exercise their decision-making authority without outside influence. But the IFR enshrines exactly such influence into law: It tells the Office of Policy to create uniform standards that *must* be applied by all immigration judges and BIA members when they interpret and apply the Immigration and Nationality Act. The preferences of EOIR’s Director—and the executive branch—are thus made paramount, a card to trump any notion of judges rendering individual, independent decisions. The core functions delineated for the Office of Policy are therefore not ones that EOIR should exercise at all, much less from a centralized, dedicated office.

Even assuming for the sake of argument that EOIR can properly engage in broad, policy-oriented tasks, those tasks should be placed within the Office of General Counsel (OGC) and not in a freestanding Office of Policy. As is standard in federal agencies, OGC houses professional experts in immigration law and procedure. The Office of Policy, in contrast, has proven to be a political arm of EOIR—as shown by its promulgation of an unprecedented and illegal asylum ban that seeks to undermine decades of established law. *See* EOIR & U.S. Citizenship and Immigration Services, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019). And the IFR’s claims that OGC cannot handle regulatory duties because it is overwhelmed with other matters are unsupported by any evidence.

To be sure, the IFR also grants the Office of Policy the authority to undertake *other* tasks—but those tasks can be, and have been, housed in other EOIR components. *See* 44 Fed. Reg. at 44,538-39. In particular, the authority to administer OLAP—including the subsidiary authority to render decisions on accreditation—can and has been housed in the Office of the Director. *See id.* at 44,537. The Office of Policy, like the time limits and the Director’s newfound decision-making authority, is thus an anomaly. It should be excised from EOIR.

B. OLAP Should Not Be Moved to the Office of Policy

Ironically, the IFR calls a different part of the agency—OLAP—“anomalous.” 84 Fed. Reg. 44,539. But OLAP is no anomaly. Rather, as a longstanding effort to ensure that immigration court proceedings fulfill the dictates of due process by promoting increased legal representation of immigrants as well as government efficiency, OLAP represents a crucial part of the long American tradition of encouraging representation of indigent litigants. And the recognition and accreditation functions exercised by OLAP have an even longer pedigree; those functions have been exercised by the Department of Justice for over 60 years.

Although OLAP itself serves a well-established, traditional function, the IFR's placement of OLAP in the Office of Policy is nonsensical. The provision of legal services to immigrants and decision-making in the realm of recognition and accreditation have nothing to do with "regulatory development and implementation." 44 Fed. Reg. at 44,541. OLAP's functions are therefore not policy functions; they are administrative functions.

Moreover, just as the Director of EOIR is not qualified to render substantive judicial decisions, the Assistant Director for Policy is not qualified to make decisions on the recognition and accreditation of legal representatives. Indeed, placing recognition and accreditation functions in the same office now officially tasked with issuing EOIR-wide policies strongly implies that recognition and accreditation decisions will henceforth be political rather than a reflection of the qualifications of applicants. Even the appearance of politics in OLAP will taint its ability to provide services. As a result, even if EOIR makes the deeply unwise decision to retain an Office of Policy, the placement of OLAP in that office should be reversed.

III. Other Changes in the IFR Degrade Agency Professionalism and Undermine Judicial Independence

Two other changes in the IFR will also advance the inappropriate transformation of EOIR from a professional, quasi-judicial agency into a political organ.

First, the IFR prevents OGC from giving any advice that could affect the outcome of an individual case. *See* 84 Fed. Reg. at 44,538-39. Like both the transfer of power from BIA members to the Director and the enshrinement of the Office of Policy, this transfers authority from expert professionals to political newcomers. Until now, OGC has routinely consulted with attorneys at the Office of Immigration Litigation regarding case-specific issues and determinations. OGC has, for example, consulted on whether the government will prosecute appeals to the BIA and defend against petitions for review filed in the federal courts of appeals. OGC staff have also routinely consulted on proposed settlement agreements in individual cases. The IFR prevents EOIR from capitalizing on this expertise, and on OGC's extensive institutional knowledge, by transferring these functions to the Office of Policy and the Director. *See id.* The IFR, in other words, again inexplicably transfers functions to less-qualified, more-politicized individuals.

Second, the change in the title given to members of the BIA serves to reinforce the subsidiary, non-judicial status they receive in the IFR. The previous title of "Board member" implied, correctly, that the Board was the highest adjudicatory mechanism within EOIR (and, except in the exceptional case referred to the Attorney General, within the Department of Justice). The change to "appellate immigration judge," in contrast, makes clear that although BIA members may continue to review the work of immigration judges, they are now subservient to the Director.

The Director, not the BIA members, is now the final judicial authority within EOIR. The IFR thus does not simply change the nomenclature applied to BIA members; it effectively demotes them.

IV. The IFR Violates the Notice-and-Comment Requirements of the APA

In addition to its myriad substantive deficiencies, the IFR violates the procedural requirements of the APA. Generally speaking, an agency must “give interested persons an opportunity to participate in the rule making” before publishing a final rule. 5 U.S.C. § 553(c). The IFR asserts that it is exempt from this notice-and-comment procedure as “a rule of management or personnel” and “a matter of agency organization, procedure or practice.” 84 Fed. Reg. at 44,540 (citing 5 U.S.C. § 553(a)(2) & (b)(A)). It is neither.

The IFR does not constitute a rule “dealing solely with ‘agency management and personnel’” (*Nat’l Treas. Employees Union v. Weise*, 100 F.3d 157, 160 (D.C. Cir. 1996) (quoting 5 U.S.C. § 553(a)(2))), because it imposes new requirements on the decision-making processes of the BIA. The IFR is also not a so-called procedural rule—*i.e.*, a matter of agency organization, procedure, or practice—within the meaning of 5 U.S.C. § 553(b)(A). To qualify as procedural, a rule cannot “alter the rights or interests of parties” before an agency. *E.g.*, *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (internal quotation marks omitted). The IFR, however, alters the substantive rights of immigrant petitioners both by removing their right to have a full and fair hearing before an impartial judicial decision-maker on appeal and by making it less likely that they can vindicate their right to counsel.

In any event, the IFR would be procedurally defective even if it were a “matter of agency organization, procedure or practice” under § 553(b)(A). The IFR states that it is exempt from the requirement that rules be published thirty days before their effective date. But the APA does *not* exempt matters of agency organization, procedure or practice from that requirement. *See* 5 U.S.C. § 553(d)(2). To the contrary, “[f]inal publication or service, thirty days prior to the rule’s effective date, applies even to” such rules. *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980).

For all of these reasons, we urge EOIR to promptly rescind the IFR in its entirety.

Sincerely,



Richard Caldarone
Litigation Counsel