



## NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

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The Honorable José Enrique Serrano,  
Chairman,  
House Appropriations Committee, Commerce, Justice, Science and Related Agencies  
Subcommittee  
H-310, The Capitol  
Washington, DC 20515

The Honorable Robert Aderholt,  
Ranking Member,  
House Appropriations Committee, Commerce, Justice, Science and Related Agencies  
Subcommittee  
H-310, The Capitol  
Washington, DC 20515

Dear Chairman Serrano and Ranking Member Aderholt,

Thank you for holding a hearing on the issues facing the Immigration Court on March 7, 2019. As President of the National Association of Immigration Judges (NAIJ), representing the approximately 400 Immigration Judges across the country, I want to thank you and the Appropriations Committee for your strong support of Immigration Judges (IJs).

During the hearing, EOIR Director, Mr. James McHenry, made several statements in response to questions that do not accurately portray the entire reality we see in our courtrooms. It is our goal to provide you with a more complete picture of several of the issues addressed in that hearing from the perspective of the IJs.

## **Immigration Judges do not support quotas**

Contrary to the impression left by the Director regarding NAIJ's position on numerical production quotas and deadlines as a basis for evaluating the performance of IJs, we have strenuously and consistently opposed implementation of these measures every step of the way, a position that has been made explicitly clear to EOIR throughout our engagement with the Agency. We have serious concerns that these metrics create a conflict of interest, will adversely affect thoughtful and deliberate decision making, and discourage judges from taking the time needed to fully evaluate novel or creative legal arguments. The current crushing workload is a serious enough impediment in affording adequate time for deliberation; the added pressure of production quotas and deadlines is unwarranted and counterproductive.

To further clarify, because of our unique status as attorney employees of the Department of Justice (rather than as judicial branch judges or Administrative Law Judges governed by the Administrative Procedures Act), we are precluded under federal labor law from preventing the imposition of quotas or from assuring that the substance of what they require of IJs is realistic while honoring our oath of office to provide due process in court proceedings. We are only allowed to bargain under labor law with respect to "impact and implementation" of these quotas, to address some protections for IJs being disciplined or faulted for poor performance, as was cited by Mr. McHenry. But such good faith bargaining on our part under labor law in no way detracts from our categorical opposition to the very concept of subjecting judges to numerical quotas and deadlines.

Mr. McHenry's assertion that our legal training and integrity as professionals will assure that we will not succumb to shortcuts or other actions to protect our self-interest in continued employment, or that we are creating a "false dichotomy" when we express the extremely negative impact of numerical quotas and deadlines, conveniently overlooks the realities of our jobs and the judicial canon of ethics that would disqualify any "regular judge" if faced with the same dilemma. We are raising these concerns in the context of already visible and untenable stress colleagues are experiencing due to the imposition of quotas in addition to the unconscionable workload we face daily. We are the canaries in the coal mine providing advance warning of the dangers ahead, and that production quotas and deadlines could not have been implemented at a worse time. As professionals with integrity, we have struggled for years at EOIR to do more with less and to accommodate shifting priorities that come with each new administration, but this latest round of policies has far exceeded any previous debilitating measures.

Mr. McHenry asserted that several other agencies have case completion quotas. This is not an accurate statement. No independent judge position in the country, faced with the high stakes traditional adversarial court proceedings over which we preside, is subject to individual production quotas and deadlines as a measure of whether or not they can maintain their position and continued employment. The very concept is contrary to the fundamental principles of the American judicial system. In fact, even in the context of Administrative Law Judges ("ALJ"), **Congress has specifically exempted ALJs from individual performance evaluations as a mechanism to ensure their independence from such measures and protect the integrity of their decisions.** Immigration Judges are provided with decisional independence, under 8 C.F.R.

1003.10(b) which states that “In deciding the individual cases before them . . ., *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.” However, we are not even provided with the mechanism that the ALJs have in protecting their decisional independence. This gap in protection is particularly troubling since IJs’ decisions have life and death consequences, and historically, 90% of IJ decisions are final decisions, not subject to any review by a higher administrative or judicial court.

