Senate Judiciary Committee
Subcommittee on Border Security and Immigration

Statement for the Record from Immigration Law Professors –
Hearing on Strengthening and Reforming America's Immigration Court System

Wednesday April 18, 2018

We, the undersigned scholars write, research, and teach in immigration clinics or subjects that touch clients in the immigration court system. We write to express to subcommittee members the importance of Judicial Independence of the Immigration Courts. We encourage Congress to consider legislation that would lead to the creation of an independent immigration court as well as to engage in robust oversight of the Department of Justice.

Over the past year, Attorney General Sessions and officials under his purview have eroded the independence of our immigration courts and have left immigrants without access to due process. In our opinion, recent actions, detailed below, are tantamount to commandeering the Executive Office for Immigration Review and Board of Immigration Appeals as tools for interior enforcement. The use of immigration courts for enforcement goals damages the integrity of the immigration adjudication system as well as its ability to uphold the law. This shift has caused judicial officials to violate their oath of office when overseeing case decisions. Regardless of individual case outcomes, immigration judges now face enormous challenges to their ethical and professional standards. As immigration law professors, we see this as detrimental to the teaching of our students on best practices and professional responsibility.

Quotas For Immigration Judges Erode Judicial Independence and Destroy Due Process

Immigration judges are employees of the Department of Justice and are deprived of many protections had by Article I and Article III Judges. Attorney General Sessions introduced a new EOIR Performance Plan, which was first announced by EOIR's head, James McHenry by e-mail on March 30, 2018.[1] Under the new standards, which are set to go into effect on October 1, 2018, immigration judges will be required to meet a number of performance metrics, which include completing 700 cases a year and having fewer than 15 percent of their cases sent back by a higher court.[2] These metrics are not put forth as suggestions or guidelines, but, rather, are inextricably tied to job security and raises. This means that immigration judges have a financial stake in the number of deportation orders they enter, or clients they convince to self-deport or voluntarily depart.

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

Tying their livelihood to speedily churning cases contradicts their oath as judges. The law requires that judges must disqualify themselves if their impartiality might reasonably be questioned, or if they or someone in their family has a financial interest in a subject matter or in the outcome of a proceeding.[3] However, it is indisputable that a judge or his or her spouse and children have a financial interest in a judge keeping their job, and, therefore, satisfying proposed metrics, comes into conflict with their oath of office, which is to "administer justice and faithfully and impartially discharge and perform all duties…under the Constitution and laws of the United States."[4] Fairness and impartiality are the hallmarks of due process, as is explained by Immigration Judge, Dana Leigh Marks, President Emeritus of the National Association of Immigration Judges.[5] As of February 2018, the immigration courts were backlogged by 684,583 cases with an average wait time of 711 days.[6] Judicial quotas and timelines will cause judges to rush "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 of constitutionality required for due process."[7] This threat to due process and the administration of justice becomes even more concerning in the face of EOIR policies and BIA precedent created by Sessions since the Trump administration took office.[8]

Immigration clinicians are certain that the quotas and timelines proposed by Sessions would compound an already critical service gap that exists for individuals placed in high stakes immigration proceedings. Academic law school programs as well as many resource scare non-profits will become increasingly unable to accept cases relegated to such short timelines. Further, short timelines would violate a clinician's duty, owed to student and client alike, since, from a

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[3] 28 US Code § 455 (a) and (b)(4)

[4] 28 US Code § 453

[5] Hon. Dana Leigh Marks, LexisNexis Legal Newsroom Immigration Law, "I'm an Immigration Judge. Case Completion Quotas Are a Really Bad Idea," April 9, 2018, https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/04/11/quot-i-m-an-immigration-judge-case-completion-quotas-are-a-really-bad-idea-quot-hon-dana-leigh-marks.aspx.

[6] *See* TRAC, Immigration Court Backlog Tool, last accessed April 16, 2018, http://trac.syr.edu/phptools/immigration/court_backlog/.

[7] 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/ce000df6-b2aa-11e7-9e58-e6288544af98_story.html?noredirect=on&utm_term=.7bab133ed110. *See also* Hashmi v. Mukasey, 533 F.3d 700 (8th Cir. 2008), holding that denial of a continuance simply to meet case completion goals is arbitrary and abuse of discretion.

