To whom it may concern,

We write to inform you that the Executive Office of Immigrant Review (EOIR) in New York City has ended the Juvenile Docket, the Court's primary tool for assisting low-income children in securing legal representation. The discontinuation of the Juvenile Docket is terrible loss for the thousands of vulnerable unaccompanied children who appear as respondents before the court each year. It also harms the Court itself, which relies on the Juvenile Docket, and the not-for-profit and pro bono attorneys who staff it, to efficiently and humanely process the removal cases of thousands of children each year.

Until recently, NYC EOIR led the nation in facilitating access to counsel for Unaccompanied Children. "Unaccompanied alien child" (UC) is a technical term defined by law as a child who "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." Despite their tender age, Unaccompanied Children have no right to counsel at government expense. Rather, they must rely on the goodwill of their caregivers or the philanthropic community to provide them with attorneys, or be forced to represent themselves in court.

For more than ten years, NYC EOIR did a commendable job in working with non-profits to promote access to counsel for immigrant children. In particular, the court consolidated the cases of Unaccompanied Children on a "Juvenile Docket" and partnered with not-for-profit and pro bono attorneys to ensure that attorneys were present on Juvenile Docket days to provide free legal screenings and, wherever possible, free representation. The court also provided a space for such screenings to take place, along with advance notice to the charitable agencies staffing the docket of the number of new children who would need screening. Thanks to the Juvenile Docket, hundreds of vulnerable, low-income children received the legal representation they—and the court—needed to properly evaluate their eligibility for immigration relief under federal law.

The role of the Juvenile Docket expanded when, in fall of 2014, the federal government decided to expedite removal proceedings for newly-arrived Unaccompanied Children from Central America. Recognizing a desperate need to provide these children with attorneys, local non-profits formed a coalition called ICARE. ICARE, in turn, worked closely with the Assistant Chief Immigration Judge and the Court Administrator to ensure that attorneys and translators were on site at every expedited docket for Unaccompanied Children. ICARE invited local elected officials and philanthropists to meet with the Assistant Chief Immigration Judge and others on the bench; together, ICARE and EOIR explained the mutually beneficial relationship between the court and ICARE. Indeed, in 2015 ICARE screened more than 1,500 Unaccompanied Children on site at 26 Federal Plaza, and secured full representation for almost 800 of those screened.

Tragically, the NYC EOIR has ceased to partner with ICARE in a meaningful way. This has reduced efficiency at the court and hampered children's access to counsel. On January 31, 2017, the U.S. Department of Justice issued a Memorandum ending priority processing for unaccompanied children. Although the Memorandum in no way prohibited the continuation of the Juvenile Docket, shortly thereafter, NYC EOIR stopped consolidating the cases of Unaccompanied Children on Juvenile Dockets. Instead, the Court now schedules Unaccompanied Children for

hearings at various times throughout the week and month, and has failed to provide ICARE with notice of when or before which Immigration Judge the children are to appear. As a result, children and their caregivers must now navigate court on their own, and must find us independently. Without a doubt, many will fall through the cracks, and children who are eligible to remain in the United States will instead be deported back to countries where they will experience violence and deprivation. We have written to the Assistant Chief Judge regarding our concerns, but have yet to receive a response.

In addition, the Court will no longer provide space for ICARE to screen children. Beginning in 2014, the court allowed ICARE to use the Ceremonial Courtroom for screenings. However, the court recently began construction on the Ceremonial Courtroom to turn it into courtrooms for new immigration judges. The court has declined to work with us to find an alternate space for screening children.

Thank you for your attention to this matter.

Kids in Need of Defense (KIND)
Safe Passage Project
The Legal Aid Society New York
The Door

Statements for the Record

1. National Association of Immigration Judges
2. National Immigrant Justice Center
3. Letter from immigration groups:
    a. American-Arab Anti-Discrimination Committee
    b. American Immigration Council
    c. American Immigration Lawyers Association
    d. Hebrew Immigrant Aid Society
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    f. Kids in Need of Defense (KIND)
    g. Lutheran Immigration and Refugee Service (LIRS)
    h. National Immigration Law Center
    i. Northern Illinois Justice for Our Neighbors
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    l. U.S. Committee for Refugees and Immigrants (USCRI)
    m. Women's Refugee Commission

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NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Statement of
Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center

