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Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling

Mimi Tsankov

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JUDICIAL INDEPENDENCE SIDELINED: JUST ONE MORE SYMPTOM OF AN IMMIGRATION COURT SYSTEM REELING

MIMI TSANKOV*

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I. INTRODUCTION

At the outset, we must acknowledge that the United States has a massive Immigration Court backlog, the scale of which is staggering. Any lasting solution must include dramatic legislative and executive action leading to comprehensive immigration reform. However, in the meantime, those that toil in this realm must persevere within the given system, all the while maintaining the highest level of judicial standards. Of late, this is proving quite difficult. In the name of addressing a high-profile backlog, reportedly in the range of 800,000¹ to 1,000,000² pending immigration removal cases, the existing U.S. Immigration Court system is under attack.

Over the past three years, there has been an alarming, unprecedented, and widely perceived partisan encroachment into the daily functions of the Immigration Court system.³ The National Association of Immigration Judges (“NAIJ”), along with many others in the legal community, argue that these incursions into judicial independence are part of a broader effort to fundamentally alter how immigration removal cases are adjudicated from a systemic standpoint,

1. Ashley Tabaddor, *Insight: Immigration Courts Face More Than 80,000 Canceled Hearings in Federal Shutdown*, BLOOMBERGLAW (Jan. 29, 2019, 4:01 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-immigration-courts-face-more-than-80-000-canceled-hearings-in-federal-shutdown-1> [hereinafter BLOOMBERG LAW] (“The longest running government shutdown in history has brought increased attention to our nation’s immigration court system and the impact of the shutdown on the ever increasing backlog, currently at 800,000 cases and growing daily during the shutdown.”).

2. *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGRATION (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536/>.

3. *Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System,”* 115th Cong. 1–13 (2018) (statement of Judge A. Ashley Tabaddor, President, Nat. Ass’n of Immig. Judges), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> [hereinafter NAIJ Senate Testimony]; *see also* New York City Bar Association, *Statement of the New York City Bar Association Concerning the Independence of Veterans Law Judges and Immigration Judges*, NEW YORK CITY BAR (Nov. 28, 2018), <https://www.nycbar.org/media-listing/media/detail/statement-of-the-new-york-city-bar-association-concerning-the-independence-of-veterans-law-judges-and-immigration-judges> [hereinafter NEW YORK CITY BAR].

and that such action is having deleterious effects.⁴ From new case quotas and deadlines imposed on Immigration Judges⁵ to the Attorney General's referral of high-profile matters to himself for decision, the effects are far-reaching.⁶ A few dramatic instances involve the abrupt removal of cases from an Immigration Judge's docket⁷ and repeated docket shuffling, seemingly designed to make political statements rather than addressing practical choices that serve efficiency while preserving due process.

The so-called "deportation machine"⁸ that some say this administration is building squeezes Immigration Judges where they are most vulnerable—their status as "employees." If an Immigration Judge provides one too many case continuances, even though related to a valid due process concern, she risks being terminated.⁹ The introduction of the "machinery" into the judicial process threatens to eviscerate procedural due process, though mandated by the U.S. Constitution.¹⁰

4. See generally NAIJ Senate Testimony, *supra* note 3.

5. *Id.*

6. See Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018). See also Letter from Catherine Cortez Masto, U.S. Sen., et al., to Kirstjen Nielson, D.H.S. Sec. & Jeff Sessions, U.S. Att'y Gen. (Sept. 13, 2018) (available at [https://www.cortezmasto.senate.gov/imo/media/doc/Administrative%20Closure%20Letter%20\(Cortez%20Masto\).pdf](https://www.cortezmasto.senate.gov/imo/media/doc/Administrative%20Closure%20Letter%20(Cortez%20Masto).pdf).) (The letter states, in pertinent part, "On May 17th, Attorney General Sessions affirmed the BIA's decision in Matter of Castro-Tum after instructing the BIA to refer the case for his review, and used his authority to unilaterally overrule decades of precedent by determining that immigration judges and the BIA do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. Additionally, Attorney General Sessions refused to delegate to judges and the BIA the general authority of administrative closures and spoke of the "need" for currently administratively closed cases to be returned to an active docket.") (footnote omitted).

7. Debra Cassens Weiss, *Union for Immigration Judges Files Grievance over Removal of Cases from Philly Judge*, ABA JOURNAL (Aug. 9, 2018), http://www.abajournal.com/news/article/union_for_immigration_judges_files_grievance_over_removal_of_cases.

8. Randy Capps, et al., *Revvig up the Deportation Machinery: Enforcement under Trump and the Pushback*, MIGRATION POLICY INSTITUTE (May 2018), <https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback>.

9. See generally NAIJ Senate Testimony, *supra* note 3.

10. *Id.*

The political backdrop couldn't be more fraught with, a highly-politicized standoff between the President of the United States, who has expressed hostility toward the Immigration Judge Corps,¹¹ and the U.S. Congress, over how to fund immigration-related border security, including the provision of Immigration Court funding.¹² This impasse culminated in an unprecedented 35-day shutdown of the U.S. Department of Justice,¹³ with appropriations not finalized until four months into fiscal year 2019.¹⁴ During the shutdown, most Immigration Courts were closed¹⁵ and it is estimated that some 80,000 Immigration Court cases, which were scheduled to be heard during those dates, were essentially "shelved" until they could be rescheduled to date sometime in the next few years.¹⁶

This article will begin by describing the existing Immigration Court system and will outline criticisms about its structure.¹⁷ Then, it will discuss the new performance quotas and deadlines for Immigration Judges and explain why they have been criticized as not only unreasonable and troubling, but also as counterproductive and harmful.¹⁸ Next, by examining erratic docket shuffling procedures

11. Steve Benen, *Trump Asks Supporters, 'What Other Country Has Judges?'*, WASH. POST (June 26, 2018), <http://www.msnbc.com/rachel-maddow-show/trump-asks-supporters-what-other-country-has-judges>.

12. Erica Werner, et al., *Trump Digs in on Border Wall Funds, but Democrats' Opening Bid Is Zero*, WASH. POST (Jan. 30, 2019), https://www.washingtonpost.com/politics/trump-digs-in-on-border-wall-funds-as-congressional-negotiators-prepare-to-convene/2019/01/30/56139e24-2488-11e9-ad53-824486280311_story.html.

13. Lisa Rein, et al., *Federal Employees Return to Backlog of Work After 35-Day Shutdown*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/politics/federal-employees-return-to-backlog-of-work-after-35-day-shutdown/2019/01/28/10030766-231c-11e9-81fd-b7b05d5bed90_story.html?utm_term=.6d9236d8370c.

14. H.R.J. Res. 31 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text>. (On February 15, 2019, President Trump signed into law a \$333 million omnibus appropriations bill that funded the federal government for the remaining seven-and-a-half months of fiscal year 2019).

15. Mallory Moench, *Immigration Courts in New York Stymied by Government Shutdown*, TIMESUNION (Jan. 22, 2019), <https://www.timesunion.com/news/article/Shutdown-cancels-thousands-of-immigration-court-13549984.php>.

16. BLOOMBERG LAW, *supra* note 1.

17. *See infra* II and III.

18. *See infra* IV.

vulnerable to the charge that they are outcome-driven, the article will explain the ways in which such actions impede due process.¹⁹ This article will conclude that the Attorney General's wide-ranging efforts to curtail Immigration Judge decisional independence threatens the very foundation upon which the Immigration Court system is based, and supports a wholesale restructuring of the system in the form of an Article I Immigration Court.²⁰

II. IMMIGRATION COURT STRUCTURAL BACKGROUND

The Immigration Court is a component of the Executive Office for Immigration Review ("EOIR"), an agency housed within the U.S. Department of Justice ("DOJ").²¹ Under its authority delegated by the Attorney General, its mission is to adjudicate immigration cases by "fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."²² Immigration Judges preside over administrative removal proceedings at the trial level.²³ Because the Immigration Court is housed within the DOJ, Immigration Judges do not have structural independence.²⁴ However, since they are required to uphold and interpret immigration laws and regulations without interference, they do have decisional independence. They are held to the highest standards of judicial conduct while administering and interpreting U.S. immigration laws.²⁵

19. *See infra* V.

