

THE ASYLUMIST

Immigration Judges Revolt Against Trump Administration

by Jason Dzubow on December 19, 2017

In a little noted, but quite extraordinary move, the [National Association of Immigration Judges](#) (“NAIJ”) has [asked Congress](#) to protect its members (Immigration Judges) from the Trump Administration (their employer). The reason? The Trump Administration is seeking to “evaluate judges’ performance based on numerical measures or production quotas.” According to NAIJ, “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.”



EOIR is developing a more efficient way to adjudicate cases (and it comes with a free drink!).

Let’s start with a bit of background. NAIJ is a voluntary organization of United States Immigration Judges. It also is the recognized representative of Immigration Judges for collective bargaining purposes (in other words, the IJs’ union): “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.”

According to NAIJ, the most important regulation governing IJ decision-making is 8 C.F.R. § 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. § 1003.10(b).

Up until now, IJs were exempted from quantitative performance evaluations. According to NAIJ, “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.”

The Trump Administration is now moving to change the way it evaluates IJs. The main reason for the change is the Administration’s goal of reducing the very-large backlog of cases in Immigration Court (currently, there are about 640,000 pending cases). The Executive Office for Immigration Review (EOIR – the office that administers the nation’s Immigration Courts) recently [announced](#) a plan to “transform[] its institutional culture to emphasize the importance of completing cases.” In other words, EOIR will judge its judges based—at least in part—on the number of cases completed.

NAIJ has called this development “alarming” and a threat to judicial independence. Why? Because when judges are forced to complete a certain number of cases, they may be unable to devote the necessary time to each case. As a result, the ability to make proper, well-thought-out decisions will suffer.

This is already a problem in Immigration Court. One IJ famously quipped that his job involved adjudicating death penalty cases in a traffic court setting. And so pushing judges to do more cases in less time will potentially impact the alien’s due process rights, and the integrity of our Immigration Courts.

NAIJ has long believed that the system needs a “structural overhaul” and has advocated for converting the Immigration Courts into Article I courts. Article I refers to the first article in the U.S. Constitution, the section on legislative (i.e., Congressional) powers. The idea is that Congress would establish an independent immigration court, much like it [created](#) a tax court and a court of veterans appeal. Such a court would be independent of the Executive Branch—the branch of government tasked with enforcing immigration law (currently, IJs are employees of the Department of Justice, a part of the Executive Branch).

NAIJ recognizes that creating Article I immigration courts “may not be feasible right now,” but it nevertheless [urges](#) Congress to protect the nation’s IJs from the new Trump Administration policy:

Congress can... 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. 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.

The fact that IJs themselves are concerned about the Administration's move is worrying. The Immigration Judges I know are conscientious and take their jobs very seriously (in contrast to the Trump Administration, which seems utterly lacking in seriousness). If EOIR is making it more difficult for IJs to do their duty, as they understand it, then something is clearly wrong.

Perhaps the IJs' concerns are overblown. Maybe EOIR will implement the new case completion standards in a way that does not damage judicial independence or due process. But given the Administration's track record in general, and the [inexperienced acting director](#) appointed to head EOIR, it's difficult to have much confidence in the new policy. Since Congress is unlikely to act on NAIJ's request for protection, I suppose we will see soon enough how these changes affect the Immigration Courts.

Finally, in my opinion, EOIR has largely misdiagnosed the problem. While some delay may be caused by IJs kicking the can down the road, or by aliens "playing" the system, most delay is systematic—it is caused by reshuffling Administration priorities, which affect how DHS and DOJ schedule cases. I doubt that imposing numerical quotas on IJs will do much to improve the situation. Other [solutions](#)—facilitating pre-trial conferences, reforming the Master Calendar system, better use of technology, imposition of costs, premium processing for certain applicants—might be more effective. Everyone agrees that reducing the backlog is a worthy goal, but case completion requirements are probably not the best way to achieve that end.

COMMENTS

[Paul Wickham Schmidt December 20, 2017 at 8:47 am](#)

As I have said before, the backlog is largely aboard ADR — "Aimless Docket Reshuffling" unilaterally instituted by DOJ/EOIR to place the Immigration Courts in line with or at the forefront of DHS's constantly changing Enforcement objectives. No independent court would allow it.

Most of the cases on the docket involve law-abiding, long term residents. They should be legalized by DHS under new legislation, or just allowed to remain until a smarter Congress and President are elected in the future and solve the problem along the lines the majority of Americans favor.

Once the Docket is reduced to criminals, security risks, and recent border arrivals, give control of the Docket to individual Immigration Judges, rather than DOJ Politicos and scared EOIR administrators trying to save their jobs. Have the BIA publicly "out" — removing from cases when necessary — those IJs who don't apply the generous standards of Cardozo and Mogharrabi to asylum grants. With some extra resources, you would eventually have a functioning, independent Immigration Court system that could do all cases on a reasonable cycle.

But, never going to happen with White Nationalist xenophobes like Trump & Sessions in charge.

Elections have consequences. Here, they are devastating for our Constitution, Due Process, and American justice. Regime change at the ballot box takes time. Until that occurs, the New Due Process Army will have to fight Gonzo and his forces of darkness every inch of the way, in and out of every Court in America. Our future as a nation of immigrants is at stake.

Best wishes and thanks for all you do.

PWS
12-20

Mohammad [December 19, 2017 at 11:24 pm](#)

Dear Jason thanks for posting important info about would be
The probable move by trump administration,do you think
Its time to worry about cases referred to courts?

[Reply](#)

[Jason Dzubow December 20, 2017 at 7:20 am](#)

I think they are trying to push cases through as fast as possible, and that they are less concerned about due process of law. Basically, they want to deport more people. However, it might backfire if judges end up erring on the side of caution and granting more cases. Probably that view is a bit too optimistic for these times, but we will see. Take care, Jason

[Reply](#)

Sara [December 20, 2017 at 9:57 am](#)

Hi Jason,

I thought about this while I was reading the post. If the IJs' concerns won't be addressed by Congress as you predicted, then it would be very satisfying to see those IJs deal with the issue by granting more cases.

I can't picture a scenario where a job like this is evaluated based on how many cases an IJ churns out in a given period. It's almost like evaluating doctors based on how fast they discharge patients from the hospital.

I know little to nothing about the specific reasons why cases take as long as they do in

court, but you have often described the IJs as generally being people of integrity who strive to be fair. This coupled with the nature of their profession makes this quantity over quality based system of evaluation sound almost insulting.

Thanks for keeping us informed as always.

Best,

Sara

[Jason Dzubow December 20, 2017 at 5:49 pm](#)

The Administration is looking for ways to deport more people more quickly. I also hope that IJs will react by granting more cases more quickly, but I am not so confident we will see that. Take care, Jason

<http://www.asylumist.com/2017/12/19/immigration-judges-revolt-against-trump-administration/>