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**WRITTEN TESTIMONY RESPECTFULLY SUBMITTED BY  
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE<sup>1</sup> AND  
THE TASK FORCE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES<sup>2</sup>**

**HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON IMMIGRATION AND CITIZENSHIP**

**JANUARY 29, 2020  
2141 RAYBURN HOUSE OFFICE BUILDING**

**COURTS IN CRISIS: THE STATE OF JUDICIAL INDEPENDENCE AND DUE  
PROCESS IN U.S. IMMIGRATION COURTS**

The New York City Bar Association (City Bar) is pleased to provide this written testimony urging the House to address the crisis in the U.S. immigration courts. The City Bar, with over 24,000 members, has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice. In furtherance of that mission, we have consistently advocated for access to counsel and for fundamental due process rights in adjudications. The City Bar has expressed its growing concerns over the past three years through reports and op-eds critical of changes to immigration court processes that have undermined due process. We would like to submit these reports for the record of these proceedings.

On April 18, 2018, the City Bar submitted testimony to the U.S. Senate in a hearing similar to today's hearing, titled, *Strengthening & Reforming America's Immigration Court System*.<sup>3</sup> In

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<sup>1</sup> The Immigration and Nationality Law Committee is comprised of former and current government employees, immigration law scholars, and immigration attorneys from the private and non-profit sectors. This testimony is based upon committee members' expertise and experience counseling clients and consolidates previous statements made by the City Bar.

<sup>2</sup> The mission of the Task Force for the Independence of Lawyers and Judges is to foster the independence of lawyers and judges in their professional activities in the United States and abroad. The Task Force applies the United Nations Basic Principles on the Roles of Lawyers to increase awareness in the legal community and the public at large about the importance of the independence of lawyers and judges to the maintenance of the rule of law in civil society.

<sup>3</sup> New York City Bar Association *Strengthening & Reforming America's Immigration Court System—Testimony*, Apr. 18, 2018, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/strengthening-and-reforming-americas-immigration-court-system-testimony>. All City Bar reports cited herein are attached. (All links cited in this testimony were last checked on January 27, 2020).

that testimony, we raised concerns about judicial performance quotas; decreasing access to counsel; and procedural changes in immigration court that stripped immigration judges of the ability to control their own dockets. Since the date of that hearing, almost two years ago, the state of the immigration courts has only gotten worse as immigration has become an increasingly polarizing political issue.

On April 4, 2018, the City Bar president and Chair of the Immigration and Nationality Law Committee spoke out against judicial performance quotas, publishing a piece on the topic in the *New York Law Journal*.<sup>4</sup> In the piece the City Bar expressed concern that tying individual judges' performance evaluations to case completion goals creates an incentive for judges to deny meritorious cases or rush them along without giving litigants adequate time to develop the record in their proceedings. The following week, the City Bar released a report decrying the judicial performance quotas, calling them "neither efficient nor just."<sup>5</sup>

Since then, the pressure on immigration judges has only increased. The National Association of Immigration Judges has been a powerful voice against changes to immigration court processes that restrict the independence of judges. Following the association's critiques of new policies restricting their independence, the Department of Justice has sought to decertify the union. Since judges are not permitted to speak about court-related matters in their own capacity, decertifying the union would essentially silence the one organization that can represent the perspectives of immigration judges concerning changes to court processes. On September 30, 2019, the City Bar President and Chair of the Immigration and Nationality Law Committee wrote an op-ed on the issue in the *New York Law Journal*, pointing out the stakes for immigration court litigants in the decertification case if the critical voices of judges are not represented.<sup>6</sup>

In October 2019, the Department of Justice issued an interim final regulation that changed the structure of the Executive Office for Immigration Review (EOIR). The City Bar submitted comments opposing this rule on October 23, 2019,<sup>7</sup> raising concerns that, for the first time, EOIR was establishing an Office of Policy within the adjudications branch, seemingly politicizing EOIR whose primary function should be case-by-case adjudications in removal proceedings. Additionally, the City Bar expressed concern that EOIR was eliminating the Office of Legal

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<sup>4</sup> John S. Kiernan and Victoria Neilson, *Case Completion Quotas for Immigration Judges Will Erode Fundamental Rights*, Apr. 4, 2018, *New York Law Journal*, <https://www.law.com/newyorklawjournal/2018/04/04/case-completion-quotas-for-immigration-judges-will-erode-fundamental-rights/?slreturn=20200024133636>.

