



NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

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Written testimony of Judge A. Ashley Tabaddor before the Senate Subcommittee on Border Security and Immigration- May 8th Hearing on:
“At the Breaking Point: The Humanitarian and Security Crisis at our Southern Border”

Chairman Cornyn, Ranking Member Durbin, and members of the Subcommittee:

I am Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ), and an Immigration Judge.[1] For the past thirteen years I have served in the Los Angeles Immigration Court where I currently preside over the “unaccompanied juvenile docket.” Since my appointment to the bench, I have presided over detained, non-detained, juvenile and “Franco” competency dockets. My current pending case load is over 2,200 cases. I am pleased to submit this written testimony for the record.

The immigration court system is broken. In spite of the largest number of Immigration Judge (“IJs”) hiring in the past two fiscal years (from under 300 IJs in FY 2017 to over 420 IJs and growing in FY 2019), the Immigration Court backlog has grown from over 600,000 to close to 900,000 pending cases, and well over 1.1 million cases if former Attorney General Sessions’s decision in Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018) is fully implemented. The source of this failure and impending implosion of the court is largely due to the fundamental structural flaw of establishing a court in the U.S. Department of Justice (DOJ), a law enforcement agency. This design defect has plagued the court from its inception with both apparent and actual conflicts of interest, some of which I highlighted in my testimony before this subcommittee on April 18, 2018.

Of paramount concern is the Department's continued mischaracterization of its unprecedented decision to impose quotas and deadlines on Immigration Judges, and the counter-productive impact of this decision on the backlog of cases pending before the court.

The Department's conflation of the concept of case completion goals with imposition of quotas and deadlines on judges is disingenuous. Court-wide case completions goals, which the immigration court has utilized in the past and continues to do so to date, are an accepted tool by court systems across the country to ascertain the proper distribution of resources and identification of training needs of its personnel. Yet, even in the context of case completion goals, the Department has failed to use these tools for its intended purposes. The Executive Office of Immigration Review (EOIR) has favored lopsided staffing models, prioritize unnecessary increases in hiring of supervisory judges over providing sufficient support staff, law clerks, space, courtrooms, technology, training, or interpreters for the increase in judge corps. Essentially, the Department has failed to effectively and efficiently administer the court which has significantly contributed to the backlog and is now facing budget shortfalls in spite of the budget increases that were provided by Congress to accommodate "IJ team" hiring in numbers well beyond the current number of non-supervisory judges.

The use of case completion goals drastically differs from individualized quotas and deadlines as a basis to impose adverse actions on or terminate judges from their position. Production quotas were first mandated as part of Immigration Judges' individual performance rating in October 2018, at the beginning of this current fiscal year. This is a radical departure from the last decade when quality, not quantity was prioritized in a judge's evaluation. NAIJ has stated its unequivocal opposition to the imposition of and use of numerical and time based production quotas from the initial discussion with EOIR. NAIJ has continuously and strenuously objected to implementation each step of the way.

Moreover, the Department's continued refusal to disclose the manner in which it arrived at the numerical measures it is using to monitor Immigration Judges is quite telling. The Department's consistent reference to "considered policy judgement" as the basis for its decision rather than relying on transparent, objective and considered studies of the actual nature of the various demands of our judges' dockets belies the Department's claim of commitment to adjudication of cases in a timely and impartial manner. Even a superficial study of Immigration Judges' workload reveals that judges carry widely divergent caseloads comprised of vastly different numbers and case types that is incompatible with a "one size fits all" set of quotas and deadlines. Thus, a singular case completion quota or pre-set deadlines, which the Department has imposed on judges, is inconsistent with the Department's professed commitment to due process.

The NAIJ was able, as a matter of labor law, to provide some protections for judges from arbitrary poor performance evaluations by requiring consideration of seven ameliorating factors to the quotas and deadlines when the required number of completions or deadlines is not met. The EOIR now disingenuously claims the availability of these factors that we negotiated in our collective bargaining agreement transforms production quotas into benign performance measures. Ironically, many of the same factors we suggested be included as frequently arising justifications for not meeting their fixed numbers were rejected by the EOIR.

