



NAIJ HAS GRAVE CONCERNS REGARDING IMPLEMENTATION OF QUOTAS ON IMMIGRATION JUDGE PERFORMANCE REVIEWS

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**Prepared for the Senate Judiciary Committee Oversight Hearing on the
Department of Justice**

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WHO ARE WE?

The National Association of Immigration Judges (NAIJ) is a voluntary organization of United States Immigration Judges. It also is the recognized representative of Immigration Judges for collective bargaining purposes. Our mission is to promote the independence of Immigration Judges and enhance the professionalism, dignity, and efficiency of the Immigration Courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security are conducted. We work to improve our court system through educating the public, legal community and media, testimony at congressional oversight hearings, and advocating and lobbying for immigration court reform. We also seek to improve the court system and protect the interests of our members, collectively and individually, through dynamic liaison activities with management, formal and informal grievances, and collective bargaining. In addition, we represent Immigration Judges in disciplinary proceedings, seeking to protect Judges against unwarranted discipline and to assure that when discipline must be imposed it is imposed in a manner that is fair and serves the public interest.

WHOSE VIEWS DO WE REPRESENT?

The NAIJ Representatives are speaking in their official NAIJ capacities and not as employees or representatives of the U.S. Department of Justice, Executive Office for Immigration Review. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the authors' personal opinions, which were formed after extensive consultation with the membership of NAIJ.

PRACTICAL REALITIES OF COURT PROCEEDINGS

The immigration courts are a high-stakes, high volume court system. For some who appear before us, their case is tantamount to a death penalty case, as some respondents face torture or death if returned to their homelands. For others, these proceedings can result in banishment and permanent exile from the only home they have known during years of lawful residence.

Moreover, immigration law is repeatedly characterized by federal circuit courts of appeal as being second only to the tax code in its complexity, and one court even stated: “[a] lawyer is often the only person who could thread the labyrinth.”ⁱ Despite everyone recognizing the complexity of the law and procedure, 40% of the individuals who appear before our courts have no legal representation.ⁱⁱ That number is surprising since even the Office of the Chief Immigration Judge recommends that all individuals in proceedings before the Immigration Court retain qualified professional representation in light of the “complexity of the immigration and nationality laws.”ⁱⁱⁱ Removal proceedings are fundamentally asymmetrical for pro se litigants due to the fact that the United States is always represented by counsel.

Despite a highly complex body of law and many pro se litigants, an Immigration Judge lacks many of the tools traditionally available to judges. We have never been able to exercise the contempt authority statutorily authorized for us by Congress in 1996 because implementing regulations have never been issued. Last year, 90% of the cases in our courts were conducted in a language other than English, through a foreign language interpreter.^{iv} Most of the time, we have no bailiffs in the courtroom, no clerk and only access to ½ of a judicial law clerk’s time. Notwithstanding these conditions, some judges routinely address 50 to 70 cases during a three-to four-hour time frame at the “master” (arraignment-type) calendar. With scarce resources, and frequently through use of a foreign language interpreter, Immigration Judges must obtain answers to critical questions that bear on an unrepresented respondent’s legal status and possible eligibility for relief. For example, the Immigration Judge must determine whether the respondent is a citizen of the United States. This is more difficult than most imagine, as the inquiry does not end with place of birth alone; the Immigration Judge may also need to consider information about the person’s parents and grandparents.^v Everyone - even children and mentally ill individuals – have no right to a free attorney and are expected to navigate the court system and understand the how the complexity of immigration law applies to them. In most cases, the focus and time spent in court centers on the possibility of relief from removal or eligibility for one or more waivers or benefits provided by the Immigration and Nationality Act. Many of these remedies have complicated prerequisites which are unfamiliar to the general public, so the judge must advise an unrepresented person as to what steps they must take to pursue relief.

IMMIGRATION COURT CASELOAD

Our nation's Immigration Courts are overwhelmed with cases.^{vi} There are currently more than 632,000 cases pending in the 58 court locations across the country.^{vii} In the last six years, the number of cases pending before the courts has more than doubled.^{viii} The Immigration Courts nationwide received 328,112 new cases in FY 2016 alone.^{ix}

As a result of the ballooning backlogs at the Immigration Courts, hundreds of thousands of immigrants will be left in a state of legal limbo for more than three years on average – some much longer. The many delayed courts experience wait times of five to six years.^x These wait times leave families of asylum seekers stranded abroad for years in dangerous or difficult situations, undermine recruitment of pro bono counsel, and add to the emotional and psychological stress for respondents who live in uncertainty. This lengthy limbo increasingly impacts respondent's family members who are United States citizens or lawful permanent residents, as mixed status families abound. Their futures which are intertwined with respondents are in limbo awaiting Immigration Judges' decisions as well.