<sup>5</sup> New York City Bar Association, *Quotas in Immigration Courts Would Be Neither Efficient Nor Just*, Apr. 10, 2018, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/quotas-in-immigration-courts-would-be-neither-efficient-nor-just>

<sup>6</sup> Roger Juan Maldonado and Victoria Neilson, *Department of Justice Seeks to Silence Immigration Judges' Union*, Sep. 30, 2019, *New York Law Journal*, <https://www.law.com/newyorklawjournal/2019/09/30/departement-of-justice-seeks-to-silence-immigration-judges-union/>

<sup>7</sup> New York City Bar Association, *Opposition to Interim Rule and Subsequent Organizational Changes to EOIR*, Oct. 23, 2019, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-interim-rule-and-subsequent-organizational-changes-to-eoir-letter>.

Access Programs and moving its functions, including expanding access to counsel for noncitizens, within the new Office of Policy.

The City Bar believes that every noncitizen deserves due process and a fair immigration court hearing. The backlog of immigration court cases now exceeds one million,<sup>8</sup> meaning that many noncitizens have to wait years for a hearing, during which time they are often living in uncertainty and separated from family members. The answer to this crisis is not to impose quotas or to take measures that will curtail the voices of judges who express concern about due process. Instead, the immigration court system should be truly independent, and not part of the Department of Justice, where it can be vulnerable to politicization as part of the executive branch.

For many noncitizens, the decision the immigration judge makes will determine whether or not the person is sent back to a country where they fear harm or whether they are separated from family members. Immigration courts adjudicate decisions of extraordinary significance. The City Bar urges the House to continue to monitor the crisis in the courts, to restore sensible docket management tools to judges, to remove performance quotas, and, ultimately, to pass legislation which would make the immigration courts truly independent.

Thank you for your consideration.

Respectfully submitted,

Immigration and Nationality Law Committee  
Victoria Neilson, Chair

Task Force on the Independence of Lawyers and Judges  
Christopher Pioch, Co-Chair  
Jessenia Vazcones-Yagual, Co-Chair

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<sup>8</sup> Priscilla Alvarez, Immigration Court Backlog Exceeds 1 Million Cases, Date Group Says, CNN, Sep. 18, 2019, <https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html>.

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**WRITTEN TESTIMONY RESPECTFULLY SUBMITTED BY  
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE<sup>1</sup> AND  
THE TASK FORCE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES<sup>2</sup>**

**SENATE JUDICIARY COMMITTEE  
SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION**

**APRIL 18, 2018**

**DIRKSEN SENATE OFFICE BUILDING 226**

**PRESIDING: CHAIRMAN CORNYN**

**STRENGTHENING AND REFORMING AMERICA'S IMMIGRATION COURT SYSTEM**

The New York City Bar Association (City Bar) is pleased to provide this written testimony urging the Senate to continue its oversight of changes being made to the immigration court system and to ensure that non-citizens receive due process in these proceedings. The City Bar is deeply concerned with recent changes that the Department of Justice (DOJ) has announced in immigration court procedures that will likely have the effect of speeding up the deportation process without providing adequate assurances that immigrants will have a fair day in court. These concerns are exacerbated by the DOJ's recent move to curtail know your rights presentations and screenings in detention facilities and at non-detained immigration courts.

The City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice. With over 24,000 members, the City Bar is an important voice in the legal profession in New York City and beyond. The City Bar has consistently advocated for access to counsel and for fundamental due process rights in adjudications. We acknowledge that the immigration court backlogs<sup>3</sup> should be addressed by DOJ, however, as discussed at the end of our testimony, there are common-sense

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<sup>1</sup> The Immigration and Nationality Law Committee is comprised of former and current government employees, immigration law scholars, and immigration attorneys from the private and non-profit sectors. This testimony is based upon committee members' expertise and experience counseling clients and consolidates previous statements made by the City Bar.

<sup>2</sup> The mission of the Task Force for the Independence of Lawyers and Judges is to foster the independence of lawyers and judges in their professional activities in the United States and abroad. The Task Force applies the United Nations Basic Principles on the Roles of Lawyers to increase awareness in the legal community and the public at large about the importance of the independence of lawyers and judges to the maintenance of the rule of law in civil society.

