



STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE SENATE JUDICIARY SUBCOMMITTEE ON
BORDER SECURITY AND IMMIGRATION

HEARING ON "STRENGTHENING AND REFORMING AMERICA'S
IMMIGRATION COURT SYSTEM"

April 18, 2018

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The American Immigration Council ("Council") is a non-profit organization which for over 30 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We write to share our analysis and research regarding the nation's immigrant courts, due process, and the importance of a truly fair day in court.

Over the last 15 months, the Trump administration has begun making significant changes to the nation's immigration court system that will compromise judges' ability to make decisions independent of pressures to expedite hearings, remove due process protections afforded noncitizens in removal proceedings, and create additional delays and inefficiencies in the immigration court system. Taken together, the Department of Justice's (DOJ) actions will exacerbate the backlogs and push the already overburdened immigration courts to the breaking point, rendering a fair day in court an impossibility.

Immigration Judge Quotas and Performance Metrics

In a controversial move, the Executive Office of Immigration Review (EOIR), the DOJ component that manages the nation's immigration court system, recently announced new case completion quotas for immigration judges.¹ These new quotas will result in time constraints and pressure for judges to reach decisions quickly, impacting individuals' ability to have a fair day in court.

¹ Betsy Woodruff, "New Quotas from Immigration Judges are 'Incredibly Concerning,' Critics Warn," The Daily Beast, April 2, 2018, available at, <https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn?ref=scroll>.

James McHenry, the director of EOIR, informed immigration judges that these new quotas will be a part of their individual performance metrics and evaluations starting October 1, 2018.² The quotas will require immigration judges to complete 700 cases per year (an average of completing three cases per work day), maintain a reversal rate by the Board of Immigration Appeals (BIA) of less than 15 percent, and meet a variety of additional benchmarks, such as short deadlines for issuing removal decisions or bond decisions.³

Director McHenry explained that this directive is intended to "encourage efficient and effective case management,"—an unsurprising goal given that the immigration court backlog is at record high levels. At the end of Fiscal Year 2016, the court backlog stood at 516,031 cases; since that time, it has grown 33 percent to a present-day backlog of 684,583 cases.⁴ As explained below, one of the reasons the backlog has continued to grow at a faster rate under the Trump administration is the elimination of enforcement priorities and prosecutorial discretion.

When the Obama administration utilized prosecutorial discretion to concentrate on removals of individuals with criminal convictions and recent border arrivals, cases falling outside of that focus were often administratively closed. Doing so removed the case from the judge's calendar and temporarily stopped the removal proceedings. According to the Transactional Records Access Clearinghouse (TRAC), immigration courts under the Obama administration were administratively closing an average of 2,400 cases per month one year prior to the Trump administration taking office.⁵

In contrast, the January 25, 2017 executive order "Enhancing Public Safety in the Interior of the United States,"⁶ essentially eliminated immigration enforcement priorities, making everyone a priority for removal. This shift has resulted in a dramatic drop in administratively closed cases to fewer than 100 cases per month.⁷ By keeping so many more cases on the docket, final immigration court dispositions have subsequently fallen by almost 10 percent.⁸

The combination of new case completion quotas and the reduction in administratively closed cases will likely mean that immigration judges feel pressed to rush through cases at a dangerous pace. Judges frequently grant continuances to help ensure a fair day in court; for example, they may grant continuances for noncitizens to secure legal representation or gather evidence or witnesses to support their claims, or for the court to locate and schedule an appropriate interpreter. Once these performance metrics and quotas are in place, however, judges will have a conflict of interest between their performance evaluations and providing a fair proceeding. With incentives for judges to move hearings along more quickly, the Council fears that immigrants' due process will pay the price.

Legal Orientation Program and Help Desk

Earlier this month, EOIR announced it was halting the Legal Orientation Program (LOP) despite the fact that it provides immigration detainees critical information about the immigration court process and legal

² Id.

³ Id.

⁴ "Immigration Court Backlog Tool," Transactional Records Access Clearing House, Updated February 2018, available at, http://trac.syr.edu/phptools/immigration/court_backlog/.

⁵ "Immigration Court Dispositions Drop 9.3 Percent Under Trump," Transactional Records Access Clearing House, July 17, 2017, available at <http://trac.syr.edu/immigration/reports/474/>.