Despite the sharp rise in the number of cases received, the court system is currently staffed with only 314 Immigration Judges on the bench (as approximately 20 judges are primarily or exclusively managerial or supervisory), a number which has been widely recognized as inadequate for more than a decade.^{xi} To put this in perspective, since 2000, the number of Immigration Judges has risen from 206 to today's 334, while the court's caseload hovered at about 150,000 to 200,000 in FY 2001 and 2002, and today it has surpassed a staggering 632,000.^{xii} In 2009 Immigration Judges were found to suffer more job stress and burnout than prison wardens and busy hospital doctors.^{xiii} One can only imagine how much worse this situation has become since this study was conducted.

THREATS TO DUE PROCESS AND JUDICIAL INDEPENDENCE LOOM: PERFORMANCE QUOTAS

Events at EOIR have taken a decidedly alarming turn with regard to the judicial independence of the judges. The Agency is now planning to evaluate judges' performance based on numerical measures or production quotas.

The most important regulation which governs immigration judge decision-making is 8 C.F.R. Section 1003.10(b). This regulation requires that immigration judges exercise judicial independence. Specifically, "in deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. Section 1003.10(b).

Judges were exempted from performance evaluations for over two decades. The basis for this exemption was rooted in the notion that ratings created an inherent risk of actual or perceived influence by supervisors on the work of judges, with the potential of improperly affecting the outcome of cases. In fact, it was because of the Agency's concerns that performance reviews could "interfere with protecting the judicial independence and integrity of the judges' decision" that immigration judges were exempted from performance reviews in 1991. See Letter of April 6, 1991 to Harry H. Flickinger, Assistant Attorney General for Administration, US Dept. of Justice from Claudia Cooley, Associate Director for Personnel Systems and Oversight, OPM. Other Administrative Law Judges are protected from any performance measurements under 5 U.S.C. § 4301(2)(D).

Attorney General Alberto Gonzales was able to get OPM to reverse that long standing rule in 2007 after many assurances as to the judicial independence of the judges were made. When requesting to lift this exemption, OPM was assured that EOIR could “respect the judicial independence and integrity of the . . . Immigration Judges . . . “and that “[t]he performance evaluation system that the EOIR would implement is neither designed nor intended to force these employees to reach particular results on the merits of their cases, but merely to ensure the highest standards of professional quality of their legal work.” Letter of February 23, 2007 to Barbara W. Colchao, Performance Management Group, OPM, from Rodney F. Markham, Deputy Director, Personnel Staff, JMD (Colchao Letter). Thus, the concern was to address the *quality* of decisions, not *quantity*.

When performance evaluations were created, the National Association of Immigration Judges negotiated in good faith with the Agency regarding how judges would be evaluated. A crucial aspect that the Agency consented to in the Collective Bargaining Agreement was a provision that prevented any rating of the judges to be based on number or time based production standards.

When a regulation allowing for the Director to set time frames was proposed, all public commenters expressed concerns with these provisions, specifically that “an official could direct the outcome of a specific case by setting an unyielding case completion goal which would prevent an immigration judge from taking the time necessary to adjudicate a case fairly” or that these priorities or time frames could abrogate the party’s right to a full and fair hearing. 72 Fed. Reg. 53673 (Sept. 20, 2007). The Department responded that the use of time frames and priorities was “well established” and “individual judges set hearing calendars and prioritize cases. Within each judge’s parameters for calendaring a case, that judge will take the time necessary for the case to be completed.” *Id.* This response is misleading if time frames are now to be used to measure immigration judge performance. A judge’s concern in getting a passing performance review may trump his or her concern to take the time necessary to assure due process.

EOIR has now reopened the Immigration Judges’ Collective Bargaining Agreement with the express intention to strike that language. As a matter of labor law, the NAIJ cannot prevent EOIR from imposing numerical performance standards on Judges, since we are “employees” of the Department of Justice and not Article 1 court judges.^{xiv}

While the Director clearly has the authority to “direct the conduct of all employees” to “set priorities or time frames” for the resolution of cases, 8 C.F.R. Section 1003.0(b) (1) (ii), previous EOIR Directors have done so in setting ‘case completion goals’ and other measures that were allegedly used as “resource allocation tools,” to determine where more judges and staff were needed, not to measure individual judge performance. *See, e.g.,* 72 Fed. Reg. 53673 (Sept. 20, 2007) (agency response to commenters).

