

**Statement of  
Mary Meg McCarthy, Executive Director  
Heartland Alliance's National Immigrant Justice Center**

**House Subcommittee on Immigration and Border Security  
Hearing on "Oversight of the Executive Office for Immigration Review"**

**November 1, 2017**

Chairman Labrador, Ranking Member Lofgren, and members of the Immigration and Border Security Subcommittee of the House Judiciary Committee:

Heartland Alliance's National Immigrant Justice Center<sup>1</sup> urges the subcommittee and members of Congress to hold the Department of Justice (DOJ) accountable to its obligation to ensure due process of law in immigration proceedings. Due process rights and impartiality must be paramount in immigration court, where judges adjudicate asylum requests for men and women who fear life-threatening harm in their countries of origin as well as discretionary relief requests that determine whether families will endure permanent separation. The immigration court system is already fragile, crippled by backlogs<sup>2</sup> and unacceptable disparities in decision making.<sup>3</sup> Despite this, the DOJ and its component, the Executive Office for Immigration Review (EOIR), have introduced or perpetuated a number of policies that are further diminishing weakened due process protections while exacerbating inefficiencies. NIJC calls on members of Congress to engage in robust oversight of the DOJ to preserve the foundational constitutional guarantee of due process of law.

Although the threats to due process are rife throughout the immigration court system, NIJC, as a legal service provider, is particularly concerned by two damaging trends: 1) attacks on judicial independence; and 2) deterioration of the immigration courts' credibility and efficiency. The

---

<sup>1</sup> NIJC is a non-governmental organization (NGO) dedicated to safeguarding the due process rights of noncitizens. We are unique among immigrant advocacy groups in that our advocacy and impact litigation are informed by the direct representation we provide to approximately 10,000 clients annually. Through our offices in Chicago, Indiana, and Washington D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, NIJC provides legal counsel to immigrants, refugees, unaccompanied children, and survivors of human trafficking.

<sup>2</sup> As of August 2017, the immigration courts were backlogged by 632,261 cases with an average wait time of 681 days. See TRAC, Immigration Court Backlog Tool, Aug. 2017, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>3</sup> It is well known among immigration attorneys that the most determinative factor in case outcome in immigration court is the immigration judge assigned. A recent study showed that the particular judge assigned to an individual seeking asylum changes his or her odds of receiving asylum by over 56 percentage points. In the New York City immigration court, for example, the rate by which individual judges grant asylum varies from 41% to 97.8%. Compare this variance to the Atlanta court, where the grant rate spans from 29.2% to 2.3%. See TRAC, "Asylum Outcome Increasingly Depends on Judge Assigned," Dec. 2, 2016, available at <http://trac.syr.edu/immigration/reports/447/>. Immigration judges in Atlanta have been accused of overt bias against asylum seekers. See Christie Thompson, *The Marshall Project*, "America's Toughest Immigration Court," Dec. 12, 2016.

attacks on the judicial independence of immigration judges are exemplified by two DOJ policies: 1) an impending effort to impose time-based and numeric case quotas on immigration judges, and 2) ongoing practices curbing immigration judges' discretion to grant continuances to ensure fair adjudication and access to counsel. NIJC's attorneys, including pro bono attorneys from large firms, have seen highly politicized White House policies take root at DOJ and accelerate deterioration of due process protections and efficiency in the immigration court system. In particular, immigration judge "surge details" to detained border dockets have only worsened the case backlog<sup>4</sup>, while the DOJ has replaced the fair administration of justice for deportations as a metric for success for the immigration courts<sup>5</sup>.

### **Attacks on judicial independence thwart immigration courts' integrity**

Unlike other judicial bodies, the immigration courts lack meaningful independence from the executive branch because EOIR is a component of the DOJ. History has shown EOIR to be particularly vulnerable to political pressures and sway. In 2003, five members of the BIA were dismissed in what is now widely considered a politically motivated "purge" of left-leaning members of the Board orchestrated by Attorney General John Ashcroft's leadership team.<sup>6</sup> Only a few years later, in 2008, the DOJ Office of the Inspector General found that high ranking officials under Attorney General Alberto Gonzales "committed misconduct, by considering political and ideological affiliations in soliciting and selecting [Immigration Judges]."<sup>7</sup> Today, politics again threaten the critical independence of the immigration courts.

