



NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

**Statement of Judge A. Ashley Tabaddor, President
National Association of Immigration Judges
January 29, 2020**

Before

United States House of Representatives
Committee on the Judiciary
Subcommittee on Immigration and Citizenship

Hearing on “The State of Judicial Independence and Due Process in U.S.
Immigration Courts”

INTRODUCTION

Chairwoman Lofgren, Ranking Member Buck and members of the Subcommittee, thank you for the opportunity to testify today before you. I am Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ) and a sitting immigration judge. Since 2005, I have served as an immigration judge with the Executive Office for Immigration Review, U.S. Department of Justice (DOJ).¹ I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of United States immigration judges. Since 1979, the NAIJ has been 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

¹ I am speaking in my capacity as President of the NAIJ and not as an employee or representative of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). 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 my personal opinions, which were formed after extensive consultation with the membership of NAIJ.

proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our court system through educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating to safeguard and ensure the integrity and independence of the Immigration Courts.

We also seek to improve the Court operations 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.

I am here today to discuss the urgently needed creation of an independent Immigration Court. America needs an Immigration Court that is free from improper influence on the decisions of immigration judges. It must be free from the constantly changing (often diametrically opposed) politicized policy directives of the Department of Justice. To be a truly independent court, it must be free from the management practices which transform the Immigration Court into a widget factory management model of speed over substance.

We acknowledge that it is difficult to look past the immediacy of the overwhelming backlog of cases which currently stands just shy of 1.1 million cases. This amounts to an almost doubling of the backlog in three years, in spite of the largest ever immigration judge hiring initiative (over 200) and concomitant increase in court appropriations in the history of EOIR. The “backlog” has been used as a justification, an excuse, and most often as pretext for implementing otherwise indefensible policies and practices with respect to the Immigration Court. Yet the problem is not a backlog or lack of funds; it is the structural flaw of the Immigration Court, located within a law enforcement agency, that frustrates the ability to properly address the backlog or the appropriated funds. It is time to acknowledge the truth organizations such as the NAIJ, the American Bar Association, the Federal Bar Association, and numerous others have stated publicly for years: unless and until the Immigration Court is removed from the DOJ and established as an independent court, we cannot begin to adequately address the immigration crisis we face as a nation.

To provide more context, I will first discuss how the structural flaw of the Immigration Court’s placement in a law enforcement agency has fostered improper cooperation between EOIR and DHS. Next, I will explain more subtle ways in which the independence of immigration judges has been impinged upon by the imposition of performance requirements based on quotas and time-based criteria, which improperly pressure immigration judges to speed up and deport more. I show how these metrics are incompatible with decisional independence, are a poor measure of

judicial performance, and are unrealistic and unfair to parties (particularly unrepresented individuals) who appear before the Courts. In light of the lack of any basis for these metrics, I next show how they are instead a sign of politicization of the Immigration Court, in stark contrast to the proper role of a neutral court system. The politicization of this system is further evidenced by regulatory changes removing the prohibition against the EOIR Director interfering with the decisions of the Board of Immigration Appeals and immigration judges. The trend towards politicizing the Immigration Court is also plainly revealed by the regulatory creation of an Office of Policy within EOIR, a component which has already encroached on the independence of the immigration judges through its creation of the stifling performance metrics. EOIR's resistance to oversight and transparency, an essential characteristic of any court system, is demonstrated by the lack of reliable data it provides the public through FOIA. I close with examples of EOIR's neglect, incompetence or design in failing to employ proper hiring protocols, misplaced priorities and the crippling and persistent lack of adequate staffing to support immigration judges. Lastly, I discuss the clear effort to silence the criticisms raised by NAIJ demonstrated by EOIR's disingenuous effort to decertify it. Taken as a whole, it is abundantly clear that Congress should act immediately to establish an independent Article I Immigration Court.