Moreover, subjecting IJs to production quotas and deadlines tied to their individual performance evaluations will not only create a perception (hopefully not a reality) of interference with their decisional independence, but it will create an appealable issue in virtually every case. Doubt will be raised as to whether a judge’s decision is based on law or personal interest, knowing the judge’s performance rating depends on these metrics. Litigants will be incentivized to challenge every aspect of a judge’s handling of a case, including procedural rulings on continuances and scheduling, noting that there are now personal incentives for a judge to push more cases through the docket faster in order to keep his or her job. Instead of reducing the backlog, this will increase the backlog as appeals will abound, even to the point of flooding the circuit courts of appeal. The final adverse consequences of these measure will not be seen for years to come, long after the individuals responsible for imposing those measures are gone.

Immigration Judges are equally committed to combatting the backlog and have been doing more with less for years. We have explained to the Agency that these measures will actually increase rather than decrease the backlog. In contrast, there is an approach that will allow IJs to focus on the backlog without the unintended consequence of compromising the integrity of the Court or further compounding the problem by provoking appeals. The answer is to follow the advice of experts in the field, such as the American Bar Association, which have recognized that numeric standards do have a place in our Court system as a case management tool, but they do not have a place in individual judge performance evaluations. Specifically, numeric standards are commonly used to assess and evaluate where resource allocations are to be made or adjusted and identify training needs of judges. This empowers judges to improve their productivity, rather than punishing them or creating appealable issues. The Court can provide docket efficiencies and creative docket management approaches without pitting a judge’s individual performance measures (and thus his or her job) against the duties undertaken under our oath of office.

### **The problem is not the “culture”**

Separately, the NAIJ takes great umbrage at the remarks made by the EOIR Director blaming the previous “culture” at EOIR for failing to emphasize completions as being at fault in what he characterizes as the trend of decreased Immigration Judge productivity prior to his arrival and boasting that he has “restor[ed] its reputation in the last 21 months.” He touted great improvements based on his assertion that the first quarter of 2019 is “on track to be the third highest in productivity in the past 36 years” and indicated it followed eight years of decline. Our review of the completion statistics over time show that this assertion mischaracterizes the facts and any recent high case completions is principally due to the addition of new IJs, rather than any claimed increase in IJ productivity.

In the Director's testimony he stated, "After eight consecutive years of declining or stagnant productivity between FY 2009 and FY 2016, EOIR is now in the middle of its third consecutive year of increased immigration court case completions." While the raw numbers do show some declining completions during that time period, the only year in which any increase in average individual IJ productivity is noted is in FY 2018, and even then by only a small margin. Therefore, the statement of a three year productivity increase is at best misleading. Looking at the completions averaged out per IJ, the number continued to drop each year, including for FY2017, **so there is actually only one year where the completions per IJ has increased - FY 2018, and that increase was only by 2.6%.** That is a fairly small increase (possibly even fitting the Director's definition of stagnant) and is likely attributed to factors other than addressing alleged declining IJ productivity. For example, in FY 2018, the Supreme Court issued the *Jennings v. Rodriguez* decision in which it limited the availability of bond hearings to a vast majority of individuals held in long term immigration detention. Prior to this decision, some courts in the nation (including the high volume courts in California) were devoting 10 to 20% of their time to bond hearings that do not count towards "case completions." In the absence of such demands on their hearing time, they were able to hear and complete more cases. The bottom line is that on a per IJ basis, there is only one year of increased completions and it was a statistically insignificant increase which is readily attributable to factors outside of any Agency initiative. We stand by our public statements that it is the frequent shifting of case and other priorities due to political pressures which have been a primary source of contribution to delay and backlogs of the cases before the Court, coupled with the chronic lack of sufficient numbers of IJs, judicial law clerks, support staff and modern technology.