20. *See infra* VI.

21. *See generally* U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *About the Office*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last visited Nov. 2, 2019) [hereinafter *About the EOIR*].

22. *Id.*

23. *See generally* U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *About the Office: Office of the Chief Immigration Judge*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited Nov. 2, 2019) [hereinafter *About the OCIJ*].

24. *See generally* ABA Commission on Immigration, *Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [hereinafter ABA Report].

25. U.S. Dep't. of Justice Exec. Off. for Immigr. Review, *Ethics and Professionalism Guide for Immigration Judges*,

The EOIR's Office of the Chief Immigration Judge is comprised of more than 440 Immigration Judges,²⁶ supervised by the Deputy Chief and Assistant Chief Immigration Judges. They report to a Chief Immigration Judge, and she to the EOIR Director, who, in turn, reports to the Office of the Attorney General—the chief law enforcement authority in the United States.²⁷ The decisions of the Immigration Judges are reviewed by the Board of Immigration Appeals (“BIA”), itself a separate component within the EOIR.²⁸ Although the BIA operates through delegated authority, it is directed to exercise its independent judgment in hearing administrative appeals of Immigration Judge decisions.²⁹

At present, there are sixty-three Immigration Courts across the United States, including those located within detention centers and correctional facilities.³⁰ The Immigration Judges at each Immigration Court preside over cases that are themselves initiated by a separate executive branch entity: the Department of Homeland Security (“DHS”).³¹ The DHS component charged with initiating cases before the Immigration Court is the Immigration and Customs Enforcement (“ICE”).³² Within ICE, the Office of the Principal Legal Advisor (“OPLA”) brings charges of removability before the Immigration Court against those who it argues are present in the United States in violation of the nation's immigration laws.³³ OPLA trial attorneys represent the

<https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>.

26. *About the OCIJ*, *supra* note 23; *see also About the EOIR*, *supra* note 21.

27. U.S. Dep't of Justice: Office of the Att'y General, *About the Attorney General*, <https://www.justice.gov/ag/about-office> (last updated July 17, 2017) (“The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government.”).

28. 8 C.F.R. § 1003.0(a) (2019).

29. U.S. Dep't. of Justice Exec. Off. of Immig. Review, *About the Board of Immigration Appeals*, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated July 17, 2018).

30. *About the OCIJ*, *supra* note 21.

31. U.S. Immigr. and Customs Enf't. Off. of the Chief Counsel, *Office of the Principal Legal Advisor*, <https://www.ice.gov/opla> (last updated Mar. 6, 2019).

32. *Id.*

33. *Id.*

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U.S. government as civil prosecutors in all such removal proceedings before the Immigration Judges.³⁴

III. GENERAL STRUCTURAL AND SYSTEMIC CRITICISMS

The Immigration Court system has received wide-ranging criticism since its establishment in 1983.³⁵ In 2006, what had begun as general concerns about professionalism,³⁶ became, in 2007, Congressional Hearings about partisan, politically motivated hiring,³⁷ and, in 2010, calls for large-scale reform by the American Bar Association.³⁸ This article will focus on five of the most prominent areas of concern expressed by leaders in the legal community.

First, public skepticism has never wavered regarding the Immigration Court's lack of independence from the DOJ.³⁹ In 2008⁴⁰ and 2018,⁴¹ despite elevated professionalism standards for DOJ personnel,⁴² there were multiple scandals involving politicized hiring decisions, including an ideologically-driven purge of the BIA.⁴³ Given

34. *Id.*

35. *See generally* ABA Report, *supra* note 24.

36. *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html.

37. *See generally* DEP'T. OF JUSTICE OFF. OF INSPECTOR GENERAL, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL, (July 28, 2008), <https://oig.justice.gov/special/s0807/final.pdf>.

38. *See generally* ABA Report, *supra* note 24.

39. *See generally id.*

40. *Politicized Hiring at the Department of Justice, Hearing Before the Committee on the Judiciary United States Senate*, 110th Cong. 2 (2008).

41. Letter from Elijah Cummings, U.S. H.R., et al., to Jeff Sessions, U.S. Att'y General (Apr. 17, 2018) (*available at* <https://cumings.house.gov/sites/cumings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf>).

42. *See generally* 5 C.F.R. § 2635 (2019), 5 C.F.R. § 3801, and 28 C.F.R. § 45 (2019).

43. *See generally* Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829 (2009).

the history of past bias, the current public is leery of all hiring decisions, which are regularly scrutinized for ideological bents.⁴⁴

Second, politicization has created crippling funding disparities between the DHS and the DOJ.⁴⁵ For many years, the Immigration Courts were severely under-resourced, especially as compared to their DHS.⁴⁶ For example, in 2012, the government spent \$18 billion on immigration enforcement—more than all other criminal federal law enforcement agencies combined.⁴⁷ In addition, from 2003 to 2015,⁴⁸ spending for the Customs and Border Protection and ICE increased 105%. The resulting impact of these funding increases dramatically expanded enforcement capability, exemplified by the use of state law-enforcement resources for immigration enforcement.⁴⁹ Meanwhile, Immigration Court spending only increased by a modest 74% during the same time period.⁵⁰ These funding imbalances have contributed to the severe backlogs. With fewer than 450 Immigration Judges, and each facing rapidly ballooning caseloads, the sheer volume is dire.⁵¹

44. *Strengthening and Reforming America's Immigration Court System for the Subcomm. on Border Security and Immigr., Comm. on the Judiciary, U.S. Sen.* (2018) (statement from Hilarie Bass, President of the American Bar Association Commission on Immigration) (available at <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/HilarieBassStatement-4-18-18.authcheckdam.pdf>) [hereinafter ABA Senate Testimony].

45. *See generally Fact Sheet: Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGR. COUNCIL (June 17, 2016), <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>.

46. *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (Mar. 1, 2014), <https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine>.

47. DORIS MEISSNER, ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2 (Migration Policy Institute, 2013).

48. *Empty Benches*, *supra* note 45.

49. *Id.*

50. *Id.*

51. IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (U.S. Gov't. Accountability Office (GAO) 2017) (available at <https://www.gao.gov/products/GAO-17-438>).

Third, the Immigration Court system is susceptible to use as a political tool in furtherance of law enforcement policies.⁵² For example, under a previous administration, mandated “surge” dockets prioritized recent arrivals over pending cases.⁵³ Any public doubt that political motivations prevented the orderly adjudication of Immigration Court cases was surely erased following the highly-politicized standoff between the President and Congress over Immigration Court and border security funding.⁵⁴ The effects of the multi-week shutdown are still being felt, and will continue to delay adjudications for years.

Fourth, since the Immigration Court is housed within a law enforcement agency, and derives its authority from the Attorney General, Immigration Judge decisions are susceptible to a perception of partiality.⁵⁵ The role of the Immigration Judge lacks the fundamental procedural protections present in other parts of this nation’s justice system.⁵⁶ In the end, Immigration Judges are civil servants, deriving authority from the top law enforcement officer—the Attorney General. While they are charged with protecting due process, and have decisional independence, they *do not* have *independent* authority to apply Constitutionally-mandated due process standards.

Finally, of the many concerns expressed, likely the most troubling is that Immigration Court proceedings lack basic procedural protections.⁵⁷ Since immigration cases are classified as “civil” matters as opposed to “criminal” cases, Respondents have no right to free representation,⁵⁸ even in cases involving juveniles, mentally

52. NAIJ Senate Testimony, *supra* note 3.

53. *Id.*

54. Peter O’Dowd & Lisa Mullins, *Week in Politics: Trump and Pelosi Still Feuding over Border Wall Funding*, WAMU (Feb. 1, 2019), <https://wamu.org/story/19/02/01/week-in-politics-trump-and-pelosi-still-feuding-over-border-wall-funding/>.