However, even in this context the EOIR refuses to apply these factors at the outset of a rating period, leaving our judges in the dark as to what exact number of quotas and deadlines they will ultimately be accountable for. For example, to date the EOIR has not identified how the 35 day government-wide shutdown will be considered in evaluating a judge's quota or deadline. It is mere sleight of hand that allows the EOIR to cite the final agreed upon article in our collective bargaining agreement as a mechanism that would somehow transform these production quotas into reasonable performance assessment standards.

The default number of completions for a satisfactory performance score is 700 cases of any case type, be it a 15 minute removal proceeding for someone with no relief, or a complex case involving contested removability with multiple parties and several forms of relief which must be analyzed. Similarly, the default percentage of cases that are expected to be completed on a singular initial trial date is 95 percent. Yet, it is not unusual for an Immigration Judge to carry three to five thousand cases on his or her docket, and to schedule a trial date two to four years from a preliminary hearing date. It is also not unusual for a number of intervening events to prevent the judge from being able to complete a case on a scheduled initial trial date, such as intervening events in the case, emergencies that behalf the parties and counsel before the court, intervening change in the law, or voluminous filings and need for extensive testimony by each party and their witnesses. Immigration Judges take an oath of office to be impartial decision makers bound by the Constitution and laws of the United States. Immigrations Judges must make decisions based on the facts and the law of the case. To impose a 95 percent rule that all trial must be initiated and completed on a single initial trial date is in direct conflict with the oath of office, divorced from the realities of our day to day working conditions, and is not only indefensible but counterproductive. In order to benefit from any of the bargaining agreement factors to justify a failure to meet the arbitrary quota involves each Immigration Judge to painstakingly document, case-by-case, the reason why achieving that number was impossible by showing which cases would fall under one of the categories. This is a burdensome process which puts a greater time pressure on busy Immigration Judges, taking time away from the adjudication of cases rather than assisting them in increasing their productivity.

Despite repeated requests by NAIJ, EOIR has failed to provide our organization with the necessary statistical reports to ascertain how many judges in each court are able to meet their goal. The assertions that *some* judges completed 1,500 cases per year fails to provide a relevant time frame and case type so as to provide a reasonable basis to assume that it is/was sustainable to use this as a marker for all judges. And if so, why establishing a 700 per year case completion quota reasonable? Why has EOIR failed to provide NAIJ with information we requested to evaluate more precisely the feasibility of the vast majority of members actually achieving this quota without resort to ameliorative factors? Thus far, based on reports from our members, most Immigration Judges will not be able to pass the default measures set by EOIR.

Most disingenuous of all claims made by the EOIR is conflating our objections in such a way that EOIR had characterized NAIJ criticism of production quotas as creating a false dichotomy that a requirement to adjudicate cases in a timely and impartial manner automatically impairs the independence of the Immigration Judges. NAIJ has never made such an assertion. Instead,

we have pointed out that Immigration Judges are bound by their oath of office. Under the law, they have independent decision making authority. EOIR's interference into decisions regarding case scheduling, the length of trials and when or if a written decision is needed constitutes an encroachment on judicial independence. The natural effect of mandating an arbitrary number of completions each year impacts a judge's decision, either consciously or unconsciously.

The parties who appear before the Court, whether they are the government or the individuals seeking protection from the court, deserve to be treated consistent with our American Judicial principles. They deserve to stand before an independent court and an impartial judge who is not placed in a conflict of interest position of honoring her oath of office or risking her source of livelihood. Not until we have a court that is a structurally independent and administered competently as a court will we begin to remedy the crisis we face today.

NAIJ is extremely grateful for your leadership on this important issue of protecting judicial independence and due process for the parties who appear before the court.

[1] I am speaking in my capacity as President of the NAIJ and not as 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.