House Subcommittee on Immigration and Border Security
Hearing on "Oversight of the Executive Office for Immigration Review"

November 1, 2017

Chairman Labrador, Ranking Member Lofgren, and members of the Immigration and Border Security Subcommittee of the House Judiciary Committee:

Heartland Alliance's National Immigrant Justice Center[1] urges the subcommittee and members of Congress to hold the Department of Justice (DOJ) accountable to its obligation to ensure due process of law in immigration proceedings. Due process rights and impartiality must be paramount in immigration court, where judges adjudicate asylum requests for men and women who fear life-threatening harm in their countries of origin as well as discretionary relief requests that determine whether families will endure permanent separation. The immigration court system is already fragile, crippled by backlogs[2] and unacceptable disparities in decision making.[3] Despite this, the DOJ and its component, the Executive Office for Immigration Review (EOIR), have introduced or perpetuated a number of policies that are further diminishing weakened due process protections while exacerbating inefficiencies. NIJC calls on members of Congress to engage in robust oversight of the DOJ to preserve the foundational constitutional guarantee of due process of law.

Although the threats to due process are rife throughout the immigration court system, NIJC, as a legal service provider, is particularly concerned by two damaging trends: 1) attacks on judicial independence; and 2) deterioration of the immigration courts' credibility and efficiency. The

[1] NIJC is a non-governmental organization (NGO) dedicated to safeguarding the due process rights of noncitizens. We are unique among immigrant advocacy groups in that our advocacy and impact litigation are informed by the direct representation we provide to approximately 10,000 clients annually. Through our offices in Chicago, Indiana, and Washington D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, NIJC provides legal counsel to immigrants, refugees, unaccompanied children, and survivors of human trafficking.

[2] As of August 2017, the immigration courts were backlogged by 632,261 cases with an average wait time of 681 days. *See* TRAC, Immigration Court Backlog Tool, Aug. 2017, available at http://trac.syr.edu/phptools/immigration/court_backlog/.

[3] It is well known among immigration attorneys that the most determinative factor in case outcome in immigration court is the immigration judge assigned. A recent study showed that the particular judge assigned to an individual seeking asylum changes his or her odds of receiving asylum by over 56 percentage points. In the New York City immigration court, for example, the rate by which individual judges grant asylum varies from 41% to 97.8%. Compare this variance to the Atlanta court, where the grant rate spans from 29.2% to 2.3%. *See* TRAC, "Asylum Outcome Increasingly Depends on Judge Assigned," Dec. 2, 2016, available at http://trac.syr.edu/immigration/reports/447/. Immigration judges in Atlanta have been accused of overt bias against asylum seekers. *See* Christie Thompson, *The Marshall Project*, "America's Toughest Immigration Court," Dec. 12, 2016.

Heartland Alliance for Human Needs & Human Rights | National Immigrant Justice Center
208 S. LaSalle Street, Suite 1300, Chicago, Illinois 60604 | ph: 312-660-1370 | fax: 312-660-1505 | www.immigrantjustice.org

through its collective bargaining agreement with NAIJ by striking language that has prevented judges to be rated based on number or time based production standards.[9]

The Washington Post editorial board urged the DOJ to back away from its plan, noting that implementing quotas could actually *worsen* rather than help the immigration court backlog, and warning of due process repercussions: "...pushing judges to resolve cases quickly to meet performance standards could put judges in the position of choosing between keeping their jobs and the interests of fairness. Judges would end up rushing through complex cases that require more time to reach a quota. If the hurry were extreme enough, a judge's brisk handling of a case might not meet the minimum standards for constitutionally required due process."[10]

Furthermore, because there is no right to counsel in removal proceedings and representation rates are so low as it is (fewer than 20 percent of immigrants in detention are able to find counsel)[11], it is imperative that immigration judges be able to use their discretion to grant continuances so immigrants can find representation and, if they cannot, gather their evidence and prepare their cases. Taking this discretion away from judges will mean that asylum seekers will be sent back to harm when they cannot properly represent themselves or find counsel. Creating pressure for judges to expedite cases in order to meet performance goals will jeopardize immigrants' rights and lives, as well as the credibility of the U.S. justice system.