MANIPULATION OF THE STRUCTURAL FLAW OF THE IMMIGRATION COURT

□ The lockstep approach of DOJ and DHS

In 1983, the current structure of our court system was established in response to the perceived and actual conflicts of interest that existed because immigration judges reported to the same supervisors as the immigration prosecutors in the former Immigration and Naturalization Service, which was also located within DOJ. When Congress created DHS in 2002, a significant step was taken toward protecting the independence of the Immigration Court by leaving the court within DOJ while removing the former Immigration and Naturalization Service and placing it in the DHS. This deliberate choice was intended to provide protection to safeguard the independence of the Immigration Court and to free it from the law enforcement priorities of the immigration enforcement agencies.

As history has amply demonstrated, placing a court under the direct authority of the nation's chief federal prosecutor, the U.S. Attorney General, cannot adequately insulate a neutral court system. DOJ and DHS are intertwined on immigration issues and successive administrations have often used the Immigration Court as an extension of their law enforcement priorities. For example, Congress provided immigration judges with contempt authority over 20 years ago. Despite an act of Congress, DHS has successfully blocked DOJ from promulgating regulations that would provide immigration judges with a valuable tool to better control immigration

proceedings. Another example of law enforcement encroaching upon the Immigration Court is DOJ's practice of wholesale reshuffling of existing cases for the sole purpose of messaging its law enforcement priorities, which has greatly contributed to the backlog of cases, while at the same time compromised the integrity of the proceedings before the Immigration Court.

In the thirty-seven years since EOIR was created, the political encroachment of previous administrations pale in comparison to the systematic and deliberate assault on judicial independence to which the Immigration Court has been subjected in the last three years in furtherance of the Executive Branch's law enforcement priorities.

□ **Imposition of quotas and deadlines on immigration judges as a pretext to interfere with their decision making authority**

Metrics are not an accurate way to assess judicial performance

Citing the backlog as the justification for its unprecedented act of interference with immigration judge decision-making, on October 1, 2018, EOIR subjected all immigration judges to a complex set of metrics, including case completion quotas, a maximum remand rate, and a series of deadlines for case processing in the guise of performance measures for individual judges. These metrics do not constitute a valid performance measure of any judge's professional abilities and work product. Numeric and time-based measures of a judge's performance, measuring quantity over quality, are arbitrary because myriad factors influence how promptly cases can be decided. Factors including the nature and complexity of the claim, the availability of evidence, the involvement of counsel, and region-specific case law all play varying roles in each case. This heavy-handed and crude measurement of judges' performance only consumes valuable time for immigration judges and their supervisors. The number of new supervisory judges hired, relative to the total number of judges nationwide, has far outpaced the number of non-supervisory hires. These supervisory judges spend the vast majority of their time monitoring the immigration judges' case completion numbers instead of hearing cases themselves.

EOIR's metrics are not based on actual conditions

Not only are these metrics unrealistic and ill-conceived, they have no sound basis in past productivity. EOIR management has steadfastly refused to explain how these metrics were determined, particularly how the 700 completions per judge per year is valid in light of the great variety of cases and dockets that judges carry across the country. For example, one judge completed more cases in the last three months than he did in the entire past fiscal year, all due to the switch of his docket from a complex detained docket to a non-detained "family unit" docket with multiple completions per single session.

A second metric requires that judges should not be remanded in more than 15 percent of their appealed cases. A judge who completes the 700 cases, has been appealed only twice and is remanded once, will be deemed to have a 50 percent remand rate and fail this metric. A judge who has been appealed one hundred times and is remanded 15 times will pass. Again, despite requests, EOIR has repeatedly refused to explain how it arrived at this percentage. This benchmark clearly has no statistical value whatsoever, other than to give management a pretext to interfere with the decisional independence of judges in the guise of “evaluating” judges’ decisions for alleged errors. In a court system, this is the job of appellate judges, not court managers.

