



## **The Immigration Court- In Crisis and in Need of Reform**

**August 2019**

The National Association of Immigration Judges (NAIJ) has prepared this paper in response to numerous recent inquiries from members of Congress and congressional staff regarding the day-to-day operations of the immigration court and the policy and administrative decisions that hamper the ability of immigration judges to discharge their duties and responsibilities under the law. Below, we specifically discuss the issues of human capital management; physical and technological resources, including interpreters; and the Department of Justice's interference with the judicial independence of immigration judges.

### **Background:**

The Executive Office for Immigration Review (EOIR) is the agency within the DOJ that oversees and administers the immigration court. At all levels, this administrative management controls the allocation of funds and makes staffing decisions. The day-to-day responsibility of judicial administration at the immigration court rests not with the immigration judges, as expected in a traditional court model, but with the EOIR management.

The immigration court currently faces a crushing caseload of over 940,000 pending cases, a backlog that has increased by over 300,000 since fiscal year 2017.

### **Human Capital Issues:**

#### *Judge Teams and Hiring:*

To address the ever-increasing workload, Congress has significantly increased funding to EOIR for the purpose of increased hiring of immigration judge teams.

Immigration judges require a team of dedicated professionals supporting their dockets in order to function efficiently and effectively. To address their daily dockets, reduce the backlog, and

remain current with new receipts, each immigration judge team, at a minimum, should include two legal assistants for every 1,000 cases on a judge's docket and a judicial law clerk.

EOIR has ignored congressional directive and is primarily hiring judges without the required team support and resources. In the past three fiscal years, the EOIR has hired over 170 immigration judges but failed to adequately budget for and hire the necessary clerical and support staff required for the successful administration of the court.

In the past, the ratio of support staff to judge, based on the number of cases on the dockets of most judges, was  $\frac{1}{2}$  to  $\frac{1}{3}$  of what it is today. For example, previously a judge who was assigned 2,000 cases was provided with a dedicated legal assistant. Today, that same judge has a pending case load of 5,000 cases and is expected to share the singular clerk assigned to her. Currently, the largest courts in the country, such as those in New York, Los Angeles, and San Francisco, are functioning at 40 to 50% capacity on staffing needs. The New York City Immigration Court has been without a Court Administrator to oversee support staff and court administration for over two years.

The increased hiring of immigration judges without concomitant hiring of support staff has resulted in an overburdened, overstressed, 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 find and ready files for the docket, process motions and correspondence, and prepare orders for judges to sign. Legal assistants also interface with attorneys and the public.

To address nationwide staff shortages, the DOJ often details staff from one court to another, which incurs costs including travel and lodging and often impacts operations at a home court. In June 2019, immigration courts were notified that EOIR is seeking staffing assistance from other DOJ components to be detailed to the immigration courts. These temporary staff would need intensive training at considerable cost to the taxpayer.

Instead of remedying the staff shortages, 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. Thus far EOIR employs 32 ACIJs with the intention of hiring 20-30 more, which is a over a five to six fold increase from previous administrations.

Some ACIJs have never been immigration judges or served on the bench. This lack of critical experience creates unnecessary issues and challenges for immigration judges on a daily basis, including severe micromanagement and interference with the judges' ability to utilize their judicial expertise in the management of their own dockets. Law clerks working directly with an

immigration judge answer not to that judge but rather to ACIJIs often located thousands of miles away, making routine communications cumbersome.

*EOIR Office of Policy and Lack of Training:*

In 2017, the DOJ created the EOIR Office of Policy, which functions as an extra layer of management that is both unnecessary and ineffective. There is considerable lack of transparency about who works within the office and how effectively it meets its mandate. The EOIR Office of Policy has taken over traditionally jurisprudential responsibilities that once belonged to the immigration court, such as judicial training and dissemination of emergent precedent cases.

EOIR inappropriately minimizes the administrative time allotted for judges to keep current on legal developments, prepare for and review the reams of documentation frequently submitted in support of a given case, and render decisions in complex, vigorously litigated matters.

In 2019, EOIR cancelled the annual in-person immigration judge training. Furthermore, EOIR terminated the ability of local judicial law clerks to provide courts with updated circuit and case law. Immigration judges are required to rely on centralized information provided by the Office of Policy which is often untimely, not court specific, and without the depth of analysis provided by law clerks who previously were responsible for the dissemination of this information.

EOIR has contributed considerably to inefficiencies within the immigration court system, hampered the judges' ability to discharge their oaths of office, and caused greater delays and a faster rate of increase in the backlog of cases.

Courtrooms and Technology:

*Physical Space:*

The immigration court system lacks the physical and technological resources necessary to meet its basic functions. There are currently immigration judges without courtrooms to hear their cases. Immigration Courts are so inundated with files that they are unable to safely store and secure them. Legions of support staff simply do not have desk space, and multiple judicial law clerks are either forced to share office space designed for one or have no office space, only a desk. The DOJ has routinely failed to secure proper court space, often positioning courtrooms in commercial buildings that are not equipped to handle the safety and security needs of the hundreds of individuals who must appear in court each day.

Furthermore, the agency has instituted a "No Dark Courtrooms" policy which speciously implies maximum efficiency but in practice results in last-minute swaps of dockets in one location for another location. The use of misleading language to score policy points, often at the expense of

proper case adjudication, simply expands the backlog and deprives judges of the opportunity to use their judicial skills in docket management.

