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# IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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# IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM

**WEDNESDAY, MAY 18, 2011**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:02 a.m., Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Franken, Blumenthal, Grassley, and Cornyn.

## OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I am going to make a short opening statement. I will put my whole statement in the record, and I want to ask each of the witnesses to put their statements in the record, but to summarize them orally so we can go to questions.

It is an understatement to say that immigration in this Nation has led to fierce debate, but we have no comprehensive solution. I know President Bush tried. I agreed with President Bush on his efforts to develop a comprehensive immigration policy.

Just a week ago, President Obama went to the border to renew the discussion, and he called for Congress to enact comprehensive reform. I do not in any way underestimate how difficult that would be, but I hope for the country that we can achieve comprehensive reform.

The more we struggle to attract support on both sides of the aisle for such a solution, the current system continues to be hobbled by a complex immigration statute, and by overburdened immigration courts. Today we are going to take a look at the courts.

Immigration courts have not attracted much attention in the immigration debate, but the decisions made by these judges carry a great deal of weight. For an asylum-seeker with a valid claim of persecution in her home country, denial of asylum may be tantamount to giving her a death sentence.

Long delays in the immigration courts pose additional burdens. A successful petitioner may not be able to reunite with his or her family, or bring the children away from danger to the United States during the pendency of the case.

In my home State, Vermont immigration and asylum advocates assist hundreds of immigrants and asylum-seekers each year. They work hard to overcome the challenges to winning a claim.

Let me give you an example that I am concerned about. The Associated Press recently reported on an asylum-seeker who had been

jailed and tortured for supporting the political opposition in Cameroon. Her husband died behind bars because of his activism. Her brother and her mother were tortured.

This woman, who fled and had to leave behind two sons and a 20-month-old daughter, waited for 5 years for her case to be resolved by the immigration courts. Five years, and, of course, during that time, her children were separated from her.

By the time she completed all the steps to bring her children to the United States, her daughter, who she had last seen as an infant, had reached the age of 10.

The pace of justice in the immigration courts is too slow. Courts operate under the Executive Office for Immigration Review, or EOIR, within the Department of Justice. They have struggled for years under heavy caseloads, insufficient staffing, and technological weaknesses.

The Federal circuit courts have excoriated immigration courts and the administrative appeals board for shoddy work, including denial of due process, bias against immigrants, and unreasoned opinions.

In the past Administration, the hiring of immigration judges was politicized, something we all have acknowledged, with candidates vetted for political affiliation, voting records, and personal views on abortion. It had nothing to do with immigration. The candidates for immigration judge positions were not asked about their immigration expertise.

The courts have come a long way since that point. This Administration revamped the personnel policies. They hired immigration judges with higher qualifications and a diversity of backgrounds.

Clerks and support staff have been added. Training and technology have both improved.

I want to commend our witness, Juan Osuna, the Director of EOIR, for his leadership in steering the ship onto a steady course.

But now, new challenges have arisen that are not of the courts' making. The heavy emphasis on enforcement by the Administration has led to a sharp increase in caseloads. At the same time, the Department of Justice faces budget cuts across the board. The Department can no longer hire judges to keep up with the caseload.

The case backlog rose 44 percent from the end of Fiscal Year 2008 to the end of the calendar year 2010. And so the example of the asylum-seeker from Cameroon has become all too typical.

I called this hearing not to criticize the immigration courts, but to have a constructive discussion about what they can do to be improved, and to ask what the courts can do with current resources to increase efficiency and improve the quality of adjudication. How many new judges and more staff are needed to bring the case backlog under control? What innovative steps are being taken by nongovernmental entities, such as the New York Immigrant Representation Study, launched by Judge Robert Katzmann of the second circuit court of appeals? And, how can bar associations, law firms, and nonprofit organizations contribute?

These challenges are not partisan or ideological. We all want the courts to operate fairly. We want them to serve the interests of justice. So I hope we will discuss how best to achieve these goals.

I am joined by the distinguished Ranking Member, Senator Cornyn of Texas, a man who, with both his judicial experience and just living in Texas, has a great deal of experience with immigration issues, and I yield to him.

I will put my full statement in the record, and then we will go to statements from the witnesses.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

## OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Well, thank you, Chairman Leahy, for holding today's hearing, and, Senator Grassley, for allowing me to serve as the Ranking Member during the hearing.

