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Statement of the New York City Bar Association Concerning the Independence of Veterans Law Judges and Immigration Judges

November 28, 2018

The New York City Bar Association issues this statement to voice its unequivocal support for the independence of our nation's immigration judges and veterans law judges. These positions should not become politicized.

The City Bar, like numerous other organizations and individuals, has expressed serious concerns about the fairness, propriety, and effectiveness of restrictions recently imposed on immigration judges by the U.S. Department of Justice, including new mandatory numerical case completion quotas which went into effect on October 1, 2018.[1] Now, with the country having just observed Veterans' Day, the City Bar, once again, is deeply concerned by what appears to be a similar encroachment upon the independence of veterans law judges at the U.S. Department of Veterans Affairs (VA). A recent report in the Washington Post states that, in an apparently unprecedented move, the White House is playing a pivotal role in the selection of veterans law judges and has requested that prospective judges provide information regarding political party and partisan activity as part of the vetting process.[2]

Veterans law judges (officially known as members of the Board of Veterans' Appeals or "Appeals Board") hear veterans' appeals of VA decisions denying benefits in connection with their military service, and are part of the VA.[3] The roughly 90 judges are appointed by the VA Secretary and approved by the President, but they are not considered political appointees and are supposed to be non-partisan.[4] Stretching back for decades, White House approval of the thousands of veterans law judge candidates forwarded by the Secretary of the VA has been essentially *pro forma*. [5] That changed earlier this year, as

the Trump administration prepared to hire its first group of veterans law judges.[6]

Initially, consistent with past practice, the attorneys under consideration completed a detailed written application, were subject to background investigations, and were vetted by multiple interviewers, including the Chair of the Board of Veterans' Appeals, a former longtime Appeals Board attorney and veterans law judge and a Trump appointee who was confirmed by the Senate in late 2017.[7] All eight of the candidates selected by the Chair of the Appeals Board were attorneys with years of experience in leadership roles at the Board; and, in fact, all eight were serving as acting judges at the time of their applications.[8]

However, before the VA Secretary was able to forward the names of the eight recommended candidates to the White House for final approval, the White House reportedly sent questionnaires to the eight candidates, requiring them to disclose their political party, to provide links to their social media profiles, and to advise whether they had ever testified before Congress, spoken at a political convention, appeared on talk radio, or published an opinion piece in a conservative or liberal outlet.[9] Such inquiries appear to be without precedent.[10]

Partisanship has no place in the selection of veterans law judges. However, when the new veterans law judges were announced, only four of the eight candidates selected by the Appeals Board Chair had garnered the White House's seal of approval.[11] According to the Washington Post, of the four candidates who were approved by the White House and sworn in last month, three are Republicans. The fourth has no party affiliation, but has voted in Republican primaries.[12] No reason was given for the White House's rejection of the other four Board Chair-approved candidates, three of whom are registered Democrats and one an independent.[13]

The facts as laid out in the Washington Post's reporting, if accurate, are cause for deep concern among those who understand the importance of an independent administrative judiciary, where political affiliation plays no role in the appointment of qualified and experienced judges. And, for those lawyers who represent veterans seeking benefits to

which they are entitled, it is a fundamental tenet of the system that cases can, should, and must be decided based on the application of the law to the facts and not on partisan or other non-judicial considerations. At a minimum, the statements in the Washington Post article merit the close scrutiny of Congress, as well as bar associations and veterans' organizations.

Questions about the independence of the veterans courts mirror and overlap with the significant concerns being raised about the eroding independence of the immigrations courts. Indeed, to the extent a pattern is emerging, it bears emphasis that *both* adjudicative systems require the continued attention and support of the legal profession.

Unlike federal trial and appellate courts, which are part of the Judicial Branch of the federal government, the immigration courts are part of the Executive Branch, within the Department of Justice—the same law enforcement agency that is charged with prosecuting criminal immigration cases in federal courts. This means that immigration judges are actually Justice Department employees and that they ultimately report to the Attorney General, who has the power to set the judges' conditions of employment, including hiring, transfers from one location to another, performance evaluations, and discipline, including termination of employment.^[14] Exercising its authority over immigration judges, the Justice Department has mandated that, as of October 1, 2018, each immigration judge must adjudicate a minimum of 700 cases per year or face possible disciplinary action, even termination.^[15]

The City Bar, among numerous other organizations and individuals, has been highly critical of these new case completion quotas: they constitute at least a potential (if not actual) conflict of interest for immigration judges as the judges' financial interests may be in direct conflict with litigants' due process rights;^[16] they gut the due process rights of immigrants;^[17] they add to the immigration courts' backlog, which already exceeds 750,000 cases;^[18] and they will spawn more appeals of immigration judges' decisions, flooding the federal appellate courts with litigation.^[19]

More generally, the City Bar, like other organizations and individuals, has condemned a range of other actions that the

Justice Department has taken in recent months that prize speed and volume—rather than sound, evidence-based reasoning, fairness, and consistency—in immigration judges' decisions.[20]

Above and beyond case completion quotas, the Attorney General may certify to himself or herself decisions from the Board of Immigration Appeals (BIA) and overrule or rewrite those decisions. The Department of Justice under former Attorney General Sessions has exercised that power to issue decisions sharply curtailing the ability of immigration judges to manage their dockets and conduct full and fair proceedings.