*Interpreters:*

On December 11, 2018, citing serious budgetary constraints the DOJ instituted severe restrictions on the use of in-person interpreters for scheduled hearings. Essentially, no judge is permitted to have more than one in-person interpreter for each morning or afternoon session of court. This restrictive policy change was further exacerbated in July when the agency announced to all judges that it will cease ordering any interpreters for any initial hearings in which a video-advisal is provided in the language of the respondent. Instead, EOIR has recommended the use of unscheduled telephonic interpreters.

The move to substitute telephonic interpreters for in-person or scheduled interpreters seriously compromises both the efficiency and integrity of court proceedings. A 5 minute hearing with an in-person interpreter frequently requires 20 to 30 minutes to complete with a telephonic interpreter. The logistical steps necessary to secure and connect to a telephonic interpreter for a hearing often requires 10 to 20 minutes. Telephonic interpreters are also limited to *consecutive* interpretation rather than *simultaneous* mode, which often doubles the amount of time for complete discourse to occur. Many telephonic interpreters use cell phones and the sound and quality of telephonic interpretations is far inferior to in-person interpretation. It is not unusual for calls to be dropped or disconnected or for individuals to be confused, as the same information often has to be repeated for a full translation. Moreover, in many instances telephonic interpreters are unavailable or are engaged in other activities while interpreting such as Uber driving or child care services.

The use of telephonic interpreters is also highly problematic for hearings conducted via video-teleconferencing (VTC). VTC creates an added logistical challenge in connecting the judge with the parties. Complex cases involving highly technical terms, expert witnesses, certain indigenous languages that require relay interpretation between the language to Spanish and then Spanish to English, or individuals having to relay sensitive and personal information in open court are not suited for telephonic interpretation.

Despite massive budget increases, the immigration court is experiencing an emergency budget shortfall. Following the award of a prime contract with SOS International LLC (SOSi) for language interpreter services in 2015, SOSi could not meet its deliverable. In 2017, the contract was renegotiated and SOSi bargained successfully for a three-hour minimum guarantee and higher rates. Poor negotiating on the part of the DOJ and unrealistic planning led to a predictable emergency whereby immigration judges are unable to introduce efficiencies into their docketing practices because they are at the mercy of budget constraints to minimize interpreter costs. In

the past, multiple cases of different languages could have been scheduled during a three-hour docket setting, but now judges are forced to delay cases because of EOIR mismanagement regarding interpreters.

#### *Electronic Filing:*

To date, the EOIR has failed to implement a fully electronic filing and electronic records system. Judges have no access to industry standard time-saving technologies and tools. Rather than adopting a pre-existing and proven court-based software, such as PACER or other federal or state court models, the agency chose a costly commercial off-the-shelf product that is in the process of being unsuccessfully customized for use in the immigration courts. Sadly, EOIR's goal of becoming paperless, in line with other federal and state courts, is far from reality due to EOIR's managerial ineptitude.

#### Interference with the Decisional Independence of Immigration Judges:

##### *Administrative Micromanagement:*

Currently, due to administrative micromanagement, judges are not permitted to control their own dockets. For example, judges can no longer determine when and how frequently to schedule master/arraignment calendars and how much time to allocate to a given merits hearing when scheduled. Judges are being assigned upwards of 50 to 100 cases per morning or afternoon session on their master calendar dockets, allowing only one to three minutes per case. Furthermore, judges are being instructed to schedule a minimum of three to four cases a day for trial (an allotment of an average of 2 hours per case). This case volume ignores the judge's experienced assessment of the time necessary for a trial. This practice often results in matters being rescheduled on short notice, resulting in great cost to the litigants and contributing to the massive case backlog.

##### *Imposition of Arbitrary Quotas and Deadlines Contrary to Judicial Principles:*

EOIR policy has subjected judges to arbitrary quotas and deadlines as a condition of their continued employment, which has created an unprecedented conflict of interest by pitting the judge's personal financial interest with his or her duty to preside over a pending case as an impartial adjudicator. This quota has put the integrity of the system in question and has resulted in the loss of public confidence in the immigration courts and process.

##### *Use of the Certification Process to Advance Law Enforcement Priorities*

The use of the certification process, by which the Attorney General reassigns a pending case to him or herself for the purpose of rewriting existing rules and laws, has been utilized by multiple

administrations to advance the Executive Branch's law enforcement priorities. In the last few years, use of the certification process has been expanded, both in frequency and scope. An unprecedented number of cases (up to four times the average for an administration) have been certified by the Attorney General. In one decision, former Attorney General Sessions removed a long standing and key docket management tool, known as "administrative closure," from the authority of the immigration judges, singularly leading to an additional backlog of 300,000 cases. This tool allowed judges to properly prioritize their cases in order to ensure due process to the parties and provide for efficient use of court resources. A circuit court of appeals recently reversed the AG's decision as an overreach of his role but the restriction remains intact for the remainder of the country not governed by the Third Circuit Court of Appeals.

#### SOLUTION:

The U.S. Department of Justice (DOJ)'s troubling and indefensible mismanagement of the Immigration Court system is unacceptable.

Administering a court system is incongruous with the DOJ's role as a law enforcement agency. This inherent conflict of interest precludes the judicial independence of immigration judges and ultimately compromises due process of the parties appearing before the court.

Furthermore, the disparate missions of the DOJ and the Immigration Court create an unmanageable tension resulting in the DOJ's lack of commitment and skill to properly administer the court in an efficient and effective manner.

This paper highlights multiple instances of this inherent conflict hobbling the daily function of the Immigration Court system. As a major cause of the ballooning backlog of cases in the Immigration Court that exacerbates the overall immigration crisis in our nation, this situation must be addressed.

The solution to this problem is the establishment of an independent Article I immigration court.