



# Widener University

## Commonwealth Law School

August 14, 2018

Honorable Jeff Sessions  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Sessions:

We are scholars and teachers of immigration law and of administrative law. We write to express our alarm about the Department of Justice's new performance metrics for immigration judges. We believe the Department's performance metrics are unacceptable and fear they are a part of larger goal to undermine the independence of the immigration courts.

Longstanding problems with immigration adjudication have simmered through both Republican and Democratic administrations.<sup>1</sup> These problems have manifested in a tremendous backlog of cases awaiting adjudication: over 700,000 cases.<sup>2</sup> The wait for a removal hearing can last years.<sup>3</sup> The status quo is not acceptable and actions to reform the system are imperative.

Reforms, however, need to enhance fairness by protecting individual rights. Whether the adjudicating body is the Environmental Protection Agency, the Internal Revenue Service, or the Department of Justice in a removal proceeding, how government power is used against a respondent should be scrutinized. This concern is amplified in immigration law because Congress has eliminated federal court review of some issues. For many, the agency hearing before the Department of Justice is the only opportunity to seek statutory protections.

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<sup>1</sup> Our comments here focus on the Department of Justice's proposed performance metrics for immigration judges, but there are other issues facing the immigration adjudication system, including a lack of access to counsel and the many types of diversions used to prevent an individual from reaching immigration court. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009).

<sup>2</sup> Transactional Records Access Clearinghouse, *Backlog of Pending Cases in Immigration Courts as of May 2018*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php).

<sup>3</sup> Transactional Records Access Clearinghouse, *Average Time Pending Cases Have Been Waiting in Immigration Courts as of May 2018*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog\\_avgdays.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php).

The concept of fair process in implementing the rule of law is one of the most fundamental American principles. It is a pillar of meaningful democracy. The idea that the government should not deprive any *person*<sup>4</sup> of life, liberty or property without first providing fair process is enshrined in the U.S. Constitution. The repercussions of a lack of fair procedure can be devastating. While it is incumbent on any federal administration to act efficiently, the adjudication process must be fair.

The fair process calculus demands an adjudicator who does not feel compelled to rule in a certain way due to unacceptable influences. The law itself may of course compel an adjudicator, but the scenario becomes very murky very quickly when an adjudicator has a personal stake in the outcome of a case.

Agency adjudicators are not Article III judges and never have had the full independence of federal court judges. Immigration Judges do not have even the job protections that other agency adjudicators enjoy, however.<sup>5</sup> Immigration judges are attorney employees of the Department of Justice.<sup>6</sup> The Department of Justice sets the conditions of employment, including location of employment and whether employment continues.<sup>7</sup> A Department of Justice regulation, nevertheless, tells immigration judges to “exercise independent judgment and discretion” when making decisions.<sup>8</sup> Also, the immigration judge position has evolved over time to make it more independent,<sup>9</sup> even if it has not reached the ideal level of independence.<sup>10</sup>

Congress has tasked you, the Attorney General, with the management of the Department of Justice, including immigration adjudication. It is your duty to insist that fairness and independence are a part of the system. Agency adjudicators are by nature more accountable to the executive branch. But that does not mean that agency adjudicators should be mere vessels who fail to apply statutory standards or who apply the law subject

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<sup>4</sup> The Due Process Clause is not limited to citizens. U.S. CONST. amends. V, IV.

<sup>5</sup> See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1647 (2016).

<sup>6</sup> 8 C.F.R. § 1003.10(a).

<sup>7</sup> See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

<sup>8</sup> 8 C.F.R. § 1003.10(b).

<sup>9</sup> Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453 (1988).

<sup>10</sup> There are proposals, for example, to recreate immigration adjudication as an Article I court with greater autonomy from the executive branch. Christine Lockhart Poarch, *The FBA's Proposal to Create a Federal Immigration Court*, THE FEDERAL LAWYER (April 2014), available at <http://www.fedbar.org/Image-Library/Government-Relations/CH16/Proposed-Article-I-Immigration-Court.aspx>; American Bar Association, *Reforming the Immigration System* (2010) at E9, available at [https://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration\\_reform\\_executive\\_summary\\_012510.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf); American Immigration Lawyers Association, *Resolution on Immigration Court Reform* (2018), available at <https://www.aila.org/File/DownloadEmbeddedFile/74919>. See also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1640 (2010) (recommending that immigration judges become administrative law judges and be relocated from the Department of Justice to an independent tribunal within the executive branch).

to unfair influence or a conflict of interest. Independence and a lack of bias help to protect individual rights and to secure public confidence in the integrity of the process.