[8] U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017. *See also Matter of L-A-B-R-*, 27 I. & N. Dec. 245 (A.G. 2018) in which Sessions will render his own decision as to when "good cause" supports an immigration judge in granting a continuance; *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (A.G. 2018) in which Sessions certified to himself the question as to whether immigration judges and the BIA possess the authority to administratively close a pending removal proceedings. These cases make clear Sessions desire to erode due process by depriving immigration courts of essential docket management tools.

request for voluntary departure (in certain instances), there are few if any matters that can be resolved in immigration court by adhering to the timelines proposed. This is because removal cases are nuanced and vary drastically in complexity. Our programs often enter cases at the BIA or Circuit Court levels only to overturn an initial, hastily made immigration judge decision, ultimately to prevail.

University of Southern California's Immigration Clinic ("USC") reports that approximately 95% of its cases that were appealed to the Ninth Circuit have been remanded despite initial immigration judge denials. It is increasingly common that students have to obtain bond through habeas or appeal to Circuit courts for a client to obtain relief. This is because, regardless of political trends, certain immigration judges are biased against certain issues. For example, from the period of 2012 to 2017, now-retired Immigration Judge Lorraine Munoz in Los Angeles, California had a denial rate of 97.5% for asylum applications, whereas, Immigration Judge Javier E. Balasquide in New York had a denial rate of 20.2% for that same period.[9] USC presently represents a client that has been in removal since 2002. USC entered on the first Petition for Review at the Ninth Circuit. The Ninth Circuit has now sent the case back down to the Immigration Judge on two occasions, causing their client to live in uncertainty for approximately sixteen years.

A common report by immigration clinics is a decline in cooperation by ICE Trial Attorneys. Instead, government counsel prosecutes by attacking client credibility and objecting to the admission of evidence at every turn. For example, students at Western State College Law's Immigration Law Clinic represented an individual who had resided in the United States for well over a decade. The father of three U.S. Citizen children, this client was the primary provider as his wife had numerous mental health issues, including schizophrenia. His oldest child was also exhibiting early signs of mental illness. Because 1.) the client was from Sacramento, but detained in Orange County, California, and 2.) his wife struggled to care for the children and herself, the case took tremendous time and resources. Students argued that their client should receive a grant of Cancellation of Removal for Non-Lawful Permanent Residents and prevailed. During the course of their representation, however, it became clear to the students that if their client had proceeded pro se, he would not have been able to maneuver thorough the complicated immigration court system to succeed on the merits of his claim. Today, the client is reunited with his family and holds status as a Lawful Permanent Resident. The Loyola Law School Los Angeles Immigrant Justice Clinic represents a victim of horrific domestic violence who now seeks asylum. The 2005 REAL ID Act requires evidence to be provided to corroborate testimony unless the applicant does not have evidence and cannot reasonably obtain it.[10] In this case, the Mexican client had reported her abuse to National System of Integral Family Development

[9] *See* TRAC, Judge-by-Judge Asylum Decisions in Immigration Courts FY 2012-2017, last accessed April 16, 2018, http://trac.syr.edu/immigration/reports/490/include/denialrates.html.
[10] 8 U.S.C. § 1158(b)(1)(B)(ii).

("DIF"), our equivalent of Children and Family Services. It took over a year to obtain relevant reports despite zealous advocacy on the part of student representatives. These are just two of many cases with complex legal and factual issues which, despite being meritorious, would be denied if quotas and production timelines are implemented. We encourage Congress to evaluate if this case would have been successful absent engaged legal representatives able to advocate for more generous timelines.

The Termination of Basic Legal Service Programs will Have Devastating Consequences for Detained Individuals

The termination of Legal Orientation Programs ("LOP") further compounds the impact of metrics and timelines for immigration judges. LOP has received bi-partisan support from Congress, including a specific directive to maintain the program at existing funding levels.[11] The Vera Institute of Justice, which administers funds and runs LOP, reports that, through its various contractors, which includes law schools and law school collaborators, it has held information sessions for 53,000 immigrants in more than a dozen states and at more than 38 detention facilities.[12] Terminating LOP and Vera's "help desk," which offers advice to non-detained immigrants in removal and directs them toward appropriate relief applications, has been described by Meg McCathy, Executive Director of the National Immigrant Justice Center (an organization that offers legal services with Vera) as a "blatant attempt by the administration to strip detained [and non-detained immigrants in removal] of even the pretense of due-process rights."[13]

