UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

MYTHS vs FACTS ABOUT IMMIGRATION PROCEEDINGS

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I. ADJUDICATOR PROFESSIONALISM AND INTEGRITY

1. **MYTH:** Immigration Judges and Appellate Immigration Judges are biased.

FACT: Immigration Judges and Appellate Immigration Judges are professional, unbiased adjudicators. By regulation, Immigration Judges and Appellate Immigration Judges exercise "independent judgment and discretion" in deciding the cases before them. By regulation, Immigration Judges and Appellate Immigration Judges also "act impartially and [do] not give preferential treatment to any private organization or individual." Immigration Judges and Appellate Immigration Judges have no personal or financial interest in the outcome of immigration cases they decide.

2. **MYTH:** Immigration Judges and Appellate Immigration Judges do not exercise independent judgment. Immigration Judges and Appellate Immigration Judges are politically pressured or otherwise directed to adjudicate cases to obtain a certain outcome.

FACT: By regulation, Immigration Judges and Appellate Immigration Judges exercise "independent judgment and discretion" in deciding the cases before them. Immigration Judges and Appellate Immigration Judges are not "swayed by partisan interests or public clamor." No officer or employee directs Immigration Judges or Appellate Immigration Judges to adjudicate cases for partisan goals. No officer or employee has the authority to direct an Appellate Immigration Judge to decide a case for a specific outcome, and no officer or employee has the authority to direct an Immigration Judge how to decide a case for a specific outcome, other than the Board of Immigration Appeals directing an Immigration Judge to take action on remand following an appeal. In the United States, almost all types of judges at all levels are required to follow precedent, and a requirement to adhere to precedent does not mean that a judge does not exercise independent decision-making authority in individual cases. Similarly, decisional independence is not compromised by the availability of administrative appellate review of an immigration judge's decision or the availability of federal court review of an Appellate Immigration Judge's decision.

3. **MYTH:** Immigration Judges should be evaluated based on the outcomes of their decisions. The outcome of an asylum case determines whether an Immigration Judge is a "good" or "bad" judge. Immigration Judges who make decisions in a manner more favorable to an alien—*e.g.*, decisions granting more asylum applications—are better judges than those who do not.

FACT: All applications are adjudicated in accordance with applicable law based on the evidence presented in each case, and multiple factors (*e.g.*, one-year filing deadline, criminal convictions, firm resettlement, binding circuit court case law) unrelated to the specific merits of a claim may affect the number of applications denied or granted. Neither outcome-oriented evaluations, evaluations exhibiting confirmation biases (*i.e.*, evaluating a judge based on whether the judge's rulings reflect the evaluator's personal preferences), nor evaluations based on popularity are accepted methods of evaluating judges in the American legal system, and none are appropriate for the evaluation of Executive Office for Immigration Review (EOIR) adjudicators. Allegedly high percentages of particular case outcomes—*e.g.*, approximately 99% of noncapital habeas cases filed in federal district court are denied; over 90% of circuit court decisions affirm the decision below—also do not reflect an accurate assessment of whether judges are "good" or "bad." As the American Bar Association and others have recognized, "[g]ood judges have the ability to decide cases on the basis of the applicable law and facts without favor or disfavor based on the identity of the parties or their counsel," and "[g]ood judges are also willing to rule on issues without regard for the popularity of their rulings and without concern for or fear of criticism." There is no established or accepted quota for how many asylum applications an Immigration Judge should grant or deny, and specific outcome measures would violate EOIR's mission and impartiality. Imposing a quota of grants or denials would override the independent judgment and discretion exercised by Immigration Judges, and directing Immigration Judges to deny or grant more asylum applications in order to meet some arbitrary quota—without regard to the underlying facts of each application—would also raise due process concerns.

4. **MYTH:** Immigration Judges, Appellate Immigration Judges, administrative law judges, and EOIR's senior leadership are political appointees.