55. *Id.*

56. *Id.*

57. *See generally* Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [hereinafter *Access to Counsel Report*].

58. *See* Immigration and Nationality Act of 2011 § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2019) (providing that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”); *Orantes Hernandez v. Thornburgh*,

incompetent individuals, or detainees.⁵⁹ As a result, many have argued that the system unfairly prejudices those unable to obtain representation, or who suffer from a legal disability.⁶⁰

In sum, the Immigration Court system has received a broad range of criticism, all of which implicates the fundamental integrity of entire system. As a result, what is often suggested as the best means of redress are proposals for restructuring Immigration Courts, which are discussed further later in this article.⁶¹

IV. NEW IMMIGRATION JUDGE PERFORMANCE QUOTAS AND DEADLINES

The Immigration Court system is operating under a new existential threat involving the recent imposition of a series of untested quotas and deadlines.⁶² As a result, Immigration Judges are now under greatly amplified external pressure to accelerate adjudications, and the well-documented structural defects in the process have been exacerbated under these new conditions.⁶³

Although Immigration Judges have been subject to performance measures for more than a decade, the current measures are designed to directly infringe on decisional independence, which is in stark contrast to prior approaches to measuring performance.⁶⁴ A leading scholar on this topic, Brookings Institute Visiting Fellow, Russell Wheeler, argues

919 F.2d 549, 554 (9th Cir. 1990) (finding that immigrants have a due process right to obtain counsel of their choice at their own expense).

59. An exception exists for certain individuals with serious mental disorders. See *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2011); see also Exec. Off. For Immigr. Review, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DOJ (Apr. 22, 2013), <https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguardsunrepresented-immigration-detainees.pdf>.

60. *Access to Counsel Report*, *supra* note 57, at 15–16.

61. See *infra* VII.

62. See NAIJ Senate Testimony, *supra* note 3, at 7; see also *Immigration Judge Performance Quotas FOIA Request*, AM. IMMIGR. COUNCIL (Apr. 23, 2018), <https://www.americanimmigrationcouncil.org/foia/immigration-judge-performance-metrics-foia-request>.

63. See NAIJ Senate Testimony, *supra* note 3, at 8.

64. *Id.* at 10.

that performance measures imposed by the DOJ are agenda-driven, unproductive, harmful, and devoid of useful meaning.⁶⁵ Although the DOJ's objective in implementing the new policy is the "timely administration of justice,"⁶⁶ its quotas and deadlines have, in application, curtailed Respondents' due process rights.⁶⁷ Judges are pressured to rush through decisions to protect their employment⁶⁸ because failure to adhere to the strict requirements imposed by the Agency's policy subjects the judges to discipline, including termination of employment.⁶⁹ This has been implemented notwithstanding the fact that many prominent community mem argue that the current quotas and deadlines do not judge fairly the performance of individual Immigration Judges.⁷⁰

Remarkably, the current measures fail to incorporate most of the recommendations provided in a detailed and comprehensive report commissioned by the EOIR itself.⁷¹ That report recommended a

65. Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS INSTITUTE (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/> [hereinafter *Cutting Corners*].

66. ATT'Y GEN., U.S. DOJ, MEMORANDUM FOR THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: RENEWING OUR COMMITMENT TO THE TIMELY AND EFFICIENT ADJUDICATION OF IMMIGRATION CASES TO SERVE THE NATIONAL INTEREST (Dec. 5, 2017).

67. See NAIJ Senate Testimony, *supra* note 3, at 8.

68. *Federal Immigration Judge Discusses Court System*, C-SPAN (Sept. 21, 2018), <https://www.cspan.org/video/?451809-1/federal-immigration-court-system&start=348>. ("This past week or so, they [EOIR] unveiled what's called the IJ dashboard . . . this mechanism on your computer every morning that looks like a speedometer on a car," said Ashley Tabaddor, and "it has all of the numbers there and 80% of it is red and there is a little bit of yellow and a little bit of green. The goal is for you to be green but of course you see all of these reds in front of you and there is a lot of anxiety attached to that.").

69. AM. IMMIGRATION LAWS. ASS'N, AILA DOC. NO. 18092834, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 1-2 (Sept. 28, 2018) [hereinafter AILA POLICY BRIEF].

70. *Id.*

71. AILA POLICY BRIEF, *supra* note 69. See generally U.S. DOJ, EXEC. OFFICE FOR IMMIGRATION REV., AILA DOC. NO. 18042011, LEGAL CASE STUDY: SUMMARY REPORT (Apr. 20, 2018) (the report was more than a year in the making and compiled by an independent, third party group) [hereinafter LEGAL CASE STUDY: SUMMARY REPORT].

judicial performance review model that “emphasizes process over outcomes and places high priority on judicial integrity and independence”⁷² which is in marked contrast to the quotas and deadlines fashioned by this Administration.

The following are five examples reflecting how the quotas and deadlines are counterproductive and actually harmful to the Agency’s mission.

A. *Quantity over Quality*

Under this Administration’s quotas and deadlines, Immigration Judges are now required to complete at least 700 cases per year.⁷³ Yet, the Agency has provided no evidence that a majority of the 442 Immigration Judges could meet such a quota.⁷⁴ This is especially troubling given the wide disparity among the various Immigration Court docket sizes.⁷⁵ When the new policy was implemented, former Attorney General Jeff Sessions reported, “We are now directing [immigration judges] to complete at least 700 cases a year. This is about average.”⁷⁶ As Mr. Wheeler states,

72. *Id.* at 21.

73. KATHERINE H. REILLY, U.S. DOJ, AILA DOC. NO. 18073084, IMMIGRATION JUDGE PERFORMANCE MEASURES OVERVIEW 1 (June 7, 2018) [hereinafter Deputy Director Presentation Overview].

74. See James McHenry, Director, Exec. Off. For Immigr. Review, Dep’t of Justice, Hearing Before the Senate Comm. on Homeland Sec. and Gov’tal Affairs: Unprecedented Migration at the U.S. Southern Border: the Year in Review (Nov. 13, 2019) (available at <https://www.justice.gov/opa/speech/executive-office-immigration-review-director-james-mchenry-testifies-senate-committee>).

75. See NAIJ Senate Testimony, *supra* note 3, at 3. (“The DOJ claimed that the border surge resulted in an additional completion of 2,700 cases. This number is misleading as it does not account for the fact that detained cases at the border are always completed in higher numbers than non-detained cases over a given period. Thus, the alleged 2,700 additional completions was a comparison of apples to oranges, equating proceedings completed for those with limited available relief to those whose cases by nature are more complicated and time consuming as they involve a greater percentage of applications for relief.”).

76. See *Attorney General Sessions Delivers Remarks on Immigration Enforcement*, U.S. DEPT. OF JUSTICE (Apr. 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement>.

It is, but the “average” is *meaningless* because immigration courts are highly diversified. Based on the Department’s most recent published statistics (2016), almost two thirds of the courts had per-judge case completions below 700 and two-fifths were below 500. Individual courts’ per-judge completion rates varied from under 300 in a few courts to well over 1,000 in others.⁷⁷

Moreover, under the new rubric, statistical “completions” are limited to “dispositive” case decisions,⁷⁸ which fails to capture administrative decisions⁷⁹ and variations in case complexity.⁸⁰ While some Immigration Judges preside over dockets comprised mostly of straightforward removal cases, in other courts, respondents’ claims are far more complex involving requests for relief, creating lengthier and more complicated cases.⁸¹ Similarly, Immigration Judges that preside over dockets comprised of large numbers of family cases may find their completion statistics artificially inflated, by comparison, since each family member counts as a *separate* statistic. (emphasis added)⁸² Consequently, requiring completion of 700 cases for all Immigration Judges is both unreasonable and unrealistic because most Immigration Judges preside over dockets with vastly different qualitative characteristics.⁸³

77. *Cutting Corners*, *supra* note 65 (emphasis added).