A number of law school clinical programs have long-standing relationships with LOP (both those that are federally funded and those that secure funding from other sources). For example, over the past four years, the University of California Irvine's Immigrant Rights Clinic ("UCI") has partnered with Public Counsel Law Center in order to provide LOP services at Orange County California's James A. Musik, a facility that houses inmates as well as ICE detainees. Additionally, the clinic has received referrals from Esperanza Immigrant Rights Project Los Angeles, which is federally funded to offer LOP at Adelanto Detention Center, a GEO operated ICE facility. UCI partners with these LOP providers to source both bond cases and cases for full-scope representation suitable for law student representation. UCI believes that the representation of detained immigrants offers its' students training in essential lawyering and

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[11] *See* H. Rept. 115-231, 2018 Commerce, Justice, Science and Related Agencies Appropriations Bill, https://www.congress.gov/congressional-report/115th-congress/house-report/231/1, as adopted by the Explanatory Statement accompanying the 2018 Appropriations Bill, https://www.congress.gov/crec/2018/03/22/CREC-2018-03-22-bk2.pfd.

[12] *Id. See also* Maria Sacchetti, LexisNexis Legal Newsroom Immigration Law, "Sessions 'Pauses' Legal Orientation Program for Detained Immigrants," April 11, 2018, https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/04/11/sessions-39-pauses-39-legal-orientation-program-for-detained-immigrants.aspx.

[13] See Sacchetti article.

litigation skills while offering a valuable service to the community. However, because law school clinics are run on an academic calendar, the program could not operate without LOP providers who have a regular presence in detention, and are able to evaluate cases and make proper referrals for pro bono representation. Together with Public Counsel, the Clinic at Western State College of Law is able to serve 60 to 80 detainees each month. The Clinic also takes cases for bond and individual representation, and those clients are all served by student advocates. Western State's staff attorney reports that the majority of individuals who attend LOP are asylum seekers as they are the most isolated individuals without the resources to hire an attorney or ability to quickly learn how to locate one. The Worker and Immigrant Rights Advocacy Clinic at Yale has been a LOP provider for over the last decade. During that time, students have made one to two trips each semester to provide group sessions and individual counseling for ICE detainees at Franklin County Jail located in Greenfield, Massachusetts. Yale students have offered consultations to hundreds of detainees over the years, and taken on matters for individual representation varying from removal defense at the EOIR, BIA and Circuit Court levels, as well as for representation in bond hearings. In the time that Yale has been supporting Franklin's LOP, it has been the only such provider serving this facility.

Law school clinical programs rely on LOP providers to bolster resources and increase the number of immigrants with representation in removal proceedings. These partnerships have been steadily on the rise. Relationships with LOP programs ensure that the most vulnerable clients have access to legal advice, and, in many instances, free legal representation. They also offer law school's strategic partnerships to bolster resources and further pedagogical goals. The loss of LOP is a loss for immigrants and academic institutions alike. For example, Loyola Law School Los Angeles' and Southwestern Law School's Immigrant Justice Clinics joined forces and received funding through the Los Angeles Justice Fund to accept cases for student and pro bono case placement. These cases were to benefit the detained population and would be identified through LOP providers in Southern California.[14] Now that LOP has been terminated, the law schools are left with the knowledge that approximately 83% of detainees lack representation and they have the funding to equip hundreds of attorneys and law students with the ability to bolster representation, but have no access to worthy clients who possess meritorious claims.[15]

LOP has been identified as the reason many individuals have been released from detention. For example, the Erie County Bar Association in Buffalo, New York, which partners with Cornell Law School, encountered a man who claimed he was born in the Bronx while he was detained at Batavia Detention Center. As LOP providers investigated, it became apparent

[14] *See* California Community Foundation Press Release, November 27, 2017, "$7.4 Million Awarded to 17 Legal Nonprofit Organizations to Provide Free Legal Representation," https://www.calfund.org/7-4-million-awarded-to-17-legal-nonprofit-organizations-to-provide-free-legal-representation/. *See also* L.A. Justice Fund grantees, https://www.calfund.org/wp-content/uploads/L.A.-Justice-Fund-Grantees.pdf.

[15] *See* TRAC, Details on Deportation Proceedings in Immigration Court, last accessed April 16, 2018, http://trac.syr.edu/phptools/immigration/nta/.

that ICE had taken this individual from criminal custody because his name and date of birth matched those of someone that they were seeking to detain. LOP providers were able to obtain his birth certificate and secure his release. Without LOP, this individual may have been removed before he was able to make contact with anyone who could help him prove his country of citizenship. UCI also encountered such a case through LOP. Based on the zealous advocacy of students, the Ninth Circuit remanded a derivative citizenship claim to the district court for further finding of fact.