As a former State court judge and attorney general, I am very familiar with the heavy workloads that judges and prosecutors and defense lawyers carry day-by-day, and it is a great privilege, I can tell you, to serve as a judge and a great honor to decide cases and interpret the laws passed by Congress, but there is no place, in my view, for making it up as you go along. And we need to make sure we have immigration courts that are enforcing the law as written by Congress and not becoming policymakers unto themselves.

In previous immigration debates, we have focused on border security, interior enforcement, temporary worker programs, and what we need to do with the current population that is here without the appropriate legal visas. However, we have not had an in-depth discussion about restructuring and reform of the immigration court system itself.

My staff and I are working on a proposed bill based, in part, upon some of the recommendations that have been made by the ABA and others, and, of course, we will look to learn from you here today about other ways that we can improve the legislation and reach out to colleagues and try to get good bipartisan support.

Immigration courts are administrative tribunals under the jurisdiction of the attorney general and the Department of Justice. The effectiveness and efficiency of the court depends on Department policy and procedures. It also depends on the resources available to the Department of Justice to handle the volume of removal proceedings initiated each year.

Of course, throwing resources and additional staff at a broken system is not a solution. And whether we ultimately decide to restructure the entire immigration court system, I think there is plenty we can do in the interim to improve the process.

It serves no one's interest to have cases languishing for years before a decision is made. It also poses a potential security risk by allowing criminal aliens to remain at large in the United States while their cases are pending review for years.

In the past, I have advocated for streamlining removal proceedings and judicial review to limit potential abuses and frivolous claims from clogging up the system. We should also address the many loopholes in the law that allow ineligible aliens to stay in the United States for significant periods of time and do a better job of enforcing final removal orders.

Courts can issue numerous removal orders, but the orders will have no effect if we continue to be lax in the enforcement of current immigration laws. The government needs to do a better job of locating aliens who have already shown a clear disregard for the law and expediting their removal from the United States.

Expedited removal is one administrative tool that could help reduce the burdens on an already overwhelmed immigration court system.

I join the chairman's concerns in fixing our broken immigration system, but I personally do not believe the American people will support that effort until we have shown them that we are serious about enforcing the law. And if the law needs to be changed, then it is within the power of Congress, with the support of the American people, to change it in a way that reflects our values and our self-interests, frankly, in protecting our country against those who would come here for purposes other than to contribute to our society in a constructive way.

But immigration court reform, I think, is a critical component of credible immigration reform and is absolutely required if we ever hope to regain the public's trust in the government to do its job.

We must also remember that building a better immigration court system is not the only thing we need to change. As I indicated earlier, we need effective border security and interior enforcement to make the immigration court system truly work.

We need credible immigration reform to remedy the flaws in our immigration laws so that people can come here legally and those who have violated our laws may be removed in a timely manner.

I remain committed, Mr. Chairman, to credible immigration reform and I am ready to engage on this issue when the President makes it a priority.

I look forward to hearing the testimony today, as well as your recommendations for immigration court reform.

Thank you again.

Chairman LEAHY. Thank you. Thank you very much. I know that the group of us who worked with President Bush included Senator Cornyn. And, again, I do believe strongly in enforcement, but I also believe strongly in having an immigration law that reflects the reality of this country.

I will first call on Juan Osuna, the Director of the Executive Office for Immigration Review, Department of Justice. In 2009, he was appointed Deputy Assistant Attorney General for the Office of Immigration Litigation, then continued his work on immigration policy as an Associate Deputy Attorney General at the Department of Justice.

From 2000 to 2009, he served on the Board of Immigration Appeals, becoming its chairman in 2008. And as of yesterday, he is the Director of EOIR. I offered him both congratulations and condolences, whichever it might be at whichever time of day it is.

But we are delighted to have you here, and, please, go ahead, sir.

**STATEMENT OF MR. JUAN P. OSUNA, DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Mr. OSUNA. Thank you, Mr. Chairman.

Mr. Chairman, Senator Grassley, Senator Cornyn, Members of the committee, thank you for the opportunity to speak with you today about the progress that the Executive Office for Immigration Review continues to make.

The Executive Office, or EOIR, administers the Nation's immigration court system, composed of 59 immigration courts around the country, plus the Board of Immigration Appeals.

The Department of Justice and EOIR continue to take significant steps to maintain and further improve the operations of the court system and we are doing so at a time of great challenge for the courts, which received more cases over the past couple of years than anytime in its history.

A large and growing proportion of these matters are related to aliens who are detained while they are awaiting their hearings. These detained cases continue to be the priority for EOIR, in large part, because they involve individuals who have criminal convictions that may make them deportable from the U.S.

We anticipate that this emphasis on the removal of criminal aliens and others who pose a threat to the community will continue as the enforcement programs of the Department of Homeland Security continue to expand.