FACT: EOIR has no political appointees. A political appointee is a full-time, non-career Presidential or Vice-Presidential appointee, a non-career Senior Executive Service (or other similar system) appointee, or an appointee to

a position that has been excepted from the competitive service by reason of being of a confidential or policy-making character (Schedule C and other positions excepted under comparable criteria) in an executive agency. No employee at EOIR, including EOIR's senior leadership, falls within one of these categories. Immigration Judges, Appellate Immigration Judges, administrative law judges, and all of EOIR's senior leadership are hired through an open, competitive, non-partisan, merit-based process. Although approximately 560 positions at EOIR currently require appointment by the Attorney General according to statute, regulation, policy, or the Appointments Clause of the Constitution, the fact that the Attorney General appoints an individual to a position does not convert that position to a political position.

5. **MYTH:** An Immigration Judge's prior legal employment, including the legal positions taken and the clients represented before he or she became an Immigration Judge, necessarily predicts how the judge will rule or reflects pre-judgment of cases by that judge. All Immigration Judges with similar professional backgrounds view the law the same way and decide cases the same way.

FACT: Attorneys represent myriad different types of clients, and many factors go into an attorney's decision to represent a client or to accept legal employment. Similarly, zealous advocacy may often require an attorney to take positions and make legal arguments with which he or she may not personally agree. For example, many judges at both the state and federal levels have prior experience as criminal prosecutors, but that fact does not mean they all share the same view of criminal law. Imputing the positions of a client or an employer to an attorney misapprehends both the role of an attorney in the American legal system and the nature of the attorney-client relationship, and using such imputed positions to predict an Immigration Judge's views on particular issues is both misguided and likely inaccurate.

6. **MYTH:** Immigration Judges lack diversity of legal experience.

FACT: Most Immigration Judges had experience in multiple legal roles prior to becoming an Immigration Judge. Of the Immigration Judges hired since January 2017, 46% had prior experience in the private practice of law; 48% had prior experience with U.S. Immigration and Customs Enforcement; 45% had prior experience with the Department of Justice; 21% had prior judicial experience; and, 29% had prior military experience.

Less than 10% of Immigration Judges had experience in only one type of legal employment prior to becoming an Immigration Judge.

7. **MYTH:** Immigration Judges have seldom granted asylum in recent years because they are biased against asylum applicants.

FACT: Between Fiscal Year (FY) 2017 and FY 2020, Immigration Judges granted nearly 57,000 asylum applications, an average of over 14,000 grants per year and the highest four-year total in EOIR's history. In comparison, between FY 2013 and FY 2016 Immigration Judges granted less than 35,000 asylum applications, averaging approximately 8,700 grants per year.

8. **MYTH:** It is unusual and inappropriate to elevate trial-level judges to appellate positions.

FACT: Most appellate courts contain judges who previously served at a trial level. There is nothing unusual or inappropriate about the elevation of a trial-level judge to an appellate judge position.

9. **MYTH:** Policy or issue preferences indicate political biases.

FACT: All judges have differing jurisprudential philosophies, and a judge's personal policy or issue preferences embodied in his or her jurisprudential philosophy do not reflect political biases. Further, all adjudicators, regardless of personal policy or issue preferences, are required by law to exercise "independent judgment and discretion" in deciding the cases before them and to "act impartially and not give preferential treatment to any private organization or individual." Immigration Judges and Appellate Immigration Judges are not "swayed by partisan interests or public clamor."

10. **MYTH:** Immigration Judges and Appellate Immigration Judges routinely engage in unprofessional or unethical behavior or violate due process and the rights of respondents in adjudicating immigration cases.

FACT: Despite a 70% increase in the number of Immigration Judges since 2017, the number of complaints of judicial misconduct have decreased for three consecutive fiscal years. The number of federal court remands has remained below 700 annually for the past four fiscal years.

11. **MYTH:** EOIR contains the only federal adjudicatory system in which the head of the agency, the Attorney General, may review administrative adjudicatory decisions.

FACT: Agency head review has been a common feature of adjudications at many federal administrative agencies for decades.

12. **MYTH:** Immigration Judges and Appellate Immigration Judges have financial incentives to complete cases with particular outcomes.