[21] In one case, Department of Homeland Security (DHS) had appealed an immigration judge's decision to administratively close a proceeding. The BIA agreed with DHS and remanded the case to the immigration judge, but the Attorney General certified the case to himself to decide an issue that was never raised below—whether immigration judges and the BIA have authority to administratively close *any* case—and decided that they do not, save in very limited circumstances, thus eliminating a non-controversial procedural tool judges had used for decades in managing their dockets.[22]

These decisions by the Attorney General, combined with the introduction of case completion quotas, significantly undermine the independent decision-making and docket-management power of immigration judges. For these reasons, and together with other organizations and individuals, the City Bar has advocated for the establishment of an immigration court under Article I of the U.S. Constitution, wholly independent of the Executive Branch.[23]

Although they toil largely in the shadows of the country's civil justice system, administrative judges are, in many respects, the workhorses of that system. The number of cases adjudicated by the administrative judiciary far exceeds the number of cases heard by federal district and appellate courts; and tens of thousands of people who will never set foot in a federal courthouse have their claims decided by administrative judges. In short, for the vast majority of people, administrative judges are "the face of justice." And, much like the independence of federal district and appellate judges, the independence of

administrative judges – including veterans law judges and immigration judges – must be zealously guarded to ensure the proper functioning of the justice system.

As to the veterans law judges, Congress should undertake a close review of the statements in the October 23, 2018 Washington Post report. And, to the extent partisan criteria have become a factor in the approval process for veterans law judges, the White House should cease any such practice and reconsider the four candidates previously rejected, without regard to their political party. Given the Board of Veterans Appeals' crushing caseload, our veterans need more judges; and they deserve the best, without regard to the would-be judges' party affiliation.

As to immigration judges, the Administration must give serious consideration to wholesale systemic reforms, including the establishment of an independent immigration court under Article I of the Constitution. At a minimum, in the near term, the Justice Department should rescind the case completion quotas recently imposed on immigration judges, which foster perverse incentives to complete cases as quickly as possible and without regard to due process. The number of cases decided by an immigration judge is no metric for justice.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 24,000 members, is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. The City Bar's Military Affairs & Justice Committee addresses legal and policy issues affecting the United States armed services and the operation of the Court of Military Justice. The Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. The Task Force for the Independence of Lawyers & Judges fosters the independence of lawyers and judges in their professional activities in the United States and abroad. The City Bar Justice Center's Veterans Assistance Project provides disabled, low-income veterans in New York City with pro bono legal assistance on issues related to their claims for benefits from the U.S. Department of Veterans Affairs. www.nycbar.org

[1] See Memorandum from EOIR Director re: Immigration Judge Performance Metrics (Executive Office of Immigration Review, U.S. Dep't of Justice, March 30, 2018), http://www.abajournal.com/images/main_images/from_Assoc_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf; EOIR Performance Plan – Adjudicative Employees, http://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf; Report, Quotas in Immigration Courts Would Be Neither Efficient Nor Just (New York City Bar Immigration & Naturalization Law Committee, April 2018), https://s3.amazonaws.com/documents.nycbar.org/files/2017296-QuotasImmigrationCourt_IMMUNAT_12.7.17.pdf; New York City Bar, Written Testimony by the Immigration and Nationality Law Committee and the Task Force for the Independence of Lawyers and Judges, Senate Judiciary Committee, on Strengthening and Reforming America's Immigration Court System, Apr. 18, 2018, https://s3.amazonaws.com/documents.nycbar.org/files/2017367-Senate_Testimony_Imm_Court_Quotas.pdf; *see also, e.g.*, Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement Opposing Performance Quotas on Immigration Judges (Oct. 1, 2018), <https://www.aila.org/infonet/retired-immigration-judges-and-former-members>; Statement of Retired Immigration Judges and former members of the Board of Immigration Appeals, re: Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System" (April 18, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/75674>; Letter from More Than 120 Law Professors to Attorney General re: Performance Metrics for Immigration Judges (Aug. 14, 2018), <https://commonwealthlaw.widener.edu/files/resources/letter-to-sessions-immigration-adjudication-with-s.pdf>; AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts (American Immigration Lawyers Association, Sept. 28, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/77605>; Head of U.S. immigration judges' union denounces Trump quota plan (MSN/Reuters, Sept. 21, 2018), <https://www.msn.com/en-xl/northamerica/top-stories/head-of-us-immigration-judges-union-denounces-trump-quota-plan/ar->