78. Deputy Director Presentation Overview, *supra* note 73, at 2.

79. *Id.* at 3.

80. *Id.*

81. *Cutting Corners*, *supra* note 65.

82. See Deputy Director Presentation Overview, *supra* note 73, at 2, “Lead and riders are each counted as a completion.”

83. *NAIJ Internal Union Meeting Notes* (on file with the author); see also Lomi Kriel, *Immigration courts backlog worsens*, HOUS. CHRON. (May 15, 2015), <https://www.houstonchronicle.com/news/houston-texas/houston/article/immigration-courts-backlog-worsens-6267137.php> (The *Legal Case Study: Summary Report* reported that “Each immigration judge was handling over 1,400 ‘matters’/year on average at the end of FY 2014—far more than federal judges (566 cases/year in 2011) or Social Security administrative law judges (544 hearings/year in 2007) (National Association of Immigration Judges President Dana Leigh Marks estimate).

B. Punishes the Provision of Due Process

The imposition of an artificial and unattainable quota directly conflicts with due process because of the arbitrary time limits judges must now respond to.⁸⁴ By extrapolation, the 700-case completion quota mandates that Immigration Judges complete 13.46 full trials per week, which equates to 2.69 full trials per day, at 2.97 hours per trial.⁸⁵ This unrealistically assumes that Immigration Judges can be on the bench forty hours of every week, and that each case requires only a single hearing. These assumptions are unrealistic.

Immigration Judges are responsible for a range of duties off the bench that support their work on the bench.⁸⁶ If an Immigration Judge must allot 40 hours of the work week to the bench, this leaves no time for additional case responsibilities such as coordination and communication with legal staff about pending motions, guiding judicial law clerks in decision writing, or even record review of the massive volume of documents filed in any given case.⁸⁷ Even while on the bench, it is common for judges to hold multiple pre-trial hearings to address matters such as removability, the admission of evidence, motions to terminate, custody matters, and a range of other issues related to the eventual trial. Moreover, since many cases are held via video teleconference, there are instances in which a case cannot go forward as planned due to technical difficulties. Thus, when case complexity and off-the-bench issues are factored in, along with unforeseen circumstances (such as a snow day, a medical appointment, or an interpreter issue) it quickly becomes apparent that an Immigration Judge must weigh fairness and due process against the consequences of failure to adhere to the new requirements and possible termination.⁸⁸

Even more worrisome is the exponential effect of missing even a single completion statistic by one day because one completion statistic lost means the Immigration Judge, to ensure compliance with the new

84. See NAIJ Senate Testimony, *supra* note 3.

85. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

86. Hon. Dorothy Harbeck, *Borrowed Robes: A Day in the Life of an Immigration Judge*, ABA JUDGES JOURNAL (July 1, 2017), https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/summer/borrowed-robos-day-life-immigratijudge/.

87. See generally *NAIJ Internal Union Meeting Notes*, *supra* note 83.

88. *Id.*

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policy, must make-up that lost statistic on another day, thereby implicating due process concerns for cases scheduled for multiple days.⁸⁹ Since complexity is not factored into the completion rate of cases, an Immigration Judge who routinely presides over multi-day hearings for a single case (presumably including testimony from expert witnesses and record documents numbering in the thousands of pages) will be disadvantaged and suffer greater exposure to discipline.⁹⁰ The system equates a straightforward single-hearing, uncontested removal case to a complex, heavily-litigated matter involving requests for relief, and, either belies intellectual honesty or pursues an outcome-driven agenda, where the completion statistic is the valued outcome.⁹¹ This one-dimensional approach serves neither the Agency's stated mission, nor the provision of Constitutionally-mandated procedural due process.⁹²

The impact of this approach can be dire, especially in the context of the thousands of children who appear in Immigration Court proceedings, many of whom have been segregated from their families and have no representation.⁹³ Because juveniles without representation are particularly vulnerable, Immigration Judges must ensure the integrity of the proceedings by taking additional steps to ensure fairness in the adversarial process, as well as screening for issues such as human trafficking, all of which requires valuable court time to ensure due process.⁹⁴

The Agency's mandated quota punishes the Immigration Judge that affords due process by taking time acquainting herself with the evidence filed, preparing for trial, granting a continuance to an attorney who falls ill, or relaxing a strict time allotment in a hearing involving a vulnerable juvenile respondent. The completion quota disregards the qualitative differences in docket and case types, punishes too much time spent on preliminary hearings for adequate case preparation, vigorously ignores duties related to additional court assignments, devalues the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Family Separation and Detention*, AM. BAR ASS'N. (July 9, 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/.

94. *Id.*

crafting of written decisions in complex cases (since such work requires time spent off the bench), and favors completions over quality of decision.⁹⁵

C. Undervalues Judicial Preparation

The 700-case completion quota undervalues and, to an extent, even ignores the time necessary for case preparation.⁹⁶ The inflexibility of the quota artificially denotes Immigration Court cases to “widget” status—identical in complexity and standardized in subject matter.⁹⁷ Operating a court docket with such a notion not only belies reality but fairness, as well.⁹⁸ Judicial reflection, preparation, and exactitude are not only a bedrock of our judicial system, but are demanded by judges. Moreover, immigration cases are ultimately reviewed through a gauntlet of appellate courts, and, in some rare cases, reach review by The United States Supreme Court. It is both unreasonable and unrealistic to expect Immigration Judges to decide complex contested motions, such as motions to terminate and motions to suppress, without adequate time for review and consideration.⁹⁹ In this way, the quota is troublesome because it fails to value the application of judicial ideals in the face of highly complex and time intensive adjudications.¹⁰⁰ For example, an Immigration Judge faced with a highly complex 12-hour case, requiring testimony from multiple fact and expert witnesses, may feel pressure to give short shrift to the litigants due to the quota.¹⁰¹ Similarly, pro se respondents with special vulnerabilities, such as juveniles or mentally incompetent respondents, may require additional judicial resources in order to present their case effectively. These pro se respondents are ill-served by the quota.¹⁰² This completion quota presents an unreasonable and unattainable mandate that is not designed

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Family Separation and Detention*, *supra* note 93.

100. *Id.*

101. *Id.*

102. *Id.*

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to preserve the value in preparation and judicial reflection, but to over-emphasize speed of adjudication.¹⁰³

D. Arbitrary and Corrosive Remand Rate Quota

The second new performance quota mandates fewer than 15% of an Immigration Judge's decisions subject to remand from appellate courts, including the Board of Immigration Appeals, the Federal Circuit Courts of Appeal, and the U.S. Supreme Court.¹⁰⁴ Astonishing in its simplicity, the quota fails to capture data in any meaningful way.¹⁰⁵

Remands to the Immigration Judge

Total Appeals*

* Total appeals includes appeals to the Board and Circuit Court. Interlocutory appeals, appeals on motions, and appeals on bonds are included.¹⁰⁶

This new bright-line standard does not appear to be based on any empirical evidence suggesting that a remand rate exceeding 15% reflects unsatisfactory performance and does not determine to what extent an Immigration Judge's performance is unsatisfactory.¹⁰⁷ Rather, it takes two raw data points and reduces their meaning to a deceptively simple conclusion.¹⁰⁸

The reality is that Immigration Court matters are remanded for a variety of reasons. Although those reasons may include error on the part of the Immigration Judge, often the reason for remand does not reflect the Immigration Judge's performance ability. A case can be remanded for a variety of reasons outside of an Immigration Judge's control, including:

103. *Id.*

104. *See* Deputy Director Presentation Overview, *supra* note 73, at 3.

105. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

106. *Id.*

107. *Id.*

108. *Id.*

- 1) the need for further fact-finding;
- 2) the presentation of new evidence on appeal;
- 3) the need to have DHS complete background checks;
- 4) the dismissal of a DHS appeal;
- 5) a finding that the BIA lacks jurisdiction;
- 6) the desire to pursue voluntary departure;
- 7) the withdrawal of an appeal;
- 8) the application of temporary protected status;
- 9) the decision to administratively close a matter;
- 10) a change in or clarification regarding the law related to the case;
- 11) differing appellate views on the exercise of discretion;
- 12) ineffective assistance of counsel; and many, many others.¹⁰⁹

With so many factors operating entirely outside of an Immigration Judge's control, drawing any conclusions about the "remand rate" is generally meaningless.¹¹⁰ Therefore, it is unreasonable to apply such an oversimplified standard when evaluating Immigration Judges.¹¹¹

Although there are likely instances in which an Immigration Judge issues an errant decision, and efforts should be taken to minimize such outcomes, a standard that mandates such a high degree of precision is arbitrary, exceedingly onerous, and counter to the regulatory requirements that require measures to be "achievable" to be sound.¹¹² When considering the enormous time-based pressures that are applied to Immigration Judges, coupled with the range of factors outside their control, this standard is devoid of accurate interpretation.

The simplistic standard could have the remarkably counterintuitive effect of penalizing Immigration Judges whose decisions are not often

109. See generally Bryan Johnson, *Statistics on BIA Remands of Immigration Judges from FY2016–FY2018YTD*, AMOACHI & JOHNSON, PLLC, ATTORNEYS AT LAW (Feb. 21, 2018), <https://amjlaw.com/2018/02/21/statistics-on-bia-remands-of-immigration-judges-from-fy2016-fy2018ytd/>.

110. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

111. *Id.*

112. See *id.*; see also *A Handbook for Measuring Employee Performance*, U.S. OFF. OF PERSONNEL MGMT (Mar. 2017), https://www.opm.gov/policy-data-oversight/performance-management/measuring/employee_performance_handbook.pdf ("Performance elements and standards should be measurable, understandable, verifiable, equitable, and achievable.").

appealed.¹¹³ For those Immigration Judges with low overall appeal rates, the rigidity of the standard can skew disproportionately to reflect poor performance when the measure is, in fact, simply reflective of a limited data pool.¹¹⁴ For example, an Immigration Judge with few cases appealed during the performance period, a single remand can inaccurately skew results.¹¹⁵ Similarly, an absolute standard of 15% fails to credit the fact that Immigration cases have not been appealed—presumably indicating satisfaction from the parties and a satisfactory performance by the Immigration Judge.¹¹⁶

In addition, immigration cases do not take place in a vacuum and often operate alongside collateral relief efforts.¹¹⁷ For example, if a Respondent gets married while an appeal is pending, a case might be remanded so that the Respondent can pursue previously unavailable relief. Similarly, a Respondent who files an appeal of a criminal conviction might persuade an appellate court to remand the criminal case for additional consideration and the criminal conviction may be overturned. It is clear that the decision to take an appeal is both complex and strategic, since an appeal is based on a host of factors, (including whether a Respondent is detained or not), many of which underlying the bald statistic are simply unrelated to an Immigration Judge's performance capability.¹¹⁸

Finally, the imposition of an inflexible 15% standard is corrosive to the process because it puts unfair and unreasonable pressure on an Immigration Judge.¹¹⁹ It unfairly holds an Immigration Judge accountable for factors s/he cannot control. At its most erosive, it can impel a judge to weigh the repercussions of a decision on herself, such as whether such decision will result in termination.¹²⁰ Judges should never be asked to choose between making a difficult, reasoned decision out of fear that their case might be remanded, which, as a result, may

113. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

114. *Id.*

115. *Id.*

116. *Id.*

117. *See, e.g., Matter of L-A-B-R-*, 27 I&N Dec. 405 A.G. (2018).

118. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

119. *Id.*

120. *Id.*

lead to termination. These are external pressures that should not be introduced into any fair judicial decision-making process.¹²¹

Moreover, there is no methodological evidence to establish this data collection system is either useful or accurate.¹²² There is no publicly available evidence that the Agency's examination of raw remand rates is conducted in a reliable manner, devoid of data integrity concerns, bias in application, and applied in a consistent, standardized way. All of this leads to unfair and damaging actions by the Agency with profound repercussions for Immigration Judges and those that appear before them.¹²³

E. Deadlines for Selected Case Completions

Immigration Judges are now subject to a host of performance deadlines which are designed to expedite various aspects of the adjudication process, rather than measuring or valuing careful review and deliberation by Immigration Judges.¹²⁴ For example, one of the deadlines requires that 90% of custody review determinations be completed at the initial hearing.¹²⁵ This deadline is arbitrary, and many respondents are simply not ready for such a hearing at the time that it has been scheduled. This can lead to Respondents withdrawing requests to hold such hearings. However, concern about the performance measure might influence a judge to require a Respondent to go forward at a hearing even without the parties' adequate preparation.¹²⁶

Similarly, another deadline requires that 100% of credible fear and reasonable fear review proceedings be completed at the initial hearing.¹²⁷ The lack of flexibility and failure to grant a continuance for a new hearing date can result in the denial of due.¹²⁸ Consider, for

121. *Id.*

122. *Id.* See generally LEGAL CASE STUDY: SUMMARY REPORT, *supra* note 71.

123. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

124. See *id.*; see generally Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call For Reform*, IMMIGRATIONIMPACT (Oct. 1, 2018), <http://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/>.

125. See Deputy Director Presentation Overview, *supra* note 73, at 5.

126. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

127. See Deputy Director Presentation Overview, *supra* note 73, at 6.

128. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

example, an individual who has retained an attorney, and the scheduled hearing date happens to fall on a day of religious observance or the attorney is ill and cannot attend the hearing. An Immigration Judge's decision to grant a continuance places an undue burden on the Judge. Although the Judge might recognize that participation by the attorney is not possible, she also knows that granting a continuance may impact her job security. To grant a new hearing date for a legitimate due-process protecting purpose would result in the Immigration Judge failing to meet the initial hearing deadline, even if every other similar type of hearing is completed at the initially scheduled hearing.¹²⁹ There is no flexibility for due process built into the measure, even for accommodation of a single due-process based continuance. This type of deadline is orientated more towards enforcement, at the risk of curtailing due process.

F. Universally Denounced as Due Process Compromising Incentives

Both scholars and legal community leaders agree that the use of such unrealistic devices to evaluate an Immigration Judge's performance compromise an Immigration Judge's independence and erodes due process.¹³⁰ In some cases, these types of quotas and deadlines create undue pressure on Immigration Judges to accelerate hearings and decide cases without allowing themselves enough time to fully consider the issues.¹³¹

The NAIJ has called the standards the "death knell for judicial independence"¹³² and the New York City Bar Association has called the quotas "neither efficient nor just."¹³³ The American Bar

129. *Id.*

130. *Id.*; see generally Letter from Jill E. Family, Commonwealth Professor of Law and Government, et al., to Jeff Sessions, U.S. Att'y Gen. (Aug. 14, 2018) (available at <https://commonwealthlaw.widener.edu/files/resources/letter-to-sessions-immigration-adjudication-with-s.pdf>).

131. *Id.*

132. *NAIJ Has Grave Concerns Regarding Implementation of Quotas on Immigration Judge Performance Reviews Before the S. Judiciary Comm. Oversight Hearing* (Oct. 18, 2017) [hereinafter *NAIJ Senate Testimony 2017*] (available at https://drive.google.com/file/d/0B_6gbFPjVDoxX1hFUHRWNjdnMWM/).