FACT: Immigration Judge and Appellate Immigration Judge pay is set by a statutory scale based solely on length of service with adjustments based on locality. Neither Immigration Judges nor Appellate Immigration Judges receive bonuses or financial awards based on the number of cases they complete or the outcomes of those cases. Like most judges, Immigration Judges and Appellate Immigration Judges receive payment for their work, but the payment of a salary for adjudicating cases does not create a financial incentive for any judge to complete cases in any particular manner.

13. **MYTH:** Administrative judges and administrative adjudicators, including Immigration Judges, can easily be converted to Article I judges with no disruption to adjudications.

FACT: There are over 10,000 federal administrative judges and administrative adjudicators, in addition to over 1900 administrative law judges and over 530 Immigration Judges. No organization has studied the cost or fully explored the ramifications of converting tens of thousands of administrative judges and adjudicators to Article I judges.

II. ADMINISTRATIVE CLOSURE

14. **MYTH:** The use of administrative closure reduced the pending caseload and efficiently managed dockets.

FACT: During the height of the use of administrative closure between February 1, 2012, and May 17, 2018, the number of pending active cases increased by 130%, from 301,250 to 715,246. The total number of pending cases, active plus inactive, increased by 127%, from 450,256 to 1,022,031, and exceeded 1 million cases total for the first time in the agency's history. During that same period, new case receipts twice fell below 200,000

annually, including the lowest single-year total since 2002. Over 300,000 cases remain administratively closed, pending but off calendar indefinitely. One federal court recently described EOIR's use of administrative closure as an "adjudicatory default" that "strikes directly at the rule of law."

III. ASYLUM

15. **MYTH:** Most asylum claims are meritorious.

FACT: Since FY 2008, the grant rate for all asylum applications—including those that originate from applications within the United States and those originating from our borders—has never been higher than thirty-one percent (31%), and it has fallen significantly since FY 2012. The average grant rate in FY 2020 was approximately nineteen percent (19%). The overwhelming majority of asylum applications either are not pursued or are unmeritorious.

16. **MYTH:** Most aliens who claim a fear of persecution in expedited removal proceedings have meritorious asylum claims.

FACT: Out of every 100 credible fear claims, on average, only about 12 result in a grant of asylum by an Immigration Judge.

17. **MYTH:** Most aliens who claim a credible fear of persecution are asylum seekers.

FACT: On average, approximately half of aliens who make a credible fear claim and are subsequently placed in removal proceedings do not actually apply for asylum.

18. **MYTH:** There is wide discrepancy in asylum grant rates across all immigration courts.

FACT: The median asylum grant rate for all immigration courts and adjudication centers in FY 2020 is ten percent (10%). Seventy-five percent (75%) of immigration courts, 52 out of 69, have a grant rate of nineteen percent (19%) or lower, and ninety-four percent (94%), 65 out of 69, have a grant rate of forty percent (40%) or lower.

19. **MYTH:** EOIR has deleted or destroyed numerous files or cases of aliens in immigration proceedings.

FACT: EOIR has not destroyed records of proceedings of aliens in immigration proceedings. EOIR adheres to an established record retention schedule which determines how long records are retained. Data that is withheld from release under the Freedom of Information Act is not deleted or destroyed. Although data about a specific case may be updated as the case progresses (*e.g.*, a respondent's new address or best language; a new application filed by a respondent) and data entry errors may be corrected (*e.g.*, corrections to a respondent's name or alien number; duplicate entries for a case), such updates or corrections do not mean that files or cases have been destroyed or deleted.

IV. DATA

20. **MYTH:** EOIR's data is unreliable because it does not conform to pre-existing narratives as to what conclusions it "should" reflect.

FACT: EOIR's data is value-neutral, and EOIR does not alter data or records to conform to any established narrative or point of view. Although EOIR's data may not support various immigration-related canards—*e.g.*, most aliens lack representation; most asylum applications are meritorious—the fact that the data does not conform to views of what individuals or organizations believe it "should" in order to support a particular narrative is not indicative of errors in the data.