#### *a) EOIR imposing case quotas on immigration judges*

In recent weeks, various news sources have reported that the DOJ plans to use numeric and time-based case completion quotas to evaluate immigration judges' performance.<sup>8</sup> The National Association of Immigration Judges (NAIJ) reports that the agency is moving to make this change

---

<sup>4</sup> Meredith Hoffman, Politico Magazine, "Trump sent judges to the border. Many had nothing to do," Sep. 27, 2017, <http://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649>. The FOIA documents are available on the National Immigrant Justice Center website at <http://immigrantjustice.org/immigration-surge-courts>.

<sup>5</sup> See Department of Justice Press Release 17-889, "Return to rule of law in Trump administration marked by increase in key immigration statistics," Aug. 8, 2017, <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

<sup>6</sup> See Ricardo Alonso-Zaldivar and Jonathan Peterson, *Los Angeles Times*, "5 on Immigration Board Asked to Leave; Critics Call It a 'Purge,'" Mar. 12, 2003. The Hon. Paul Wickham Schmidt, one of the Board members improperly fired, recounted his experience last year for the blog "The Asylumist," online here: <http://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/>.

<sup>7</sup> See Eric Lichtblau, *New York Times*, "Reports Faults Aides in Hiring at Justice Dep't," July 29, 2008; U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, "An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General," July 28, 2008.

<sup>8</sup> See, e.g., Maria Sachetti, Washington Post, "Immigration judges say proposed quotas from Justice Dept. threaten independence," Oct. 12, 2017, [https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aeel-11e7-be94-fabb0f1e9ffb\\_story.html?utm\\_term=.3c7ea8e11d45](https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aeel-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.3c7ea8e11d45).

through its collective bargaining agreement with NAIJ by striking language that has prevented judges to be rated based on number or time based production standards.<sup>9</sup>

*The Washington Post* editorial board urged the DOJ to back away from its plan, noting that implementing quotas could actually *worsen* rather than help the immigration court backlog, and warning of due process repercussions: "...pushing judges to resolve cases quickly to meet performance standards could put judges in the position of choosing between keeping their jobs and the interests of fairness. Judges would end up rushing through complex cases that require more time to reach a quota. If the hurry were extreme enough, a judge's brisk handling of a case might not meet the minimum standards for constitutionally required due process."<sup>10</sup>

Furthermore, because there is no right to counsel in removal proceedings and representation rates are so low as it is (fewer than 20 percent of immigrants in detention are able to find counsel)<sup>11</sup>, it is imperative that immigration judges be able to use their discretion to grant continuances so immigrants can find representation and, if they cannot, gather their evidence and prepare their cases. Taking this discretion away from judges will mean that asylum seekers will be sent back to harm when they cannot properly represent themselves or find counsel. Creating pressure for judges to expedite cases in order to meet performance goals will jeopardize immigrants' rights and lives, as well as the credibility of the U.S. justice system.

*b) EOIR curbing immigration judge discretion to manage their dockets*

Concerns among immigrants and their attorneys that cases will be rushed through the system at the expense of due process are heightened by a July 31, 2017 Operating Policies and Procedures Memorandum (OPPM) issued by EOIR, on the "efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public..."<sup>12</sup> This OPPM casts blame on respondents' attorneys for case delays, despite recent findings by the Government Accountability Office (GAO) that attribute the majority of case delays in immigration court to the Department of Homeland Security (DHS) and the courts' own "operational-related" factors.<sup>13</sup>

Despite the GAO's findings, immigration practitioners throughout the country have reported that the Immigration and Customs Enforcement Office of Chief Counsel (OCC) now routinely

---

<sup>9</sup> The statement of the National Association of Immigration Judges on this issue is available online at <http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration>.

<sup>10</sup> Editorial Board, Washington Post, "Sessions's plans for immigration courts would undermine their integrity," Oct. 22, 2017, [https://www.washingtonpost.com/opinions/sessionss-plan-for-immigration-courts-would-undermine-their-integrity/2017/10/22/ce000df6-b2aa-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.a872b75eb400](https://www.washingtonpost.com/opinions/sessionss-plan-for-immigration-courts-would-undermine-their-integrity/2017/10/22/ce000df6-b2aa-11e7-9e58-e6288544af98_story.html?utm_term=.a872b75eb400).