Despite the challenge of an increasing caseload, I would like to share with you today some of the efforts that EOIR has undertaken that are designed to ensure prompt review of priority cases, while giving each individual case the review that it merits.

A well functioning immigration court system begins with adequate resources, and the Department and EOIR are fully committed to ensuring that the immigration courts have the appropriate number of judges and staff needed to support our mission within the confines of an admittedly difficult budget climate.

During Fiscal Year 2010 and into the beginning of Fiscal Year 2011, EOIR undertook a major hiring initiative that resulted in the hiring of more than 50 new immigration judges. While this initiative was cut short due to budgetary restrictions on hiring and further reduced by attrition, we were still able to net a sizable increase in the immigration judge corps.

The number of immigration judges reached a record level of 272 in December 2010 and, as of today, stand at 268 judges hearing cases nationwide.

We are very hopeful that Congress will support and approve the President's Fiscal Year 2012 request for additional appropriations for EOIR in order to allow us to continue our successful hiring initiative.

We also recognize, however, that it is not enough to hire the most qualified individuals to serve as immigration judges. It is vital that we properly train new judges and that we provide continuous training for judges as long as they are hearing cases.

Conferences that EOIR held in 2009 and 2010 provided continuing education on many substantive legal issues, including asylum, adjustment of status, and many procedural issues.

The current budget environment is making training a little bit more challenging, but EOIR is turning to other established methods of training to ensure that our immigration judges and members

of the Board of Immigration Appeals are always up-to-date on this rapidly changing area of law.

The Department expects not only legally correct decisions from its immigration judges and members of the BIA, but also the demeanor and temperament appropriate for delegates of the Attorney General.

This year, EOIR released a new "Ethics and Professionalism Guide for Immigration Judges" and we are ensuring that any allegations of misconduct against immigration judges receive prompt and adequate review and resolution.

The Board of Immigration Appeals also continues to enhance the quality of its decisions, while keeping up with the appellate caseload. An indicator of the Board's success is the Federal courts. There are approximately 530 fewer appeals from BIA decisions into the Federal courts today as opposed to a year ago, and overall, the number of BIA appeals to the Federal courts are about half today as what they were at the high water mark in 2006.

In addition, the Federal courts are affirming BIA decisions at a higher rate. So far in 2011, the courts are affirming almost 90 percent of the Board's decisions nationwide.

We believe that the good work of the immigration courts and the BIA is worth noting and that with congressional support, it can continue to improve.

Other programs, like the very successful legal orientation program, are expanding and helping respondents in proceedings better understand the system, while also helping to boost efficiency.

We also have underway enhanced efforts to combat fraud, hold bad attorney responsible and accountable, and enhance the capacity of legitimate organizations to represent immigrants.

Chairman Leahy, Senator Cornyn, Senator Grassley, this statement paints only a partial picture of the work that is being done at EOIR. I want to note that I do not view the immigration court system in isolation or as a standalone component. As you know, every removal case before an immigration judge begins with a DHS enforcement action, and, therefore, the Department of Justice and EOIR are in constant contact with DHS and other agencies in order to anticipate and respond to caseload trends.

This important coordination effort allows our two departments to explore additional efficiencies and ways of handling the administrative caseload more efficiently, while ensuring that we are focusing those resources on the highest priority cases.

Thank you for the opportunity to speak with you today. I look forward to answering any questions you might have.

[The prepared statement of Mr. Osuna appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our next witness, Julie Myers Wood, served as Director of U.S. Immigration and Customs Enforcement during the last 3 years of the Bush Administration. Prior to that, she held positions at a variety of government agencies, including Department of Commerce, Department of Treasury, Department of Justice.

It is good to see you again, Ms. Wood, and you are now president of INC Solutions, LLC.

Please go ahead. Your full statement, of course, will be made part of the record.

**STATEMENT OF HON. JULIE MYERS WOOD, PRESIDENT, ICS CONSULTING, LLC, ARLINGTON, VA**

Ms. WOOD. Thank you very much and good morning, Chairman Leahy and Ranking Member Cornyn and Senator Grassley and Members of the committee. It is great to see all of you again and also nice to be here more unofficially than as a government official.

But it is a pleasure for me to have the opportunity to talk a little bit about what I saw when I was at ICE and ways I think we can work to improve our immigration court system.

As a former assistant secretary at ICE, I did really have an insider's view of how the immigration court system can affect our overall immigration enforcement program.

