TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

Statement of the Tahirih Justice Center:

UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY IMMIGRATION & CITIZENSHIP SUBCOMMITTEE:

Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts

January 29, 2020

The Tahirih Justice Center (Tahirih)[i] respectfully submits this statement to the United States (U.S.) House of Representatives Committee on the Judiciary, Immigration & Citizenship Subcommittee, as it considers *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.*

Tahirih is a national, nonpartisan advocacy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past 22 years. The women and girls we serve endure horrific abuses such as rape, domestic violence, forced marriage, honor crimes, and human trafficking. They are in dire need of humanitarian relief. As an organization dedicated to promoting safety and justice for our clients, Tahirih is deeply concerned about increasing bias and routine violations of due process in the immigration courts that unlawfully limit access to protection for survivors. **We respectfully urge Congress to pass legislation moving the immigration courts out of DOJ to restore fairness and ensure judicial independence and accountability.**

I. The Executive Office for Immigration (EOIR) is Inherently Vulnerable to Bias and Politicization

EOIR is an office within the US Department of Justice (DOJ) that encompasses both the immigration courts and the Board of Immigration Appeals (BIA). Nonetheless, DOJ, through the Attorney General (AG), also oversees the attorneys that prosecute immigration cases appealed from the BIA to the federal circuit courts. In this way, a stark conflict of interest is built into EOIR's structure. As a result, it is easily manipulated by the whims of those in power. Justice in immigration proceedings is elusive at best. Rather, EOIR has largely become a vehicle for the Administration to fast-track mass deportations even for the most vulnerable asylum seekers like our clients.[ii]

II. The Administration has Leveraged EOIR's Structural Vulnerabilities to Politicize the Courts, and Undermine Judicial Independence and Due Process for Immigrants in Proceedings

Over the past few years, the Administration has taken a variety of actions large and small to drastically limit access to humanitarian relief for immigrants including survivors of GBV. Due process has been virtually gutted, with the procedural safeguards that remain on the verge of extinction. The aptly named "asylum free zones"[iii] throughout the country are illustrative. Tahirih represents survivors in Atlanta, where the grant rate for asylum claims is less than 3%.[iv]

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In addition, new EOIR hiring policies have given rise to numerous allegations of biased hiring based on political ideology.[v] The Administration has sought to terminate the Immigration Judges Union, to further weaken adjudicators' power and independence. And, when an immigration judge continued an important case last summer to maximize fairness of process, EOIR took the extraordinary step of removing the judge from the case.[vi]

1. The Politicization of the AG Certification Process

The AG has seized on his authority to remove specific cases from the courts. He has instead certified them to himself[vii] to ensure certain outcomes – namely, those that foreclose access to relief. Through this channel, the AG has:

- limited continuances, which hinders opportunities to secure counsel;[viii]
- limited "administrative closure" to promote removal of respondents before other applications for relief can be adjudicated;[ix]
- narrowed asylum eligibility for survivors of domestic violence and persecution based on a family-related particular social group;[x]
- restricted bond for asylum seekers,[xi] which, by prolonging incarceration, exacerbates trauma, delays survivors' healing, obstructs access to counsel and mental health services, and interferes with case preparation; and
- permitted judges to refuse to hold full asylum hearings with all relevant evidence.[xii]

a. The Impact of the AG's Decisions on Survivors of GBV

In *Matter of A-B-*,[xiii] the AG single-handedly sought to dismantle hard fought precedent centering survivors of domestic violence in the asylum analysis. Marginalizing the experience of survivors who have endured physical, sexual, and emotional torture - met with indifference or additional punishment from their own governments - has no place in our modern legal system.

The AG also punished survivors petitioning for relief through the longstanding bipartisan Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). These forms of relief include the U visa, T visa, and the VAWA "Self-petition" for lawful status. Per *Matter of Castro Tum*,[xiv] survivors with pending requests for this relief are now routinely denied motions to continue their cases while they await adjudication of their petitions by United States Citizenship & Immigration Services (USCIS). They are routinely and swiftly removed in the interim at great risk to their physical and emotional health and safety. Auxiliary services such as mental health counseling and shelters are often scarce in survivors' home countries. Tahirih client "Anna" was removed to her home country even after her U visa petition was *prima facie* approved by USCIS. Her abuser returned there as well, and her life is now in imminent danger.