<sup>11</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

<sup>12</sup> U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017.

<sup>13</sup> United States Government Accountability Office, Report to Congressional Requesters, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," p. 124, June 2017.

refuses to join in almost any motion to the court for prosecutorial discretion, including previously routine requests for administrative closure.<sup>14</sup> As a result, noncitizens are squeezed from both sides, as EOIR pressures immigration judges to limit continuances and ICE refuses to support administrative closure of non-priority cases likely to end in relief from removal. NIJC client Diana<sup>15</sup> sought police help to investigate her ex-partner, a serial batterer of women. She submitted an application for a U visa in 2014 and has since been placed on the U visa waitlist and granted deferred action, meaning that she will receive a U visa as soon as one becomes available. Her next immigration court hearing was rescheduled from 2019 to 2017 with less than two months' notice. Despite her likelihood of receiving a U visa soon, given her place on the waitlist and her grant of deferred action, OCC is opposing administrative closure in her case and other similar cases.

The prosecution of all cases docketed in immigration court without a meaningful and uniform consideration of prosecutorial discretion will tragically add to the court's already crushing backlog. Immigration judges, constrained by DOJ policy and pressure to limit continuances and rush cases, will lack the discretion critical to managing their ever-growing dockets. This will result in inadequate and improper judicial decision-making, swamping the Board of Immigration Appeals and already overburdened circuit court of appeals.

### **Political pressure exacerbates inefficiencies and undermines system credibility**

#### *a) Politically-driven "surge details" of immigration judges increase backlog*

Purportedly pursuant to the White House's January Executive Order regarding border security<sup>16</sup>, EOIR began scrambling in early 2017 to remove immigration judges from already-backlogged immigration courts to be sent on one- to two-week "detail" assignments in courts in at least a dozen detention centers around the country.<sup>17</sup> In at least five of the detention centers where the agency's so-called "surge courts" were established, immigration judges arrived for temporary detail assignments to find there were not enough cases to keep them busy. In order to accommodate these inefficient temporary details, the immigration court system delayed more than 22,000 immigration court hearings nationwide—at a time when the case backlog tops

---

<sup>14</sup> Human Rights First, *Tilted Justice* (October 2017), at pp. 18-

19, <https://www.humanrightsfirst.org/sites/default/files/hrf-tilted-justice-final%5B1%5D.pdf>.

<sup>15</sup> Names have been changed for our clients' protection.

<sup>16</sup> Section 5(c) of the January 25, 2017 Executive Order regarding "Border Security and Immigration Enforcement Improvements" instructed the Attorney General to: "take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code."

<sup>17</sup> These details were preliminarily announced via press release. See Executive Office for Immigration Review, EOIR Provides New Hearing Location Details, Mar. 17, 2017, [https://www.justice.gov/sites/default/files/pages/attachments/2017/03/17/noticeresixhls\\_03172017\\_1.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2017/03/17/noticeresixhls_03172017_1.pdf); Executive Office for Immigration Review, EOIR Provides Information for Two New Hearing Locations, Mar. 24, 2017, <https://www.justice.gov/sites/default/files/pages/attachments/2017/03/24/noticenewhearinglocations03242017.pdf>.

600,000.<sup>18</sup> As NIJC has seen firsthand in our clients' cases, due process protections are eroded by not only improper haste, but also unreasonable delays.

In many of the cases bumped off of "home court" dockets, volunteer attorneys and clients traveled long distances to court only to learn from the court staff that their cases would not be heard that day. The human costs of these delays can be tragic; a delayed case can mean delayed employment authorization, delayed protection, and delays in reunification with spouses and children waiting abroad in dangerous conditions.

As immigration judges are detailed to detained dockets, the agency has not shared any public plans or policies regarding coverage for the non-detained dockets they leave behind. These dockets include vulnerable populations such as children, families and asylum seekers. Immigration attorneys report that courts are canceling merits hearings on these dockets with only telephonic notice or *no notice* provided to immigrants and their attorneys. This makes it more challenging for attorneys to take on *pro bono* cases in a system that is already quite chaotic. Additionally, sloppy notice procedures will lead to a massive uptick *in absentia* deportation orders issued to individuals without representation who missed their hearings through no fault of their own. Once entered, reopening such *in absentia* orders can be challenging if not difficult even for those with viable claims to relief from removal.