Years of delay for individual hearings affects the American public's ability to believe that we are getting enforcement done and we are doing a good job, and can also lead individuals, like the individual that Chairman Leahy highlighted, can leave them in legal limbo for far too long.

So I think what Ranking Member Cornyn is doing in looking at how can we address the immigration court system independently kind of makes a lot of sense.

We should, however, not forget that the immigration court is only one part of the larger system and I am fully in support of the calls to reform our overall immigration system, and I think a band-aid fix approach will not be enough. And so we should look overall if we can make some changes and improvement.

But given what we have and given the increasing number of cases that are coming into immigration court, I think there are several steps that can be taken now to improve efficiency and improve justice in the system.

First, I would look to internal efficiencies and I think that under Juan's leadership, the Department of Justice has taken some significant steps to try to improve efficiency in the immigration courts with the existing caseload.

But I think there is more to be done. I think we can look to the model of the Federal criminal courts and look at some of the things they do there in terms of performance metrics and also in terms of supervisory judge roles to improve the performance and the professionalism of the court.

It also makes sense to ensure that our judges are getting enough training on the complicated cases so they can move them along not only swiftly, but correctly, and not make kind of incorrect or unwise decisions as they move forward.

But internal tweaks will only get us so far. And so we have to look—are there external things that we can do differently in this system that will not reduce our overall effectiveness in immigration enforcement, and I think there are a number of things that we can do.

First, I think the Agency has been looking at prosecutorial discretion. What cases are in the courts now that should not be? And I think that makes complete sense.

A lot of times, in my experience, we would spend 5 years or a number of years litigating cases and, at the end of the day, decide that this was a case that should not be brought. We should decide that up front and keep that case out of immigration court.

The same thing with voluntary departures. Many aliens are eligible for voluntary departures. That should be encouraged at the very beginning of the process so eligible aliens stay out of the immigration court system.

There are also more mandatory methods that could be effective. I think looking at expedited removal, can we expand that, can we expand that to known smuggling routes, can we expand that to aliens who are incarcerated in certain instances, still within our current statutory authorities. I think that could make a lot of sense and then careully could be effective.

We should also look at stipulated removal and a program called Rapid Prepack. One of the greatest pressures coming into the immigration court system are criminal aliens coming through the Secure Communities program. The Rapid Prepack program takes criminal aliens who are in states that have early release laws for citizens and essentially applies them also to non-violent criminal aliens and allows them to stipulate to their removal, saving them time in State prison and saving the government time in putting them through removal proceedings.

That saved six states over $400 million to date and I think it is a program worth expanding. But we cannot look at efficiency kind of by itself without thinking of how are we making sure that justice is being done. And one of the concerns that I had when I served as assistant secretary are the number of times when representation was really needed, but it was not there.

We have many good immigration and ICE attorneys that are looking hard to make sure they find the cases that warrant representation or warrant merit, but it is hard to find that when everybody is pro se.

So I think it makes sense to look at are there vulnerable populations that would benefit through court-appointed representation.

In addition, I think expanding the legal orientation program would be helpful. I saw that that program really made a difference in detention facilities, and, in fact, it has reduced detention time by an average of 7 days. So it is actually a cost-saving program. But right now, it is only in 27 facilities. So that is the kind of thing that I think could be expanded and could be done in a cost-saving manner to make sure that individuals get the attention they need.

As I mentioned, I think these things are really just kind of arguing around the edges. We need overall reform and an overall look at the system, and I would join the Chairman, the Ranking Member's and Senator Grassley's efforts to do so.

Thank you very much, and I look forward to your questions.

[The prepared statement of Ms. Wood appears as a submission for the record.]

Chairman LEAHY. Thank you. I have to keep reminding myself not to call you Ms. Myers anymore, but Ms. Wood, and thank you very much for your comments. I do appreciate them and I appreciate you being here.

Our last witness, Karen Grisez, is the chair of the American Bar Association's Commission on Immigration. She oversaw the completion of the Commission's comprehensive 2010 study on immigration adjudication, which is the study here. It is the most significant report of its kind, in more than a decade.

Ms. Grisez is an attorney with the Washington, DC, office of Fried Frank, where she also serves as a public service counsel and advises attorneys in their pro bono work, including a large number of asylum cases.

So, Ms. Grisez, again, we will put your full statement in the record. The report has been very helpful to my staff and to this committee.

Why do you not, in the time that you have, please tell us what you would like us to remember especially from this hearing.