The Department of Justice should not conflate enforcement with adjudication. Immigration judges are not prosecutors. Immigration adjudication is different than other functions of the Department of Justice. Immigration judges hear cases initiated by the Department of Homeland Security.<sup>11</sup> The Department of Homeland Security therefore decides who enters the immigration adjudication system. The Department of Justice is tasked not with enforcement, but rather with carefully evaluating another agency's claims that an individual should be removed from the United States.<sup>12</sup>

The Department of Justice must adjust and rapidly respond to the work thrust upon it by the Department of Homeland Security. One tool to help improve the efficiency and operations of the immigration courts would be for the Department of Homeland Security to more carefully assess and vet the cases it chooses to bring forward. We urge you to work with the Department of Homeland Security to improve their procedures rather than expecting all management of enormous dockets to fall on the shoulders of the immigration judges.

Instead of providing adequate resources<sup>13</sup> or implementing other case management tactics, the Department of Justice has proposed the case completion quotas.<sup>14</sup> We believe that these quotas show disregard for the importance of independence,<sup>15</sup> including avoidance of a conflict of interest, in adjudication. The quotas seem to align with President Trump's

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<sup>11</sup> Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Adjudication* at 12 (2012), available at <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.

<sup>12</sup> Congress has charged immigration judges with the duty to adjudicate charges of removal. 8 U.S.C. §1229a.

<sup>13</sup> The Administrative Conference of the United States has recognized the need for additional resources for immigration adjudication. See Administrative Conference Recommendation 2012-3 at 3, 5, available at <https://www.acus.gov/sites/default/files/documents/2012-3.pdf>. We recognize that the Department of Justice has been hiring more immigration judges, but the number of judges has not kept pace with the workload. In 2012, there were 264 immigration judges and now there are approximately 330. Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Adjudication* at 6 (2012), available at <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>; (reporting 264 immigration judges in 2012); U.S. Department of Justice, Office of the Chief Immigration Judge, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (stating that there are approximately 330 immigration judges).

<sup>14</sup> EOIR Performance Plan, available at <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf>.

<sup>15</sup> We implore the Department of Justice to promote independence even outside the context of the quotas. A group of former immigration adjudicators recently objected to the Department's removal of an immigration judge from a particular case and replacement with a supervisory judge who implemented the administration's preferred outcome. *Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence*, July 30, 2018, available at, <https://www.aila.org/infonet/retired-ijs-former-bia-mems-attack-on-jud-independ>.

displeasure with the need for process in immigration cases. In response to a Republican proposal to add 375 immigration judges, he said, “We don’t want judges; we want security on the border.”<sup>16</sup> He also characterized the Republican proposal as adding five or six thousand more judges (in actuality the legislation proposed adding 375 judges).<sup>17</sup> He said that to add that many judges must involve graft.<sup>18</sup> He also has claimed that there is something wrong with foreign nationals having lawyers represent them in immigration proceedings.<sup>19</sup>

Performance metrics for judges are not inherently objectionable. Careful data collection and analysis can be helpful for training adjudicators and for marshalling court resources. Immigration judges already are subject to qualitative evaluations of their work. These new quantitative performance metrics, however, appear to affect conditions of employment<sup>20</sup> such as salary and location of employment.<sup>21</sup> This is unacceptable. These metrics will diminish independence in immigration adjudication as immigration judges will now have a personal stake in the outcome of cases. Meeting the performance metrics will become a powerful influence over immigration decision-making.

The metrics establish case completion quotas for immigration judges at 700 completions per year. This sets up many immigration judges to fail, or perhaps even worse, encourages immigration judges to cut corners to meet the quota.<sup>22</sup> As far as we know, the Department has not introduced a case weighting system. Not every immigration court docket is the

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<sup>16</sup> *Remarks by President Trump at the National Federation of Independent Businesses 75th Anniversary Celebration*, June 19, 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-federation-independent-businesses-75th-anniversary-celebration/>.

<sup>17</sup> *Id.*; *GOP Moves to End Trump’s Family Separation Policy, but Can’t Agree How*, N.Y. TIMES, June 19, 2018, available at <https://www.nytimes.com/2018/06/19/us/politics/trump-immigration-children-separated-families.html>.

<sup>18</sup> *Remarks by President Trump at the National Federation of Independent Businesses 75th Anniversary Celebration*, June 19, 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-federation-independent-businesses-75th-anniversary-celebration/>.