133. IMMIGRATION & NATIONALITY LAW COMMITTEE, QUOTAS IN IMMIGRATION COURTS WOULD BE NEITHER EFFICIENT NOR JUST (N.Y.C. Bar Ass'n. Apr. 10, 2018) (available at <https://www.nycbar.org/member-and-career->

Association has recommended an Immigration Court model that embodies the ideals proposed by the Institute for Advancement of the American Legal System. “These models stress judicial improvement as the primary goal, *emphasize process over outcomes*, and place a high priority on maintaining judicial integrity and independence.”¹³⁴

A commonly held view is that the central cause of the backlog of cases is due to the DOJ’s failure to properly staff and fund the Immigration Courts in the face of an imbalanced budget for immigration law enforcement, and is not due to Immigration Judges’ lacking performance or efficiency.¹³⁵ As a result, performance measures that emphasize outcomes over process are the antithesis of the remedy for the backlog of cases. Since the backlog has grown as a result of a decade-long delay in appointing an adequate number of Immigration Judges to address the caseload, a solution that is too reliant on curtailing Immigration Judges’ authority, and which uses unrealistic quotas and deadlines will not achieve the goal of reducing that backlog.¹³⁶ Ironically, the new quotas and deadlines threaten to exacerbate the backlog. The integrity of, and the impartiality of, the Immigration Judge are compromised by the appearance of a financial interest in the outcomes (if not an actual financial interest), since the very structure under which case decisions are made implicate due process concerns.¹³⁷ The measures will likely generate individual and class action litigation, creating even longer adjudication times and greater backlogs, instead of making the overall process more efficient.¹³⁸

services/committees/reports-listing/reports/detail/quotas-in-immigration-courts-would-be-neither-efficient-nor-just).

134. ABA Senate Testimony, *supra* note 44 (emphasis added).

135. *Id.*; see also Hon. Dana Leigh Marks, *Still a Legal “Cinderella”? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 FED. LAW. 29 (Mar. 2012), https://www.naij-usa.org/images/uploads/publications/Legal-Cinderella-March2012_1.pdf; Cristobol Ramon, et al., *Why Hiring More Judges Would Reduce Immigration Court Backlogs*, BIPARTISAN POLICY CENTER (July 25, 2018), <https://bipartisanpolicy.org/blog/why-hiring-more-judges-would-reduce-immigration-court-backlogs/>.

136. ABA Senate Testimony, *supra* note 44.

137. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

138. ABA Senate Testimony, *supra* note 44.

Immigration Judges serve as impartial decision-makers, rule on the admissibility of evidence and legal objections, make factual findings, reach conclusions of law, and have the authority to issue decisions about removability. Yet, in juxtaposition, they are civil servant employees subject to discipline and/or termination.¹³⁹ Immigration judges have no fixed term of office and their removal and transfer are subject to federal labor law protections and any rights conferred through collective bargaining. This construct creates pressure on Immigration Judges and by its very nature calls into question their independence, undermining public confidence in their capability and neutrality.¹⁴⁰ Moreover, critics agree this organizational structure impedes the quality of the Immigration Court system.¹⁴¹

Such criticism dates back to December 26, 2000, when the DOJ published a proposed 72 FR 53673, a rule in the Federal Register revising the authorities delegated to the EOIR Director and the Chief Immigration Judge.¹⁴² 8 C.F.R. Section 1003.2 was then modified to confer authority on the EOIR Director to: “Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, *to set priorities or time frames for the resolution of cases*[.]”¹⁴³

It was also modified to permit the imposition of performance appraisals, but required that, “such appraisals must fully respect their roles as adjudicators.”¹⁴⁴ Moreover, the rule placed limits on the authority of the EOIR Director, stating that “[t]he Director shall have no authority to adjudicate cases arising under the Act or regulations and *shall not direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.*”¹⁴⁵

At the same time, 8 C.F.R. Section 1003.10 was modified to state,

139. See generally 8 C.F.R. §§ 1003 (2003) & 1240 (2003).

140. ABA Senate Testimony, *supra* note 44.

141. NAIJ Senate Testimony 2017, *supra* note 132.

142. Final Rule, Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge [72 FR 53673] [FR 50-07] (Sept. 20, 2007) [hereinafter Final Rule]. <https://www.uscis.gov/blink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-139104/0-0-0-140843.html>.

143. 8 C.F.R. § 1003.0(b)(ii) (2019) (emphasis added).

144. *Id.* § 1003.0(b)(v) (emphasis added).

145. *Id.* § 1003.0(c) (emphasis added).

Immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. 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.¹⁴⁶

During the 60-day comment period, three individuals submitted comments about the authorities of the Director all of which related to a concern that the setting of deadlines could impede judicial independence.¹⁴⁷ They raised an alarm that setting priorities or time frames for the resolution of cases could lead “an official to direct the outcome of a specific case by setting an unyielding completion goal which would prevent an immigration judge from taking the time necessary to adjudicate a case fairly.”¹⁴⁸ One commentator asked specifically whether the rule is intended:

- (a) To authorize an official to establish time frames for particular types or classes of cases which would be *guidelines* for the judges to follow, but permit a departure from the guidelines in individual cases when necessary; or
- (b) to have an official *direct* a judge to cut short a particular case regardless of the judge’s need to take additional time.¹⁴⁹

Another commenter went so far as to state that “the rule can be interpreted to abrogate the parties’ right to a full and complete hearing.”¹⁵⁰ This commenter would have the rule recognize that only the Immigration Judge should determine the amount of time necessary to complete a case.”¹⁵¹

In responding to the comments, the DOJ stated that it, “*does not believe that the authority to establish time frames and guidelines ‘directs’ the result of the adjudication.* Time frames and guidelines are designed to ensure the timely adjudication and conclusion of

146. *Id.* § 1003.10.

147. Final Rule, *supra* note 142.

148. *Id.*

149. *Id.* (emphasis added).

150. *Id.*

151. *Id.*

proceedings, and their use is well-established in immigration procedure.”¹⁵² To support its view, the DOJ referenced not regulatory but *statutorily*-mandated completion deadlines.¹⁵³ It noted that asylum cases have a *statutory* completion requirement of 180 days¹⁵⁴ and that a credible fear review by an immigration judge has a *statutory* completion requirement of seven days.¹⁵⁵ Furthermore, the DOJ relied on the fact that “individual immigration 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*. Some cases take less time to complete, some more, and most fall within the estimated times.”¹⁵⁶ The DOJ justified the finalization of the rule unchanged stating,

Experience has shown that the time frames do not “direct the result” of a particular case, but rather that the guidelines promote timely results. The Department shares the commenters’ concern for due process and fairness in immigration proceedings. Timely adjudications ensure due process and fairness for the aliens in proceedings, as well as for the government and its citizens who have an interest in having cases adjudicated, benefits conferred, and the laws enforced.¹⁵⁷

152. *Id.*

153. Final Rule, *supra* note 144.

154. *Id.* See also 8 U.S.C. § 1158(d)(5)(A)(iii) (2019). In addition, the DOJ referenced an unrelated Board of Immigration Appeals case management system where single Board members are required to dispose of all assigned appeals within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel as set forth in 8 C.F.R. § 1003.1(e)(8)(i) (2019). However, this type of deadline is not at all like the deadlines currently imposed on Immigration Judges as it involves appellate review of a closed record, rather than trial judge rulings in a fluid case being adjudicated in an Immigration Court over a period of time.

155. Final Rule, *supra* note 144. See also 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2019).

156. Final Rule, *supra* note 144.

157. *Id.* (emphasis added). The DOJ relied on the decisions of *Capital Area Immigrants’ Rights Coalition, v. U.S. Dep’t of Justice*, 264 F.Supp. 2d 14 (D.D.C. 2003) (rejecting challenges to the Attorney General’s reform of the Board’s procedures in 2002); *Nash, v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989) (rejecting administrative law judge (ALJ) challenge to efforts by the Social Security

This reasoning is flawed because *experience* is now showing that the DOJ *can and will* create performance measures that impede judicial independence which curtail an Immigration Judge's ability to "set hearing calendars and prioritize cases." Under the new performance measures, NAIJ argues that EOIR disregards the DOJ's assumption that "[w]ithin each judge's parameters for calendaring a case, *that judge will take the time necessary for the case to be completed.*" Doing so can exact a heavy penalty, up to and including termination of the Immigration Judge, at the expense of due process for litigants.