The statistics support NAIJ’s point that these metrics have no realistic basis. EOIR management has released the results for the first year these numeric performance measures have been in force. In fiscal year 2019, the span of “completions” per judge ranged from 36 to over 2,000. Over 60 percent of judges failed to complete 700 cases for the year, but 19 percent completed over 900 cases. What is clear is that the quotas and deadlines *cannot* actually provide a fair picture of a judge’s performance. They are nothing more than a tool to bully judges into rushing through cases, curtailing or barring testimony and evidence, and issuing decisions without adequate deliberation.

Performance metrics create an uneven playing field for the parties

Equally troubling is that the impact of the time constraints imposed by the case completion quotas is not borne equally by the respondents and DHS. Instead, these metrics strongly favor DHS and prejudice the individuals DHS is seeking to remove. DHS is always represented by an attorney, typically one who has handled hundreds, if not thousands, of cases and can more readily accommodate a shortened time frame for trial. The respondents are often unrepresented, non-English speaking, and forced to appear before a judge who is penalized for slowing down to provide more guidance. The respondents also carry the burden of proof to persuade the judge to allow them to remain in the United States under the law. Any lack of evidence caused by the speed at which the metrics force judges to process cases works against the respondent and can be fatal to his or her case.

Additionally, it is often quicker for an immigration judge to deny a case than to grant the respondent’s application for relief, particularly in the context of the claims of Central American applicants who make up a large part of the Court’s current dockets. Immigration judges are caught in the crossfire between DOJ management and the appellate courts, being pushed to decide cases faster and on more limited records, only to be criticized or reversed later when the Circuit Courts become involved. The Attorney General and the Board of Immigration Appeals (BIA) recently published decisions disfavoring asylum applicants, whose claims rest on grounds other than religious or ethnic persecution. For the asylum applicant to prevail on their claim,

extensive testimony and evidence is required which the performance metrics penalize against the judge.

Agency metrics create tension with due process

The hostile nature of these quotas and deadlines to basic principles of due process is also readily apparent with “Benchmark 5,” which requires that 95% of cases be completed on the initial trial date. Under this arbitrary standard, immigration judges are penalized for continuing a hearing, no matter how good the reason, or for taking more than one hearing session to complete a case. In addition, it penalizes judges for myriad events or issues beyond their control. The enormous backlogs facing the courts, and the artificial overbooking of judges’ dockets at the direction of management, are well-known. Judges often inherit sisyphian dockets, with multiple complex hearings booked at the same time. Judges are also assigned new cases with no additional time provided on their dockets to schedule them. Essentially, judges are told to overbook and schedule the case anyway, regardless of whether there is actually time to complete the hearing that day, and then they are punished for not completing them on time.

Aside from these scheduling issues, there are many legitimate reasons why a trial date may need to be reset. For example, it is not infrequent that a case needs to be continued because evidence critical to a respondent’s case arrives late from overseas and needs to be translated; or a respondent has only gathered the funds to hire an attorney shortly before the hearing in an area where pro bono attorneys are not accepting new clients; or DHS background checks are incomplete; or a change in the law requires additional briefing on a complex issue; or the mundane but frequent reason that a solo practitioner is ill on the day of the trial. No matter how good the reason, Benchmark 5 penalizes judges for continuing the hearing or allowing any trial to last longer than one session. Thus it is not surprising that *more than 97 percent of judges* failed to satisfy this metric last fiscal year!

Why were metrics really devised?

This program appears designed to mask its true underlying purpose, which is to incentivize judges to issue more orders of deportation, faster, at the risk of losing their jobs. The supervisory judges, who spend most of their time monitoring the metrics of immigration judges, would be far better deployed hearing a full docket of cases.

