PROJECT ON GOVERNMENT OVERSIGHT

Statement for the Record
The Constitution Project at the Project On Government Oversight
before the House Committee on the Judiciary
Subcommittee on Immigration and Citizenship
on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts"
January 29, 2020

The Supreme Court has held that the fundamental requirements of procedural due process include notice of the government's proposed action, an opportunity for a fair hearing before an impartial decision-maker, the right to present evidence and confront the government's evidence, and the right to be represented by counsel.[1] The immigration court system has a long history of imperfectly meeting these requirements, even though the due process clause of the Constitution applies to removal proceedings. There is a mismatch between the courts' limited resources, their large and growing caseload, and the potentially devastating consequences of deportation decisions. These chronic problems have been compounded by a series of recent policy changes that have drastically curtailed immigration courts' independence and immigrants' rights to seek relief from deportation. This statement will focus on those recent changes.

New Limits on Court Independence and Impartiality

Immigration judges and members of the Board of Immigration Appeals are Department of Justice employees. The attorney general can direct those judges in how to manage their courtrooms and dockets; discipline or terminate judges for poor performance; and overturn immigration court precedents. The last two U.S. attorneys general, Jeff Sessions and William Barr, used these tools repeatedly to restrict immigrants' rights and to incentivize immigration judges to order as many deportations as possible. The attorneys general took actions including:

- Imposing case-completion quotas that require judges to decide at least 700 cases per year in order to receive satisfactory performance evaluations.[2]
- Limiting judges' authority to administratively close or terminate cases,[3] causing a major growth in the backlog of pending cases.[4]

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[1] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 542 (1985); Ward v. Village of Monroeville, *409 U.S. 57, 61-62* (1972); *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972).

[2] Joel Rose, "Justice Department Rolls Out Quotas for Immigration Judges," National Public Radio, April 3, 2018. https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges

[3] Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); Romero v. Barr, 937 F.3d 282, 294 (4th Cir. 2019) (finding that *Matter of Castro-Tum* was wrongly decided).

[4] Priscilla Alvarez, "Immigration court backlog exceeds 1 million cases, data group says," CNN, September 18, 2019. https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html; Julia Preston and Andrew R. Calderon, "How Trump Broke the Immigration Courts," *POLITICO Magazine*, July 16, 2019. https://www.politico.com/magazine/story/2019/07/16/trump-ice-raids-immigration-courts-arent-ready-227359

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- Ordering judges to prioritize certain categories of cases, leading to cancellation or double or triple booking of scheduled hearings in other cases.[5]
- Repeatedly overturning Board of Immigration Appeals precedents in order to narrow procedural protections for asylum seekers and eligibility for asylum.[6]

These actions have coincided with a series of public statements by President Donald Trump denouncing asylum seekers as perpetrating a "scam" and a "hoax" in order to "invade" the United States, and the immigration court system as a "ridiculous" obstacle to summary deportation.[7]

The cumulative effect, in the words of former immigration judge John Richardson, has been "the relegation of [judges] to the status of 'action officers' who deport as many people as possible as soon as possible with only token due process."[8] Richardson and several other former immigration judges have told news reporters that they resigned or retired as a result of these changes.[9]

Increases in Immigration Detention

For over a decade, The Constitution Project has recommended that the government limit the use of immigration detention to ensure that people receive due process of law in deportation proceedings, including access to counsel, access to interpretation, and the ability to obtain and submit corroborating evidence.[10] Unfortunately, the Department of Homeland Security (DHS)

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[5] Amy Taxin "Trump administration pushes to speed up migrant family cases," Associated Press, August 3, 2019. https://apnews.com/1e3d49caa25940a88de13306af0ead78; Kate Brumback, Deepthi Hajela, and Amy Taxin, "AP visits immigration courts across US, finds nonstop chaos," Associated Press, January 19, 2020. https://apnews.com/7851364613cf0afbf67cf7930949f7d3

[6] Matter of E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018); Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Matter of M-S-, 27 I. & N. Dec. 509 (A.G. 2019), Matter of L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019).

[7] White House, "Remarks by President Trump in Roundtable on Immigration and Border Security," April 5, 2019. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-immigration-border-security-calexico-california/; Colby Itkowitz, "Trump: Congress needs to 'get rid of the whole asylum system,'" *Washington Post*, April 5, 2019. https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html; White House, "Remarks by President Trump Before a Working Lunch with Heads of the Baltic States," April 3, 2018. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-working-lunch-heads-baltic-states/; President Donald Trump (@realdonaldtrump), "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came," Twitter, June 24, 2018. https://twitter.com/realDonaldTrump/status/1010900865602019329

[8] Hamed Aleaziz, "Being An Immigration Judge Was Their Dream. Under Trump. It Became Untenable," *BuzzFeed News*, February 13, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump

[9] Hamed Aleaziz, "Being An Immigration Judge Was Their Dream. Under Trump. It Became Untenable," *BuzzFeed News*, February 13, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump; Priscilla Alvarez. "Immigration judges quit in response to administration policies," CNN, December 17, 2019. https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html

[10] The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* (2009), 2, 6. https://archive.constitutionproject.org/pdf/359.pdf The

has done the opposite and has drastically increased the use of immigration detention. The average daily population of people in Immigration and Customs Enforcement (ICE) detention rose to a record high of over 55,000 last year, with most held in remote rural areas where access to counsel was particularly limited.[11] Federal courts found that in many parts of the country, ICE had unlawfully stopped releasing asylum seekers on parole over the last several years.[12]

In recent months the total detention population has dropped, primarily as a result of the administration's increasingly successful efforts to prevent asylum seekers and other migrants from entering the United States through Mexico. Even so, as of this month, ICE was detaining over 40,000 people on an average day, including 9,000 asylum seekers whom asylum officers or immigration judges had found to have a credible fear of persecution.[13]

The "Migrant Protection Protocols"

In January 2019, DHS started the "migrant protection protocols," a misnomer for a program that requires asylum seekers and other migrants to wait in Mexico while their cases make their way through the immigration court system.[14] Forcing migrants to wait in Mexico violates federal law and the United States' international legal obligations not to return people to persecution or torture.[15] Ordering them deported without a meaningful opportunity to present their claims for asylum, as many immigration courts have done, violates the Constitution's due process clause.

According to statistics compiled by the Transactional Records Access Clearinghouse, DHS returned 59,241 people to Mexico under this program from January to December 2019.[16] This included thousands of families with children. As of September 2019, 16,000 children under 18 had been returned, 4,300 of whom were younger than five years old.[17]

Once returned to Mexico, families often have no safe place to live. Shelters in border cities are at capacity, and migrants lose their places when they come to the United States to ask for asylum or

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Constitution Project, *The Use and Abuse of Immigration Authority As a Counterterrorism Tool* (2008), 12. https://archive.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf

[11] Yuki Noguchi, "Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar," National Public Radio, August 15, 2019. https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks

[12] Damus v. Nielsen, 313 F.Supp.3d 317 (D.D.C. 2018); Heredia Mons v. McAleenan, Civ. No. 19-1593 (JEB), 2019 WL 4225322 (D.D.C. September 5, 2019).

[13] "Detention Statistics, ICE Currently Detained Population," Immigration and Customs Enforcement, last modified January 18, 2020. https://www.documentcloud.org/documents/6704914-Detention-Management-ICE-Screenshot-1-28-2020.html

[14] Department of Homeland Security, "Migrant Protection Protocols," Press Release, January 24, 2019. https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols

[15] Audio of Proceedings Before 9th Circuit, *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Circuit, October 1, 2019). https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034446

[16] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[17] Kristina Cooke, Mica Rosenberg, and Reade Levinson, "Exclusive: U.S. migrant policy sends thousands of children, including babies, back to Mexico," Reuters, October 11, 2019. https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1

attend court hearings, leaving them homeless. They are also frequent targets for kidnapping, extortion, and violence.[18]

A human rights group has compiled hundreds of reports on attacks against migrants returned to Mexico, including cases of murder, forced disappearance, rape, and torture. The group says it believes that "our count is only the tip of the iceberg, as the overwhelming majority of returned people have not spoken with human rights investigators or journalists."[19] The danger is particularly acute for the over 26,000 people who have been returned under the migrant protection protocols to Nuevo Laredo and Matamoros in Tamaulipas state, an area for which the State Department has issued a travel advisory, warning Americans not to travel there "due to crime and kidnapping. … Heavily armed members of criminal groups often patrol areas of the state in marked and unmarked vehicles and operate with impunity particularly along the border region."[20]

In addition to the dangers and hardships they face, migrants whose cases are being heard under migrant protection protocols are not receiving proper notice or a meaningful court hearing, in violation of the Constitution's due process clause.

- The U.S. government is legally required to include the immigrants' physical address on court notices so they can receive updates about their cases. Instead, the Notices to Appear issued to migrants before they are returned to Mexico contain false, incomplete, or obviously inadequate addresses. In several cases, "Facebook" was listed as a migrant's address.[21]
- In other cases, DHS has returned people to Mexico even after an immigration judge granted them asylum. In order to get Mexico to take them back, DHS issued Notices to Appear falsely stating that there is an additional immigration court hearing scheduled.[22]

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[18] *This American Life*, "The Out Crowd," NPR, November 15, 2019. https://www.thisamericanlife.org/688/the-out-crowd; Maria Verza, "Migrants stuck in lawless limbo within sight of America," Associated Press, November 15, 2019. https://apnews.com/3752fd080525419fbe9352901b50e0ba; John Washington, "The US Is Making a Mockery of Its Asylum Obligations," *The Nation*, July 3, 2019. https://www.thenation.com/article/archive/immigration-mexico-trump-asylum/