<sup>3</sup> Immigration Court backlogs currently number more than 640,000 cases. Transactional Records Access Clearinghouse (TRAC) of Syracuse University, Immigration Court Backlog Tool, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/). (All websites last visited April 17, 2018.)

means to decrease the backlogs which will not undermine due process and fairness in immigration court.

## **Judicial Quotas**

The City Bar has recently updated a report condemning any correlation between case completion quotas and performance reviews for immigration court judges.<sup>4</sup> In that report the City Bar made several key points which we will reiterate here. First, the quotas are strongly opposed by immigration court judges themselves.<sup>5</sup> Immigration judges, like all independent adjudicators, should be able to manage their courtrooms and their dockets according to their needs and independent judgment. Tying the “efficiency” of a judge’s decision making to his or her raises and career trajectory, at a minimum, gives the appearance of a potential conflict of interest.

Second, the quotas themselves set almost impossibly high numbers. 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 new policy will require judges to resolve 85% of cases within ten days of hearing testimony, and requires judges to complete 95% of individual hearings on the day that the hearing begins. Courts have described immigration law as “labyrinthine” in its complexity.<sup>6</sup> Setting strict time limits on completing nearly all cases, restricting the ability of respondents or DHS to call necessary experts and develop the record, and discouraging continuances,<sup>7</sup> in the name of “efficiency” is simply incompatible with due process. It is apparent that one of the only ways judges could meet these numbers would be to encourage respondents to accept removal orders without applying for relief. It is difficult to imagine how an immigration judge could adequately explain the immigration process and elicit testimony in cases where respondents do not have counsel.

Third, if non-citizens are unable to obtain justice in immigration court, they will likely appeal their cases to the Board of Immigration Appeals and to the circuit courts. When Attorney General John Ashcroft cut the number of BIA members and short-circuited due process at the appellate body by allowing single members to rubberstamp removal orders, appeals to the federal

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<sup>4</sup> Immigration and Nationality Law Committee, "Quotas in Immigration Courts Would Be Neither Efficient nor Just," (revised and reissued April 2018)

[http://s3.amazonaws.com/documents.nycbar.org/files/2017296-QuotasImmigrationCourt\\_IMM NAT\\_12.7.17.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/2017296-QuotasImmigrationCourt_IMM NAT_12.7.17.pdf)

<sup>5</sup> 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-ae1-11e7-be94-fabb0f1e9ffb\\_story.html?utm\\_term=.3d2d4f665dd1](https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-ae1-11e7-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”).

<sup>6</sup> *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).

<sup>7</sup> EOIR Operating Policies and Procedures Memorandum 17-01: Continuances, dated July 31, 2017, <https://www.justice.gov/eoir/file/oppm17-01/download>

circuit courts skyrocketed.<sup>8</sup> It is inevitable that if non-citizens are not given full hearings in their cases, or if immigration judges are forced to rush decisions without fully considering legal arguments, the non-citizens will pursue appeals. These appeals often last many years, so, rather than lead to the expeditious resolution of cases, attacks on due process at the trial court level will lead to further delays in case resolution.

Fourth, and perhaps most importantly, immigration courts adjudicate decisions of extraordinary significance. The U.S. Supreme Court has recognized the importance of deportation proceedings to those defending them, calling the “severity of deportation—the equivalent of banishment or exile.”<sup>9</sup> As a matter of justice and fairness, anyone facing such an important adjudication should have his or her case heard by a judge whose sole interest in the case is determining the correct result under the law, and not by a judge who is watching the clock. The stakes in these proceedings are simply too high for non-citizens to have their hearings rushed artificially without regard to their individual dynamics.

### **Cancellation of Legal Orientation Program**

At the same time that judges are being called upon to complete a larger number of cases, in less time, and with fewer continuances, the DOJ has announced that it is cancelling a successful program that has assisted unrepresented immigrants in understanding immigration proceedings before they appear before an immigration judge. The Legal Orientation Program (LOP) has provided funding for non-profit attorneys to explain the immigration court process to detained immigrants in detention facilities. The vast majority of these detained immigrants have no meaningful access to counsel as there are not enough pro bono attorneys to provide free representation and the detainees often cannot afford private counsel. Even for those who could pay, many detention facilities are simply too remote for private counsel to regularly provide representation.