AAAt2PD; Amid turmoil on the border, new DOJ policy encourages immigration judges to cut corners (Brookings Institution, June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/>; Statement of ABA President Hilarie Bass Re: Mandatory case completion quotas for immigration judges (American Bar Association, Oct. 16, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement_of_abapre1/; Letter to Senator John Cornyn and Senator Richard Durbin, re: April 18, 2018 Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System” (Federal Bar Association, April 16, 2018), <http://www.fedbar.org/Image-Library/Government-Relations/Letter-from-FBA-President-Kip-T-Bollin-.aspx>.

[2] *‘I’ve never seen these positions politicized’: White House rejection of veterans judges raises concerns of partisanship* (Washington Post, Oct. 23, 2018), https://wapo.st/2q6xf8h?tid=ss_mail&utm_term=.819160453819.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*; White House Politicized Selection of Veterans Law Judges (DisabledVeterans.org, Oct. 24, 2018), <https://www.disabledveterans.org/2018/10/24/wapo-white-house-politicized-selection-of-veterans-law-judges/>. DOJ was similarly recently accused of rescinding a job offer for a Board of Immigration Appeals position received by a government attorney with over 25 years’ of federal service, allegedly because she has taken pro-immigrant positions on

controversial issues. Immigration judge applicant says Trump administration blocked her over politics (CNN June 21, 2018), <https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html>.

[11] News Release, President Trump approves appointment of four additional judges to VA's Board of Veterans' Appeals (U.S. Dep't of Veterans Affairs, Oct. 11, 2018), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5127>; Washington Post, *supra* n.2.

[12] Washington Post, *supra* n.2.

[13] *Id.*; DisabledVeterans.org, *supra* n.10.

[14] Letter from More Than 120 Law Professors, *supra* n.1; Jeff Sessions Is Executing Trump's Immigration Plans With a Quiet, Efficient Brutality (Mother Jones, Sept. 7, 2018), <https://www.motherjones.com/politics/2018/09/jeff-sessions-is-executing-trumps-immigration-plans-with-a-quiet-efficient-brutality/>; AILA Policy Brief, *supra* n.1; Justice Department Rolls Out Quotas For Immigration Judges (NPR, April 3, 2018), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges>; In Immigration Courts, It Is Judges vs. Justice Department (New York Times, Sept. 7, 2018), <http://nyti.ms/2M7Yhox>; Brookings Institution, *supra* n.1; Immigration judges say new quotas undermine independence (Business Insider/Associated Press, Sept. 21, 2018), <https://www.businessinsider.com/ap-immigration-judges-say-new-quotas-undermine-independence-2018-9>; MSN/Reuters, *supra* n.1.

[15] DOJ Slaps Quotas On Immigration Judges To Speed Deportations (Huffington Post, April 3, 2018), https://www.huffingtonpost.com/entry/doj-quotas-on-immigration-judges-to-speed-deportations_us_5ac346cbe4b04646b645d061; Jeff Sessions Is Quietly Transforming the Nation's Immigration Courts (The Atlantic, Oct. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/>.

[16] New York City Bar Report, *supra* n.1; *see also, e.g.*, Letter from More Than 120 Law Professors, *supra* n.1; April 2018

Statement of Former Immigration Judges, *supra* n.1; Brookings Institution, *supra* n.1; [Law Professors Denounce Case Quotas, *supra* n.1](#); Commentary: I'm an Immigration Judge. Case Completion Quotas Are a Really Bad Idea. (Fortune magazine, April 9, 2018), <http://fortune.com/2018/04/09/immigration-judge-quotas-department-of-justice/>; Justice Department imposes quotas on immigration judges, provoking independence concerns (ABA Journal, April 2, 2018), http://www.abajournal.com/news/article/justice_department_imposes_ AILA Policy Brief, *supra* n.1.

[17] New York City Bar Report, *supra* n.1; Letter from More Than 120 Law Professors, *supra* n.1; [Law Professors Denounce Case Quotas, *supra* n.1](#); New Quotas for Immigration Judges Are 'Incredibly Concerning,' Critics Warn (The Daily Beast, April 2, 2018), <https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn>; AILA Policy Brief, *supra* n.1; Brookings Institution, *supra* n.1.

[18] New York City Bar Report, *supra* n.1 at 2 (“...quotas will be unlikely to save any time. Cases sloppily rushed through courts will result in a dramatic increase in motions to reopen and appeals, drawing cases out longer than if they had simply been diligently resolved in the first instance.”); *see also, e.g.*, ABA Journal, *supra* n.16; AILA Policy Brief, *supra* n.1.

