

The New York Legal Assistance Group (NYLAG) respectfully submits this testimony for the Subcommittee on Immigration and Citizenship’s consideration at the January 29, 2020 hearing, “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.

NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address the urgent legal needs of our clients with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG provides free legal services to low-income New Yorkers in a number of areas of civil law, including immigration law. NYLAG’s Immigrant Protection Unit provides free legal services -- affecting over 30,000 immigrants in 2018 alone -- specifically to low-income immigrants who are defending against removal in the immigration courts.

As advocates before the Executive Office for Immigration Review (“EOIR”), NYLAG attorneys have noticed alarming trends towards the erosion of the independence of immigration judges in making even the most routine decisions, resulting in widespread due process violations for those in removal proceedings. Indeed, immigration judges have openly stated during hearings in which NYLAG attorneys have appeared for immigrant respondents that they no longer have the authority to make even the most basic docket management decisions.

For example, immigration judges have stated, and EOIR has issued policy documents confirming, that certain “family units” in removal proceedings must have their cases adjudicated within one year of filing of the Notice to Appear (“NTA”), with sets forth the charges against the immigrant in removal proceedings.¹ This is the case regardless of whether the Department of Homeland Security (“DHS”) timely filed the NTA with EOIR. This is also the case regardless of whether the immigrant facing removal has found an attorney who needs additional time to prepare the case, or expects to obtain evidence to support the case but will not receive that evidence until after the one year mark. This policy, mandated by the Executive branch, has had deleterious effects on immigrants, immigration judges, and legal service providers like NYLAG. First, this policy fundamentally restricts the ability of immigration judges to make decisions about the management of the cases on their own docket, with the effect of making it more difficult for immigration judges to provide a fair hearing to the respondents defending before them. Second, this policy infringes upon the basic due process rights of immigrants in removal, making it often virtually impossible to obtain counsel and gather the evidence necessary to win a case in a timely manner. Finally, this policy makes it harder for free legal services providers like NYLAG to represent cases in this posture, further compounding the due process violations faced by families on the accelerated docket.

By way of example, NYLAG’s clients, the “Ramirez” family were placed on the accelerated family unit docket. NYLAG accepted their case approximately two months before their trial, which had been scheduled less than six months after their prior master calendar hearing. NYLAG moved to continue on the grounds that we had recently been retained and needed additional time to gather evidence and develop arguments, particularly in this case where two members of the family had factually and legally distinct asylum claims. Despite the rationale

¹ Executive Office for Immigration Review, “Case Priorities and Immigration Court Performance Measures,” Jan. 17, 2018; Executive Office for Immigration Review, “Tracking and Expedition of ‘Family Unit’ Cases,” Nov. 16, 2018.

provided, the immigration judge did not feel she had the authority to continue the case. **[What was the upshot? What happened to the clients in this case? We did our best but did not have the time to gather evidence from abroad that might have ultimately helped support their burden on the case?]**

Immigration judges have also stated, and EOIR has issued precedential case law confirming, that they no longer have the ability to make routine docket management decisions that can be made by independent judges in other courts throughout the country and across federal, state and administrative systems. For example, immigration judges can no longer terminate a case in the interest of justice. In the past, immigration judges were able to decide to terminate a case so as to allow an immigrant respondent to pursue collateral relief from the United States Citizenship and Immigration Services (“USCIS”), or to avoid grave injustices, for example the removal of an infant or incapacitated immigrant, or the removal of a terminally ill immigrant. They are now prohibited from doing so.

Moreover, beyond simply lacking the authority to terminate cases in the interest of justice, immigration judges have now also been prohibited by EOIR from “administratively closing” cases, which is the EOIR term of art for taking a case off a judge’s docket. Even where there is no reason to proceed on a case for an unpredictable amount of time, for example because the immigrant respondent is awaiting a decision from USCIS on a pending application, immigration judges are required to continue the case to another date, thereby wasting their own time in conducting another hearing for the sole purpose of scheduling a new hearing, wasting the resources of legal services providers such as NYLAG, and causing increasingly longer delays for hearings.

NYLAG’s client “Alex” typifies this problem. With NYLAG’s assistance, Alex filed a petition with USCIS as a Special Immigrant Juvenile based on domestic abuse he suffered in his home country at the hands of his father. NYLAG requested his case be taken off the immigration court calendar, either through a move to a status docket or administrative closure. However, the immigration judge stated that she lacked authority to move the case off her calendar. Instead, she scheduled the case for another appearance. Based on current processing times for this type of petition before USCIS, it is likely that the petition will remain unjudicated at the next hearing. Nevertheless, Alex, a NYLAG attorney, a DHS attorney, and the immigration judge will all be forced to spend their time discussing the case without making any progress towards its resolution.

Finally, and perhaps most egregiously of all, is the continuing erosion of the authority of immigration judges to continue cases at all. The Department of Justice, including the Attorney General himself, have issued precedential decisions slowly mandating that immigration judges proceed to trial on cases even where the case against an immigrant respondent may become moot as a result of a USCIS decision in the future, thereby spending hours of their time hearing a matter that could have been, and should have been, resolved through other means.² For example, many of NYLAG’s clients have submitted petitions to USCIS for U Nonimmigrant Status. The waiting period for a resolution of such a petition is currently in the range of five years. A removal order is waivable through a petition for U Nonimmigrant Status. However, recent EOIR

² See, e.g., *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

precedent now requires immigration judges to schedule trials and hear and decide cases where their final decision may very well be found to be waived in a matter of years.³

It should be further noted that while much of the recent EOIR policy restricting judicial independence allows for exceptions to be made if DHS consents, EOIR well knows that DHS attorneys have also recently lost much of their discretion to join in motions with immigrant respondents, so the stated exceptions to the rules are unusual at best, and specious at worst. Moreover, they still fail to allow immigration judges any autonomy whatsoever, instead requiring them to make the decision recommended by the prosecuting agency.

The current EOIR system has been politicized to such an extent that immigration courts are now being used to promote the executive branch's stated policy goal of deporting as many immigrants as possible, even where Congress has legislated avenues that would permit immigrants to remain in the United States and in contravention of the most basic of due process rights. As such, NYLAG strongly recommends that the Subcommittee take whatever steps it deems appropriate to correct the path of the EOIR away from a political tool, and into a judicial body wherein adjudicators have the independent authority to manage their dockets and provide fair hearings to the immigrants.

³ See *Matter of MAYEN*, 27 I&N Dec. 755 (BIA 2020).