In a recent email correspondence, the Acting Deputy Director of EOIR criticized an immigration judge for noting on the record the existence of the quotas and deadlines and discussing the benchmarks when making a decision in a particular case. She wrote to the judge’s supervisor that “*judges should be reminded that they should not be making decisions on the bench based on the performance metrics, but rather based on the facts of the particular case and applicable law.*”

This hide-the-ball instruction is consistent with testimony at the January 8, 2020 hearing on EOIR's decertification petition, where the Agency repeated that judges should be making decisions based solely on the facts and the law and not the numeric performance standards. This clear admission highlights that even EOIR management recognizes that the quotas and deadlines have no legitimate purpose in a judge's duties and responsibilities. Otherwise, why can't a judge honestly mention the role of the metrics in his or her decisions?

Equally disturbing, because the performance metrics set the bar so high that all judges are incapable of meeting them, EOIR is empowered to dismiss judges who fail to follow their policy preferences under the pretext of inadequate performance. This is what happens when the structure of the Immigration Courts allow it to be used as a tool for immigration enforcement rather than as a fair and independent tribunal. They are a pretext. These meaningless and politically-motivated performance metrics are clearly designed to intimidate judges rather than to honestly evaluate their performance. It places each judge at odds with their oath of office to provide impartial justice because their continued employment hangs in the balance. Yet this is just another example of the pernicious effect of the structural defect of allowing the Immigration Court to remain in a law enforcement agency.

□ **Politicization of the adjudication process by vesting the Director of EOIR with adjudicatory authority**

The Director is the senior official within EOIR who is responsible for the administration and management of all EOIR components, including the Immigration Court. The position entails regular *ex-parte* communications with high-level DOJ and DHS officials and is incompatible with serving in an adjudicatory capacity over any pending cases before EOIR. Accordingly, there is no statutory language that requires the "Director" of EOIR to even be an attorney. The regulation only requires that "[w]ithin the Department of Justice, there shall be an Executive Office for Immigration Review (EOIR), headed by a Director who is appointed by the Attorney General." 8 C.F.R. § 1003.0(a). This is in sharp contrast to the language describing the Board of Immigration Appeals, which states that the "Board members shall be *attorneys* appointed by the Attorney General." 8 C.F.R. § 1003.1(a)(1). Similarly, the term "immigration judge" is defined by statute as "an *attorney* whom the Attorney General appoints as an administrative judge." 8 U.S.C. § 1101(b)(4).

Moreover, the Director's role at its inception was limited to "the general supervision of the Board of Immigration Appeals and the Office of the Chief Special Inquiry Officer in the execution of their duties." 48 Fed. Reg. 8039 (Feb. 25, 1983). The 1983 regulations limited the ability of the Director to delegate authority granted to him or her by the Attorney General. The

Director could only delegate that authority to the Chairman of the BIA or to the Chief Special Inquiry Officer (later renamed as Chief Immigration Judge). 48 Fed. Reg. 8039 (Feb. 25, 1983). Importantly, the regulation did not grant the Director power to issue or review immigration decisions with precedential effect. Rather, at that time the regulation stated that the BIA had the ability to issue precedential decisions, and only the Attorney General or the BIA itself could modify or overrule those decisions. The Director's lack of adjudicatory power, consistent with the statutory scheme of proceedings before EOIR, was codified in 2007 in 8 C.F.R. § 1003.0(c), which stated that “[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and shall not direct the result of an adjudication assigned to the [BIA], an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.” (emphasis added) With the promulgation of the regulation, the Director of EOIR was expressly prohibited from interfering in the decision-making of BIA members and immigration judges and from adjudicating cases arising under the INA.

In a sharp departure from decades of precedent, on August 26, 2019, DOJ announced an interim rule, effective immediately, that vested the EOIR Director with the ability to decide cases pending before the Board of Immigration Appeals (BIA)—and by extension, the ability to bind all immigration judges. Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (August 26, 2019). This rule grants the Director unilateral ability to rewrite immigration law in conformance with the policy agenda of any administration, thwarting the Congressional scheme established in the Immigration and Nationality Act. This significant rule was promulgated with no notice and comment period before its effective date. As discussed in NAIJ's comment in response to the regulations, the professed reasons set forth by the Department to support this drastic change in the organizational structure and locus of decision making at EOIR is self-serving, circular, and strains credulity at best.

https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Comment_Re_Interim_Rule_on_EOIR_Organization.pdf.