[19] New York City Bar Report, *supra* n.1; Brookings Institution, *supra* n.1; AG Sessions’ plan to clear immigration case backlog will make things worse, judges and attorneys fear (Dallas News, April 10, 2018), <https://www.dallasnews.com/news/immigration/2018/04/10/immigratic-judges-attorneys-worry-sessions-quotas-will-cut-justice-clogged-court-system>; AILA Policy Brief, *supra* n.1; ABA Journal, *supra* n.16.

[20] For example, in the past year alone, Attorney General Sessions reassigned select cases away from certain immigration judges; pulled at least six cases from the assigned immigration judges to decide himself; stripped immigration judges of virtually all power to terminate, administratively close, or continue cases that are pending before them; and largely barred immigration judges from considering immigrants’ claims of domestic violence and/or gang-related persecution in deciding asylum cases. *See, e.g.*, Jeff Sessions is

exerting unprecedented control over immigration courts – by ruling on cases himself (Vox, May 21, 2018); MSN/Reuters, *supra* n.1; Immigration judges union alleges DOJ, Jeff Sessions interfering in cases (Arizona Republic, Aug. 8, 2018), <https://www.azcentral.com/story/news/politics/immigration/2018/08/08/association-immigration-judges-challenges-doj-judicial-interference-immigration-court-case/934849002/>; 2 Phoenix immigration judges retire as Trump administration pushes for faster deportations (Arizona Republic, Sept. 29, 2018), <https://www.azcentral.com/story/news/politics/immigration/2018/09/29/administration-phoenix-immigration-judges-retire-amid-deportation-quotas-jeff-sessions/1427755002/>; Immigration judges’ union calls for immigration court independent from Justice Department (Washington Post, Sept. 21, 2018), https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.78d6695c9cee; Immigration judges, worried Trump is seeking to cut them out, fight back (Washington Post, Aug. 9, 2018), https://wapo.st/2OVJ38F?tid=ss_mail&utm_term=.fb9d6a283841; ABA Journal, *supra* n.16; AILA Policy Brief, *supra* n.1; New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations (Wall Street Journal, April 2, 2018), <https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158>.

[21] Jeff Sessions is exerting unprecedented control over immigration courts – by ruling on cases himself (Vox, May 21, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>. In *Matter of L-A-B-R*, 27 I&N Dec. 245 (AG 2018), the AG certified a case to himself and issued a decision making it much harder for immigration judges to grant continuances when respondents are seeking collateral relief. In *Matter of S-O-G and F-D-B*, 27 I&N Dec. 462 (A.G. 2018), the Attorney General decided that immigration judges and the BIA may only terminate or dismiss removal proceedings where the regulations expressly allow or if the respondent has been found not removable. See also Attorney General Jeff Sessions Limits When Immigration Judges Can Postpone Hearings (Houston Public Media, Aug. 20, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/08/20/300917>

general-jeff-sessions-limits-when-immigration-judges-can-postpone-hearings/.

[22] *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018).

[23] New York City Bar Report, *supra* n.1; *see generally* Video, Hearing Before the Subcommittee on Border Security and Immigration, Committee on the Judiciary, U.S. Senate, “Strengthening and Reforming America’s Immigration Court System” (April 18, 2018), <https://www.c-span.org/video/?444093-1/senate-panel-holds-hearing-immigration-court-system>; *id.*, <https://www.judiciary.senate.gov/meetings/strengthening-and-reforming-americas-immigration-court-system>; *see also, e.g.*, Statement of ABA President Bob Carlson re: Immigration lawyers and judges (American Bar President, Sept. 11, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/77365>; Statement of Hilarie Bass, President of the American Bar Association, for the Subcommittee on Border Security and Immigration, Committee on the Judiciary, United States Senate, “Strengthening and Reforming America’s Immigration Court System” (ABA Governmental Affairs Office, April 18, 2018), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Hi4-18-18.authcheckdam.pdf>; Statement of Judge of A. Ashley Tabaddor, President, National Association of Immigration Judges, April 18, 2018, Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System,” <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Immigration/Green-Card-Winter-2018.aspx>; Congress Should Establish an Article I Immigration Court (Federal Bar Association), <http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx>; April 2018 Statement of Former Immigration Judges, *supra* n.1; AILA Policy Brief, *supra* n.1; Letter from More Than 120 Law Professors, *supra* n.1; We need an independent immigration court system (The Hill, Oct. 1, 2018), <https://thehill.com/opinion/judiciary/409172-we-need-an-independent-immigration-court-system>.

Issue(s): Governmental Affairs

Committee(s): Immigration & Nationality Law Committee | Independence of Lawyers and Judges, Task Force for the Military Affairs & Justice Committee

Subject Area(s): Veterans | Immigration | Independence of the Judiciary

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