V. FAILURE TO APPEAR

21. **MYTH:** Few aliens fail to attend their immigration court proceedings.

FACT: Forty-nine percent (49%) of all non-detained or MPP removal cases completed in FY 2020 resulted in an *in absentia* order of removal due to an alien's failure to attend a scheduled immigration court hearing.

VI. PERFORMANCE MEASURES

22. **MYTH:** EOIR is the only federal agency in which judges or administrative adjudicators are subject to performance measures or case completion goals.

FACT: Ninety-seven percent (97%) of administrative judges or administrative adjudicators, excluding administrative law judges, are subject to performance measures just as Immigration Judges are. Although not subject to performance evaluations, many administrative law judges are subject to case processing goals, just as Immigration Judges are.

23. **MYTH:** EOIR's case completion goals are unfounded in law and contrary to the recommendations of other governmental bodies.

FACT: Multiple statutory provisions reflect the intent of Congress to adjudicate immigration cases within specified time frames. The Government Accountability Office, the Department of Justice Office of the Inspector General, and Congress have all called for EOIR to establish case completion goals, particularly for non-detained cases that make up the bulk of the pending caseload.

24. **MYTH:** Immigration Judges cannot complete 700 cases per year without violating due process.

FACT: Historically, multiple sources have asserted that Immigration Judges have completed well over 700 cases per year with no noted allegations of due process violations associated with those higher completion numbers, including the Government Accountability Office and the National Association of Immigration Judges. The American Bar Association has also twice recommended that Immigration Judges should manage a caseload "roughly on par with the number of cases decided each year by judges in other federal administrative adjudicatory systems (around 700 cases annually)."

VI. REPRESENTATION

25. **MYTH:** Most aliens in immigration proceedings do not have representation. Most asylum applicants and unaccompanied alien children (UAC) in immigration proceedings do not have representation. Most aliens who appeal an Immigration Judge's decision do not have representation on appeal.

FACT: Seventy-five percent (75%) of aliens with pending immigration cases who have had at least one hearing and eighty-five percent (85%) of pending asylum applicants in immigration proceedings have representation. Sixty-five percent (65%) of all UAC cases and seventy-five percent (75%) of UAC cases that have been pending for more than one year have representation. Eighty-six percent (86%) of aliens in cases on appeal have representation.

26. **MYTH:** Most aliens with representation are granted asylum in immigration proceedings.

FACT: The asylum grant rate for cases with representation is approximately twenty-two percent (22%). The asylum denial rate for cases with representation is approximately fifty-five percent (55%). These rates are essentially the same as the national averages.

27. **MYTH:** Participation in the Legal Orientation Program (LOP) reduces the length of an alien's proceedings, reduces the time an alien spends in detention, and reduces costs to the Department of Homeland Security (DHS).

FACT: Aliens who participate in LOP spend an average of 30 additional days in detention, have longer case lengths, and add over $100 million in detention costs to DHS.

VII. VIDEO TELECONFERENCING (VTC)

28. **MYTH:** EOIR is the only federal administrative agency that uses video teleconferencing (VTC) for court hearings or case adjudications, and eliminating or restricting the use of VTC through litigation would affect only EOIR.

FACT: VTC is widely used at numerous federal administrative agencies for court hearings or case adjudications similar to how it is used by EOIR, including at the Social Security Administration, the Department of Veterans Affairs, and the Department of Health and Human Services. Any restriction or elimination of the use of VTC for court hearings or case adjudications would have implications for all agencies utilizing VTC—not just EOIR.

29. **MYTH:** VTC is unreliable, and its use violates due process.

FACT: VTC has been used by EOIR since the 1990s, and its use was expressly authorized by statute in 1996. It is used widely throughout many federal agencies, and federal courts have consistently rejected general challenges to its use as a violation of due process. Many stakeholders have also called for increased usage of VTC during the outbreak of COVID-19. There is no indication of a statistically significant difference in outcomes between VTC cases and in-person cases. Less than one percent (.0033) of EOIR VTC hearings, 923 out of over 282,000, are continued due to a VTC malfunction.