Tying numerical case completions to the evaluation of the individual judge’s performance evaluation specifically interferes with judicial independence and clearly will put Immigration Judges in a position where they could feel forced to violate their legal duty to fairly and

impartially decide cases in a way that complies with due process in order to keep their jobs. In a recent case, the 7th Circuit Court of Appeals noted that focus on quantity would make quality of decisions decline. *Association of Administrative Law Judges, Judicial Council No. 1, IFPTE, AFL-CIO & CLC et al v. Colvin*, No. 14-1953 (7th Cir. 2015) slip op at 5, 7 (giving an example of how drastically limiting hearing time could “dangerously diminish” the quality of justice). The court stated that “[w]e can imagine a case in which a change in working conditions could have an unintentional effect on decisional independence so great as to create a serious issue of due process.” Adding any quantitative measure to performance review is counter-intuitive to the announced goals of such reviews to ensure “the highest professional quality” of decisions. Colchao Letter, *supra*.

After a remand from the Third Circuit Court of Appeals in *Hashmi v. Attorney General of U.S.*, 531 F.3d 256, 261 (3d Cir. 2008) (where the court found that “the Immigration Judge’s denial of the respondent’s final continuance request was arbitrary and an abuse of discretion because it was ‘based solely on case-completion goals,’ rather than the specific facts and circumstances of the case.”), the Board of Immigration Appeals issued a precedential decision, specifically mandating that “[c]ompliance with an Immigration Judge’s case completion goals however, is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances.” *Matter of Hashmi*, 24 I&N Dec. 785, 793-794 (BIA 2009).

The U.S. Department of Justice Office of the Inspector General issued “Management of Immigration Cases and Appeals by the Executive Office for Immigration Review” in October, 2012 (I-2013-001). As noted in this report, EOIR case completion goals are the standards against which to measure the courts’ ability to process cases. I-2013-001 at 19. There is no mention that these case completion goals should be used to assess judicial performance.

The regulation for the authority of the Director to “[p]rovide for performance appraisals for immigration judges” requires that in doing so he “fully respect [...] their roles as adjudicators.” 8 C.F.R. Section 1003.0(iv). The regulation goes on to state such evaluation can include “a process for reporting adjudications that reflect temperament problems or poor decisional quality,” so the concern was clearly with quality rather than quantity.

If EOIR is successful in tying case completion quotas to judge performance evaluations, it could be the death knell for judicial independence in the Immigration Courts. Judges can face potential termination for good faith legal decisions of which their supervisors do not approve. In addition, the nation’s Circuit Courts will be severely adversely impacted as they were when Attorney John Ashcroft implemented streamlining measures at the Board of Immigration Appeals, thereby causing a flood of cases in the higher courts. Should judges be subjected to performance metrics, the result will be the same and appeals will abound, repeating a history which was proven to be disastrous. Rather than making the overall process more efficient, this change will encourage individual and class action litigation, creating even greater backlogs.

There is no reason for the agency to have production and quantity based measures tied to judge performance reviews. The current court backlog cannot be attributed to a lack of

productivity on the part of Immigration Judges. In fact, the GAO report shows that Immigration Judge related continuances have decreased (down 2 percent) in the last ten years. GAO Report at 124. The same report shows that continuances due to “operational factors” and details of Immigration Judges were up 149% and 112%, respectively. GAO Report at 131, 133.^{xv} These continuances, where Judges were forced to reset cases that were near completion in order to address cases that were priorities of various administrations, have a tremendous impact on case completion rates.

The imposition of quotas or deadlines on judges can impede justice and due process. For example, a respondent must be given a “reasonable opportunity” to examine and present evidence. Section 240(b) (4) (B) of the Act. Given that most respondents do not speak English as their primary language and much evidence has to be obtained from other countries, imposing a time frame for completion of cases interferes with a judge’s ability to assure that a respondent’s rights are respected.

Not only will individuals who appear in removal proceedings potentially suffer adverse consequences, but also the public’s interest in a fair, impartial and transparent tribunal will be jeopardized by implementation of such standards.

THE SOLUTION

While it cannot be denied that additional resources are desperately needed immediately, resources alone cannot solve the persistent problems facing our Immigration Courts. The problems highlighted by the response to the recent “surge” underscores the need to remove the Immigration Court from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. Since the 1981 Select Commission on Immigration, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced.^{xvi} In the intervening years, a strong consensus has formed supporting this structural change.^{xvii} For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now “[m]ost immigration judges and attorneys agree the long term solution to the problem is to restructure the immigration court system....”^{xviii}

The time has come to undertake structural reform of the Immigration Courts. It is apparent that until far-reaching changes are made, the problems which have plagued our tribunals for decades will persist. For years NAIJ has advocated establishment of an Article I court. We cannot expect a different outcome unless we change our approach to the persistent problems facing our court system. Acting now will be cost effective and will improve the speed, efficiency and fairness of the process we afford to the public we serve. Our tribunals are often the only face of the United States justice system that these foreign born individuals experience, and it must properly reflect the principles upon which our country was founded. Action is needed now on this urgent priority for the Immigration Courts. It is time to stop the cycle of overlooking this important component of the immigration enforcement system – it will be a positive step for enforcement, due process and humanitarian treatment of all respondents in our proceedings.

