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National Assn. of Immigration Judges Say DOJ's "Myths v. Facts" Filled with Errors and Misinformation

DOJ Document Demonstrates the Need for an Independent Immigration Court Say Judges

WASHINGTON – This month the Department of Justice's (DOJ) Executive Office of Immigration Review (EOIR), the office overseeing the nation's Immigration Court and Immigration Judges, released a five-page document, "Myths vs. Facts About Immigration Proceedings." The National Association of Immigration Judges (NAIJ) has conducted a review of the document and has determined that the DOJ's key assertions under both the "myths" and the "facts" either mischaracterize or misrepresent the facts.

"I would not use the term 'fact sheet' to describe this document," said NAIJ President Judge Ashley Tabaddor. "Rather than disseminating accurate and verifiable facts and figures as it claims, this document has been presented as a communications tool in furtherance of the law enforcement policies and public statements of the executive branch."

NAIJ researchers, in reviewing the document, have preliminarily highlighted eight areas where the DOJ has mischaracterized or misrepresented the facts. The eight illustrative examples are outlined in this news release (see below) and are not a complete list of the concerns with the DOJ's claims.

"The DOJ's distorted document is a clear demonstration of why an immigration court accountable to our chief federal prosecutor undermines the integrity and effectiveness of the

immigration court system. The country would be better served by an independent court similar to the Tax Court and Bankruptcy Court."

NAIJ officers are available for interview on the items presented here and on how an independent Immigration Court could function. Call contact to schedule an interview.

Examples of Errors and Misinformation Include:

Item 1 DOJ "fact"- In bullet point #11, the DOJ asserts that the majority of administrative adjudicators or judges are subject to performance measures and "case completion goals." Later, in bullet point #12 the claim is made that "case completion goals" are an acceptable norm in law and practice.

The Truth- There is a clear distinction between "case completion goals" and *quotas and deadlines.* The DOJ has not imposed "case completion goals" for immigration judges, but has imposed *quotas and deadlines* as a condition of continued employment on judges. The former is a carrot designed to enhance the efficiency and professionalism of the workforce, an aspirational motivator and resource allocation tool. The latter is a stick designed to punish judges who do not complete an arbitrary number of cases within an arbitrary set of deadlines. Quotas and deadlines compromise the independence and integrity of judges and implicates due process in individual cases, while case completion goals assist in identifying areas in which additional resources and/ or training is needed. Congress prohibited *by statute* the application of quotas and deadlines on federal Administrative Law Judges. Immigration Judges, however, do not have that statutory protection and thus are compromised by current DOJ practices and policies.

Item 2 DOJ "fact"- In bullet point #13, the DOJ asserts that it is not unprecedented to have a head of agency review administrative adjudicatory decisions.

The Truth- Two wrongs do not make a right. We now have independent courts such as the Tax Court, the Bankruptcy Court and the Court of Veterans Appeals, all of whom were created out of their previous "agency head review" to avoid the inevitable conflict of interest that compromises the integrity and effectiveness of the adjudicatory functions of judges. When it becomes clear, as it has with the immigration court, that the law enforcement role of the agency head is influencing the administration of the adjudicatory function of the agency, the two must be separated.

Item 3 DOJ "fact"- In bullet point #14, the DOJ asserts that following case law and precedent does not compromise an Immigration Judge's decisional independence.

The Truth- No one has made such a claim. What does compromise the court system, however, is allowing the agency head, who is the chief prosecutor, to insert himself into the judicial process. The current system permits the U.S. Attorney General to issue "precedent decisions" consistent with the law enforcement priorities of the administration. Such a "prosecutorial super veto" power compromises the integrity and independence of the court.

Item 4 DOJ "fact"- In bullet point #15, the DOJ asserts that the immigration court can not be easily converted to an independent Article 1 court because there are over 10,000 federal administrative judges and no organization has studied the cost of converting the current court to an independent court.

The Truth- The fact that there are over 10,000 federal administrative judges across the government is a red herring, as the relevant number is the 430 immigration judges currently serving. Moreover, the fact that a customized financial study has not been conducted does not mean that the conversion to an independent Article 1 court would not be advisable. There is precedent for creating independent courts from agency adjudications. Through acts of Congress the Tax Court, Bankruptcy Court, and the Court of Veterans Appeals are independent of the agencies from which they originated.

Item 5 DOJ "fact"- In bullet point #16, the Agency asserts that *completing* 700 cases per year, per judge without violating due process is supported by the NAIJ and other reputable organizations such as the American Bar Association (ABA).

