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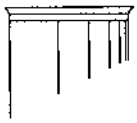

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October 12, 2018

President A. Ashley Tabaddor
National Association of Immigration Judges
c/o United States Immigration Court
606 S. Olive Street, 15th Floor
Los Angeles, CA 90014

Dear Judge Tabaddor:

Thank you for your invitation to comment on the Justice Department assertions about its immigration judge performance measures as quoted in your letter of October 9. As you note, I am a co-author of a May 2018 report[1] submitted to a committee of the Administrative Conference of the United States (hereinafter "report"). Some of the DOJ assertions apparently rely on that report. I am also a public member of the Administrative Conference (ACUS) and serve on its Adjudication Committee. For purposes of both this letter and my past criticisms of the DOJ measure at issue,[2] however, I am speaking on my own behalf and not on behalf of ACUS or its members or staff, or the federal government.

I turn to the three assertions as quoted in your letter:

1. "*96.6% of all non-administrative-law judge federal administrative adjudicators are subject to case-processing goals just like immigration judges.*"

I cannot pin down the 96.6% figure, but the report makes clear that almost all non-ALJ executive branch adjudicators (non-ALJs) are subject to case processing goals in some form. The report at 52 says that 99.4% of the non-ALJs that agencies reported in the project survey (10,763 of the 10,831) are subject to performance appraisals. Data at 38 indicate that 95.3% of reported non-ALJs (10,252 of 10,831) are subject to "quantitative case processing goals."

The claim, however, that the case processing goals imposed on these non-ALJs are "just like" those that took effect on October 1 for immigration judges has no basis, at least in the report. For one thing, the report authors did not examine the particular case processing goals that agencies reported imposing, and the report does not describe the range of case processing goals reported by the agencies in their open-ended responses.

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[1] *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal* available at https://www.acus.gov/sites/default/files/documents/Final%20Report%20%285.11.18%29.pdf (Professor Kent Barnett of the University of Georgia Law School is the principal author.)

[2] See https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/

Moreover, the report did not cite any government-wide uniformity in the types of case-processing goals that agencies impose, how they impose them, or how if at all they measure compliance with them.

2. "*there is no evidence that performance measures have a deleterious effect on administrative adjudicators. As the Administrative Conference of the United States (ACUS), an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure, has recognized, "case-processing goals can improve productivity and accountability.*"

Note, first, that the quoted language is not from an ACUS recommendation. It is from the report cited above that I and several co-authors prepared for consideration by an ACUS Committee. That report, on its cover page disclaimer states that "[t]he opinions, views and recommendations [in the report] are those of the authors and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited."

The report at 37 states: "As [ACUS] has previously recognized, case-processing goals can improve productivity and accountability," citing but not quoting from a 1986 ACUS recommendation ("Admin. Conference of the U.S., Recommendation 86-7, 'Case Management as a Tool for Improving Agency Adjudication' at 1 (1986)."

The characterization of ACUS's view of case-processing goals, in other words, is the report's, not ACUS's. And the 1986 Recommendation,[3] concerned principally with Administrative Law Judges (at a time of far fewer non-ALJs than today),[4] said nothing about using case processing goals as part of performance appraisals, in part because ALJs are exempt from performance appraisals.

The 32-year old ACUS Recommendation about case-management described a different set of case-processing goals than the current DOJ policy at issue. One of the 12 case-management techniques that ACUS recommended in 1986 was "step-by-step time goals," not the number-of-completion goals that DOJ has imposed on immigration judges. The 1986 Recommendation said the time goals should "be fixed in all cases . . . *largely with the input of presiding officers [i.e., hearing adjudicators] and others affected*" (emphasis added). The Recommendation urged agencies to "exercise the[ir] authority *consistent with the ALJ's or other presiding officer's [i.e., hearing adjudicator's] decisional independence*, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases. *The experiences and opinions of presiding officers [hearing adjudicators] should play a large part in shaping these criteria and procedures*" (emphasis added).

3. "*we have found no evidence that any judge who completed 700 cases this past fiscal year violated due process in doing so. Histrionics aside, these efforts to undermine the legitimacy and independence of our immigration judges by casting aspersions on their ability to render both timely and impartial decisions do a gross disservice to our professional immigration judge corps.*"

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[3] Available at https://www.acus.gov/sites/default/files/documents/86-7.pdf

[4] See report at 9-10.

This passage portrays critics of the Department's case-processing goals as critics instead of immigration judges. I criticized the Department policy in a June 2018 statement[5] that was not and that I did not intend to be a criticism of immigration judges. I noted, in fact, that "[p]erformance measures are key ingredients in promoting effective, efficient tribunals . . . [if those measures] rest on solid analysis." I stated that the analysis underlying the Department's measures is not publicly apparent, and the result of the measures' application is likely to present many immigration judges with a depressing choice: protect their economic well-being by closing 700 cases per year or risk their economic well-being by providing due process to the respondents before them. I would urge the Department to reveal any solid and systematic evidence it might have that all immigration judges can routinely process 700 cases a year while ensuring due process.

Cordially,

Russell Wheeler

[5] See note 2, supra.