Through the LOP program, immigrants are given a basic orientation to immigration court proceedings, and potentially available relief. In some settings, immigrants also receive one-on-one consultations so they can better understand whether there is a form of relief for which they may be eligible or whether it would be more beneficial to quickly accept a removal order to gain release from detention. Additionally, LOP funding has allowed non-profit providers to screen immigrants at non-detained courthouses, again helping to orient immigrants and refer them to counsel.

The DOJ itself has lauded the positive effects of this program, stating on its website:

Experience has shown that the LOP has had positive effects on the immigration court process: detained individuals make wiser, more informed, decisions and are more likely to obtain representation; non-profit organizations reach a wider audience of people with

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<sup>8</sup> See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005) 94.

<sup>9</sup> *Padilla v. Kentucky*, 559 U.S. 356, 373, (2010).

minimal resources; and, cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention.<sup>10</sup>

Likewise immigration judges have supported the program because the better informed the immigrant respondents are before appearing in court, the less time the immigration judge must spend explaining basic concepts, freeing up valuable judicial bench time to focus on actual adjudications.<sup>11</sup> Given the DOJ's renewed focus on reducing immigration court backlogs, removing access to counsel for tens of thousands of immigrants will only increase the time each judge need to spend on each case.

More importantly, lack of access to counsel will undoubtedly result in less due process in these proceedings. In addition to the legal complexity of immigration law, respondents in these proceedings face unique challenges. Non-citizens who must navigate the immigration court system: a) are primarily not native English speakers; b) may come from countries with vastly different legal systems (or no functioning legal system at all); c) may have been severely traumatized before leaving their country or on their journey to the United States; and d) may be in remote locations with no access to counsel. It is clearly unreasonable to expect anyone to present a coherent, well-argued case under such circumstances.

### **Recent and Anticipated Changes to Immigration Law**

The attorney general oversees the immigration courts and the Board of Immigration Appeals (BIA). In this capacity, he has the authority to review and interpret immigration law in his own precedential decisions. While in past administrations, attorneys general have used this authority sparingly, Attorney General Jeff Sessions has referred himself several cases, which taken together, paint a troubling picture of further restrictions on due process in the immigration courts.

The Attorney General will soon issue precedential decisions in two cases that will have an immediate effect on immigration court procedure and on the ability of immigration judges to exercise judicial independence. In January 2018, Attorney General Sessions referred himself *Matter of Castro-Tum*,<sup>12</sup> a case in which he will determine whether immigration judges have the authority to exercise discretion over their own dockets and administratively close cases. If the Attorney General issues a precedential decision stripping immigration judges of this authority, their ability to manage their dockets and prioritize cases will be eviscerated. Judges will be forced to issue decisions in cases where removal would clearly be an unjust result because they would no longer have the authority to mark a case off-calendar to wait for a change in the respondent's personal circumstances (such as the availability of a visa) or in the interest of justice, such as to

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<sup>10</sup> DOJ, Legal Orientation Program, (Updated November 16, 2016) <https://www.justice.gov/eoir/legal-orientation-program>.

<sup>11</sup> Immigration judges union spokesperson, Dana Marks explained, "When someone has had a legal orientation program, they're more familiar with what their possibilities are, and we generally can ask a few targeted questions and narrow issues much more effectively." Kate Morrissey, "Legal orientation for detained immigrants will lose federal funding in May," San Diego Union Tribune (Apr. 11, 2018) <http://www.sandiegouniontribune.com/news/immigration/sd-me-legal-orientation-20180411-story.html>.

<sup>12</sup> *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018).

prevent a U.S. citizen child from entering the foster care system if his or her parent would be removed.