b) EOIR curbing immigration judge discretion to manage their dockets

Concerns among immigrants and their attorneys that cases will be rushed through the system at the expense of due process are heightened by a July 31, 2017 Operating Policies and Procedures Memorandum (OPPM) issued by EOIR, on the "efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public..."[12] This OPPM casts blame on respondents' attorneys for case delays, despite recent findings by the Government Accountability Office (GAO) that attribute the majority of case delays in immigration court to the Department of Homeland Security (DHS) and the courts' own "operational-related" factors.[13]

Despite the GAO's findings, immigration practitioners throughout the country have reported that the Immigration and Customs Enforcement Office of Chief Counsel (OCC) now routinely

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[9] The statement of the National Association of Immigration Judges on this issue is available online at http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration.

[10] Editorial Board, Washington Post, "Sessions's plans for immigration courts would undermine their integrity," Oct. 22, 2017, https://www.washingtonpost.com/opinions/sessionss-plan-for-immigration-courts-would-undermine-their-integrity/2017/10/22/ee000df6-b2aa-11e7-9e58-e6288544af98_story.html?utm_term=.a872b75eb400.

[11] Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[12] U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017.

[13] United States Government Accountability Office, Report to Congressional Requesters, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," p. 124, June 2017.

600,000.[18] As NIJC has seen firsthand in our clients' cases, due process protections are eroded by not only improper haste, but also unreasonable delays.

In many of the cases bumped off of "home court" dockets, volunteer attorneys and clients traveled long distances to court only to learn from the court staff that their cases would not be heard that day. The human costs of these delays can be tragic; a delayed case can mean delayed employment authorization, delayed protection, and delays in reunification with spouses and children waiting abroad in dangerous conditions.

As immigration judges are detailed to detained dockets, the agency has not shared any public plans or policies regarding coverage for the non-detained dockets they leave behind. These dockets include vulnerable populations such as children, families and asylum seekers. Immigration attorneys report that courts are canceling merits hearings on these dockets with only telephonic notice or *no notice* provided to immigrants and their attorneys. This makes it more challenging for attorneys to take on *pro bono* cases in a system that is already quite chaotic. Additionally, sloppy notice procedures will lead to a massive uptick *in absentia* deportation orders issued to individuals without representation who missed their hearings through no fault of their own. Once entered, reopening such *in absentia* orders can be challenging if not difficult even for those with viable claims to relief from removal.

NIJC *pro bono* client Catherine fled death threats in her home country to seek refuge in the U.S. in 2014. After one day of detention, the government released her and placed her on the non-detained docket and was scheduled for a hearing nearly two years later. She has been waiting for her day in court ever since. Her merits hearing, originally scheduled for 2016, has been cancelled and rescheduled by the court three times with little to no notice. As a result, Catherine and her attorneys have prepared testimony, witnesses, and other evidence three times, only to have those efforts and resources wasted. The most recent cancellation took place in October 2017, with the court citing the judge's detailing to the detained docket as the reason for the third cancellation. At this time, Catherine does not have a new date for her merits hearing.

NIJC client Justin has been a lawful permanent resident since the 1970s, when his family brought him here as a child. He was placed in removal proceedings in 2014 due to minor criminal charges, and is eligible for a waiver based on his long-term family and community ties to the U.S. However, he has been waiting for his day in court since then, with his initial status (master calendar) hearing having been rescheduled twice since 2015. Currently, his case is scheduled for an initial hearing in 2018, nearly four years after being placed in removal proceedings. In 2018, when he appears appear before a judge, he will at last have an opportunity to ask for a date for a merits hearing so he can present his case.

b) DOJ sees deportations – not justice – as goal of immigration courts

On October 4, 2017, the DOJ issued a press statement[19] presenting statistics intended to support a conclusion that the "surge of immigration judges" had been successful. The statistics provided

[18] *See infra* n. 4.

Statement for the Record of the American-Arab Anti-Discrimination Committee, American Immigration Council, American Immigration Lawyers Association, HIAS, Human Rights First, Kids in Need of Defense (KIND), Lutheran Immigration and Refugee Service (LIRS), the National Immigrant Justice Center (NIJC), the National Immigration Law Center, Northern Illinois Justice for Our Neighbors, Tahirih Justice Center, USC International Human Rights Clinic, U.S. Committee for Refugees and Immigrants (USCRI), Women's Refugee Commission

U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Border Security

Hearing on Oversight of the Executive Office for Immigration Review

Dear Chairman Labrador, Ranking Member Lofgren, and Members of the Committee,

Thank you for the opportunity to submit a statement for the record for the Hearing on Oversight of the Executive Office of Immigration Review (EOIR). This hearing comes after the White House announced its Immigration Principles, and as EOIR and the National Association of Immigration Judges (NAIJ) negotiate new performance evaluation standards.