2. The Politicization of Judicial Review through Rulemaking

EOIR issued rules in July and August 2019 which further politicize the immigration courts. The rules inappropriately shift influence over individual cases to the EOIR Director. In contrast to judges and BIA members, the Director is not a judge, with core functions being administrative in nature. These include communicating with Congress, the bar, and other stakeholders.[xv] Nothing about the Director's core competencies resembles the ability to render decisions in individual cases. Empowering this Director in this way sharply increases the risk of error, costly appeals, and most disturbingly, improper removal of vulnerable asylum seekers who have indeed met their burdens of proof.

a. The Impact of the August EOIR Interim Final Rule (IFR) on survivors of GBV

The August 2019 IFR codified policies that erode due process[xvi] in various ways. Among other measures, the rule imposed abbreviated timelines within which the Board of Immigration Appeals (BIA) must review appeals. If the BIA exceeds the timeframe, the EOIR Director can step in and issue a ruling.[xvii] True judicial independence demands that decisionmakers take whatever time is necessary to reach correct, just, and consistent results in each case before them. This expedited review process transforms EOIR from a judicial system into a political tool designed to prioritize speed at the expense of justice.[xviii] By contrast, to our knowledge, no United States federal court has previously been subject to arbitrary deadlines for a broad category of cases.[xix]

An assembly-line approach in the courts significantly harms survivors of GBV. Their cases are notoriously complex, insofar as they deviate from those reflecting a cis-male centered experience improperly presumed to be universal. Gender-based asylum claims often involve persecution inflicted by family members such as honor crimes, forced marriage, and domestic abuse. Judges frequently misconstrue or dismiss these forms of persecution as "personal" or "private" in nature that applicants can readily flee from internally, even where a government routinely refuses to protect survivors from these harms. Pervasive social stigmas around reporting GBV are also common, which further complicate survivors' ability to obtain objective corroboration for their claims. *Pro bono* attorneys spend nearly 300 hours during their first year representing Tahirih clients in proceedings. Thoughtful, informed, and careful judicial review in these cases is critical to ensuring compliance with our obligations under both US asylum law and the 1951 United Nations Convention and 1964 Protocol Relating to the Status of Refugees which prohibits *refoulement.*[xx] Yet, the IFR does exactly the opposite by fast-tracking even those cases warranting highly nuanced analyses and where an individual's life and freedom hangs in the balance. As survivors of GBV, Tahirih's clients are a highly vulnerable population. Not only do they face persecution, but when a non-state actor is the persecutor, it is often futile or even more dangerous to pursue government protection.[xxi] The IFR's expedited adjudication and review of cases poses an impermissible risk of "erroneous deprivation"[xxii] of life and liberty for survivors.

b. Competing Government Interests Should Not Prevail at the Expense of Due Process

While the government has a strong interest in reducing backlogs, which themselves lead to due process violations,[xxiii] fairness is the foundation of our legal system. It is not a bargaining chip. Increasing appropriations for EOIR in order to reduce the backlogs is an alternative, provided neutrality and fairness when hiring additional personnel is restored. Moreover, backlogs have not been caused by those seeking relief. Rather, they have been manufactured by the government itself. Most notably, the Attorney General unlawfully[xxiv] added "330,211 previously completed cases" to "the 'pending' rolls"[xxv] with the stroke of a pen by precluding immigration judges from administratively closing cases.[xxvi] EOIR is thus replacing one illegal fiat – that of restricting immigration judges' authority to manage their dockets – with another - restricting BIA members' authority to manage theirs.

Finally, the IFR timeline may reduce incarceration costs during the entire pendency of an individual's removal proceedings. However, the practice of detaining immigrants for that period is itself unconstitutional.[xxvii] Any justification along these lines improperly invokes one due process violation to justify another.

The IFR does provide an alternative when the BIA does not meet its deadlines: arrogating decision-making authority to an unqualified functionary – the EOIR Director - in violation of the Administrative Procedure Act.[xxviii] BIA members, dependent though they are on the AG, are judges and must be attorneys.