Compounding the City Bar's concerns with the Attorney General's restriction of judicial independence is another case he referred to himself last month, *Matter of L-A-B-R*.<sup>13</sup> In this case, again, the Attorney General will issue a decision which will dictate how immigration judges manage their dockets. In *L-A-B-R*, the Attorney General asks under what circumstances judges have the authority to grant continuances in immigration court to await "adjudications of collateral matters from other authorities."<sup>14</sup> Of course, when the Department of Homeland Security was established in 2002 - bifurcating immigration functions which all used to fall within the Department of Justice - certain adjudications were delegated to the sole jurisdiction of a DHS sub-agency, the United States Citizenship and Immigration Services (USCIS). Thus, for example, USCIS has sole jurisdiction to adjudicate "petitions for alien relatives," (the first part of an application for lawful permanent residence); petitions for special immigrants (including those seeking special immigrant juvenile status and self-petitioners under the Violence against Women Act); applications for cooperating crime victims (U visas); and applications for individuals who have been trafficked (T visas.) If the Attorney General issues a precedent decision restricting an immigration judge's authority to grant continuances, the judge will cease to be an independent adjudicator and will instead become part of the prosecution, being required to order removal in spite of the fact that the respondent has an avenue to permanent status in the United States.

In addition to decisions on these procedures which the Attorney General will soon issue, he has also just withdrawn a precedential decision which required immigration judges to hold evidentiary hearings in all cases where a respondent is seeking asylum.<sup>15</sup> Although there is earlier precedent which should still require judges to take testimony in these cases,<sup>16</sup> City Bar members have already heard of instances in other jurisdictions where immigration judges have issued a "Notice of Intent to Issue Decision Without an Evidentiary Hearing."<sup>17</sup> In an immigration system in which large numbers of respondents appear without representation,<sup>18</sup> it is essential that immigration judges allow non-citizens to apply for whatever relief may be available and that the immigration judge ensure that the record is fully developed in each case.

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<sup>13</sup> *Matter of L-A-B-R*, 27 I & N Dec. 245 (A.G. 2018).

<sup>14</sup> *Id.*

<sup>15</sup> *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018).

<sup>16</sup> "In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself." *Matter of Fefe*, 20 I & N Dec. 116, 118 (BIA. 1989).

<sup>17</sup> "Notice of Intent to Issue Decision Without an Evidentiary Hearing," (Mar. 27, 2018), on file with Immigration and Nationality Law Committee.

<sup>18</sup> For immigrants who have never been detained, representation rates in 2017 were at approximately 70%. For those who were or had been detained, the rates dropped to approximately 30%. TRAC Immigration, Who Is Represented in Immigration Court? <http://trac.syr.edu/immigration/reports/485/>

## **City Bar Recommendations for Improving Immigration Court Processes**

The City Bar agrees that the federal government has an inherent interest in ensuring that the immigration courts operate efficiently and supports efforts to reduce backlogs. However, due process for those in proceedings must continue to be the primary concern of the Department of Justice, and “efficiency” can never be a substitute for fundamental rights.

Rather than curtail access to counsel, reduce non-citizens’ abilities to seek relief, and handcuff the ability of immigration judges to give cases the time and consideration they deserve, the City Bar makes the following suggestions to improve the immigration court system:

- Restore the LOP program. The LOP program is inexpensive and has been considered a success by the DOJ as well as advocates. Funding for the program should be restored and expanded.
- Rescind the memorandum that would tie judicial performance reviews to case completion quotas. Judges must be able to exercise independence and should never feel that they must decide a case without fully developing the record or risk losing their job or potential pay raises.
- Restore prosecutorial discretion to DHS attorneys and ensure that immigration judges continue to have the authority to administratively close cases and grant continuances as required in the interest of justice.
- Hire more immigration judges, ensuring that new hires continue to have the necessary immigration law experience and judicial temperament.
- Hire judicial law clerks for each immigration judge. Unlike other federal judicial positions, immigration judges are not each assigned a law clerk. Thus, judges must use valuable time reviewing case records, drafting decisions, and performing legal research that could more efficiently be delegated to a law clerk. Having high quality, individual law clerks assigned to each judge would free up more time for the judges to spend hearing cases.
- Pass legislation that would establish immigration courts as independent Article 1 courts. The stakes in immigration court proceedings could not be higher for respondents. At the same time, the immigration judges must apply increasingly complex law to facts, which may take many hours of testimony to fully develop. This important judicial process should be fully independent of the political whims of the administration which holds political power.
- Establish a right to counsel for non-citizens facing deportation. Current law allows non-citizens the right to counsel at no government expense, however, too many non-citizens are forced to face experienced prosecutors on their own with no access to counsel and little understanding of the American legal system.