**STATEMENT OF MS. KAREN T. GRISEZ, CHAIR, COMMISSION ON IMMIGRATION, AMERICAN BAR ASSOCIATION, WASHINGTON, DC**

Ms. GRISEZ. Good morning. Thank you, Mr. Chairman, Senator Grassley, Ranking Member Cornyn. I very much appreciate the opportunity to be with you all this morning to share the views of the ABA on ways to improve efficiency and justice in the immigration court system and to offer whatever I may have to share from my personal experience in the handling of matters in immigration court and supervising other lawyers in doing so.

The ABA has a special interest in the efficiency and fairness of removal proceedings. The Commission, as you have heard, released a report last year making several recommendations for improving the removal adjudication system.

I want to focus my remarks this morning on only a few of those recommendations that would boost efficiency, while also improving justice for those going through the system.

I want to begin by commending Director Osuna on all the recent improvements that have been made at EOIR. We very much appreciate his efforts to improve the agency's performance and, at the same time, we echo his concerns about the implications of DHS' increased enforcement efforts and the spike in NTAs on EOIR's ability to keep up with the caseload.

Increased caseloads, as you know, without increased resources can only lead to burgeoning backlogs. We recommend, therefore, an increase in the hiring of IJ packages sufficient to bring caseloads down to a level comparable to those of other Federal administrative adjudication systems and, at a minimum, Congress should approve EOIR's Fiscal Year 2012 budget request.

An additional recommendation we have to increase the productivity of the immigration court without more judges is to hire more law clerks to support the judges at a ratio of one clerk to one judge, where now the average is more like one clerk to four judges.

With enough new judges to bring caseloads down to manageable levels, we should also then expect formal written decisions rather than oral decisions hurriedly dictated immediately at the conclusions of hearings. This would improve quality of the decisions, increase confidence in them, and decrease both appeals and time-consuming remands.

Another important area of concern for the ABA is access to counsel. We also favor a system in which every person in removal proceedings, whether detained or not, would have access to a legal orientation program. The LOPs provide critical information about removeability and eligibility for various forms of relief, but equally important is the information that they provide to individuals who have no relief.

Far too often, I see people pursuing appeal after appeal afer appeal every time a judge asks them, "Do you accept my decision or do you want to appeal?" I am one of the screeners that assists the DOJ in the BIA pro bono project and I constantly see people, pro se people pursuing appeals to the BIA, aggravated felons, with no relief under the law, and their appeal is "I want another chance. I'll never do it again."

And where the cases may be sympathetic and there may be a lot of equities, there is no legal relief and those cases should not be in the system under the current law.

Chairman LEAHY. (Off microphone.)

Ms. GRISEZ. Yes. And the sooner, Mr. Chairman, the sooner persons get access to the LOP, the sooner they can make those decisions about abandoning when that is the appropriate avenue.

We had a case in my firm where an associate was appointed to a ninth circuit appeal, and that individual, after several years of detention, had never spoken to a lawyer before. On review of the case, the lawyer found that while the individual was correct about a procedural defect in the conduct of his hearing below, he ultimately had no relief. He was not eligible for anything.

So after counseling, that individual withdrew his appeal and accepted deportation, but that could have happened several years earlier if he had seen a lawyer earlier.

We have three recommendations today on conserving immigration court resources. First, only those cases that actually need an adversarial process and where the Government has an intent to remove the person should be in the immigration court system. If there is no intent to remove or the person is prima facie eligible for relief, that latter category of cases could be handled administratively.

Then, the use of pre-trial conferences, already authorized by the regs, should be more extensively used to narrow issues and preserve hearing time.

Third, the last point is on asylum applications. We strongly favor moving defensive applications in removal proceedings in the first instance to the asylum offices of USCIS, where they can be adjudicated more quickly by specially trained officers. And, finally, elimination of the 1-year deadline. That is consuming a lot of adjudicatory resources, both at the asylum office level and later in immigration court. And our recommendation is that the time should be spent on the merits, ascertaining the need for protection and not only assessing when the person entered or whether they have appropriate proof of their date of entry.

So with that, Senator, I will conclude my opening comments and am happy to take your questions.

[The prepared statement of Ms. Grisez appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much. And I thank all three of you for your comments. To many, this is probably not seen as the most exciting of issues. Except for those who are in the immigration court system in one way or the other. Then it is a vital system and I think it is extraordinarily important not only for our country, but for our system of justice in the United States.

Now, Mr. Osuna, let me ask you. Using DOJ's data, the Transactional Records Access Clearinghouse, or TRAC, found the immigration courts case backlog reached an all-time high of 267,000 cases at the end of calendar year 2010, and, of course, that backlog is going to be difficult to reduce if you receive 400,000 new cases in Fiscal Year 2011.