NIJC *pro bono* client Catherine fled death threats in her home country to seek refuge in the U.S. in 2014. After one day of detention, the government released her and placed her on the non-detained docket and was scheduled for a hearing nearly two years later. She has been waiting for her day in court ever since. Her merits hearing, originally scheduled for 2016, has been cancelled and rescheduled by the court three times with little to no notice. As a result, Catherine and her attorneys have prepared testimony, witnesses, and other evidence three times, only to have those efforts and resources wasted. The most recent cancellation took place in October 2017, with the court citing the judge's detailing to the detained docket as the reason for the third cancellation. At this time, Catherine does not have a new date for her merits hearing.

NIJC client Justin has been a lawful permanent resident since the 1970s, when his family brought him here as a child. He was placed in removal proceedings in 2014 due to minor criminal charges, and is eligible for a waiver based on his long-term family and community ties to the U.S. However, he has been waiting for his day in court since then, with his initial status (master calendar) hearing having been rescheduled twice since 2015. Currently, his case is scheduled for an initial hearing in 2018, nearly four years after being placed in removal proceedings. In 2018, when he appears appear before a judge, he will at last have an opportunity to ask for a date for a merits hearing so he can present his case.

*b) DOJ sees deportations – not justice – as goal of immigration courts*

On October 4, 2017, the DOJ issued a press statement<sup>19</sup> presenting statistics intended to support a conclusion that the "surge of immigration judges" had been successful. The statistics provided

---

<sup>18</sup> See *infra* n. 4.

in this statement appeared largely conclusory, however, and don't add up in the context of the FOIA and the actual functioning of the immigration court system. For example, the statement claimed that "the mobilized immigration judges have completed approximately 2,700 more cases than expected if the immigration judges had not been detailed." A DOJ spokesperson clarified to the press that this number was calculated "by using historical data to compare the cases judges were projected to complete at their home courts with those they completed at the surge courts."<sup>20</sup> But this comparison of detained to non-detained court processing is, according to National Association of Immigration Judges' President Emeritus Dana Marks, "comparing apples to oranges." As Judge Marks explains, "detained dockets always have a higher volume and a greater percentage of cases where people are not eligible to seek some reprieve from removal or are not inclined to because they don't want to remain in custody."<sup>21</sup>

This statement followed on the heels of an August DOJ press statement touting statistics released by EOIR as a demonstration of the "return to rule of law" under the Trump administration.<sup>22</sup> The data included a showing of a 27.8 percent increase in total orders of removal over a six month period in 2017 as compared to the same period in 2016. The press statement also touted as a victory the finding that over 90 percent of the cases decided by immigration judges engaged in "details" to border facilities resulted in deportation or removal. By equating deportations with "return to rule of law," the DOJ raises serious questions about its capacity to fairly administer an impartial system of justice subject to due process requirements under the U.S. Constitution. Moreover, when considered within the larger context of EOIR's attempts to impose case quotas on immigration judges and limit case continuances, the DOJ's actions threaten the very credibility of the U.S. justice system.

NIJC calls on members of Congress to engage in robust oversight of the DOJ to protect the impartiality of immigration court system in the face of clear evidence of the administration's efforts to conscript it into furthering an agenda of mass deportations.

\*\*\*

---

<sup>19</sup> Department of Justice Press Release, 17-1100, "Justice Department Releases Statistics on the Impact of Immigration Judge Surge," Oct. 4, 2017, <https://www.justice.gov/opa/pr/justice-department-releases-statistics-impact-immigration-judge-surge>.

<sup>20</sup> Allegra Kirkland, "What Trump's DOJ's numbers don't say about immigration court backlog," Oct. 20, 2017, <http://talkingpointsmemo.com/muckraker/doj-numbers-dont-tell-full-story-immigration-judge-surge>.

<sup>21</sup> *Id.*

<sup>22</sup> *See infra* n. 5.