### **The budget shortfall was predictable and preventable**

At the hearing, a very legitimate concern was raised as to how EOIR could have been taken by surprise at the skyrocketing costs of our interpreter contract. This came as quite a shock to us as well, since cost of interpretation should be one of the easiest costs to project. Since our dockets are fully booked in the majority of our non-detained courts for three or more years, it is a simple matter to run calendars, see the language needs and calculate a baseline minimum of what the interpreter expense will be for a year or more at a time. Additionally, Mr. McHenry failed to mention a significant contributor to the interpreter costs at EOIR: a major change in the terms of the governing contract effective September 1, 2017. Before the contract modification, if a request for an interpreter was cancelled by 5:00 p.m. local time the day before the hearing, EOIR did not pay any penalty. In addition, the minimum time paid to an interpreter was two hours. After the September 1, 2017, contract modification, EOIR must cancel with at least 48 hours advance notice or be charged for three hours. In addition, the minimum time paid to an interpreter was increased to three hours. Therefore it was not merely increased demand that drove the costs of interpretation through the roof, but also the extremely disadvantageous contract modification. Even more inexcusable, other than a singular email in a myriad of emails we receive on a daily basis, there was no significant court-wide advisal of these changes or training of IJs made so that IJs and their assistants could be sure to minimize the impact of these changes. Instead, many IJs and their staff were completely unaware of the impact of the contract modifications to the Court's budget.



## **Video-teleconferencing is not a panacea**

Another important issue raised in the hearing was the impact of increasing use of video-teleconference (VTC) technology. NAIJ shares deep concern over this issue and the paucity of information on how it affects the outcomes of hearings. While we do not have access to the statistics cited by Mr. McHenry, the statement that only 151 cases out of 29,000 held were adjourned for VTC malfunctioning does not comport with our experience. To the contrary, we were recently provided information forwarded to a media outlet through a FOIA request on continuances. Based on the data the Agency released to this source, in FY 2018, a total of 1,090 cases were adjourned due to video malfunctioning. This is more consistent with IJ reports to us that highlight the rampant problems with dropped connections, difficulty hearing or seeing individuals on the screens, extremely problematic issues with interpretation and coordination between telephonic interpreters and the VTC units. In addition, several IJs have shared with us that they have experienced serious health issues stemming from the lack of ergonomic planning in the installation of the VTC units and screens, as well as excessive time staring at screens. To our knowledge, the agencies which Mr. McHenry cited as successful users of VTC have an extremely different client base and type of hearings. They do not have the complex legal issues combined with non-English speakers who comprise a high percentage of those appearing before the Immigration Court, nor do they employ VTC for adversarial hearings where large numbers of respondents are unrepresented while the government has attorneys at virtually every case. (The figures on the percentage of individuals who have legal representation have inexplicably disappeared from the latest version of the EOIR Statistical Yearbook which changed its format, although the FY 2016 Yearbook showed 39% of respondents were not represented by counsel.)

## **Compromising on training is not the solution**

Finally, the Director at times acknowledges the importance of training, yet he has indicated that “due to budget constraints,” the annual Immigration Judge Conference is being cancelled. This conference is the only time the entire IJ corps is brought together to train, share best practices and obtain in person Continuing Legal Education credits, which are required in many states to maintain a license to practice law. On-going and thoughtful training sessions are a key component of a highly qualified and well respected judge corps. It is deeply concerning that the Agency would compromise on training and would cancel our in-person training session. We encourage the Committee to find a way to continue with the annual training conference.

NAIJ is a willing, able and committed party in combating the backlogs and protecting the integrity of the Immigration Court. We hope that by sharing our realities on the job and on the bench would better inform our representatives on the Hill. Our judicial corps fully understands the urgency of this issue and stands ready to do our part to assure justice is provided in an efficient, effective, and fair manner.

Sincerely,



A. Ashley Tabaddor, President,  
National Association of Immigration Judges