By the Numbers:
Why Quotas on Immigration Judges Will Adversely Impact the Court's Backlog

This briefing paper is intended to provide a thorough explanation of why the current Department of Justice's Executive Office for Immigration Review (EOIR) plans to include numeric and time-based elements (quotas and deadlines) to the Immigration Judge Performance Work Plan is doomed to create increased delays and backlogs at our nation's 60 Immigration Courts.

I. The Crucial Difference Between Court-Based Measures and Performance Evaluation Elements: Case Completion Goals

Like all federal agencies, EOIR is mandated by statute to employ evaluative measures to assess its performance under the Government Performance and Results Act (GPRA) of 1993 and the GPRA Modernization Act of 2010. It is long established and widely accepted that court-wide "case completion goals" can be an important and effective management tool for court administrators. These are court-based aspirational completions targets and time-based standards that allow an agency to study its system in general, and individual locations in particular, in order to assess if the proper resources are being devoted to assure that cases move through a court system in a relatively uniform and appropriate period of time. In order to make those comparisons, it is helpful to have an ideal standard that is agreed upon as fair and achievable, and then to assess why some court locations are successful in achieving that standard and others are not.

For example, the immigration court in location A may be able to complete 100 cases within a six month timeframe, but the court in location B may be taking 12 months. Further analysis would then be conducted to determine why. Perhaps there are 4 judges in location A but only 2 judges in location B. Perhaps a vastly greater number of individuals are represented in location A which is in a large urban area, while location B is located in a remote detention facility. Perhaps location A and B have the same number of judges and percentage of attorney representation, but location A has twice the number of judicial law clerks.

It is understandable that the agency would want to have a measure against which to evaluate the many variables involved so that resources can be devoted to location B, perhaps taking some from location A, in order to achieve a 9 month timeframe to completion in both locations.

Or, if it is determined that six months is truly optimal, the agency can use this information to gain additional resources so that locations A and B are both able to complete 100 cases in roughly the same timeframe. Thus, court-wide case completions goals are a resource allocation tool which enable the agency to more effectively deploy the resources, human technological, at its disposal, or to justify additional allocations by Congress. EOIR has been using such an approach since GPRA's passage in the 1990s, and is the framework as outlined in the attached announcement by Director James McHenry dated January 17, 2018. https://www.justice.gov/eoir/page/file/1026721/download

II. The Crucial Difference Between Court-Based Measures and Performance Evaluation Elements: Performance Evaluations

However, in addition to case completion goals, for the first time EOIR is in the process of formulating and applying individual numeric and time-based production *quotas and deadlines* to Immigration Judges through the mechanism of their Performance Work Plans (the document which sets forth the Agency's expectations for satisfactory performance) and individual Performance Appraisals (the individual rating which reflects the supervisor's rating of an Immigration Judge's performance). These proposed measures are in stark contrast to resource allocation tools because they are applied to individual judges to evaluate whether the *quantity* of output is viewed as satisfactory over a given period of time. While the Agency's concerns over the growing backlog at the Immigration Courts is understandable, and creative ideas to address this issue are needed, the application of quotas and deadlines is not the answer. We predict that not only that such an approach will fail to improve the backlogs at the Courts, but in fact will increase it.

For two decades, Immigration Judges were exempted from performance evaluations entirely because of the decisional independence they need to fairly and impartially decide the matters which come before them. The exemption was rooted in the notion that ratings created an inherent risk of actual or perceived influence by supervisors on the work of judges, with the potential of improperly affecting the outcome of cases. In 2007, the DOJ decided to depart from that established precedent due to political pressures. In the wake of harsh criticisms by Circuit Courts, Attorney General Alberto Gonzales decided to implement Performance Appraisal for Immigration Judges, with the assurance that these measures would be exclusively qualitative, not quantitative. For a complete history see https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf.

When a regulation allowing for the Director to set time frames was proposed, all public commenters expressed concerns with these provisions, specifically that "an official could direct the outcome of a specific case by setting an unyielding case completion goal which would prevent an immigration judge from taking the time necessary to adjudicate a case fairly" or that these priorities or time frames could abrogate the party's right to a full and fair hearing. 72 Fed. Reg. 53673 (Sept. 20, 2007). The Department responded that the use of time frames and

priorities was “well established” and “individual 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.” Id. This response is misleading if time frames are now to be used to measure immigration judge performance. A judge’s concern in getting a passing performance review may override his or her concern that due process requires additional time be spent or a continuance be granted.