<sup>19</sup> *Id.*

<sup>20</sup> We are aware of your congressional testimony stating that an immigration judge would not be fired automatically for failing to meet the quota and that the Department of Justice would consider an explanation why a judge did not meet a quota. *Department of Justice FY19 Budget: Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies*, 115th Cong., available at <https://www.c-span.org/video/?444369-1/attorney-general-sessions-testifies-justice-department-budget#&start=1786> (testimony of Attorney General Jeff Sessions at 31:20). The Department, however, has not clarified exactly how these performance metrics would be used, and immigration judges believe that a failure to meet a quota would be used punitively. See Letter from A. Ashley Tabaddor, President, National Association of Immigration Judges, to Hon. Jefferson B. Sessions, May 2, 2018, available at <https://assets.documentcloud.org/documents/4452614/NAIJ-Letter-to-the-AG-5-2-2018.pdf>.

<sup>21</sup> Location of employment is valuable in a system with immigration courts in major cities and in extremely remote detention centers.

<sup>22</sup> Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, June 18, 2018, available at <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/>.

same. Deciding 700 claims for asylum is not the same workload as deciding 700 cases where the only issue is whether a foreign national entered the United States without inspection. Asylum cases require careful consideration of evidence about country conditions and an applicant's experiences in that country. Also, the unique characteristics of a particular judge's caseload could prevent meeting the case completion goal. Some immigration courts have specialized dockets for vulnerable populations such as those with mental illness or juveniles. Judges assigned to these dockets have additional obligations to ensure minimum standards of fairness.<sup>23</sup>

The quota motivates judges to come up with coping mechanisms.<sup>24</sup> Efficiencies can come at too great of a cost. For example, what if an immigration judge decides to review paper records and then decide which cases to invite to provide live testimony? If a judge is worried about meeting a quota, a judge might only schedule those matters that could be handled quickly. That would leave more complicated cases to be decided on paper submissions alone.

The quota also sets up an incentive for immigration judges to deny applications for relief. Cancellation of removal provides just one example. By statute, the number of grants of cancellation of removal is limited to 4,000 per year.<sup>25</sup> Once the cap is reached, immigration judges may delay a grant to the following fiscal year. If deferring a grant is not considered a completion, then the incentive is to deny the application for relief to earn a completion. This incentive exists even if an immigration judge sincerely believes that the individual is eligible for relief from removal. There are similar issues where the Department of Homeland Security must complete final security checks before a grant of asylum. The immigration judge knows that an asylum case requires multiple steps to complete, but a denial of a case shortens the completion time. Should the judge erroneously deny relief to maintain his or her conditions of employment?

In addition to the case completion quotas, the Department's proposal calls for certain types of cases to be decided within a certain number of days. This further erodes an immigration judge's independence to decide what cases need more attention or to allow a continuance to ensure fairness. For example, the plan calls for 95% of all individual merits hearings to take place on the originally scheduled date. The problem here is that there are many forces

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<sup>23</sup> The federal courts impose obligations on individual immigration judges. For example, in a recent decision on whether a juvenile must be appointed counsel, the Ninth Circuit held that the detailed questioning by the immigration judge was an adequate substitute for appointed counsel. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1137-42 (9th Cir. 2018) (noting the obligations of the immigration judge to develop the record). While many of us disagree with the lack of appointed counsel for indigent children, it is clear that federal courts mandate an active and inquisitorial role of immigration judges that requires time and patience.

<sup>24</sup> Your own recent decision in *Matter of Castro-Tum* eliminated a docket management tool known as administrative closure. Now immigration judges must keep these cases active and open on their dockets. 27 I&N Dec. 271 (2018), available at <https://www.justice.gov/eoir/page/file/1064086/download>.

<sup>25</sup> 8 U.S.C. § 1229b(e).

at work that lead immigration judges to issue continuances. Because there is no right to government funded counsel in removal proceedings, foreign nationals may ask for a continuance to find a lawyer, or a newly hired lawyer may need time to prepare. Also, witnesses may not be available on a particular date, or testimony may run long, and the hearing may need to be continued to another day. The 95% goal encourages immigration judges to hold hearings without lawyers even when the foreign national desires one and provides incentive for immigration judges to cut hearings short. Moreover, a study conducted on behalf of the Administrative Conference of the United States revealed a significant percentage of the delays in cases were made at the request of the Department of Homeland Security, not the respondent.<sup>26</sup> If the Department of Homeland Security is not ready to proceed and the immigration judge rushes to completion, the government may have to file more appeals. That would simply create more work somewhere else.