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The City Bar thanks the Senate for holding hearings on this important subject and hopes that the Senate will continue to provide oversight on these issues that are central not only to ensuring that non-citizens receive due process, but to ensuring that our federal adjudication system remains fair and impartial.

Thank you for your consideration.

April 17, 2018

Immigration and Nationality Law Committee  
Victoria Neilson, Chair

Task Force for the Independence of Lawyers and Judges  
William August Wilson, III, Chair

**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.<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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

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<sup>1</sup> 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](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).

<sup>2</sup> 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](https://www.americanbar.org/news/abanews/aba-news-archives/2017/10/statement_of_abapre1.html).

<sup>3</sup> Transactional Records Access Clearinghouse (TRAC) of Syracuse University, Immigration Court Backlog Tool, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](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.<sup>4</sup> 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.<sup>5</sup> 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

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

<sup>5</sup> 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.<sup>6</sup>

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.”<sup>7</sup> 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.

Immigration and Nationality Law Committee  
Victoria Neilson, Chair

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<sup>6</sup> 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>.

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



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*Submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: RIN No. 1125-AA85 or EOIR Docket No. 18-0502, Comments in Response to the Interim Rule Reorganizing the Executive Office for Immigration Review**

Dear Assistant Director Alder Reid:

On behalf of the New York City Bar Association (“City Bar”), we are writing in response to the Justice Department’s Interim Rule (“Interim Rule”) that became effective on August 26, 2019 and changes the organization of the Executive Office for Immigration Review (“EOIR”).

The City Bar and its 24,000 members have a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The City Bar’s Immigration & Nationality Law Committee addresses diverse issues pertaining to immigration law and policy. Our members include staff members of legal services organizations providing immigration assistance, private immigration attorneys, staff members of local prosecutor’s offices, staff members of immigrant advocacy organizations, academics, and law students. Many of our Committee members work for DOJ-recognized organizations that employ DOJ-accredited representatives.

The City Bar opposes the Interim Rule because it improperly politicizes EOIR’s adjudicative function and appears to marginalize the crucial role of the Office of Legal Access Programs (“OLAP”). Specifically, we oppose the establishment of the Office of Policy as an official component of EOIR, the transfer of OLAP to this Office of Policy, and the delegation of authority from the Attorney General to the Director of EOIR, allowing him or her to adjudicate certain Board of Immigration Appeals (“BIA”) cases. The City Bar has expressed concern previously about the potential for politicizing the adjudicative process in immigration court and

has called for the establishment of an independent Article 1 court.<sup>1</sup> Recognizing that such a change would require legislative action, we respectfully request that the Interim Rule be rescinded.

## **I. WE OPPOSE THE FORMALIZATION OF THE OFFICE OF POLICY UNDER EOIR.**

The City Bar opposes formalizing the Office of Policy as part of EOIR and making it permanent via regulation. As an initial matter, having an Office of Policy within EOIR is highly problematic because the mission of EOIR is to adjudicate individual cases, not to make policy. Our concern is compounded by the fact that the Trump administration created the Office of Policy in 2017 and, prior to and following its creation, has repeatedly expressed animosity towards immigrants in public statements.<sup>2</sup> As an administrative court, EOIR should be dedicated to the fair application of the law on an individual, case-by-case basis. Placing the Office of Policy on an equal level with this essential adjudicative function politicizes EOIR and threatens judicial independence within the immigration system. An Office of Policy has no place within EOIR.

## **II. WE OPPOSE MOVING OLAP UNDER THE OFFICE OF POLICY.**

OLAP serves the important function of increasing access to legal counsel in immigration proceedings for low-income immigrants. This is a critical role because deportation devastates individual immigrants, families and communities, yet there is no right to government-appointed counsel in immigration court. When noncitizens are forced to represent themselves in removal proceedings, the chance of a favorable outcome declines dramatically.<sup>3</sup> Unrepresented noncitizens in removal proceedings must oppose highly trained attorneys arguing for the government. They lack guidance about how to present their case and are not connected with tools to manage trauma that may have led to their decision to enter the United States. Detained noncitizens in removal proceedings face even worse odds of success without representation and, for many, an OLAP coordinated know your rights presentation is their only contact with a legal professional.<sup>4</sup> OLAP also benefits EOIR and the Department of Homeland Security because noncitizens who know their rights and can access quality representation contribute to efficiency of adjudications, saving immigration judges valuable time on the bench during which they would otherwise be explaining basic processes.