⁶ "Enhancing Public Safety In the Interior of the United States," Executive Order 13768, January 25, 2017, available at <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

⁷ "Immigration Court Dispositions Drop 9.3 Percent Under Trump," Transactional Records Access Clearing House.

⁸ Id.

screenings for pro bono representation.⁹ EOIR is also ending the immigration court “help desk,” created in 2016 to provide basic information about the court process to non-detained immigrants facing deportation in five cities.¹⁰ The agency has chosen not to renew the contracts with LOP and help desk providers while it reportedly assesses the programs’ cost effectiveness and efficiencies.

Because noncitizens in removal proceedings are not provided a government-funded attorney, and only 14 percent of detainees are able to secure a private attorney, the vast majority are faced with navigating the complex immigration court system alone.¹¹ The information provided through LOP and help desks can serve as lifeline, and LOP in particular, has brought substantial efficiencies to the court process.

Started in 2003 under President George W. Bush and renewed annually with bipartisan support from Congress, LOP currently operates in 38 detention facilities throughout the country.¹² Although participation in LOP is no replacement for representation by an attorney, the program provides important information to significant portion of the detained population.¹³ The program itself has also been shown to increase efficiency in the system and save the government money, as those with a greater understanding of the process need less of the immigration judge’s time to explain it and do not prolong proceedings because they understand that they are ineligible for immigration relief.¹⁴ In fact, a 2012 DOJ report demonstrated that LOP reduced the amount of time to complete immigration proceedings by an average of 12 days.¹⁵ Factoring in the additional savings to the Department of Homeland Security from fewer days spent in detention, LOP was shown to have a net savings of approximately \$18 million.¹⁶ Because LOP has expanded and immigration detention costs have increased since the study, the cost savings have likely increased as well.

Without a legal orientation, unrepresented noncitizens in proceedings will need to use more of the court’s valuable time as immigration judges try to fill some of the gaps and answer questions about the process. This will not only compromise efficiencies, but it is wholly inappropriate for the arbiter of a case to be responsible for explaining to the affected party how the process works and what the person’s rights and relief options are. Ending the cost-effective LOP and help desk programs is short-sighted, benefits no one, and ultimately further erodes due process for immigrants.

Attorney General Certification of Cases

⁹ “Statement on DOJ’s Decision to Halt Legal Orientation Program,” Vera Institute of Justice, April 11, 2018, available at, <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program>.

¹⁰ Maria Caeiro, “Immigration Court Help Desk,” Vera Institute of Justice, accessed April 12, 2018, available at, <https://www.vera.org/projects/immigration-court-helpdesk/overview>.

¹¹ Ingrid Eagly, Esq. and Steven Shafer, Esq. “Access to Counsel in Immigration Court,” American Immigration Council, September 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹² Executive Office of Immigration Review, “Executive Office for Immigration Review Expands Legal Orientation Program Sites,” Department of Justice, November 9, 2016, available at <https://www.justice.gov/eoir/pr/executive-office-immigration-review-expands-legal-orientation-program-sites>.

¹³ Zhifen Cheng, Neil Weiner, “Legal Orientation Program (LOP) Evaluation, Performance and Outcome Measurement Report, Phase III: the Role of LOP Affecting Case Processing Times,” Vera Institute of Justice, June 2009, available at

https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/LOP_Phase_III_Report_6.22.09_FINAL.pdf.

¹⁴ “Providing Noncitizens With Their Day in Court,” American Immigration Council, May 2013, available at, <https://www.americanimmigrationcouncil.org/research/providing-noncitizens-their-day-court>.

¹⁵ Executive Office of Immigration Review, “Cost Savings Analysis-The EOIR Legal Orientation Program,” Department of Justice, Updated April 2012, available at, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

¹⁶ Id.

Since January of this year, Attorney General Sessions has repeatedly employed an otherwise sparingly used procedure of certifying immigration cases to himself for review. By regulation, the Attorney General is authorized to reconsider cases previously decided by the BIA, which hears appeals from immigration courts nationwide.¹⁷ The cases in question directly impact the control immigration judges have over the pace of their docket as well as the availability of asylum protections for vulnerable populations. With so much at stake and given the Attorney General's open hostility to immigrants over the course of his career, these certifications are deeply concerning.