[19] Human Rights First, *A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico*, January 2020. https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf

[20] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/; "Mexico Travel Advisory," Department of State, last modified December 17, 2019. https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html

[21] Adolfo Flores, "Border Patrol Agents Are Writing 'Facebook' As A Street Address For Asylum-Seekers Forced To Wait In Mexico," *BuzzFeed News*, September 26, 2019. https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico; Debbie Nathan, "U.S. Border Officials Use Fake Addresses, Dangerous Conditions, and Mass Trials to Discourage Asylum Seekers," *Intercept*, October 4, 2019. https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/

[22] Gustavo Solis, "CBP agents wrote fake court dates on paperwork to send migrants back to Mexico, records show," *San Diego Union Tribune*, November 7, 2019. https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud; Hamed Aleaziz, "US Border Officials Are Issuing Fake Court Notices To Keep Out Immigrants Who Have Won Asylum," *BuzzFeed News*,

- U.S. law gives migrants the right to be represented by an attorney during deportation hearings (though not a right to government-appointed counsel).[23] But U.S. attorneys are reluctant to take cases in Mexico given the expense and danger of traveling to border cities, the lack of confidential meeting spaces for clients who lack housing, and uncertainty about whether they are legally authorized to practice law in Mexico.[24] Statistics show that only a small percentage of individuals returned to Mexico are represented by counsel in their immigration court hearings. [25] The Justice Department has also restricted volunteer lawyers from providing "know your rights" presentations or speaking to unrepresented migrants before court.[26]
- The United States requires asylum applications and supporting documents to be filed in English, with a certified translation attached to all documents originally written in another language,[27] but it is extremely difficult for migrants to access translation services in Mexico, particularly for speakers of indigenous languages.
- Migrants are supposed to be screened for fear of return to Mexico before being placed in the migrant protection protocol program, but the asylum officers who conduct these screenings have described the process as being designed to return people to Mexico regardless of the dangers they face.[28]
- Over 20,000 people placed in the migrant protection protocol program have been given *in absentia* deportation orders after failing to appear at a scheduled court hearing.[29] There is no plausible way for an immigration court to determine that asylum seekers' absence was voluntary given the lack of adequate notice; the dangerous conditions they face in Mexico; their lack of access to shelter, medical care, and other basic necessities of life; and the fact that they may have been sent hundreds or thousands of miles away from the ports of entry where they are instructed to report. (Because of these factors, judges at the San Diego immigration court have frequently terminated migrant protection protocol cases rather than ordering deportation *in absentia*, an action that provides little immediate assistance to families stranded in Mexico but does protect them from the harsh legal

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December 10, 2019. https://www.buzzfeednews.com/article/hamedaleaziz/immigrants-asylum-turned-away-us-border

[23] 8 U.S.C. § 1229a(b)(4)(A) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) ("[A]liens have a due process right to obtain counsel of their choice at their own expense.")

[24] Priscilla Alvarez, "Immigration lawyers struggle to navigate return-to-Mexico policy," CNN, March 31, 2019. https://www.cnn.com/2019/03/30/politics/immigration-lawyers-remain-in-mexico/index.html

[25] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[26] Priscilla Alvarez, "Immigration lawyers struggle to navigate return-to-Mexico policy," CNN, March 31, 2019. https://www.cnn.com/2019/03/30/politics/immigration-lawyers-remain-in-mexico/index.html

[27] Human Rights First, *Orders From Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, October 2019. https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf

[28] Molly O'Toole, "Asylum officers rebel against Trump policies they say are immoral and illegal," *Los Angeles Times*, November 15, 2019. https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal

[29] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

consequences of a deportation order.[30] Judges at other courts have terminated very few cases.[31])

- Many migrant protection protocol hearings are now being held at tent "courts" where hearings are conducted entirely by video-conference. Public access to the tent courts is either severely curtailed or non-existent.[32]

The Constitution Project at POGO is heartened by this committee's recent announcement of an investigation into migrant protection protocols. We suggest that the investigation include requests for or, if necessary, subpoenas of communications from the Department of Homeland Security and the Justice Department to immigration judges on how to implement migrant protection protocols, particularly with respect to issues of inadequate or fraudulent Notices to Appear, *in absentia* removal orders, and the operations of the newly created tent courts. More generally, we suggest that the committee attempt to confidentially interview current and former immigration judges in order to gain a full understanding of the pressures they are facing.

[30] Alicia A. Caldwell, "Judges Quietly Disrupt Trump Immigration Policy in San Diego," *Wall Street Journal*, November 28, 2019. https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400

[31] "Details on MPP (Remain in Mexico) Deportation Proceedings," Transactional Records Access Clearinghouse, last modified December 2019. https://trac.syr.edu/phptools/immigration/mpp/

[32] Adolfo Flores, "Immigration 'Tent Courts' Aren't Allowing Full Access To The Public, Attorneys Say," *BuzzFeed News*, January 13, 2020. https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access