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<sup>1</sup> New York City Bar Association, Written Testimony Respectfully Submitted By The Immigration And Nationality Law Committee And The Task Force For The Independence Of Lawyers And Judges to the Senate Judiciary Committee Subcommittee On Border Security And Immigration, Apr. 18, 2018, [https://s3.amazonaws.com/documents.nycbar.org/files/2017367-Senate\\_Testimony\\_Imm\\_Court\\_Quotas.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2017367-Senate_Testimony_Imm_Court_Quotas.pdf). (All links in this report were last visited on October 23, 2019.)

<sup>2</sup> See, e.g., *Here's Donald Trump's Presidential Announcement Speech*, Time (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>; Jefferson B. Sessions III, Att'y General, *Attorney General Sessions Delivers Remarks on Sanctuary Jurisdictions* (Mar. 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions>; 'Angel Families,' *Trump Aides Rally Against Illegal Immigrant Crime*, Fox News (Sept. 7, 2018) <https://www.foxnews.com/politics/angel-families-trump-aides-rally-against-illegal-immigrant-crime>.

<sup>3</sup> Steering Comm. Of the N.Y. Immigrant Representation Study Report, *Accessing Justice the Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo Law Review 357, 363-64 (2011).

<sup>4</sup> See *id.*

We are concerned that the shift of OLAP under the Office of Policy signals an erosion of OLAP’s commitment to “improve the efficiency of immigration court hearings by increasing access to information and raising the level of representation for individuals appearing before the immigration courts and BIA.” The Trump administration – which created the Office of Policy – has openly attacked immigration lawyers and indicated an intention to end know your rights presentations for detained noncitizens.<sup>5</sup> In light of these actions which conflict with OLAP’s mission, the Office of Policy is a concerning location to house OLAP. OLAP should be returned to a separate office within EOIR.

### **III. WE WOULD OPPOSE ANY CHANGES THAT THREATEN THE ABILITY OF THE RECOGNITION AND ACCREDITATION PROGRAM TO HELP ADDRESS THE REPRESENTATION CRISIS.**

The Department of Justice’s Recognition and Accreditation (R&A) Program, a key component of OLAP, “aims to increase the availability of competent immigration legal representation for low-income and indigent persons, thereby promoting the effective and efficient administration of justice.”<sup>6</sup> There are currently 1,077,155 pending removal cases nationwide.<sup>7</sup> There are not enough immigration attorneys to address the need for representation in these proceedings. Accredited representatives help to provide competent representation to those who would otherwise not be able to afford representation, thereby protecting the due process rights of noncitizens as well as increasing the efficiency of the immigration court system.

Many legal services organizations that provide immigration assistance employ partially and fully DOJ- accredited representatives and depend upon these legal professionals’ help to meet the extremely high demand for immigration legal services. Immigration law is notoriously complex and difficult to navigate. Indeed, the forms required by United States Citizenship and Immigration Services (“USCIS”) to apply for affirmative immigration benefits grow ever longer as more detailed information is required and inquiries into the immigration history of applicants become more searching. Likewise, defending noncitizens from removal grows ever more challenging as new policies and legal decisions attempting to limit availability of asylum are issued.<sup>8</sup> Noncitizens should not have to face such a high-stakes, complicated system without the assistance of a legal representative. If the R&A Program is altered or deprioritized because of its new location under the Office of Policy, many low-income immigrant families will have to face

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<sup>5</sup> See Justice News, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review. <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>; Vanessa Romo, *Justice Department Will Pause A Legal Advice Program For Detained Immigrants*, NPR (Apr. 12, 2018, 6:33 PM), <https://www.npr.org/sections/thetwo-way/2018/04/12/601642556/justice-department-will-pause-a-legal-advice-program-for-detained-immigrants>.

<sup>6</sup> *Recognition & Accreditation (R&A) Program*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/recognition-and-accreditation-program> (last accessed October 23, 2019).

<sup>7</sup> Transaction Records Access Clearinghouse, Syracuse University, Immigration Court Backlog Tool, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>8</sup> See, e.g., Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. 208, 10003, 1208) (barring migrants at the southern border of the United States from eligibility for asylum if the migrants passed through a third country en route to the United States without applying for asylum in that third country and being denied).

these processes alone and would therefore have their chance of a favorable outcome severely diminished.