What is clear, however, is that the insertion of the Director into the role of direct line of review of immigration judge and BIA decisions provides significant new authority to control the outcome of immigration cases pending before the Immigration Court and the BIA. Through its newly created authority, the Director can unilaterally rewrite immigration law with the issuance of precedential cases, without even the internal checks in place for the certification process that apply to the Attorney General. Moreover, since EOIR has now imposed a maximum remand rate as part of immigration judges' individual performance evaluations, the Agency is ensuring that the judges (and the BIA) are mindful of how EOIR wishes for them to rule on a case or risk termination of their employment for a high reversal/remand rates.

In a telling preview of the impact of the politicization of the adjudicatory process at EOIR, in the case of *Baez-Sanchez v. Barr*, ___ F.3d ___, Docket No. 19-1642 (7th Cir. Jan. 23, 2020), Judge Easterbrook had very strong words for EOIR’s BIA (referred to as the Board in his published decision):

“In sum, the Board flatly refused to implement our decision. . . . We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails. *The Board seemed to think that we had issued an advisory opinion, and that faced with a conflict between our views and those of the Attorney General it should follow the latter.* Yet it should not be necessary to remind the Board, all of whose members are lawyers, that the “judicial Power” under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government.” (emphasis added).

This regulation illustrates the improper politicization of EOIR’s adjudicatory functions and highlights the dangers of allowing the Immigration Court to remain at DOJ.

□ **The creation of the Office of Policy is a transparent politicization of our Immigration Courts.**

The Office of Policy (OP) was first created by Attorney General Sessions on July 26, 2017. Initially, the OP was responsible for public relations for EOIR and to house EOIR’s Law Library, Virtual Law Library, and Immigration Research Center. Had OP remained within those narrow confines, it might have passed scrutiny as merely administrative in its role, despite the name. However, even before it was formalized by the interim rule, the OP was already exceeding this role. The OP has been identified as the component responsible (under the direction of the Director) for the creation of the immigration judge quota of 700 case completions per year. As discussed above, the quotas and deadlines system is a direct interference in the decisional independence of judges and a challenge to the principles of due process in the Immigration Court.

The interim rule vesting new powers in the EOIR Director also formalizes and expands the OP’s reach far beyond its initial formulation and its stated role of addressing the backlog in the Immigration Courts. As the DOJ’s own public description readily concedes, the OP “is responsible for all agency policy and regulatory review and development, internal and external communications, official data collection and reporting, strategic planning, and legal education, research, and certifications.” <https://www.justice.gov/eoir/office-of-policy>. The existence of a policy office as a high level component of any court system is troubling and calls into question the neutrality required of any fair and independent adjudicatory system. Courts, including the

Immigration Courts, are governed by the laws passed by Congress and properly promulgated regulations. The role of policy in a court setting, if any, should be administrative in nature and cannot be allowed to intrude into substantive legal issues. Yet the establishment of the OP enables EOIR to bring the Immigration Courts in closer policy alignment with DHS. This change flies in the face of congressional intent which was to distance the Immigration Court from DHS enforcement functions and provide safeguards against intrusion into the neutral adjudicatory role of the Immigration Court.

Within days of this interim regulation, on October 1, 2019, the OP issued a new directive on behalf of the Director that radically shortens and re-defines the BIA's processing times. Thus the OP has already shown its true colors in working to create a system of "assembly line justice" that favors speedy removals over deliberative review.