Assuming the enforcement policies remain the same, how does the White House coordinate budget policy so that we can ensure that there is adequate funding and staffing to keep up with these 400,000 new cases coming in?

Mr. OSUNA. Yes, Mr. Chairman. One of the real positive aspects of the last couple of years in my experience has been that there is an awareness at all levels, both within the Department, at DHS, at OMB, and at the White House, about this crucial link between enforcement and adjudications.

It is critically important that we look at the system not by agency, agency-by-agency or even department-by-department, but as a process; that the removal process begins with an enforcement action and goes potentially all the way up into the Federal courts.

The White House and OMB have been fully engaged and fully supportive of making sure that those links are maintained in the appropriations process and enhanced; that if there are enhancements to DHS enforcement programs, that there is some sort of assessment and a link made to what is going to be required in the immigration court system.

Chairman LEAHY. Well, when you look at what is required, you must have in mind what you think, in an ideal world, is the number of immigration judges you need. How many additional judges would you need?

Mr. OSUNA. Well, I think what we are looking at—it is a difficult question, to one extent, because we do not know exactly what we are going to see with enforcement patterns in the future.

It is likely that if enforcement patterns continue at DHS the way they are, that we will be facing a substantial increase in immigration court proceedings in 2011 and 2012.

I think, at a minimum, we are looking at a hiring initiative comparable to the one that we just undertook for the last year and a half, which was roughly about 50 new immigration judges. But that is a very rough number that would depend a lot on a lot of other factors.

It is possible that even with an additional 50 judges, for example, that these enforcement patterns could be such that it might not be enough.

On the other hand, if the Congress does pass some sort of comprehensive immigration reform bill that has a wide effect on the system, that will also be a game-changer in many ways for the immigration courts.

Chairman LEAHY. Is it safe to say, assuming things stay the same, you are going to need more?

Mr. OSUNA. Absolutely.

Chairman LEAHY. And, Ms. Grisez, let me ask you. Statistics from the Department of Justice show the asylum grant rate in immigration courts is approximately 50 percent, coming up from a low of 16 percent in 1996.

Let me play the devil's advocate a little bit. Does this show the immigration courts are getting it right, or do we have to worry about asylum-seekers in the system?

Ms. GRISEZ. Well, Senator, it is difficult to say what the right——

Chairman LEAHY. Is your microphone on?

Ms. GRISEZ. There, sorry. It is difficult to say what the right number is and I would never say that there should be a uniform percentage of what the approval rate should be.

Two different things are going on. One is the asylum office has gotten better and as the asylum office adjudications are improving, fewer cases are making their way into the immigration court system than formerly were.

Another thing is that fewer asylum-seekers, in the first instance, are coming to the United States. So those going into the system from the expedited removal process and coming straight into court for adjudication have also been reduced.

But as Director Osuna said, more people in immigration court and certainly more non-detained people in immigration court have been getting counsel over the recent years. So that is one of the factors that may be contributing to the current grant rate.

But at the same time, this is all in the context of people coming from different situations, from different countries, different dynamics, all over the world. So the grant rate should never be stable. It should be justice. It should be the right result in every particular case, regardless of——

Chairman LEAHY. You may have a major civil war, even a genocidal operation in one part of the world which may dramatically spike the numbers, just to give one example.

Ms. GRISEZ. Yes, Your Honor. At any given time——

Chairman LEAHY. Senator Cornyn is the only one who has been a judge. My time is up, but I have one more question.

Ms. Wood, we have all talked about the importance of counsel. Ms. Wood, you know Asa Hutchinson, former Undersecretary of Homeland Security, former Member of the House of Representatives. Both of you have spoken in public about the efficiencies you gain when the attorneys are available to represent detained immigrants in deportation proceedings.

Now, you were in a position where, as an official, you were charged with removing immigrants. Did counsel help ICE? Did it help? How could it be more efficient?

Ms. WOOD. Absolutely. And when I was a Federal prosecutor, some of the hardest cases that I tried were cases that were pro se cases.

It was hard for the judge to decipher kind of what was going on. It was hard to make sure, as an officer of the court, that the defendant was able to present their case appropriately, and it was

very difficult. And I saw absolutely the same thing at ICE in civil immigration proceedings.

Chairman LEAHY. Thank you. I think anybody who has been a prosecutor will say that you actually have an easier time if you have good counsel on the other side.