This statement addresses the concerns of the aforementioned signatories regarding: 1) efforts to impose quotas on immigration judges; 2) the immigration court backlog; 3) the detailing of immigration judges to border facilities; 4) the mission of EOIR; 5) access to counsel; 6) asylum-free zones; 7) stakeholder engagement and transparency issues; 8) immigration judge hiring practices; 9) EOIR's recent memo regarding the definition of an unaccompanied alien child (UC); and 10) due process violations for asylum-seeking individuals and families.

1. **EOIR seeks to use numeric and time-based case completion quotas to evaluate immigration judges' performances.**

Various news sources, including the Washington Post,[1] have reported that the Department of Justice (DOJ) plans to use numeric and time-based case completion quotas to evaluate immigration judges' performances. The National Association of Immigration Judges (NAIJ) reports that the agency is moving to make this change through its Collective Bargaining

[1] Maria Sachetti, Washington Post, "Immigration judges say proposed quotas from Justice Dept. threaten independence," Oct. 12, 2017, https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aee1-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.3c7ea8e11d45.

current backlog of pending cases nor contribute to the denial of justice for respondents and the public..."[8]

Taking the discretion away from judges to properly manage their own dockets will mean that bona fide asylum seekers will be sent back to harm when they cannot properly represent themselves or find counsel. Creating pressure for judges to expedite cases to meet performance goals will jeopardize immigrants' rights and lives, as well as the credibility of the U.S. justice system.

Imposing numeric quotas on immigration judges will contribute to the Trump Administration's broader agenda to streamline removal procedures and deport massive numbers of people at the expense of due process. The Department of Homeland Security (DHS) plans to expand other procedures that undermine due process, as well, such as the nationwide use of expedited removal,[9] which enables DHS to bypass immigration court proceedings altogether. Expedited removal is now used in more than 80 percent of all removals. Taken together, these policies demonstrate a clear design to speed up the deportations of more people with little regard for due process or principles of fairness and humanitarianism that have long been the foundation of America's immigration policy. By compelling judges to decide cases even faster, the Administration will achieve more rapid deportation rates. Immigration courts should be an instrument of justice, not a tool to further an enforcement agenda. EOIR should not proceed with this plan to impose numeric quotas on judges.

2. The immigration backlog reached an all-time high in August 2017.

For over a decade, the immigration courts have been severely underfunded as compared to the skyrocketing budget increases Congress has provided to immigration enforcement. The combined budgets of Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) exceed $20 billion.[10] By comparison, the EOIR budget is about $420 million.[11] Unable to keep pace with ICE and CBP's aggressive prosecution of removal cases, the immigration backlog has continued to grow.

In August 2017, the backlog in the U.S. immigration courts reached an all-time high, with 632,261 cases pending.[12] In some of the nation's largest immigration courts, people wait an

[8] U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017, https://www.justice.gov/eoir/file/oppm17-01/download.
[9] Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," (Jan. 25, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united
[10] DHS Budget in Brief, Fiscal Year 2017, *available at* https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf.
[11] EOIR FY2017 Budget Request At A Glance, *available at* https://www.justice.gov/jmd/file/821961/download.
[12] *See* TRAC Immigration, Immigration Court Backlog Tool; *available at* http://trac.syr.edu/phptools/immigration/court_backlog/.

for detailed judges. These judges then frequently sat on empty dockets with little or nothing to do.[16]

On October 4, 2017, DOJ issued a Press Statement[17] presenting statistics intended to support a conclusion that the "surge of immigration judges" had been successful. The statistics provided in this statement, however, do not add up in the context of the real-life functioning of the immigration court system. For example, the statement claimed that "the mobilized immigration judges have completed approximately 2,700 more cases than expected if the immigration judges had not been detailed." A DOJ spokesperson clarified to the press that this number was calculated "by using historical data to compare the cases judges were projected to complete at their home courts with those they completed at the surge courts."[18] But this comparison of detained to non-detained court processing is, according to National Association of Immigration Judges' President Emeritus Dana Marks, "comparing apples to orange." As Judge Marks explains, "detained dockets always have a higher volume and a greater percentage of cases where people are not eligible to seek some reprieve from removal or are not inclined to because they don't want to remain in custody."