III. Example of Why Metrics Like Case Completions Goals cannot work as Performance Quotas

Because of the ongoing negotiations, NAIJ does not believe it is prudent to disclose the details of specific proposals that have been advanced. Nevertheless, we have been advised that case completion quotas and deadlines would be included as individual performance measures for Immigration Judges. We will highlight some of the reasons why such measures are unworkable and counterproductive. First, the tying of quotas or deadlines to an IJ’s livelihood is inherently problematic. It is unprecedented and NAIJ is not aware of any other judges who are subjected to such a system of performance evaluations. If implemented, these measures will create an automatic, built-in appeal issue anytime any individual’s request for a continuance is denied or a case is scheduled earlier than requested by a party. The judges will be subjected to inquiry and confrontation by the party who will demand to know where the judge is on his or her quotas or deadlines. The actual standards will likely become part of the evidentiary record leading to unnecessary litigation.

So as to demonstrate why quotas and deadlines are unworkable and counterproductive, we will discuss one example to illustrate the problem: a requirement that a specified percentage of cases be completed on the first scheduled merits hearing date or that the judges have certain number of “completions” in a specified period of time, These requirements reflects a fundamental lack of understanding of a trial court judge’s docket, mainly that many factors are outside the control of the judge and due process is the fundamental principle underlying the proceedings. Our judges preside over proceedings that are tantamount to a bench trial. In every case, the government is represented by counsel, and the respondent is the answering party, most often appearing *pro se*. Each party has the opportunity to file documents, present witnesses, object to the other parties’ actions, argue their case, etc. Cases are continued for many reasons: an attorney or an essential witness can become unavailable due to illness or a family emergency, the Court’s contract foreign language interpreter can fail to appear, or the Court’s equipment to record the hearing may fail. Even if testimony begins at the hearing, there are many good reasons why cases may not be able to be completed in one setting, such as lengthy testimony by the respondent, testimony revealing new evidence which must be investigated is given, or simply too many witnesses to accommodate in one hearing session. Moreover, in certain circuits, the law requires that the respondent be provided an additional time and a separate hearing once the judge determines that further corroborating evidence is needed. In addition, many cases are set to an “individual” hearing that will not result in a final decision, such as hearing on charges of removability when smuggling or fraud is alleged, a hearing on a motion to terminate or suppress, or a hearing on the Respondent’s mental

competency to proceed. In any of those instances, failing to complete the case on the first scheduled merits hearing has nothing to do with the Immigration Judge's performance or productivity.

Therefore, as a practical consequence of quotas and deadliness, judges will be forced to maintain daily logs of the reasons cases are being continued to defend against an unsatisfactory performance review or disciplinary action as they cannot be held responsible for matters outside of their control, nor can they be directed to violate the due process rights of the parties. Considering the backlog of cases and the value of a judge's time, having to spend any time keeping logs and records of this nature is indefensible and will lead to an unnecessary increase in the backlog as judges will have less time each day to complete cases.

This is particularly so as there is absolutely no reason to attribute the current court backlog to a lack of Immigration Judge productivity. In fact, the GAO report shows that close to 90% of continuances were attributed to factors other than the Immigration Judge, and that number reflects an increase over the past ten years. GAO Report at 124. The same report shows that continuances due to "operational factors" and details of Immigration Judges were up 149% and 112%, respectively. GAO Report at 131, 133. These continuances, where Judges were forced to reset cases that were near completion in order to address cases that were priorities of various administrations, have a much greater impact on case completion rates.

Moreover, the law mandates that a respondent be provided a "reasonable opportunity" to examine and present evidence. Section 240(b) (4) (B) of the Act. Given that most respondents do not speak English as their primary language and much evidence has to be obtained from other countries, imposing a time frame for completion of cases interferes with a judge's ability to assure that a respondent's rights are respected.

Thus, it is clear that a measure such as this would be unfair, impracticable and will compound the backlog issues.