#### **IV. WE OPPOSE THE DIRECTOR OF EOIR BEING GRANTED THE POWER TO ISSUE PRECEDENTIAL DECISIONS.**

We believe that vesting the EOIR Director with the power to issue precedential decisions threatens the independence of immigration judges and BIA members. BIA members are career government employees with extensive knowledge of and experience in immigration law. Currently, pursuant to regulation, three BIA members must adjudicate a case in order to issue a precedential decision. This process places value on careful thought and deliberation and allows for multiple perspectives to inform precedential decisions. It is entirely appropriate because precedential decisions have tremendous impact – they are binding on every immigration judge and Department of Homeland Security officer throughout the country.

We have several grave concerns about the Interim Rule which instead values swift adjudication over careful deliberation and would enable the EOIR Director, acting alone, to assign a case to him or herself and issue a precedential decision within 14 days if the BIA members have not reached a final decision in 90 days for detained cases or 180 days for non-detained cases. First, a single, unconfirmed political appointee should not hold this much power in an adjudicative process that is intended to be fair and impartial. Indeed, the National Association of Immigration Judges has publicly stated its strong opposition to the rule, specifically focusing on the problematic combination of adjudication and policy-making within the EOIR Director role.<sup>9</sup> A panel of three BIA members should continue to be required for precedential decisions. Second, this rule will put pressure on BIA members to complete cases quickly even though immigration cases before the BIA are extremely complex and their impact on noncitizens' lives is profound. BIA members need the ability to fully analyze the complex issues that each case presents without being cabined by one-size-fits-all time limits. Third, this prioritization of swift adjudication over careful consideration will also impact the independence and autonomy of immigration judges. Indeed, immigration judges already face quotas that impinge on their ability to fully and fairly adjudicate cases and this rule will exacerbate those pressures.<sup>10</sup> The Interim Rule should be rescinded and precedential decisions should be made by a panel of three BIA members.

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<sup>9</sup> Ashley Tabaddor, President of the National Association of Immigration Judges (NAIJ), Statement by Immigration Judges Union on Major Change Announced to Immigration Courts (“By collapsing the policymaking role with the adjudication role into a single individual, the Director of EOIR, an unconfirmed political appointee, the Immigration Court system has effectively been dismantled.”) [https://www.naij-usa.org/images/uploads/newsroom/NAIJ\\_Speaks\\_on\\_Major\\_Change\\_Announced\\_to\\_the\\_Immigration\\_Court\\_System.pdf](https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Speaks_on_Major_Change_Announced_to_the_Immigration_Court_System.pdf).

<sup>10</sup> Written testimony of Ashley Tabaddor, President of NAIJ, before the Senate Subcommittee on Border Security and Immigration, May 8, 2019, *At the Breaking Point: The Humanitarian and Security Crisis at our Southern Border* (stating that noncitizens “deserve to stand before an independent court and an impartial judge who is not placed in a conflict of interest position of honoring her oath of office or risking her source of livelihood”) [https://www.naij-usa.org/images/uploads/publications/NAIJ\\_Written\\_Testimony\\_Before\\_Senate\\_Subcommittee%2C\\_May\\_2019.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ_Written_Testimony_Before_Senate_Subcommittee%2C_May_2019.pdf)

**V. EOIR’S REORGANIZATION THROUGH AN INTERIM RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.**

Where no urgent need exists to implement regulations quickly, the Administrative Procedure Act requires regulations to go through a Notice of Public Rule-Making (“NPRM”) process, which allows the public to comment, and requires the agency to respond substantively to the comments. This process should have been followed with respect to the Interim Rule. EOIR asserts that these regulations do not need to pass through the usual notice and comment processes because they do not affect the general public. We disagree. As set forth above, these changes will have a profound and far-reaching impact on organizations providing immigration legal services and on the lives of immigrant families and communities. There is no justification for accelerating the implementation of this regulation and the public should have been heard prior to EOIR making these significant changes.

**VI. CONCLUSION**

For the above stated reasons, the City Bar opposes the Interim Rule because it weakens the independence of the immigration courts and the BIA and marginalizes access to counsel for low-income immigrants. Thank you for the opportunity to submit these comments. We appreciate your consideration.

Respectfully submitted,



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