Ms. WOOD. Absolutely. Absolutely. And you have a duty. The ICE attorneys feel that they are officers of the court under the Rules of Professional Responsibility. They have a duty to make sure that justice is done. And so they are looking to see are there some sort of issues, and sometimes, particularly with mentally incompetent individuals or unaccompanied minors that do not have representation, it is really hard to figure out is there—is there something there that could allow them to adjust or is there not. And so counsel definitely helped and aided those cases.

Chairman LEAHY. Judge Cornyn.

[Laughter.]

Senator CORNYN. I thought Ms. Grisez calling you Your Honor was a nice touch, actually.

Chairman LEAHY. Actually, I appreciate it very much.

Ms. GRISEZ. It was really that I was just so eager to speak with Senator Cornyn.

[Laughter.]

Chairman LEAHY. We will start the clock again for Senator Cornyn, because I do not want to take his time, but I know, having spent years in courtrooms before I came here, I at least twice in my first 6 months as a very, very junior Member of one of the committees referred to the chairman as his honor, and I considered it a compliment to him. So I took it as a compliment.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

The average time it takes to dispose of an immigration case, the national average, I believe, is 467 days. Mr. Osuna, you can correct me if I am wrong, but those are the numbers that I have.

In California, it is 639 days, and I am glad to say in Texas it is 253 days, although I do not think that is anything to be proud of, in particular.

You have talked a lot about the resources that you need and whether counsel are appointed and the problems of trying to litigate cases with pro se parties.

But let me talk to you just briefly about the streamlining of judicial review as a general matter, and I would like to get the views of all three witnesses.

We know that multiple layers of review can sometimes catch mistakes that are made and certainly, if you are talking about a death penalty case, you want to make sure you have the maximum sort of review and opportunities for people who are wrongly convicted to raise those issues.

But in fairly routine matters that take 30 minutes before a trial judge, and you can correct me if I am wrong, but I am advised that an asylum case would take maybe an hour, depending on the nature of the evidence produced, but many of these cases are really not in dispute in terms of the facts of the matter.

It is a question of getting somebody the due process that is required and getting him in front of the judge. But the multiple lay-

ers, a hearing before an immigration judge, a review by the Board of Immigration Appeals, a possible review by the circuit court of appeals, what sort of opportunities do you see—and I would like each of the witnesses to respond to this—for streamlining judicial review that would not sacrifice basic fairness and the rule of law, but which would give more certainty and perhaps cut down on some of the logjam which we find not only before the immigration judges, but before the circuit courts?

Mr. OSUNA. Let me just start with a little bit of overview. In terms of the multiple levels of appeals, 90 percent of immigration judge decisions never get appealed beyond the immigration judge stage.

In other words, the immigration judge decision in 90 percent of the cases—in fact, it is more than that, it is about 92 percent these days—ends right there.

In detained cases, cases tend to move very, very quickly, for the most part, nationwide. Detained cases, the appeal rate there is even smaller than the national average. I am not sure what it is, but it is about half the regular appeal rate, meaning that it is close to 4 or 5 percent of the nationwide average of 8 to 10 percent.

So I think it is an important big picture or item to talk about, because, again, the vast majority of cases never go beyond the immigration judge stage.

The Agency does focus, as we mentioned, on detained cases and I have begun to talk about the system more in terms of bifurcated system between detained and non-detained, because that is really what it has turned into.

Because of enforcement patterns, because of everything else, the focus of the agencies, not just at ICE, but also at the EOIR, is on the adjudication of detained cases.

The Department has set this as a priority. What that means for EOIR is that resources and immigration judge docket time and immigration judges themselves are being shifted into the detained dockets, for obvious reasons. Those are the individuals that are detained at cost to the government. There is a liberty interest there, and often those individuals are the ones that have criminal convictions that we should be moving relatively quickly through the system.

In terms of changes, the Department is not in a position to support——

Senator CORNYN. Mr. Osuna, may I make a suggestion that—I am going to ask you to followup, since time is limited here, in writing with some of your suggestions and I am really earnest in my request to get your advice and support on this, but I want to give the other witnesses a chance to answer this question, and I hope we get a couple of rounds and we can come back to some other issues.

Ms. Wood.

Ms. WOOD. Certainly, I would agree with Juan that the majority of cases kind of do not get appealed. I think one of the really important things is reducing the cases that go into the immigration courts at the core level to begin with.

Then I think looking to see——

Senator CORNYN. And how do you do that?

Ms. WOOD. How do you do that? By expanding, by looking at kind of a potential expansion of expedited removal.

Senator CORNYN. Is that within the Secretary's discretion to expand the category of cases that are subject to expedited removal?

