Statement of
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House Subcommittee on Immigration and Border Security
Hearing on "Oversight of the Executive Office for Immigration Review"
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Chairman Labrador, Ranking Member Lofgren, and members of the Immigration and Border Security Subcommittee of the House Judiciary Committee:

WHO ARE WE?

The National Association of Immigration Judges (NAIJ) is a voluntary organization of United States Immigration Judges. It also is 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 proceedings initiated by the Department of Homeland Security are conducted. We work to improve our court system through: educating the public, legal community and media; testimony at congressional oversight hearings; and advocating and lobbying for immigration court reform. We also seek to improve the court system 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.

WHOSE VIEWS DO WE REPRESENT?

The NAIJ Representatives are speaking in their official NAIJ capacities and not as employees or representatives of the U.S. Department of Justice, Executive Office for Immigration Review. 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 the authors' personal opinions, which were formed after extensive consultation with the membership of NAIJ.

DAILY REALITIES OF COURT PROCEEDINGS

The immigration courts are a high-stakes, high volume court system. For some who appear before us, their case is tantamount to a death penalty case, as some respondents face torture or death if returned to their homelands. For others, these proceedings can result in banishment and permanent exile from the only home they have known during years of lawful residence.

Moreover, immigration law is repeatedly characterized by federal circuit courts of appeal as being second only to the tax code in its complexity, and one court even stated: "[a] lawyer is often the only person who could thread the labyrinth."[i] Despite everyone recognizing the complexity of the law and procedure, 40% of the individuals who appear before our courts have no legal representation.[ii] That number is surprising since even the Office of the Chief Immigration Judge recommends that all individuals in proceedings before the Immigration Court retain qualified professional representation in light of the "complexity of the immigration and nationality laws."[iii] Removal proceedings are fundamentally asymmetrical for pro se litigants due to the fact that the United States is always represented by counsel.

Despite a highly complex body of law and many pro se litigants, an Immigration Judge lacks many of the tools traditionally available to judges. We have never been able to exercise the contempt authority statutorily authorized for us by Congress in 1996 because implementing regulations have never been issued. Last year, 90% of the cases in our courts were conducted in a language other than English, through a foreign language interpreter.[iv] Most of the time, we have no bailiffs in the courtroom, no clerk and only access to half of a judicial law clerk's time. Notwithstanding these conditions, some judges routinely address 50 to 70 cases during a three- to four-hour time frame at the "master" (arraignment-type) calendar. With scarce resources, and frequently through use of a foreign language interpreter, Immigration Judges must obtain answers to critical questions that bear on an unrepresented respondent's legal status and possible eligibility for relief. For example, the Immigration Judge must determine whether the respondent is a citizen of the United States. This is more difficult than most imagine, as the inquiry does not end with place of birth alone; the Immigration Judge may also need to consider information about the person's parents and grandparents.[v] No one – not even children and mentally ill individuals – have a statutory right to a free attorney, and everyone is expected to navigate the court system and understand the how the complexity of immigration law applies to them. In most cases, the focus and time spent in court centers on the possibility of relief from removal or eligibility for one or more waivers or benefits provided by the Immigration and Nationality Act. Many of these remedies have complicated prerequisites which are unfamiliar to the general public, so the judge must advise an unrepresented person as to what steps they must take to pursue relief.

IMMIGRATION COURT CASELOAD

Our nation's Immigration Courts are overwhelmed with cases.[vi] There are currently more than 632,000 cases pending in the 58 court locations across the country.[vii] In the last six years, the number of cases pending before the courts has more than doubled.[viii] The Immigration Courts nationwide received 328,112 new cases in FY 2016 alone.[ix]

As a result of the ballooning backlogs at the Immigration Courts, hundreds of thousands of immigrants will be left in a state of legal limbo for more than three years on average – some much longer. The many delayed courts experience wait times of five to six years.[x] These wait times leave families of asylum seekers stranded abroad for years in dangerous or difficult situations, undermine recruitment of pro bono counsel, and add to the emotional and psychological stress for respondents who live in uncertainty. This lengthy limbo increasingly impacts respondent's family members who are United States citizens or lawful permanent residents, as mixed status families abound. Their futures which are intertwined with respondents also remain in limbo awaiting Immigration Judges' decisions as well. Conversely, lengthy delays can create incentives for those whose cases lack merit to remain in the system in order to secure additional time in the U.S.