EOIR should provide an update as to the status of the "immigration judge border surge" initiative. It has not yet addressed the average delay when a case is continued so that an immigration judge can be detailed. It remains unclear, moreover, what procedures are in place 1) to ensure adequate and timely notice is given to respondents and their counsel when judge details delay home court cases; and 2) to allow for expedited rescheduling of cases when urgent humanitarian considerations are present, such as derivative family members remaining abroad in danger awaiting the outcome of an asylum hearing.

4. **EOIR's purported "return to the rule of law" has undermined due process.**

In August, DOJ issued a press statement touting statistics released by EOIR as a demonstration of the "return to rule of law" under the Trump administration.[19] The data included a showing of a 27.8% increase in total orders of removal over a six-month period in 2017 as compared to the same period in 2016. The press statement also touted as a victory the finding that over 90% of the cases decided by immigration judges engaged in "details" to border facilities resulted in deportation or removal.

[16] Women's Refugee Commission, "Prison for Survivors," p. 24, Foonote 102 (Oct. 2017), *available at* file:///C:/Users/GaultL/Downloads/Prison-for-Survivors-REPORT-FINAL%20(1).pdf

[17] Department of Justice Press Release, 17-1100, "Justice Department Releases Statistics on the Impact of Immigration Judge Surge," Oct. 4, 2017, https://www.justice.gov/opa/pr/justice-department-releases-statistics-impact-immigration-judge-surge.

[18] Allegra Kirkland, "What Trump's DOJ's numbers don't say about immigration court backlog," Oct. 20, 2017, http://talkingpointsmemo.com/muckraker/doj-numbers-dont-tell-full-story-immigration-judge-surge.

[19] Department of Justice Press Release 17-889, "Return to rule of law in Trump administration marked by increase in key immigration statistics," Aug. 8, 2017, https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics.

be fourteen times more likely to be allowed to remain in the United States if they had counsel in immigration court.[24]

This crisis is particularly acute in detention, where fewer than 20% of immigrants are represented.[25] Because of the constraints and impact of detention, including the barriers to obtaining evidence and preparing witnesses, and the retraumatization detention engenders in asylum seekers, detention greatly intensifies the need for representation. Studies show that only 3% of detained immigrants even proceed to seek relief from removal, as opposed to 32% of those represented.[26] EOIR oversees the Legal Orientation Program, through which legal service organizations provide basic information to individuals in immigration detention about the detention and deportation process. This program has seen remarkable success, including great cost savings to the government.[27] Nonetheless, the program does not fund direct representation and is operational at less than a quarter of the existing ICE detention sites.

Just this month, ICE issued a Request for Information to assist in its plans to open new detention centers in or near Chicago, Detroit, St. Paul, and Salt Lake City. Yet the primary legal service providers in all four jurisdictions have gone on the record to state that they do not have the resources or capacity to meet the *existing* legal services needs of those detained in these areas, let alone to provide more. In a response to the RFI, a group of 14 NGOs including these legal service providers stated, "the expansion proposed by this RFI cannot be effectuated in a manner that will provide meaningful access to pro bono legal services for the vast majority of those detained."[28]

EOIR should report on 1) the procedures it has in place to ensure that pro se respondents have sufficient time and assistance to properly prepare their cases, especially when they are detained in remote detention centers; 2) the training it provides to immigration judges who routinely hear detained cases to ensure that they are providing ample continuances to pro se respondents to find lawyers and—if that is impossible—to prepare their cases pro se; and 3) the procedures it has in place on these detained dockets to facilitate access to pro bono representation. EOIR should also affirm that access to basic know your rights programming is critical for unrepresented immigrants, especially those in detention who are unable to find a lawyer.

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[24] TRAC, "Representation makes fourteen-fold difference in outcome: immigration court 'women with children' cases," July 15, 2015, http://trac.syr.edu/immigration/reports/396/.