They have experience adjudicating cases and expertise in specific areas on immigration law. As noted above, it is highly inappropriate for a bureaucrat such as the EOIR Director to perform adjudicatory functions.[xxix]

3. Policy Guidance and Other Actions that Undermine Fairness

a. Fast-tracking Cases and the Impact on Survivors

In addition to the IFR's strict timelines for judicial review, EOIR also imposed performance metrics on immigration judges that directly link job evaluations to case completion rates.[xxx] Other efforts to arbitrarily force rapid decision-making include expediting Family Unit (FAMU) cases[xxxi] and pressure exerted on judges through a December 2017 AG memorandum.[xxxii]

Survivors of GBV in immigration proceedings need time to secure competent counsel as they navigate the complexities of the asylum process. As explained in detail above, their lives are at stake, yet the legal framework applied to their claims is inherently marginalizing. Once in progress, it is imperative that adjudicators conduct careful and thorough review of their cases. Truncating complex proceedings further compromises survivors' claims, and arbitrarily rushes attorneys – most often *pro bono* - through case preparation. Finally, the healing process for survivors is re-triggering, non-linear, and enduring. It can last for years or even a lifetime. Survivors need time to begin processing trauma so that they can meaningfully identify evidence, develop testimony, and otherwise prepare their cases.

b. Obstructing Legal Access and the Impact on Survivors

EOIR's Legal Orientation Program (LOP) has benefitted all relevant stakeholders since its inception. Respondents receiving legal orientations are empowered to make informed decisions about their cases, and in turn, judges can conduct proceedings with greater efficiency. However, DOJ attempted to scrap the program, and persists in maligning it despite strong data from EOIR itself demonstrating its benefits.[xxxiii] Survivors of GBV often do not know they are eligible for relief until receiving a legal rights presentation, as abusers notoriously mislead or withhold helpful information from them. For others, lack of accountability of abusers at home might lead to assumptions about what, if any, legal protections are available to them in the U.S. No legitimate interest can be served by limiting access to potentially life-saving information particularly when doing so has been shown to enhance judicial efficiency.

4. The Impact of Video Teleconferencing (VTC) on Survivors' Claims in Immigration Court

EOIR has been steadily expanding its longstanding use of VTC to immigration courts nationwide.[xxxiv] Yet, VTC prevents judges from directly assessing non-verbal forms of communication such as a respondent's body language or eye contact while testifying. A report, commissioned by EOIR itself, recommends limiting the use of VTC to hearings addressing procedural matters for this reason.[xxxv] VTC technical glitches are also commonplace and VTC reportedly causes further communication problems for those in need of language interpretation. Interacting with counsel via VTC is also challenging for respondents.[xxxvi] With no ability to observe a respondent in person, a judge is ill-equipped to accurately assess credibility particularly in cases involving GBV. Recounting horrific, sensitive details about rape and other violence is highly re-traumatizing in a regular court setting and even more so when VTC is used. Survivors must be truly seen and heard to have their claims fully and fairly evaluated.

III. Conclusion

Impartiality is the non-negotiable cornerstone of any judicial system. All who appear before our immigration courts deserve a meaningful opportunity to pursue the relief that Congress created for them. This includes a hearing where the ultimate decision is not a foregone conclusion. For survivors of GBV the stakes are extraordinarily high, with unimaginable violence awaiting them upon return home. That our immigration court system is structurally flawed has never been more apparent. To comply with our own domestic laws and international obligations, and ensure accountability, independence, and freedom from political influence, we urge Congress to remove the immigration courts from DOJ.

Respectfully,

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[i] www.tahirih.org

[ii] ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (2010): https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report. authcheckdam.pdf; *See also* https://www.tahirih.org/wp-content/uploads/2019/10/Tahirih_EOIR-Comments.pdf

[iii] https://immigrationimpact.com/2016/12/20/asylum-free-zones/#.Xi-1qtPsbv8

[iv] http://trac.syr.edu/immigration/reports/590/

[v] https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=1425

[vi] Press Release, National Association of Immigration Judges, *Judges' Union Files Grievance Over DOJ's Interference with Judicial Independence and Violation of the Due Process Rights of Those Appearing before the Immigration Courts* (Aug. 8, 2018).

[vii] U.S.C. § 1103(g)(2) (West 2018).

[viii] *Matter of L-A-B-R-* et al., 27 I&N Dec. 405 (A.G. 2018).

[ix] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[x] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

[xi] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

[xii] *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

[xiii] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

[xiv] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[xv] EOIR, Office of the Director, https://www.justice.gov/eoir/office-ofthe-director

[xvi] All immigrants in immigration proceedings are protected by the Due Process Clause of the Fifth Amendment. *See Plyler v. Doe*, 457 U.S. 202, 212 (1982), requiring "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *See Kaley v. United States*, 571 U.S. 320, 357 (2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (emphasis added).