Despite the sharp rise in the number of cases received, the court system is currently staffed with only 314 Immigration Judges on the bench (as approximately 20 judges are primarily or exclusively managerial or supervisory), a number which has been widely recognized as inadequate for more than a decade.[xi] To put this in perspective, since 2000, the number of Immigration Judges has risen from 206 to today's 336, while the court's caseload hovered at about 150,000 to 200,000 in FY 2001 and 2002, and today it has surpassed a staggering 632,000.[xii] In 2009 Immigration Judges were found to suffer more job stress and burnout than prison wardens and busy hospital doctors.[xiii] One can only imagine how much worse this situation has become since this study was conducted.[xiv]

THREATS TO DUE PROCESS AND JUDICIAL INDEPENDENCE LOOM: PERFORMANCE QUOTAS

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.

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).

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.

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 overcome his or her concern to take the time necessary to assure due process.

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 feel forced to violate their legal duty to fairly and impartially decide cases in a way that complies with due process in order to keep their jobs. 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, AFLCIO & 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. Letter of February 23, 2007 to Barbara W. Colchao, Performance Management Group, OPM, from Rodney F. Markham, Deputy Director, Personnel Staff, JMD (Colchao Letter).

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.

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.

In addition, the nation's Circuit Courts will be severely adversely impacted as they were when Attorney John Ashcroft implemented streamlining measures at the Board of Immigration Appeals, thereby causing a flood of cases in the higher courts. Should judges be subjected to performance metrics, the result will be the same and appeals will abound, repeating a history which was proven to be disastrous. Rather than making the overall process more efficient, this change will encourage individual and class action litigation, creating even greater backlogs.

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 productivity on the part of Immigration Judges. 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.[xv] 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 tremendous impact on case completion rates.

The current backlog in cases is not due to lack of productivity of Immigration Judges; it is due to the Department's failure for over a decade to hire enough Judges to keep up with the caseload. Over a decade ago, in 2006, after a comprehensive review of the Immigration Courts by Attorney General Gonzales, it was determined that a judge corps of 230 Immigration Judges was inadequate for the caseload at that time (approximately 168,853 pending cases) and should be increased to 270.[xvi] Despite this finding, there were less than 235 active field Immigration Judges at the beginning of FY 2015.[xvii] Even with a recent renewed emphasis on hiring, the number of Immigration Judges nationwide as of June 2017 stood at approximately 318 (298 who are actually in field courts), well below authorized hiring levels of 384.[xviii] From 2006 to 2017, while the caseload has quadrupled (from 168,853 to 629, 051), the number of Immigration Judges has not even doubled!

Not only would the imposition of quotas be unwarranted, it would damage the integrity of Immigration Court system and possibly contribute to a greater backlog. 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. Even the perception that judges are "rushing" cases through the system will likely result in more appeals and remands, not to mention potential class actions, further bogging the courts down.

The public's interest in a fair, impartial and transparent tribunal will also be jeopardized by implementation of such standards, as mixed status families are on the rise and faith in the system will be undermined.

PRACTICAL PROBLEMS THAT NEED TO BE RESOLVED FIRST

Rather than placing the blame for the backlog in the Immigration Courts at the feet of the judges, the real causes need to be squarely addressed. Beginning in 2014 when the numbers of families and unaccompanied children from Central American began because to rise exponentially, control of their dockets was taken away from judges. As NAIJ predicted,[xix] the process became less efficient and cases which were not ready for final determinations dominated judges' dockets, causing cases ready to be completed to be pushed back for years. This has occurred again as the recent surge of judges to the border resulted in older scheduled cases to pile up at the courts where judges were drawn from. The border detail assignments have been plagued by inefficiencies – insufficient numbers of cases to fill the dockets, immigration judges and support staff without access to computers and therefore unable to work effectively, and disruption in the dockets left behind.