LOP success stories are common and often result in previously overlooked individuals securing relief from removal or deportation. Erie County Bar Association shares the story of an eighteen-year-old transgender woman who had been detained with adult men. After meeting her in LOP, providers learned that she had been persecuted and sex trafficked in her native country by drug cartels since she was thirteen years old. Although she had interacted with U.S. immigration authorities before, she had been granted several voluntary returns to her country of origin. Each of these encounters resulted in her return to her traffickers as opposed to receiving help. Her case was taken for representation, and she ultimately secured a grant of asylum.

Without LOP, more cases will be lost as there will no longer be a front line of defense present to counsel clients and support them in connecting with pro bono representation. This is certain to lead to increased numbers of appeals filed for both meritorious cases and claims where the client, if counseled, may have accepted a removal order. Clinical programs have been intentionally designed to serve our most vulnerable immigrant populations. The termination of LOP coupled with quotas undeniably represent the current administration's desire to deprive individuals in removal from pro bono legal counsel, including that of law school clinical programs.

Asylum Seekers Face Compounded Vulnerabilities

Asylum applicants are among the most vulnerable groups. Many asylees have fled to the United States without family support or finances, carrying with them complex trauma that hinders eliciting the facts necessary to prevail on their claims. 90% of unrepresented asylum applicants were denied relief.[16] The concept that the asylum process is filled with fraud is due to rhetoric put forward by the Trump administration and has led to policies with a disproportionate impact on asylees.[17] A large percentage of law school clinics focus primarily on practicing asylum law. These clinics find clients to be consistently credible with colorable, legal claims for

[16] *See* TRAC, "Asylum Representation Rates have Fallen Amid Rising Denial Rates," last accessed April 17, 2018, http://trac.syr.edu/immigration/reports/491/.
[17] Jeffrey S. Chase, LexisNexis Legal Newsroom Immigration Law, "Former Immigration Judge Refutes Sessions' Asylum Fraud Claims," October 26, 2017, https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2017/10/27/former-immigration-judge-refutes-sessions-39-asylum-fraud-claims.aspx.

relief. Sessions' attacks on asylum seekers justify concern for the safety of asylees moving forward.

Now at Vanderbilt University Law School, Prof. Karla McKanders reports that she opened the first immigration law school clinic in the state of Tennessee in 2008 at the University of Tennessee, Knoxville. She has watched as Tennessee has become a new destination for immigrants over the course of the last decade. Her law school clinics in partnership with EOIR and Equal Justice Works have dedicated countless resources to representing asylum seekers in the region. Her students won a series of complex asylum cases including the following:

- Togolese asylum seeker, tortured by the government on account of his political beliefs, political activism, and leadership role in student run political parties. Togolese soldiers arrested and detained the client, forced him to undress and beat him mercilessly on his face, soles of his feet, chest and back. They then killed his father, and deprived him of food and water. He identified ethnically as Ewe while the military and police were Kabye. The asylum seeker's ethnicity, language and past political activities made him an identifiable target for persecution.
- Syrian asylum seeker, persecuted on account of her Christianity. She chose not to be aligned with the Assad regime, nor militants in Syria. In this case, the client resided in a Christian neighborhood targeted by militant militia. With student assistance, the client was able to demonstrate that the militia murdered girls form her Christian neighborhood and targeted the area for its predominant religion.
- Eritrean asylum seeker escaping persecution by the government. The client was threatened and tortured for his refusal to join a political party and to comply with governmental requests. He was beaten and hung in the desert while his family was extorted to pay for his release.

In addition to observing persecution by government actors, clinical programs have seen a marked increase in gender-based violence. Tahirih Justice Center, a program that regularly partners with law school clinical programs states that one in three women are victims of abuse annually, eighty two million girls are forced into marriage, and one million are forced into modern day slavery amongst other horrific abuses.[18] These statistics exemplify the unique vulnerabilities of women and girls fleeing violence. Individuals persecuted on account of their queer identity are also subject to heightened victimization and persecution. USC Immigration Clinic was able to secure asylum for a mother and daughter, Mayan women from Guatemala who were subjected to domestic violence, and beaten. The daughter was locked in a windowless room for five months and was also stabbed by her abuser. Although she reported the violence to the police and sought a restraining order, the Guatemalan government was unwilling to protect her.

[18]Tahirih Justice Center, Recommendations for the Protection of Immigrant Survivors of Human Trafficking, Domestic Abuse, and Sexual Violence, April 4, 2017, https://www.tahirih.org/wp-content/uploads/2017/04/Tahirih-Recommendations-for-Protecting-Survivors-of-Violence.pdf.