IV. Why Production Quotas for Immigration Judges Won't Work to Reduce the Case Backlog

Tying quotas and deadlines to the evaluation of the individual judge's performance evaluation specifically interferes with judicial independence and clearly will put Immigration Judges in a position where they could conceivably violate their legal duty to fairly and impartially decide cases in a way that complies with due process. By creating a tension with due process, either actual or perceived, appeals will abound and backlogs in the system will increase.

In a recent case, the 7th Circuit Court of Appeals noted that focus on quantity would make quality of decisions decline. Association of Administrative Law Judges, Judicial Council No. 1, IFPTE, AFL-CIO & CLC et al v. Colvin, No. 14- 1953 (7th Cir. 2015) slip op at 5, 7 (giving an example of how drastically limiting hearing time could "dangerously diminish" the quality of justice). The court stated that "[w]e can imagine a case in which a change in working conditions

could have an unintentional effect on decisional independence so great as to create a serious issue of due process." It should be noted that this case dealt with ***court-based measures, not performance evaluation measures,*** which it did not strike due to jurisdictional issues, but even in the context of ***court-based measures***, the Seventh Circuit expressed concerns about due process. *It should be notes that Social Security Judges, who were the subject of the case, are statutorily exempt from performance evaluations to protect their independent decision making authority*.

If EOIR is successful in tying case completion quotas to judge performance evaluations, it could be the death knell for judicial independence in the Immigration Courts. Judges can face potential termination for good faith legal decisions of which their supervisors do not approve.

In addition, Circuit Courts will be severely adversely impacted and we will simply be repeating history which has proven to be disastrous. Even the Board of Immigration Appeals has recognized that "[c]ompliance with . . . case completion goals . . . is not a proper factor in determining whether or not to grant a continuance. *Matter of Hashmi,* 24 I&N Dec. 785, 794 (BIA 2009). One need only remember the lasting impact of Attorney General Ashcroft's "streamlining" initiative at the Board of Immigration Appeals. These streamlining goals enabled the Immigration Court to reduce its backlog, but created an avalanche of appeals at the Circuit Court levels, which the Courts then remanded back to the Immigration Courts based on due process concerns, creating another backlog. Any reduction of the backlog caused by Immigration Judges sacrificing quality for quantity, which is inevitable, will result in further appeals and remands, leaving the Immigration Court in a worse situation than it was when it started.

The United States Government Accountability Office issued its report entitled "IMMIGRATION COURTS-Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges Report to Congressional Requesters" in June 2017, GAO-17-438, (GAO Report). This GAO Report contains a section entitled, "Comprehensive Performance Assessment Could Help EOIR Identify Effective Management Approaches to Address the Case Backlog;" however, nowhere is the suggestion made that numerical or time-based criteria be added to performance evaluations for immigration judges.

Ultimately, numeric performance goals are inappropriate because they are antithetical to judicial independence, which is a cornerstone to any fair adjudicatory system. No other Judges in the United States have numeric performance goals. The mere existence of such goals become a factor in the decision-making process, and unfairly influence decisions.

V. The Proper Solution: Established Judicial Models of Performance Evaluation and an Immediate Increase in Resources

We strongly support the right of the public to observe the performance of the Immigration Courts and of Immigration Judges specifically, as public servants who are rightly accountable to them. The proper model, however, is not a discipline based performance appraisal, but rather

the well tested measures used in most state judicial systems, which provide information to the public and promote judicial self-improvement. Not one of these myriad of programs serve as a basis for judicial discipline.

The widely accepted models for judicial evaluation programs currently in use throughout the United States are:

> (1) the **American Bar Association's**, Black Letter Guidelines for the Evaluation of Judicial Performance, February 2005 (includes both actual guidelines and commentary); and
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> (2) the **Institute for Advancement of the American Legal System's (IAALS)** , A Blueprint for Judicial Performance Evaluation and Shared Expectations, Judicial Accountability in Context, 2006 (includes an overview of existing state court judicial evaluation programs and a recommended model program).

The guiding principles of both these programs should be applied to any Immigration Judge evaluation program: the program should be for judicial improvement and not the basis for disciplinary action and that the evaluations should be done by committee with input from stakeholders. Transparency in this process is essential. Fairness and thoroughness must be insured. It is extremely important that expectations be clear – that this process is designed to teach judges about their strengths and weaknesses on the bench and to provide them with an opportunity to improve their performance. Confidentiality is essential, both for those responding to the surveys as well as to the Immigration Judges who are rated. The chosen evaluators should merely conclude, based on agreed benchmarks, that a given judge "meets" or "does not meet" the judicial performance standards set forth in the survey.