The Office of Policy issued political statements which threaten the Court's neutrality

Further demonstrating the dangers of a policy office within a court system, in May 2019, without even attempting to maintain a pretext of neutrality, independence or judicial demeanor, EOIR entered the foray of political propaganda by releasing a five-page document entitled, "Myths vs. Facts About Immigration Proceedings."

https://www.naij-usa.org/images/uploads/newsroom/NAIJFacts_vs_Fiction2.pdf

This document contained 18 assertions about the Immigration Court and the asylum process that parroted the Executive Branch's talking points in support of its numerous controversial policy positions. The Agency's publication was met with instantaneous response by organizations that are active in the front line of the removal and asylum process. *See, e.g.,*

https://www.naij-usa.org/images/uploads/newsroom/Fact-checking_the_Trump_administration's_immigration_fact_sheet_-_The_Washington_Post.pdf (the Washington Post) (debunking the myth that most asylum seekers fail to show up for their hearing);

https://www.naij-usa.org/images/uploads/newsroom/McHenry_Letter_%28final%29.pdf

(Roundtable of Former Immigration Judges) (calling out the Agency on its "political pandering");

https://www.naij-usa.org/images/uploads/newsroom/HRF_Notice_of_Rejection_of_EOIR_Factsheet_May_2019.pdf (Human Rights First);

https://www.naij-usa.org/images/uploads/newsroom/Facts_About_the_State_of_Our_Nation's_Immigration_Courts.pdf (American Immigration Lawyers Association).

Similarly, the NAIJ was compelled to issue its own public statement addressing EOIR's gross mischaracterization or misrepresentation of the facts.

https://www.naij-usa.org/images/uploads/newsroom/NAIJFacts_vs_Fiction2.pdf

Education of the public is a proper function of EOIR, but issuing blatantly one-sided political talking points is an unprecedented act of politicization of the Immigration Court system. Such statements make the job of immigration judges more difficult as it causes the public to lose trust in our neutrality. Why are taxpayer's dollars being spent on such campaign-like tasks? How does this relate to authority to adjudicate individual cases, which is the primary mandate of EOIR? Perhaps most importantly, how can such statements be squared with the primary duty of any court to remain impartial?

□ **EOIR's active dissemination of misinformation and half-truths in support of the Executive Branch's law enforcement priorities**

Another extremely troubling action taken by EOIR which demonstrates partisanship rather than judicial temperament is EOIR's apparent manipulation of publically available data. It is no surprise that any statistics on the day-to-day operation of the Immigration Court must be gleaned from information maintained by EOIR in its database. This data is critical to EOIR's ability to efficiently and effectively manage its workload and is equally critical to the public and meaningful congressional oversight. Accordingly, the Transactional Records Access Clearinghouse (TRAC) at Syracuse University has been systematically gathering information from EOIR for public dissemination under a standing FOIA request.

On October 31, 2019, TRAC noted "severe irregularities" related to the data EOIR had been providing. The organization issued a public report documenting "*gross irregularities in recent data releases*" by EOIR. <https://trac.syr.edu/immigration/reports/580/>. Rather than addressing the documented deficiencies in the data, EOIR issued a blanket denial of TRAC's claim. On November 4, 2019, TRAC followed with a statement requesting "EOIR to Issue Correction to Public Statements Regarding Incomplete and Inaccurate Data." <https://trac.syr.edu/immigration/reports/582/>. Again, EOIR has dug in its heels and denied the allegations. On December 18, 2019, TRAC noted again that "New Immigration Court Data Released, Even more Records Missing Despite Assurance, further indicating the deletion of millions of records was likely intentional, and that EOIR demonstrated a 'lack of commitment...to ensuring the public is provided with accurate and reliable data.'" <https://trac.syr.edu/immigration/reports/586/>

Unfortunately, the Syracuse University findings are consistent with the experience of our judges, who find time and again that DOJ's data does not match the reality we see in our courtrooms.

The United States and the American people need a neutral fact-based Immigration Court system. This cannot be achieved if we do not have the reliable, accurate, and complete data to ascertain the facts. While in the past the sloppiness of EOIR's statistics was benignly attributed to

negligence or incompetence, EOIR's recalcitrance in the face of requests for correction has shown what appears to be gross negligence, a deliberate manipulation of statistics, or at worst, an outright misinformation campaign.