[25] Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[26] *Id.*

[27] A 2012 study conducted by the Department of Justice found that detained immigrants who received LOP completed their court proceedings more quickly and therefore remained detained for an average of six fewer days, yielding the government a net savings of more than $17.8 million over a three year period. https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

[28] *See* letter to ICE submitted on Oct. 26, 2017 by the National Immigrant Justice Center, Detention Watch Network, the American Civil Liberties Union, and 11 legal service providers in the affected areas, online at http://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-10/NGOResponsetoICE-RFI_FINAL_10-26-17.pdf.

other woman asylum outright. Reuters' analysis of immigration court data found that the two women's story was not an outlier, but rather an illustration of consistent trends.

According to a petition brought to the Inter-American Commission on Human Rights, credible reports show that "...claims based on gender violence and other persecution perpetrated by non-state actors, such as gangs and other criminal organizations, are disfavored," despite clear Board of Immigration Appeals and circuit precedent recognizing their viability. The petition goes on to state: "Qualitative reports from the undersigned attorneys and others working in the field describe the situation as a combination of factors that are unrelated to the governing law and instead appear to originate in the national government's inability or unwillingness to supervise asylum adjudications in these jurisdictions. The result of this inability or unwillingness to supervise asylum adjudications in these jurisdictions has been the creation of rogue immigration judges who serve as a second prosecutor instead of a neutral fact-finder."[34]

EOIR should clarify that all immigration judges—regardless of where they sit—must render their decisions in accordance with binding precedential decision of the Board of Immigration Appeals and the governing circuit court. It should also immediately provide plans for investigation into jurisdictions like the Atlanta immigration court, where asylum rates are so low as to suggest that judges are denying meritorious claims, and report what its standards are for triggering an internal investigation. EOIR should also commit to taking steps to investigate the problem of "asylum free zones" and develop training and accountability procedures to ensure that judges are not allowed to get away with systematically withholding relief from meritorious applicants.

7. EOIR has decreased its engagement with stakeholders and reduced transparency.

Advocates and immigration practitioners have observed a disturbing pattern by EOIR officials of discontinuing any engagement with stakeholders. On April 3rd, 2017, EOIR unexpectedly cancelled via email a national stakeholder engagement scheduled for two days later, on April 5th.[35] That same week, EOIR leadership withdrew its scheduled participation in an engagement on April 7, 2017 at the American Immigration Lawyers' Association's spring conference. In September, EOIR headquarters informed the American Immigration Lawyers Association that EOIR would not be scheduling a Fall EOIR Stakeholder Meeting this year.

Stakeholder engagement is critical for an adjudicative agency like EOIR. EOIR leadership should outline what steps it is taking nationally and at the local level to receive meaningful feedback from stakeholders, including the private immigration bar, free and low cost legal service providers, and civil society organizations.

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[34] *Id.*

[35] EOIR Cancels Stakeholder Meeting, April 3, 2017, https://www.justice.gov/sites/default/files/pages/attachments/2017/04/03/eoirstakeholdermtgcancelle_040517.pdf.

addressed how placing more children into the backlogged courts for their asylum hearings will reduce the court's current backlog.

Conclusion:

Immigration court backlogs, judge detailing, detention policies, asylum-free zones, UC definitions, and other challenges currently undermine due process within the immigration courts and harm the most vulnerable among us—those seeking refuge in the United States. We stand willing and ready to work with EOIR to address these concerns and recommendations, and to adopt policies which protect and promote due process in our immigration courts.

http://www.apbco.org

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October 26, 2017

VIA ELECTRONIC & HAND DELIVERY

The Honorable John Culberson, Chair
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

The Honorable José Serrano, Ranking Member
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

The Honorable Richard Shelby, Chair
Senate Appropriations Subcommittee on
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The Honorable Jeanne Shaheen, Ranking Member
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The Honorable Chuck Grassley, Chair
Senate Judiciary Committee

The Honorable Dianne Feinstein, Ranking Member
Senate Judiciary Committee

The Honorable Robert Goodlatte, Chair
House Judiciary Committee

The Honorable John Conyers, Jr., Ranking Member
House Judiciary Committee

Dear Chairs and Ranking Members:

We write on behalf of the Association of Pro Bono Counsel (APBCo), a membership organization of law firm pro bono practice leaders, to express concern over Department of Justice plans to deal with immigration court backlogs through "numeric performance standards" imposed on immigration judges. *See* "Immigration Judges Say Proposed Quotas From Justice Dept. Threaten Independence," The Washington Post, Oct. 12, 2017, available at http://wapo.st/2hS5yM0. Our concern focuses on the negative impact of rushed hearings on due process in immigration proceedings, including impeding the ability of private lawyers to provide pro bono assistance to persons facing removal from the United States.