The Truth- Neither the NAIJ nor the ABA has made such an assertion. The ABA's report references "managing" a caseload of 700 which is distinct from "completing" 700 cases per year. (Currently our judges "manage" upwards of 5,000 cases). Similarly, the NAIJ's comments relating to the average number of completion of cases in fiscal year 2010 misstates the NAIJ's position. The *previous* administrations' definition of "completion" is distinct from the *current* administration's definition of "completion" which expressly *excludes* "administratively closed" and "change of venue" decisions that previously bolstered the number of "completed" cases. For example, under the *current* definition, an immigration judge with a juvenile docket in Los Angeles has completed 247 cases in this fiscal year (7 months to date). If considered under the *previous* definition, the judge would have completed over 800 cases in the same time frame. Thus, any reference to NAIJ's historical "completions" rate of cases grossly mischaracterizes the issue and misstates the NAIJ position on quotas and deadlines.

Moreover, Immigration Judges do not have a uniform set of assigned cases. It is not usual for a judge overseeing a detained docket to manage a caseload of 100-300 cases while a judge overseeing a non-detained docket to manage a caseload of 5,000 cases or more. Additionally, even in the context of managing thousands of cases, the court has specialized dockets such as juvenile/unaccompanied minors docket, family unity docket, aged-case docket, arraignment docket, etc. To impose a singular quota on all judges regardless of their individual docket configuration is not supported by any reputable organization or entity.

Item 6 DOJ "fact"- In bullet point #18, the DOJ sets forth a "myth" that "Immigration Judges have financial incentives to complete cases with particular outcomes" and proceeds to explain that judges are paid by a statutory pay scale and not paid based on the outcome of the cases they adjudicate.

The Truth- Like all judges Immigration Judges are paid a salary. However, in contrast to independent judges in independent courts who cannot be fired for making good faith decisions on cases based solely on the facts and the law of the case, Immigration Judges are subject to quotas and deadlines as a condition of their continued employment which conflicts with their oath of office to neutrally uphold the law. If they do not meet an arbitrary case completion quota or deadline, they can be disciplined for insubordination or given unsatisfactory performance ratings which can lead them to lose their job. This conflict of interest would not be tolerated if Immigration Judges were treated as independent decision makers in an independent court free from the prosecutorial enforcement policies of the agency head, the U.S. Attorney General.

Item 7 DOJ "fact"- In bullet point #6, the DOJ claims that a 21% grant rate of asylum to individuals who have representation debunks a myth that "most aliens with representation are granted asylum in immigration proceedings."

The Truth- No one claims that most aliens with counsel are granted asylum. Rather the claim is that individuals with counsel have a far greater likelihood of prevailing on their asylum claim. This claim is supported even using the DOJ's faulty definition of "median" 11% asylum grant rate in their bullet point #3. Under their own statistics, individuals with counsel are twice as likely to prevail on their asylum application. Moreover, the grant rate of asylum for individuals with counsel neglects to include other forms of relief that may have been granted instead of asylum, such as withholding of removal, adjustment of status, cancelation of removal, or any of the other reliefs available under immigration law.

Item 8 DOJ "fact"- In bullet point #9, the DOJ claims that less than one-tenth of one percent of Video-Teleconferencing (VTC) hearings are continued due to VTC malfunction.

The Truth- This statistic does not reflect the reality of our judges' experience with VTC. Immigration Judges routinely report technical problems with the use of VTC, such as pixelated

screens, sound quality issues, and dropped Internet reception. A major flaw in EOIR's data collection system is due to the fact that the administration restricts judges to selecting only one reason for why a case is continued. By restricting the judges from providing the full basis for continuing a matter, EOIR is able to cherry pick the data in support of its results oriented position. For example, after many interruptions in a hearing due to problems with the VTC, a Judge can continue the case because there remained inadequate time to complete the hearing. The choice of continuance code to use is random, as either a code based on VTC problems or inadequate time are both correct. This is but one reason why this statistic is highly unreliable.

The other reason is that a hearing may proceed, despite the difficulty, but it is impossible to measure whether technical problems have subtly diminished the accuracy or tone of interpretation or adversely impacted a credibility determination. Studies regarding the impact of VTC on these issues have been conducted and raise concerns. Moreover, it must be remembered that Immigration Courts are truly unique in the fact that our proceedings are conducted in a language other than English. Approximately 85% of the time an interpreter is required (sometimes even requiring relay interpreters), making VTC hearings additionally problematic. NAIJ has not and does not assert that a VTC hearing always compromises due process. However, we do strongly assert that undue reliance on VTC without easy availability of alternative means of conducting the hearing when a judge deems it appropriate is highly problematic and does implicate due process.

The National Association of Immigration Judges (NAIJ), founded in 1971, is a voluntary organization formed with the objectives of promoting independence and enhancing the professionalism, dignity, and efficiency of the Immigration Court.

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