□ **Mismanagement of resources and shabby hiring practices**

Lack of Support Staff

Under the guise of addressing the backlog, EOIR sought and received additional levels of funding to increase the number of immigration judges and support staff. To address their daily dockets, reduce the backlog, and remain current with new receipts, each immigration judge needs a team of support staff, which at a minimum should include two legal assistants for every 1,000 cases on a judge's docket and a judicial law clerk. Accordingly, Congress' funding for new judges comes with sufficient monies to hire teams. Yet EOIR's hiring practices have ignored congressional directives for effective use of funds and is primarily hiring judges and supervisory judges, rather than focusing on the required support team and concomitant resources such as contract interpreters. In the past three fiscal years, EOIR has hired over 200 immigration judges but failed to adequately budget for and hire the necessary clerical and support staff required for the successful administration of the court; nor have they allocated sufficient resources towards hiring in-house interpreters or augmenting their contract interpreter capacity.

Previously a judge who was assigned 2,000 cases was provided with at least one full-time legal assistant. Today, that same judge has a pending case load of 5,000 cases and is expected to share the clerk assigned to him or her. Currently, the largest courts in the country, such as those in New York and San Francisco, are functioning with only 40 to 50 percent of their needed staff, with legal assistants supporting two or even three immigration judges. The New York City Immigration Court has been without a Court Administrator to oversee support staff and court administration for over two years.

The continued hiring of immigration judges without concomitant hiring of support staff has resulted in an overburdened, stressed, and demoralized workforce. The added stressors placed on a bare-bones support staff have resulted in increased attrition and job dissatisfaction. In the New York City Immigration Court, for every two judges there is only one legal assistant to locate and prepare files for the docket, process motions and correspondence, prepare orders for judges to sign, and interface with attorneys and the public regarding their judges' dockets.

As one immigration judge recently noted to NAIJ:

We are still woefully understaffed and I don't even have an assigned legal assistant anymore. . . . Someone called the director's office to complain about us never answering

phone calls. We have not opened mail for about 8 weeks now. . . . 3 days this week I had respondents including MPP [“Migrant Protection Protocol” or “Remain in Mexico”] ones showing up for hearings for which they had notices that never made it to my docket or in some instances they were on my docket but no one could find the files.

This long-standing inability of EOIR to timely fill vacant positions has dramatically impacted the ability of the Immigration Courts to fulfill our function. Judges cannot effectively manage their dockets without support staff. The level of dysfunction caused by inadequate numbers of support staff are a serious impediment to the efficient and effective operation of the Immigration Courts and must be addressed.

Lack of Interpreters

Over 90 percent of individuals appearing in Immigration Court proceedings are non-English speakers who require interpreter services. Citing severe budgetary constraints, in December 2018, EOIR informed judges that in-person interpreters would be restricted to one in-person interpreter in the morning and one for the afternoon, regardless of the number of hearings scheduled on the judge’s docket. Thus, even if an immigration judge knew that they could address multiple cases using multiple languages in a single morning or afternoon session, and thereby complete more cases, they would be unable to do so as they would not be afforded the in-person interpretation. Adding insult to injury, EOIR also advised judges to use telephonic interpreter services in the alternative, a time-consuming and often fruitless undertaking due to the lack of exotic language interpreters on standby.

Severe cutbacks on interpreter services due to an alleged budget shortfall were instituted despite massive budget increases and appropriated funds provided to EOIR. Over the course of the past several years, under the guise of lack of funding, EOIR has steadily eroded the ability of non-citizens who appear before the Court to actively participate in and fully understand what is being said in Immigration Court hearings. Without an interpreter, many are limited in their ability to understand the very nature of the proceedings or to be able to adequately present their case to the Court. Instead of recognizing the need for readily available in-person interpreter services, EOIR has systematically chipped away at access to this most basic of all due process requirements.

