

REPORT BY THE IMMIGRATION AND NATIONALITY LAW COMMITTEE

QUOTAS IN IMMIGRATION COURTS WOULD BE NEITHER EFFICIENT NOR JUST

On April 2, 2018, James McHenry, the director of the immigration courts, issued a memo to all immigration judges that accompanied an updated policy that ties the performance evaluation of immigration judges to case completion quotas. This plan had been previously strongly opposed by immigration judges.¹ In December 2017, following news of this potential shift, the New York City Bar Association (City Bar) issued a report firmly opposing the proposed shift because of its potential to erode due process in immigration court. The American Bar Association President, Hilarie Bass, likewise issued a statement warning that such quotas threaten “to subvert justice.”² Not only are such quotas a threat to judicial independence in an area of law where stakes are extremely high, quotas will likely further exacerbate the backlog they are meant to remedy.

The implication that the immigration court backlog of more than 640,000 cases – more than 85,000 in New York alone – is somehow the result of judicial inefficiency is belied by the reality of an immigration judge’s work.³ Immigration judges contend with caseloads that sometimes exceed 2,000 respondents each. In New York, attorneys and immigrants regularly cram into courtrooms and overflow into hallways as judges work diligently to cope with an ever-increasing workload. Judges should not be required to further shave time off of each case, rather judges need more resources, such as dedicated law clerks.

The new policy, set to go into effect on October 1, 2018, will require judges to complete 700 cases per year. This quota translates into each judge hearing testimony and rendering decisions in almost three cases per day, five days per week, 52 weeks per year. Furthermore, the

¹ Maria Sacchetti, *Immigration judges say proposed quotas from Justice Dept. threaten independence*, The Washington Post, 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=.3d2d4f665dd1; President Donald J. Trump’s Letter to House and Senate Leaders & Immigration Principles and Policies, Oct. 8, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/> (outlining need for “performance metrics”)(all sites last visited April 5, 2018).

² Statement of ABA President Hilarie Bass Re: Mandatory case completion quotas for immigration judges, American Bar Association, Oct. 16, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement_of_abapre1.html.

³ Transactional Records Access Clearinghouse (TRAC) of Syracuse University, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (accessed Nov. 15, 2017, 9:37 PM).

new policy will require judges to resolve 85% of cases within ten days of hearing the decision, and requires judges to complete 95% of individual hearings on the day that the hearing begins.

On July 31, 2017, Chief Immigration Judge MaryBeth Keller issued a memo on the circumstances under which immigration judges should grant continuances in cases.⁴ While the memo allowed for judges to maintain discretion in granting continuances, it also emphasized the need for greater “efficiency,” discouraging multiple continuances particularly for attorney preparation. However, more complicated cases may require substantial evidence and legal arguments to determine whether an immigrant even belongs in court proceedings prior to reaching the merits of any applications.⁵ In many cases, attorneys have to invest substantial time before the case can even be fully assessed and a final hearing can be scheduled. For example, if the Department of Homeland Security wants to remove someone from the United States for a misdemeanor committed thirty years ago, the attorneys may have to spend substantial time waiting for records keepers to produce decades-old court transcripts to be sure exactly what happened so long ago.

Immigration cases vary dramatically in complexity. On rare occasions, a case may be resolved in a single, short hearing. The complexity of immigration law often requires judges to proceed with caution and continuances. It is a field rife with unsettled law, and parties are slowed down by language barriers; overseas witnesses and evidence; applications pending before other government agencies; a mix of local, state, federal, and foreign law; respondents struggling with symptoms of trauma; and a shortage of affordable legal counsel. Rushing cases will often mean depriving parties of due process.

To make matters worse, these quotas will be unlikely to save any time. Cases sloppily rushed through courts will result in a dramatic increase in motions to reopen and appeals, drawing cases out longer than if they had simply been diligently resolved in the first instance. The immigration court backlog has been growing for years as a symptom of an immigration system that all sides agree is broken. Forcing cases through this broken system faster will only compound existing problems and endanger the lives of people with genuine claims.

Rather than impose arbitrary quotas on judges, hampering their ability to exercise control and independent judgment in their courtrooms, the City Bar recommends that Congress establish immigration court as a truly independent adjudicative Article I court. As long as the court remains within the executive branch, it will never be truly independent of political pressures exerted by the executive. The City Bar further urges the federal government to invest resources in providing counsel to vulnerable immigrants to clarify and narrow legal issues in each case. There are many steps the director of the immigration court could take to improve efficiency

⁴ "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017, <https://www.justice.gov/eoir/file/oppm17-01/download>.

⁵ Not only must judges make threshold determinations about whether non-citizens may be removable, in many instances, U.S. citizens are wrongly placed in removal proceedings. See Lise Olsen, *Hundreds of American citizens end up in deportation proceedings each year, immigration data shows*, Houston Chronicle, July 30, 2017, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Hundreds-of-citizens-end-up-in-deportation-11719324.php>.

without sacrificing due process, such as improving technology and requiring opposing counsel to engage in pre-trial conferences before the cases are scheduled for merits hearings.⁶

Quotas misconstrue the role of the judiciary. The mission of the Executive Office for Immigration Review “is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.”⁷ These principles call for not merely speed but also accuracy. For these reasons, the City Bar strongly urges the administration to rescind its memo ordering numerical quotas for immigration judges. Quotas threaten due process to the people in removal proceedings and judicial independence.

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Updated and Reissued April 2018

⁶ See “Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court,” National Immigrant Justice Center, Oct. 2014, <https://immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf>.

⁷ U.S. Dep’t of Justice, Executive Office for Immigration Review, EOIR Mission, <https://www.justice.gov/eoir>.