The first case the Attorney General referred to himself was *Matter of Castro-Tum*, which had been administratively closed by an immigration judge.¹⁸ Administrative closure is an important mechanism that helps immigration judges control their caseloads by allowing them to temporarily remove a case from the docket. Judges are then able to prioritize hearings and stop the removal of people who are awaiting resolution of other matters relevant to their immigration cases.¹⁹

This move by Sessions could signal an attempt to end administrative closure altogether—which could force over 350,000 cases back into immigration court, exacerbating the challenges of an already overburdened court system.²⁰

The Council, with other immigrant rights organizations, filed an amicus brief in *Matter of Castro-Tum*, which outlines Sessions' troubling statements that display an intense hostility toward noncitizens who do not meet his standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration status.²¹ This lengthy record makes clear that it is not possible for Sessions to be the neutral arbiter that due process requires.

A second case the Attorney General certified to himself related to immigration court procedure was *Matter of L-A-B-R-*, which would impact the issuance of continuances and may limit their availability in the future. A continuance, which only may be granted for "good cause," is a critically important option for individuals who seek a level playing field in deportation proceedings.²²

By granting a continuance and rescheduling a hearing for a later date, an individual in removal proceedings is granted valuable time to find a lawyer, gather needed evidence, or allow the immigration benefits agency, U.S. Citizenship and Immigration Services, sufficient time to adjudicate a case under its review. An attorney might also ask the court to grant a continuance to become familiar with a new case and adequately prepare for a hearing.²³ Immigration judges need to have docket management tools, like continuances, readily available to accommodate requests such as these which are critically important when one is at risk of deportation.

¹⁷ 8 C.F.R. § 1003.1(h)(1)(i).

¹⁸ *Matter of Reynaldo Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018),

<https://www.justice.gov/eoir/page/file/1022366/download>.

¹⁹ "Matter of Castro-Tum," Amicus Brief, American Immigration Council, February 19, 2018, available at

<https://www.americanimmigrationcouncil.org/amicus-brief/matter-castro-tum>.

²⁰ "Sessions Takes Aim at Judges' Handling of Immigration Cases," Associated Press, January 5, 2018, available at

<http://www.latimes.com/local/lanow/la-me-immigration-courts-20180105-story.html>.

²¹ "Matter of Castro-Tum," Amicus Brief, American Immigration Council.

²² 8 C.F.R. § 1003.29.

²³ Emily Creighton, "Government Moves to Curb Non-Citizens' Ability to Get More Time to Prepare for Hearings," American Immigration Council, August 8, 2017, available at

<http://immigrationimpact.com/2017/08/08/government-non-citizens-prepare-hearings/>.

Last year EOIR issued guidance suggesting judges limit the issuance of continuances,²⁴ which may be an indication of how the Attorney General will decide the case. The guidance advises judges to “root out continuance requests” that only seek to delay a decision and to refer an attorney for disciplinary action when he or she takes on “more cases than he or she can responsibly and professionally handle.”

Finally, the Attorney General referred two asylum-related cases to himself, *Matter of A-B-* and *Matter of E-F-H-L-*.²⁵ *Matter of A-B-* addresses whether private criminal activity, such as domestic violence, should constitute “a particular social group,” one of the recognized grounds for seeking asylum. *Matter of E-F-H-L-* held that asylum applicants are entitled to a full hearing on their application and that the hearing cannot be pretermitted for failure to make a qualifying asylum claim in the application itself.²⁶ With so many asylum seekers trying to navigate the U.S. protection system without an attorney, it is essential for all those who express a fear of return to get a proper hearing before a judge where a claim can be fully assessed.²⁷

Conclusion

We are bearing witness to a full-fledged attack on our immigration court system by this administration, with the desired outcome of moving cases through as quickly as possible – regardless of how due process is compromised. By adding cases to the docket and suspending the orientation programs that enable people to move more quickly through the system, the inefficiencies will exponentially grow. We urge this subcommittee to remain vigilant in its oversight of DOJ and EOIR to ensure that our nation respects the rights of all who come before its courts and that the immigration courts have the tools in place to effectively and efficiently adjudicate removal cases. We must zealously guard our fundamental value of fairness and prevent the U.S. government from sending the vulnerable among us back to harm's way. The Council looks forward to working with the Committee to ensure a fair day in court for all.

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²⁴ Id.

²⁵ *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1040936/download>

²⁶ *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2017),

<https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3803.pdf>.

²⁷“Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-*,” National Immigrant Justice Center, January 2016, available at

<https://www.immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf>.