It is universally agreed upon that more resources are needed for the Immigration Courts. While the pace of hiring has increased, retirements are plentiful as well, and unpleasant working conditions cause judges to retire at the earliest possible time, rather than working longer and mentoring new judges. Not only do more judges need to be hired, but all judges need increased access to training. One aspect of the slow pace of completions in recent years is due to an ever changing and increasingly complex body of law that judges must address. Greater numbers of cases present cutting edge legal issues such as the impact of various criminal convictions, highly nuanced standards like definitions of a particular social group, or voluminous documentation on country conditions and social, economic and living conditions in countries where applicants are from. In many instances immigration proceedings are becoming quasi criminal in nature. With such changes in the law, increased training is needed, not less. Deciding to forego training because of the belief that court time is too valuable to cancel with the large backlog is penny wise and pound foolish. When educated on the issues which we will face in advance, judges can more quickly and competently cut to the chase in court and move cases along more effectively and efficiently. When educated on the issues which we will face in advance, judges can more quickly and competently address the issues and more effectively and efficiently move cases to completion.

We are also plagued by disruptions to our dockets caused by increasing numbers of unavailable interpreters and equipment failure. The contract with our language services providers should be reviewed and improved so that court hearing time is not lost due to unavailability of interpreters. Even when it is working, our simultaneous interpretation equipment needs to be upgraded to service the demands of our Language Access program. We need improved video tele-conferencing and digital audio equipment, as frequent breakdowns cause delays or even outright cancellation of hearings on an unacceptably frequent basis. We need office space adequate to accommodate the increased size of our dockets, including courtrooms large enough for the dockets with greater numbers of respondents, as well as to provide workspace for the necessary support employees, including more judicial law clerks, necessary to meet this caseload.

STEPS BACKWARD

NAIJ is concerned by the limitations on relevant experience which apparently was just instituted in recent job announcements for judges. Rather than creating a broad pool of potential applicants by allowing seven years of relevant legal experience, the new requirement requires a very limited field of experience to prosecution or defense of cases initiated by the government. This change unnecessarily excludes law professors and expert immigration practitioners whose practice consisted of affirmative filings with USCIS. At a time when the judge corps is in desperate need of expansion, reducing the potential applicant pool is shortsighted and self-defeating.

THE SOLUTION

First step: Rather than avoiding the obvious and mundane flaws in our system which have created the backlog we have today, EOIR is planning steps to improperly narrow the discretion of judges to control their dockets. The priorities are the opposite of what is needed. First address the clear practical problems that interfere with productivity as outlined in the practical problems above. Then, and only then, will it be possible to see if increased managerial control of the dockets is warranted. As it stands now, judges firmly believe that such control is the very genesis of the problem itself. Procure the resources needed, fix what is broken and then see what strides can be made to reduce the backlog.

Next step:

Congress can act easily and swiftly resolve the threat to judicial independence caused by performance reviews with a simple amendment to the civil service statute on performance appraisals. 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.[xx] 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.

We urge you to take this important step to protect judicial independence at the Immigration Courts by enacting legislation as described above. Encroachments on the decisional independence of Immigration Judges will short circuit an already vulnerable system, leading to overwhelming numbers of individual appeals and class actions.

Final Step: While it cannot be denied that additional resources are desperately needed immediately, resources alone cannot solve the persistent problems facing our Immigration Courts. The problems highlighted by the response to the recent "surge" underscores the need to

remove the Immigration Court from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. Since the 1981 Select Commission on Immigration, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced.[xxi] In the intervening years, a strong consensus has formed supporting this structural change.[xxii] For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now "[m]ost immigration judges and attorneys agree the long term solution to the problem is to restructure the immigration court system...."[xxiii]

The time has come to undertake structural reform of the Immigration Courts. It is apparent that until far-reaching changes are made, the problems which have plagued our tribunals for decades will persist. For years NAIJ has advocated establishment of an Article I court. We cannot expect a different outcome unless we change our approach to the persistent problems facing our court system. Acting now will be cost effective and will improve the speed, efficiency and fairness of the process we afford to the public we serve. Our tribunals are often the only face of the United States justice system that these foreign born individuals experience, and it must properly reflect the principles upon which our country was founded. Action is needed now on this urgent priority for the Immigration Courts. It is time to stop the cycle of overlooking this important component of the immigration enforcement system – it will be a positive step for enforcement, due process and humanitarian treatment of all respondents in our proceedings.