As we noted above, the priorities of the Department of Homeland Security directly and at times dramatically impact the work of the immigration courts. The case completion quotas have arrived at the same time that President Trump's administration has changed its prosecutorial discretion policies to make more foreign nationals priorities for removal.<sup>27</sup> The administration has announced its plans to open more actions in immigration court.<sup>28</sup>

Also, the Department of Justice has announced that it is reviewing the Legal Orientation Program, which provides information about the removal process to immigration detainees in a group setting.<sup>29</sup> This review is taking place despite previous reviews that have found the program to increase the efficiency of the immigration courts and to save the government money.<sup>30</sup> Without an adequate increase in resources, putting more individuals in removal proceedings and/or ending the Legal Orientation Program will only magnify the negative effects of the performance metrics.

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<sup>26</sup> Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Adjudication* at 73 (2012), available at <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> (reporting that 11% of delays were because a Department of Homeland Security attorney was not ready to proceed and that 14% were because the Department of Homeland Security was missing a file).

<sup>27</sup> *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

<sup>28</sup> See, e.g., US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

<sup>29</sup> *Sessions Backtracks on Pausing Legal Aid Program for Immigrants Facing Deportation*, WASH. POST. (April 25, 2018), available at [https://www.washingtonpost.com/local/immigration/sessions-backtracks-on-pausing-legal-aid-program-for-immigrants/2018/04/25/c0d27a12-48cb-11e8-827e-190efaf1f1ee\\_story.html](https://www.washingtonpost.com/local/immigration/sessions-backtracks-on-pausing-legal-aid-program-for-immigrants/2018/04/25/c0d27a12-48cb-11e8-827e-190efaf1f1ee_story.html).

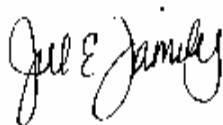
<sup>30</sup> *ICE Praised Legal-aid Program for Immigrants that Justice Dept. Plans to Suspend*, WASH. POST. (April 17, 2018), available at [https://www.washingtonpost.com/local/immigration/ice-praised-legal-aid-program-for-immigrants-that-justice-dept-plans-to-suspend/2018/04/17/c0b073d4-3f31-11e8-974f-aacd97698cef\\_story.html?utm\\_term=.8fa7c90bba02](https://www.washingtonpost.com/local/immigration/ice-praised-legal-aid-program-for-immigrants-that-justice-dept-plans-to-suspend/2018/04/17/c0b073d4-3f31-11e8-974f-aacd97698cef_story.html?utm_term=.8fa7c90bba02).

The Department's performance metrics are a poor fit for the realities of immigration adjudication. Immigration law is extremely harsh and complex, and the consequences of the decisions of immigration judges are weighty. These decisions should not be made too quickly. An immigration judge must apply statutes that rival the tax code in complexity and must ensure the opportunity to be heard to a diverse and often poorly educated pool of respondents. The Supreme Court regularly hears immigration law cases that require it to resolve thorny questions. These Supreme Court opinions often leave many questions unanswered, as the Court only decides issues directly before it. Immigration judges need time to digest new interpretations and to think about how those new interpretations apply in a wide array of factual scenarios. For example, a recent Supreme Court decision holding certain Department of Homeland Security charging documents<sup>31</sup> to be ineffective has created motions within the immigration courts to terminate proceedings and to reopen older cases. Finally, immigration judges are deciding cases with grave consequences. If an individual is removed, they may face death upon return to their country of nationality. Or an individual may be separated from children or other close family.

The immigration adjudication system needs more resources. More immigration judges need to be hired to guarantee that we do not sacrifice our cherished American values and our constitutional obligations. We also note that with the hiring of judges it is critical that the agency adequately provide support staff from law clerks to court administration. All immigration judges need more time to work through their cases fairly and efficiently. Immigration judges need to be given independence so that we all have confidence that their decisions are based on their judgment as adjudicators, and not influenced by what the adjudicators think best will guarantee positive conditions of employment.

We appreciate that you want to work to ensure efficiency in immigration adjudication. However, you are also charged with guiding our government to comply with the rule of law and to protect American legal values. Accordingly, we urge you to reconsider the new performance metrics.

Respectfully,  
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<sup>31</sup> *Pereira v. Sessions*, 138 S.Ct. 2105, 585 U.S. \_\_\_\_ (June 21, 2018).

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