APBCo is a membership organization of 211 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at 109 of the country's largest law firms. APBCo members' firms provided almost 4 million hours of pro bono legal services last year. A substantial portion of that time is devoted to representing immigrants around the country, including those seeking asylum and defending removal in immigration court. APBCo members therefore have a strong interest in ensuring that the immigration system is funded sufficiently to ensure due process and access to counsel. And as the Department of Justice has long recognized, "[p]ro bono representation in immigration court ... promotes the effective and efficient administration of justice." OPPM 08-01: Guidelines for Facilitating Pro Bono Legal Services (March 10, 2008) at 2, available at http://bit.ly/2yDDBiX (hereafter "Pro Bono OPPM").

We agree that immigration dockets are backlogged and serious intervention is needed to repair the system. According to the Transactional Records Access Clearinghouse (TRAC), an independent data gathering, data research and data distribution organization at Syracuse University, U.S. Immigration Courts had more than 630,000 cases on their dockets as of August of this year. On average, immigration cases are taking 681 days to resolve, with cases for non-detained individuals taking much longer. The multi-year wait for a merits hearing undermines the system and everyone in it, including those seeking protection from persecution, trafficking and torture. An inefficient system also reduces our firms' ability to find and keep pro bono volunteers, who are understandably apprehensive about committing to a case that will not go to hearing for years.

But quotas are not the solution. Imposing quotas that force immigration judges to adjudicate backlogged cases with ever-greater speed will only make things worse. The current backlog was not caused by immigration judges spending too much time on each case, but rather by a lack of capacity in the immigration courts, which have been short-staffed for years. There is neither a sufficient number of immigration judges nor enough law clerks to support them. Imposing numerical quotas and case-completion deadlines on an already overloaded court system, with no additional resources, is merely an exercise in whip-cracking that values speed, or rather the prospect of speed, over fairness and due process.

The DOJ's proposal concerns APBCo not just because of our commitment to fair and legitimate court processes, but because it will inevitably reduce our ability to provide pro bono representation to immigrants in need of counsel. First, we are concerned that any quota-based system will discourage pressured immigration judges from granting continuances to allow respondents to find pro bono counsel. The process that connects pro bono counsel with needy immigrants who have bona fide claims can be time-consuming – legal services providers need to identify who qualifies for free legal services, evaluate their cases, and then solicit pro bono help from private lawyers. As the Department of Justice has understood, when scheduling cases and considering continuances, "[j]udges should be mindful of the inherent difficulties in the recruiting of pro bono representatives and the burdens pro bono representatives assume for the public good." *See* Pro Bono OPPM at 4. We ask that you remind the Department that continuances in many cases safeguard the process and facilitate the efficient operation of the immigration courts.

Second, a numeric performance system could also encourage immigration judges to shorten hearings, which already provide limited time for respondents to present their claims for relief. These claims are often complex, involving evidence from multiple sources (including testimony and documentary evidence from overseas). The Department of Justice must be clear that immigration judges retain discretion to allow hearings to proceed as long as needed for a respondent to present a full claim for relief. As leaders of law firm pro bono practices, we are concerned that any effort to limit pro bono lawyers' ability to present their clients' claims in full will discourage future participation in these cases. Furthermore, having one's day in court is a pillar of our justice system, one that should not be eroded by a calculation that puts quantity ahead of quality adjudication.

The backlog in the immigration courts is real, and common-sense solutions are required. For instance, immigration judges could make better use of pre-hearing conferences to limit the scope of, or even resolve, their cases. Another way to safely shrink the docket would be for the Department of Homeland Security to better exercise its prosecutorial discretion by passing on clearly meritorious claims and focusing instead on cases that present real issues of national security, community safety and imminent harm to the respondents.

We look forward to working with you to ensure that efforts to deal with the backlog in the immigration courts are undertaken in a way that preserves the fairness and legitimacy of the courts and encourages further pro bono representation.

Sincerely,

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