Thank you.

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[i] Baltazar-Alcazar v. I.N.S., 386 F.3d 940, 948 (9th Cir. 2004).
[ii] Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook* at F1(Mar. 2017).
[iii] U.S. Dep't of Justice, Immigration Court Practice Manual § 2.2(a).
[iv] Yearbook, *supra* note ii at E1.
[v] Immigration and Nationality Act (INA)§§ 301(c)–(h), 8 U.S.C. §§ 1401(c)–(h).
[vi] Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action,* http://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf.

[vii] *Backlog of Pending Cases in Immigration Courts as of August 2017*, TRAC Immigration, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last accessed Oct. 15, 2017).
[vii] *Id.*
[viii] Yearbook, supra note ii at A2.
[ix] TRAC, *Id.*
[x] *Despite Hiring, Immigration Court Backlog and Wait Times Climb***,** TRAC Immigration, http://trac.syr.edu/immigration/reports/468/.
[xi] Memorandum from Attorney General Alberto Gonzales, *Measures To Improve the Immigration Courts and the Board of Immigration Appeals*, Aug. 9, 2006, https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf.
[xii] TRAC, *Id.*
[xiii] To better understand the personal toll these working conditions have wrought on immigration judges, *see* Burnout and Stress Among United States Immigration Judges, 13 Bender's Immigration Bulletin 22 (2008), available at pdfserver.amlaw.com/nlj/ImmigrJudgeStressBurnout.pdf; see also Stuart L. Lustig et al., Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey, 23 Geo. Immigr. L.J. 57 (Fall 2008 CQ ed.), available at articleworks.cadmus. com/geolaw/zs900109.htm
[xiv] Judicial Edge, *Nearly half of all judges have suffered from this condition*, National Judicial College (October 20, 2017), www.judges.org/nearly-half-judges-suffered-condition.
[xv] For some unknown reason, EOIR has chosen to drop the code used for such continuances from the list of codes which can be used by Immigration Judges as of October 1, 2017. *See* OPPM 17-02, https://www.justice.gov/eoir/file/oppm17-02/download.
[xvi] Memorandum from Attorney General Alberto Gonzales, *Measures To Improve the Immigration Courts and the Board of Immigration Appeals*, Aug. 9, 2006, https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf.
[xvii] TRAC, *Id.*
[xviii] *Id.*
[xix] NAIJ letter to the House Speaker and Majority Leader, at https://www.naij-usa.org/images/uploads/publications/NAIJ-position-ensuring-fairness-to-juveniles-House-7-23-14_1.pdf.
[xx] Pursuant to 5 C.F.R. §930.201(f)(3), administration law judges are also exempt from monetary or honorary awards or incentives. DOJ already follows that protocol for Immigration Judges despite subjecting them to performance evaluations.
[xxi] COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY THE COMMISSIONERS (1981).
[xxii] Prestigious legal organizations such as the American Bar Association, Federal Bar Association, and American Judicature Society wholeheartedly endorse this reform. While not as certain as to the exact form of change desired, reorganization has also been endorsed by the American Immigration Lawyers Association, and increased independence by the National Association of Women Judges. *See* http://naij-usa.org/publications/article-iandindependence-endorsements/.
[xxiii] Casey Stegall, *Long Lines, Suspended Lives: Statistics Reveal Immigration Courts Are Drowning*, FOX NEWS LATINO (Jan. 20, 2014), http://latino.foxnews.com/latino/news/2014/01/30/long-lines-suspended-livesimmigration-court-system-in-desperate-need-its-own/.