The politicization of our country's judicial functions undermines the fundamental democratic principles that Immigration Judges have sworn to uphold.¹⁵⁸ For Immigration Courts to continue to be impartial, Immigration Judges must be free to decide cases based upon the laws and facts of the case impervious to either external pressures or internal preferences.¹⁵⁹ Impartiality is impossible to achieve unless Immigration Judges are independent and free from external threats and intimidation, as well as from fear of sanctions on their employment status. Immigration Judges decide matters of "life and death" for people facing deportation at the U.S border.¹⁶⁰ One faulty decision and an Immigration Judge can inadvertently return a Respondent to the hands of their persecutor.¹⁶¹ Because of such, these quotas and deadlines are of particularly grave concern especially in hearings involving vulnerable populations.

Administration (SSA) to improve the quality, timeliness, and efficiency of the ALJ decision making process; "those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decision making process.").

158. In removal proceedings, a respondent has the right to a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. See 8 C.F.R. § 1240.10(a)(4) (2015). The Fifth Amendment requires that removal proceedings "conform to the traditional standards of fairness encompassed in due process; and accordingly, statements made by an alien used to support [removal] must be voluntarily made." *Cuevas-Ortega v. Immigration Naturalization Service*, 588 F.2d 1274, 1277 (9th Cir. 1979).

159. *NAIJ Senate Testimony 2017*, *supra* note 132.

160. *Id.*

161. *Id.*

V. USE OF ERRATIC PARTISAN DOCKETING SHUFFLING MECHANISMS

Over the past three years, Immigration Judges have been whipsawed through a range of policy initiatives as key law enforcement tools in the Administration's ever-evolving, "crisis"-mode immigration policy.¹⁶² Immigration Judges have dutifully accommodated a range of policy implementations, including special temporary assignments,¹⁶³ presiding over immigration cases involving vulnerable immigrant children who have been separated from their parents,¹⁶⁴ and tolerating unfounded public disparagement from the President of the United States questioning the value of their role in the entire process.¹⁶⁵ Not surprisingly, "The judges' morale is the lowest it's been in years . . . [t]o argue or pretend like they're not an integral part of the system and that they're not an integral part of the solution only exacerbates that problem."¹⁶⁶ More importantly, these aberrations from normal operations are a worrisome distraction from attending to their primary responsibilities—addressing the backlog and resolving cases assigned to their home court dockets.¹⁶⁷

In 2017, the Administration began a series of rotating detail assignments for Immigration Judges handling immigration cases at border courts along the U.S.-Mexico Border in order to stymie migrant

162. Lorna Aldrich, *Legal Panel Says Changes to Immigration Courts Create Barriers to Justice and Due Process*, NAT'L. PRESS CLUB (Sept. 28, 2019), <https://www.press.org/news/legal-panel-says-changes-immigration-courts-create-barriers-justice-and-due-pro>.

163. Press Release, Dep't. of Justice, Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) (*available at* <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>).

164. Press Release, Dep't. of Justice, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis (May 2, 2018) (*available at* <https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border>) [hereinafter Southwest Border Crisis].

165. Eric Katz, *Immigration Judges Are 'Shocked and Disappointed' by Trump's Disparagements*, GOV'T EXEC. (June 25, 2018), <https://www.govexec.com/management/2018/06/immigration-judges-are-shocked-and-disappointed-trumps-disparagements/149273/>.

166. *Id.*

167. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

entrants at the border.¹⁶⁸ At the taxpayers' expense, large groups of Immigration Judges were ordered to cancel their home court dockets and relocate to centers along the border, where they were ordered to adjudicate only those cases involving migrants detained while crossing.¹⁶⁹ That program was scaled back significantly soon after Immigration Judges began to report that, upon arrival, their caseloads were nearly half empty.¹⁷⁰ "The problem was so widespread that, according to internal Justice Department memos which were reported widely, nearly half the thirteen courts charged with implementing these directives could not keep their visiting judges busy in the first two months of the new program."¹⁷¹ By May 2018, the program had been retooled to involve supervisory Immigration Judges presiding over border court dockets, in some instances by video teleconference.¹⁷²

Surprisingly, the temporary reassignments have been criticized as having the opposite of the intended effect.¹⁷³ Rather than leading to more rapid and streamlined deportations, and reduction of the backlog, the "surge" of Immigration Judges to the border exacerbated the backlog. When the policy went into effect, Immigration Judges sent on temporary assignments had to cancel cases on their overloaded home court dockets. From March 2017 to May 2017, the policy delayed more than 20,000 home court hearings, thus exacerbating already overloaded home dockets.

Next, the Administration announced a new policy and, "escalated effort," to address a crisis at the southwest border of the United States. Dubbed a "zero-tolerance" policy, then-Attorney General Sessions announced that the DOJ would criminally prosecute all illegal entrant

168. *Id.*

169. Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do*, POLITICO (Sept. 27, 2017), <https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649>.

170. *Id.*

171. *Id.* ("Within the first three months of the program, judges postponed about 22,000 cases around the country, including 2,774 in New York City alone, according to the DOJ memos. The delays added to an already clogged system: New York City's immigration court backlog stood at 81,842 as of July, according to the immigration data tracker TRAC Immigration.").

172. Southwest Border Crisis, *supra* note 164.

173. *Id.*

referrals from the Department of Homeland Security.¹⁷⁴ This presented a crisis because when an adult is referred for prosecution, a child traveling with the adult is turned over to the U.S. Health and Human Services Department, which is responsible for placing the child with a sponsor as the child's immigration case is resolved.¹⁷⁵ The policy proved to be controversial as more than 2,000 children were separated from their parents at the border between April and May, while their parents faced criminal prosecution.¹⁷⁶ Following legal action and relentless public pressure, the Administration reversed course, and the policy was discontinued in June.¹⁷⁷

In 2018, the Administration issued a new precedent decision which severely limited the grounds for granting asylum and reversed previously established law. *Matter of A-B*¹⁷⁸ overruled a prior decision, *Matter of A-R-C-G*,¹⁷⁹ which held domestic violence survivors could receive asylum protection in some circumstances. Additionally, *Matter of A-B* attacked asylum claims involving harm caused by non-state actors. This shift furthers the Administration's policy of separating children from parents who cross the southern border seeking asylum.¹⁸⁰ Regardless, it vastly complicates resolution of possibly hundreds of thousands of pending cases.¹⁸¹ Astoundingly,

174. Press Release, Dep't. of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) (*available at* <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>).

175. Salvador Rizzo, *The Facts about Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.b022b181a1fa.

176. *Id.*

177. *Id.*

178. *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018).

179. *Matter of A-R-C-G*, 26 I&N Dec. 338 (BIA 2014).

180. Eli Rosenberg, *Sessions Defends Separating Parents and Children*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/news/post-politics/wp/2018/06/05/sessions-defends-separating-immigrant-parents-and-children-weve-got-to-get-this-message-out/?utm_term=.6bb1bc819980.

181. *Asylum Practice Advisory: Applying for Asylum After Matter of A-B – Matter of A-B Changes the Complexion of Claims Involving Non-state Actors, but Asylum Fundamentals Remain Strong and Intact*, NAT'L IMMIGRANT JUSTICE CTR. (June 2018), <https://www.immigrantjustice.org/sites/default/files/content->

the Administration seems to be increasing the complexity surrounding case adjudication while simultaneously imposing a one-size-fits-all case-completion mandate on all Immigration Judges.¹⁸²

Given the breadth of the challenges facing the Immigration Judge corps, including constantly shifting policy directives with unusually high turnover related to the investiture of each new Attorney General, Immigration Judge retirement has skyrocketed.¹⁸³ New Immigration Judges operate in constant fear that they will be subject to discipline, despite their diligence in attending to the massive backlog of pending cases assigned to them.¹⁸⁴

In the midst of all these challenges, the Administration took its most worrisome action yet in the case of *Matter of Castro-Tum*.¹⁸⁵ In this decision, the Attorney General, in a case certified to himself, ruled that Immigration Judges and Board of Immigration Appeals Board Members lack general authority to administratively close cases, and restricted administrative closure to circumstances where explicitly provided by regulation or settlement agreement.¹⁸⁶ Administrative closure is a useful docket-management mechanism that has been used for more than three decades. It temporarily suspends removal proceedings in appropriate cases while collateral relief, such as a family-based visa petition, is being pursued, or while a respondent is serving time in criminal custody.

