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**WRITTEN TESTIMONY RESPECTFULLY SUBMITTED BY
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE¹ AND
THE TASK FORCE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES²**

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

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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 backlogs³ should be addressed by DOJ, however, as discussed at the end of our testimony, there are common-sense

¹ 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.

² 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.

³ 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/. (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.⁴ 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.⁵ 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.⁶ 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,⁷ 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

⁴ 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

⁵ 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; 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”).

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

⁷ 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.⁸ 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.”⁹ 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

⁸ 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.

⁹ *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.¹⁰

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.¹¹ 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*,¹² 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

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

¹¹ 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>.

¹² *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*.¹³ 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."¹⁴ 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.¹⁵ Although there is earlier precedent which should still require judges to take testimony in these cases,¹⁶ 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."¹⁷ In an immigration system in which large numbers of respondents appear without representation,¹⁸ 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.

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

¹⁴ *Id.*

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

¹⁶ "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).

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

¹⁸ 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.

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