We realize that immediate action is needed, and that a structural overhaul and creation of an Article I Court, while the best and only durable solution, may not be feasible right now. However, Congress can act easily and swiftly resolve this problem through a simple amendment to the civil service statute on performance reviews. . Recognizing that performance evaluations are antithetical to judicial independence, Congress exempted Administrative Law Judges (ALJs) from performance appraisals and ratings by including them in the list of occupations exempt from performance reviews in 5 U.S.C. § 4301(2)(D). This provision lists ALJs as one of eight categories (A through H) of employees who are excluded from the requirement of performance appraisals and ratings.^{xix} To provide that same exemption to Immigration Judges, all that would be needed is an amendment to 5 U.S.C. § 4301(2) which would add a new paragraph (I) listing Immigration Judges in that list of exempt employees.

We urge you to take this important step to protect judicial independence at the Immigration Courts by enacting legislation as described above.

Thank you.

FOR ADDITIONAL INFORMATION, CONTACT

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ⁱ Baltazar-Alcazar v. I.N.S., 386 F.3d 940, 948 (9th Cir. 2004).

ⁱⁱ Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook* at F1(Mar. 2017).

ⁱⁱⁱ U.S. Dep't of Justice, Immigration Court Practice Manual § 2.2(a).

^{iv} Yearbook, *supra* note ii at E1.

^v Immigration and Nationality Act (INA)§§ 301(c)–(h), 8 U.S.C. §§ 1401(c)–(h).

^{vi} Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action*, <http://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf>.

^{vii} *Backlog of Pending Cases in Immigration Courts as of August 2017*, TRAC Immigration, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last accessed Oct. 15, 2017).

^{viii} *Id.*

^{ix} Yearbook, *supra* note ii at A2.

^v TRAC, *Id.*

^x *Despite Hiring, Immigration Court Backlog and Wait Times Climb*, TRAC Immigration, <http://trac.syr.edu/immigration/reports/468/>.

^{xi} Memorandum from Attorney General Alberto Gonzales, *Measures To Improve the Immigration Courts and the Board of Immigration Appeals*, Aug. 9, 2006, <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf>

^{xii} TRAC, *Id.*

^{xiii} To better understand the personal toll these working conditions have wrought on immigration judges, see *Burnout and Stress Among United States Immigration Judges*, 13 *Bender's Immigration Bulletin* 22 (2008), available at pdfserver.amlaw.com/nlj/ImmigrJudgeStressBurnout.pdf; see also Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *Geo. Immigr. L.J.* 57 (Fall 2008 CQ ed.), available at articleworks.cadmus.com/geolaw/zs900109.htm

^{xiv} *E.g.*, *National Weather Serv. Employees Organization et al.*, 63 F.LRA 450, 453 (FLRA 2009).

^{xv} For some unknown reason, EOIR has chosen to drop the code used for such continuances from the list of codes which can be used by Immigration Judges as of October 1, 2017. See OPPM 17-02, <https://www.justice.gov/eoir/file/oppm17-02/download>.

^{xvi} COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY THE COMMISSIONERS (1981).

^{xvii} Prestigious legal organizations such as the American Bar Association, Federal Bar Association, and American Judicature Society wholeheartedly endorse this reform. While not as certain as to the exact form of change desired, reorganization has also been endorsed by the American Immigration Lawyers Association, and increased independence by the National Association of Women Judges. See <http://najib-usa.org/publications/article-i-andindependence-endorsements/>.

^{xviii} Casey Stegall, *Long Lines, Suspended Lives: Statistics Reveal Immigration Courts Are Drowning*, FOX NEWS LATINO (Jan. 20, 2014), <http://latino.foxnews.com/latino/news/2014/01/30/long-lines-suspended-lives-immigration-court-system-in-desperate-need-its-own/>.

^{xix} Pursuant to 5 C.F.R. §930.201(f)(3), administration law judges are also exempt from monetary or honorary awards or incentives. DOJ already follows that protocol for Immigration Judges despite subjecting them to performance evaluations.