The purpose of evaluations should be two-fold: public accountability and improvement of the administrative judiciary. To accomplish those ends, any evaluation of Immigration Judge performance should include government attorneys, the private bar and pro se respondents as they are they in the best position to provide feedback. In order to provide a full picture from a maximum number of perspectives, particularly as they have an opportunity to observe judicial temperament first-hand, court staff members who work with the Immigration Judges and contract interpreters should be included in the group whose input provides the basis for any evaluation, as is the standard in the ABA and IAALS models consulted. Finally, Guideline 2-3 of the ABA Black Letter Guidelines for the Evaluation of Judicial Performance should be followed, to wit: "The information developed in a judicial evaluation program should not be disseminated to authorities charged with disciplinary responsibility, unless required by law or by rules of professional misconduct.

Appropriate Criteria for Evaluation

1. **Legal Knowledge**
   Demonstrates an understanding of substantive law and relevant rules of procedure; demonstrates an awareness and attentiveness to the factual and legal issues before the court; demonstrates proper application of statutes, judicial precedents, and other appropriate sources of legal authority.
2. **Integrity**
   Avoids impropriety or the appearance of impropriety; displays fairness and impartiality toward all parties; avoids ex parte communications.
3. **Communications Skills**
   Clearly explains oral decisions and orders; issues clear written decisions and orders; clearly explains instructions to interpreters and staff members.
4. **Professionalism and Judicial Temperament**
   Shows courtesy toward attorneys, court staff, and others in the courtroom; maintains and requires order and decorum in the courtroom; demonstrates appropriate demeanor on the bench; participates in professional development opportunities and judicial education; promotes public understanding and confidence in the court.
5. **Administrative Performance**
   Appears prepared for hearings; uses court time efficiently; issues decisions and orders without unnecessary delay; effectively manages cases; offers help to other judges where appropriate; shares burden of court workload.

The responses from the questionnaires for attorney, staff and pro se respondents would be tallied. The questions on those forms fall into the five categories described above: legal knowledge, integrity, communications skills, judicial temperament and administrative performance. After the tally, a judge would be found to meet or not meet each individual standard based on receiving an acceptable score on 80% of the responses applicable to the standard.

The panel of evaluators from the Agency may also consider, in addition to the benchmarks above, a self-evaluation completed by the Immigration Judge, the contents of an interview by the panel of evaluators with the Immigration Judge, courtroom observations made by the panel of evaluators, review of appellate decisions, and additional favorable factors such as involvement by the Immigration Judge in judicial or legal education programs (internal to or external to the Agency) and/or participation in other special projects, details or additional work assignments undertaken to benefit the Agency.

Attached are sample surveys for attorneys and court staff for evaluation of judges taken from the IAALS Blueprint.

In addition, it is clear that the court needs an *immediate* infusion of resources to attack the backlog. It has been uncontested for over a decade that the Immigration Court has been

understaffed, but only recently has the Department of Justice *started* to act by additional hiring. This response has been insufficient in quality, quantity and timing. While there has been an increase in hiring of Immigration Judges, the vast majority of Judges hired have been from the government sector, casting concerns of bias in the hiring process. High quality candidates from the private sector do not make it through. In addition, the hiring of support staff has been and continues to be woefully inadequate. For example, the last administration recognized the need for hiring new court interpreters and the current administration has stated agreement with that position, but not a single interpreter has been hired in years. Further, the appointment process for Judges has been plagued with unexplained delays. In addition, while the court has had the ability to bring on temporary Immigration Judges to reduce the backlog for some time, no Judges have been hired. Some bypass process is needed for hiring new Immigration Judges in a prompter matter, or the Immigration Court system is likely to implode.

Another thing that aides in the prompt resolution of cases is provision of legal representation to all parties. Recent decreases in funding to these resources should be eliminated.

VI. Conclusion

The implementation of quotas and deadlines will ultimately increase, rather than decrease the court backlog. Numeric or time-based performance evaluation measures encroach on judicial independence and introduce bias in the system. The Court's backlog will be better addressed by promptly providing better resources to the court, including more judges, staff, and better access to legal counsel for parties appearing before the court, as well as proper judicial training.

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