Despite having no criminal history, both women were held in detention for over five months before being granted asylum. UCI worked on a case as a result of their partnership with Esperanza Immigrant Rights Project, a LOP provider, which concerned an asylum seeker who is gay and owned a small electronics store in his home country. The client was arrested and tortured in his country of origin and faced imprisonment on account of his sexual orientation. He fled to the U.S. and presented himself to authorities to request asylum and was subsequently detained at Adelanto Detention Facility. UCI was initially retained to help him secure release on bond. When he could not locate the funds to pay to be released, UCI committed to representing him at his merits hearing where he was granted asylum and released from immigration detention. Within the last month, Western State College of Law obtained a grant of asylum for a Guatemalan woman in her thirties who was identified with assistance of the LOP. This victim of domestic violence obtained a restraining order and reported her abuse to the police multiple times to no avail. During the height of the domestic violence, her abuser kidnapped her children and tried to murder her multiple times. The assigned ICE trial attorney contested every aspect of the case, which required clinical law students to exhibit advanced lawyering skills. Students reflected that articulating the facts and requirements for a grant of asylum is very complicated. This case would certainly have lost in the face of the quotas and timelines discussed above as documents to corroborate evidence came by mail, which took far longer than 30 days.

Particularly concerning are two shifts in how asylum applicants will interact with our immigration court system. First, Attorney General Sessions referred a case to himself and vacated a previous Board decision which held that a respondent applying for asylum and withholding of removal is entitled to a full evidentiary hearing.[19] Second, on April 6, 2018 President Trump put forth a memorandum titled "Ending "Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement," calling for an end to the policy of where certain asylees are permitted to await their hearing outside of immigration detention. These two shifts, when viewed together, will lead to a marked decline in both asylum claims filed and successful asylum claims. Holding asylees in detention during the pendency of their proceedings compounds their vulnerability. Kari E. Hong, Professor at Boston College, reports that she has two clients who report sexual abuse in two distinct detention facilities, Hudson (in New Jersey) and Aurora (in Colorado). Both clients have relief available, but remain detained. USC states that immigrants are becoming disheartened and are considering forfeiting their claims despite representation. One client in her thirties from Honduras was raped repeatedly by gang members, but, as opposed to proceeding with her case, decided to return to her home country. The Clinic was told by the client that she made this decision because detention officers informed her there would be no more release from detention and clients were no longer receiving asylum. Similarly, two twin sisters from El Salvador fleeing rape and third-party violence were contemplating giving up their claims after learning of judicial quotas. Summarily denying asylum claims will be incentivized and facilitated in cases like these due to

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

the aggregate impact of quotas, timelines, the inability to be released from detention, and the new legal standard articulated in *Matter of E-F-H-L-*.

Removing Immigration Courts From the Department of Justice's Control and Restoring LOP are Two Immediate Needs to Ensure Due Process in Removal Proceedings

While we have yet to see the larger impact of each of these changes in policy and law, there is no denying that when viewed cumulatively they present an overt attempt to erode due process. Congress must maintain its commitment to LOP as a vital and financially viable program.[20] Congress must also engage in rigorous oversight of the DOJ and enact legislation to create an independent immigration court. We have built our careers upon our dedication to serving vulnerable immigrant populations and training the next generation of competent immigrant rights attorneys. The American Bar Association places an obligation on educators to ensure a non-lawyer's conduct comports with the professional and ethical obligations of an attorney.[21] While secondary to the impact on immigrants, it is clear that these changes to our legal system will force some clinicians and educators to either forgo representation on certain complex cases or restructure programs as the immigration court system clashes with pedagogical goals. The education of future attorneys should be taken seriously as it is critical to ensuring our immigration system runs efficiently and ethically.

For the above reasons, we call on Congress to defend the integrity of an already straining immigration court system. Thank you for your consideration.

Respectfully Submitted,

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[20] *See* H. Rept. 115-231, 2018 Commerce, Justice, Science and Related Agencies Appropriations Bill, https://www.congress.gov/congressional-report/115th-congress/house-report/231/1, as adopted by the Explanatory Statement accompanying the 2018 Appropriations Bill, https://www.congress.gov/crec/2018/03/22/CREC-2018-03-22-bk2.pfd.

[21] ABA Model Rules of Professional Conduct, Rule 5.3, Responsibilities Regarding Nonlawyer Services, subpart (b).

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