After the *Castro-Tum* case was remanded to the presiding Immigration Judge at the Philadelphia Immigration Court, Castro-Tum, the Respondent, failed to appear for his hearing, and the Immigration

type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf.

182. Daniella Silva, *Trump Administration Begins Returning Asylum Seekers to Mexico*, NBC NEWS (Jan. 29, 2019), <https://www.nbcnews.com/news/latino/trump-administration-begins-returning-asylum-seekers-mexico-n964256>.

183. Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump>.

184. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

185. 27 I&N Dec. 271 (A.G. 2018); *see also* *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ*, NAIJ (Aug. 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf> [hereinafter *NAIJ Grievance*].

186. *Id.*

Judge continued the case briefly on due process grounds. As a consequence, the case was removed from the Immigration Judge's docket, and reassigned to an Assistant Chief Immigration Judge for adjudication, following which *Castro-Tum* was ordered removed.¹⁸⁷

The NAIJ brought a grievance against the Administration arguing infringement upon the Immigration Judge's independence to provide due process and noting that an additional eighty-six cases had been reassigned for similar reasons.¹⁸⁸ The NAIJ argued that the reassignment of the *Castro-Tum* case violated the trial Immigration Judge's decisional independence described under 8 CFR 1003.9(c), his discretion to grant a continuance "for good cause" or to grant a reasonable adjournment, and his ability to take any action deemed appropriate under law.¹⁸⁹ Here, the exercise of the Immigration Judge's judicial independence led the Agency to reassign *Castro-Tum* and other cases.¹⁹⁰ The Agency denied the grievance.

The NAIJ vehemently disagrees with the Agency's decision to exercise its power to reassign cases as in the *Castro-Tum* case.¹⁹¹ Here, the actions taken by the Agency infringed on an Immigration Judge's decisional independence, and while the Agency has the authority to "assign" work, it must do so without interfering with judicial independence.¹⁹² This new trend must be stopped immediately before it taints both due process and the Immigration Court's impartiality. The Agency violated that precept by taking the reassignment actions in this case and other related matters on the affected Immigration Judge's docket.¹⁹³

VI. TOWARDS AN ARTICLE I COURT—PROSPECTS FOR THE FUTURE

We began this discussion with an acknowledgment that any lasting solution to address the massive Immigration Court backlog must include dramatic legislative and executive action, leading to

187. *Id.*

188. *Id.*

189. 8 C.F.R. § 1003.10 (2019); 8 C.F.R. § 1003.29 (2019); 8 C.F.R. § 1240.6 (2019); 8 C.F.R. § 1240.1 (2019).

190. *NAIJ Grievance*, *supra* note 185.

191. *NAIJ Internal Union Meeting Notes*, *supra* note 83.

192. *Id.*

193. *Id.*

comprehensive immigration reform. In the absence of such reform, we must identify and take steps to address the root causes of the backlog. Underfunding the Immigration Court and then, once hobbled, subjecting it to a series of untested and demonstratively ineffective policies does not lead to a real solution. The Immigration Court is but one element of an interconnected process. Solutions that disregard that fact by experimenting with powerful policy levers undermine the importance of the Immigration Court and harm our democratic ideals.

While we wait for comprehensive solutions, those that toil in this realm must persevere within the given system while maintaining the highest judicial standards. Of late, this has proven challenging. Immigration Judges are not Article III members of the judicial branch, and they do not enjoy the full independence that federal court judges have. Additionally, they have increasingly limited job security. The DOJ has the authority to set the conditions of employment for Immigration Judges, including if, and whether, such employment continues. While a DOJ regulation mandates that Immigration Judges “exercise independent judgment and discretion” when making decisions, as demonstrated in *Castro-Tum*, the Agency can infringe on decisional independence unimpeded.

When the DOJ takes action that conflates an Immigration Judge’s exercise of its adjudicatory responsibilities with enforcement, such as with unrealistic case completion quotas and deadlines, confidence in the system further erodes. Immigration Judges must maintain their independence when hearing cases being prosecuted by a wholly different entity—the DHS. Immigration Judges do not serve as prosecutors and are not tasked with enforcement, but rather, their role is to carefully evaluate another agency’s claims that an individual should be removed from the United States. Instead of providing adequate resources or implementing productive management tactics, the DOJ has implemented case completion quotas and deadlines disregarding the importance of independence, and fomenting conflict of interest concerns regarding adjudicatory decision-making.

For years, the NAIJ has been calling on Congress to remove the Immigration Courts from the Executive Branch and to create a separate Article I Immigration Court. This model would offer independence for Immigration Judges and build greater confidence in Immigration Courts. The need for an independent Article I Immigration Court has become increasingly more urgent given the experiences described here.

As this article has discussed, the Administration is engaging in alarming, unprecedented, and widely perceived intrusions into Immigration Judge decisional independence.¹⁹⁴ Moreover, the Administration's varied policies vis-à-vis Immigration Court proceedings in furtherance of expedited adjudications have proven ineffective, as the case backlog has ballooned by more than 50% since the beginning of 2017.¹⁹⁵ The answer is not to scapegoat the Immigration Judges and demean the value that they bring to the adjudicatory process. Nor is it productive to over-emphasize removal at the expense of due process as doing so impedes the ability of Immigration Judges to maintain the high standards that litigants deserve. The creation of an Article I Immigration Court would improve workforce professionalism and credibility. Third party stakeholders including the American Bar Association,¹⁹⁶ the Federal Bar Association,¹⁹⁷ and the American Immigration Lawyers Association, have all called on Congress to create an Article I independent Immigration Court to address these concerns.

In 2018, Rebecca Gambler presented prepared testimony before the U.S. Senate entitled *Immigration Court: Observations on Restructuring Options and Actions Needed to Address Long-Standing*

194. NAIJ Senate Testimony, *supra* note 3; *see also* NEW YORK CITY BAR, *supra* note 3.

195. *Immigration Court Backlog Surpasses One Million Cases*, *supra* note 2. (The Syracuse TRAC reports that "The Immigration Court backlog has jumped by 225,846 cases since the end of January 2017 when President Trump took office. This represents an overall growth rate of 49 percent since the beginning of FY 2017. Results compiled from the case-by-case records obtained by TRAC under the Freedom of Information Act (FOIA) from the court reveal that pending cases in the court's active backlog have now reached 768,257—a new historic high.").

196. AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM, ES-46 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.pdf; *see also* AM. BAR. ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2-29 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.

197. *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N. (2018), <http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx>.

Management Challenges.¹⁹⁸ She referenced a General Accounting Office report from June 2017, which found that EOIR case backlogs were of epic size, resulting from costly, ineffective case management, and relied on outdated technologies. The Report stated that the majority of Immigration Court experts and stakeholders interviewed favored replacing the current Immigration Court system within the DOJ with an independent Article I Immigration Court outside of the executive branch.¹⁹⁹ The recommended restructuring would instill effectiveness and efficiency in the system, increase the perceived independence of the system, and improve the professionalism and credibility of the workforce.²⁰⁰ These are laudable goals, fully supported by the NAIJ.²⁰¹

The creation of an Article I Immigration Court is not the *deus ex machina* which will would definitively solve all of the immigration challenges facing the U.S. However, our Nation's democratic institutions are founded upon fairness and due process. The current Immigration Court system is falling short of these ideals. An Article I Immigration Court is but one aspect of the complex immigration system that needs re-tooling. Taking the Immigration Court out of the executive branch would instill trust in this honorable institution, making it more effective in handling the fair, expeditious, and orderly review and processing of immigration cases.

198. *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GENERAL ACCT. OFF. (June 1, 2017), <https://www.gao.gov/products/GAO-17-438>.

199. *Id.*

200. *Id.*

201. *See generally* NAIJ Senate Testimony, *supra* note 3.