



Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges

- 1) 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.
- 2) 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).
- 3) 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.
- 4) 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.
- 5) 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.
- 6) 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 quality of decisions, not quantity.

- 7) 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.
- 8) 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.
- 9) EOIR is now reopening the Immigration Judges’ Collective Bargaining Agreement with the intention to strike that language.
- 10) 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).
- 11) 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 conceivably violate their legal duty to fairly and impartially decide cases in a way that complies with due process. 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*.

- 12) 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).
- 13) 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.
- 14) 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 from reporting adjudications that reflect temperament problems or poor decisional quality,” so the concern was clearly with quality rather than quantity.
- 15) 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.
- 16) In addition, Circuit Courts will be severely adversely impacted and we will simply be repeating history which has proven to be disastrous. One need only remember the lasting impact of Attorney General Ashcroft’s “streamlining” initiative at the Board of Immigration Appeals.
- 17) The United States Government Accountability Office issued its report entitled “IMMIGRATION COURTS-Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges Report to Congressional Requesters” in June 2017, GAO-17-438, (GAO Report). This GAO Report contains a section entitled, “Comprehensive Performance Assessment Could Help EOIR Identify Effective Management Approaches to Address the Case Backlog;” however, nowhere is the suggestion made that numerical or time based criteria be added to performance evaluations for immigration judges.

- 18) 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 Immigration Judge productivity. 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. 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 much greater impact on case completion rates.

- 19) 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.

- 20) 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.

For further information, please contact:
Ashley Tabaddor, President
National Association of Immigration Judges
310-709-3580
ashleytabaddor@gmail.com
www.naij-usa.org

October 1, 2017