[xvii] *See* 84 Fed. Reg. at 44,53940.

[xviii] Single members have 90 days to decide cases, three-member panels have 180 days. *See* 84 Fed. Reg. at 44,539.

[xix] Congress occasionally imposes timelines covering narrow classes of cases. *See, e.g.,* 28 U.S.C. § 1453(c)(2) (review of remand orders under the Class Action Fairness Act). As a legislative body, Congress is entitled to implement its priorities in this way.

[xx] https://www.unhcr.org/1951-refugee-convention.html

[xxi] *See, e.g.,* U.S. Dep't of State, Guatemala 2018 Human Rights Report 16 (2018) ("Guatemala Report"), https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf; U.S. Dep't of State, El Salvador 2018 Human Rights Report 16 (2018), https://www.state.gov/wpcontent/uploads/2019/03/EL-SALVADOR-2018.pdf; Amnesty International, Mexico 2017/2018, https://www.amnesty.org/en/countries/americas/mexico/report-mexico/;

U.S. Dep't of State, Haiti 2018 Human Rights Report 19-20 (2018), https://www.state.gov/wpcontent/uploads/2019/03/HAITI-2018.pdf; U.S. Dep't of State, Saudi Arabia 2018 Human Rights Report 44 (2018), https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf; U.S. Dep't of State, Kenya 2018 Human Rights Report 23 (2018), https://www.state.gov/wpcontent/uploads/2019/03/KENYA-2018.pdf.

[xxii] *Mathews*, 424 U.S. 319 at 334-35. The Supreme Court has repeatedly recognized that removal "may result in poverty, persecution, and even death" (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and of "life" or "all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is true of asylum seekers, who are, by definition, seeking protection from persecution. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

[xxiii] *See* http://www.tahirih.org/wp-content/uploads/2018/04/Tahirih-Statement-for-April-18-2018-Senate-Immigration-Subcomm-hearing-on-immigration-courts.pdf;https://www.tahirih.org/news/immigration-backlogs-keep-asylum-seekers-in-limbo/

[xxiv] Per the U.S. Court of Appeals for the Fourth Circuit, DOJ's own regulations expressly preclude this action by the Attorney General. *See Zuniga Romero v. Barr*, 4th Cir. No. 18-1850, Dkt. 50 (Aug. 29, 2019).

[xxv] TRAC, Immigration Court Backlog Surpasses One Million Cases: https://trac.syr.edu/immigration/reports/536

[xxvi] *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[xxvii] *See,* e.g., Padilla v. ICE, ___ F.3d ___, 2019 U.S. Dist. LEXIS 110755 (W.D. Wash. July 2, 2019).

[xxviii] 8 C.F.R. § 1003.1(a)(1). As the IFR acknowledges, prior 8 C.F.R. § 1003.0(c) expressly prohibited the Director from deciding individual appeals. And where, as here, an agency knowingly makes a change to preexisting regulations, it must provide a reasoned, non-arbitrary explanation for that change. FCC v. Fox TV Stations, Inc., 566 U.S. 502 (2009). The IFR does not do so.

[xxix] https://www.tahirih.org/wp-content/uploads/2019/10/Tahirih_EOIR-Comments.pdf; The IFR further prevents the DOJ Office of General Counsel (OGC) from providing advice on cases. Like the transfer of power from BIA members to the Director, this transfers authority from expert professionals with deep institutional and substantive knowledge to political newcomers.

[xxx] https://www.justice.gov/eoir/page/file/1026721/download

[xxxi] https://www.justice.gov/eoir/page/file/1112036/download

[xxxii] https://www.justice.gov/eoir/file/1041196/download

[xxxiii] www.abajournal.com/news/article/doj_review_finds_immigrant_legal_education_program_ineffective_provider

[xxxiv] DOJ Backgrounder, *EOIR Strategic Caseload Reduction Plan*, (Dec. 5, 2017), *available at* https://www.aila.org/infonet/doj-backgrounder-eoir-strategic-caseload-reduction

[xxxv] https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf

[xxxvi] *See* https://gothamist.com/news/immigration-court-interpreters-say-video-teleconferencing-makes-it-difficult-to-do-their-jobs; *See also* https://gothamist.com/news/use-of-video-technology-surges-in-immigration-courts