Questionable Hiring Practices

Instead of remedying the staff shortages and assuring the availability of adequate interpreter services, EOIR has focused on the hiring of mid-level management, supervisory judges called Assistant Chief Immigration Judges (ACIJs). This increased focus on the expansion of mid-level management has resulted in lopsided staffing. Currently, EOIR employs over 30 ACIJs, which is more than over a five- to six-fold increase from previous administrations. EOIR has indicated

its intention is to hire one ACIJ for every court with four or more judges. This would increase the number of ACIJs to over 60, a ten-fold increase in comparison to previous administrations. The need for more ACIJs would seem to flow directly from the addition of the numeric and time-based performance criteria. Because an ACIJ's primary role is management of the Court with a very limited (perhaps 10 percent) time on the bench, this disproportionate hiring does not help address case backlogs. Rather, instead of hearing cases, supervisory judges are tasked with micromanaging the immigration judges and other court personnel, a questionable way to utilize resources in light of the ever burgeoning caseload.

□ **DOJ's effort to silence the judges and erode decisional independence by petitioning to decertify the NAIJ**

On August 9, 2019, the EOIR petitioned the Federal Labor Relations Authority (FLRA) to decertify the NAIJ and silence the immigration judges. EOIR argues that immigration judges are "management officials" who formulate agency policies simply through their individual case adjudications. DOJ argued the same position two decades ago. In 2000, the FLRA, in a well-reasoned and thorough published opinion, rejected on all grounds the Agency claim that judges' duties and responsibilities somehow transform them into "management officials" under the law.

In the hearing conducted on January 7-8, 2020, the disingenuousness of the DOJ position was made ever more clear as EOIR stipulated to the threshold issue before the FLRA: that the duties and responsibilities of immigration judges have not changed since the FLRA ruling in 2000. EOIR was simply rearguing the case, twenty years later, hoping for a different result. The move by DOJ to seek decertification is nothing short of political retribution against the NAIJ for serving as an agent of transparency and accountability against EOIR's systematic encroachment on judicial independence and persistent efforts to transform the Court into a law enforcement tool of the Executive Branch. If EOIR prevails in its efforts to decertify the NAIJ, it will be the final nail in the coffin for the exercise of independent decision-making by immigration judges. The Immigration Court will no longer possess even the most basic qualifications of a court but rather become a deportation assembly line under one administration and perhaps an amnesty tool under another.

THE ONLY LASTING SOLUTION

The call for an independent Article 1 Immigration Court is not new. Many of these systemic issues have been raised and robustly discussed in the past. Every administration has been afforded the opportunity to implement its "solution." The benefit of the doubt has been repeatedly afforded to DOJ by Congress. More money has been thrown at the problem than

could reasonably be justified when flawed and politicized management practices have persisted unabated. It is quite evident that simply hiring more judges in the context of a fundamentally faulty system is tantamount to throwing good money after bad. It is equally evident that the will of Congress cannot be carried out by a court located within DOJ or in any other law enforcement agency.

Every reputable organization that has studied the Immigration Court has reached the same conclusion. The American Bar Association has produced an in-depth and extensive report of the need for an independent Immigration Court. The Federal Bar Association has drafted proposed Article 1 legislation. The American Immigration Lawyers Association, the largest organization of immigration law attorneys who practice on a daily basis before the Court, has formally endorsed an independent Immigration Court. If nothing else, the drastic pendulum swings between the previous and current administration's use and abuse of the Immigration Court has evidenced what our founding fathers knew at the inception of our country—the importance of separation of powers between the judicial role of the government from its law enforcement prerogatives. The judicial role of the Immigration Court is simply irreconcilable with the law enforcement mission and role of the DOJ. The only real and lasting solution is the establishment of an independent Immigration Court. Only then will we begin to move forward in solving the immigration crisis facing our nation.

Sincerely,

A. Ashley Tabaddor
President, National Association of Immigration Judges