Ms. WOOD. It is. By statute, right now, the Agency would have up to 2 years—if an individual had been in the country, up to 2 years. Right now, they are doing if an individual has been in the country up to 14 days and 100 miles from the border.

You could certainly target like certain smuggling routes where it is easy to see that people have only been in the country kind of a certain amount of time or you could look in certain detention facilities, people who are convicted of State and local crimes, where it is also easy to show that they have been in the country for a short period of time, and that might be a good category.

Also, stipulated removal. I know the ninth circuit had a case that had limited somewhat stipulated removal, *U.S. v. Ramos*, but there are things that can be done kind of in that area and that is within the Agency's discretion.

Also, cases that are appropriate for voluntary departures and prosecutorial discretion, just weeding those out up front. And so the goal would be, at the end of the day, there are not a lot of successful appeals because cases that would be successful appeals, you are not getting into the system kind of in the first place. So you are making the right decision.

So I would really focus there and then perhaps look at whether the BIA kind of legal advisor pro bono program could make sure they are matching people up with education to see whether or not an appeal is worth their time.

Senator CORNYN. Ms. Grisez. With the chairman's permission. My time is over, but please go ahead.

Ms. GRISEZ. Thank you. The response, I think, is very much what Ms. Wood has indicated, that we should never be sacrificing protection for people, the protection of life and liberty, by eliminating layers of judicial review.

The right thing to do is get the decision right in the first instance.

Senator CORNYN. If I could just interject here. Of course, we recognize the different layers of judicial review, given the severity and gravity of the charges and the potential sanction, and, certainly, we are not going to give the same level of judicial review for people running stop signs and the like, not that we are talking about those kind of cases.

But are you suggesting that we could not streamline judicial review, and appellate review in particular, without sacrificing the ability to litigate these cases fairly and in accordance with the law?

Ms. GRISEZ. Well, I do not think that it should be that access to the Federal courts for review should be reduced beyond what it already is. There were already substantial restrictions on judicial review in connection with the IIRIRA in 1996. Now, the cases that are still amenable to judicial review are those where the stakes are very high and people who are dissatisfied with their results below.

Especially in a system that we know is not yet perfect, that opportunity for review should not go away. My view would be that we should be increasing protections on the front end, LOP for ev-

eryone, access to counsel, better trained, better resourced immigration judges will produce better results there; then, at the BIA, what is already happening, moving away from affirmances without opinions to lengthier decisions, more three-member panel review than one, and that is a place that we think we should return to grater levels of consideration at the BIA.

And then with those measures correctly in place and the decisions better, you will have fewer appeals, and we are already starting to see that. In the second and the ninth circuits, under the prior so-called streamlining reforms at the board, the rates of appeal in the circuit court were up so high that more than half of the caseload in the ninth circuit was immigration matters and more than 40 percent in the second circuit.

With the changes that have happened at the board, those rates are coming back in line. Reversal rates are decreasing and rates of appeal are decreasing. So I think it illustrates that protections on the front end, getting it right below is the way to solve the problem of appeals, not cutting off the level of appeals when there are still infirmities in the system below.

Senator CORNYN. Thank you.

Chairman LEAHY. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

On the subject of getting it right below, you have the good luck or misfortune of having three former prosecutors on the panel today and I want to ask a question that focuses on what happens below, what happens in the process leading to the judicial part of the system.

And we are here to evaluate the court system, but, obviously, in any judicial system, the judicial actors have a responsibility to make sure that the folks on the ground, the policing element get it right.

In Connecticut, for example, we have had a number of instances where the tactics or conduct of the ICE agents in their raids and other activities have been questioned.

I wonder if members of the panel, beginning with you, Director Osuna, could comment on what responsibilities the immigration judicial element have to supervise what is happening on the ground in policing and how well they are doing it.

Mr. OSUNA. A lot of this has to do with ICE policy that I will probably not be able to talk about, but I would just say, generally, this, Senator. Certainly, the Fifth Amendment due process protections apply immigration court, as they do in most administrative proceedings, and immigration judges do see or hear cases once in a while where there may have been something that crossed the line at the enforcement stage.

I think it is fairly rare, in my experience, that they see those instances, but when they do, the due process protections do apply and they will take appropriate action when the particular case—when that happens.

Senator BLUMENTHAL. To some extent, though, the assertion of due process rights often depends on an advocate who knows the law. And as Ms. Wood's testimony indicates, 84 percent of all the individuals who come before the immigration courts are unrepre-

sented by counsel and may be completely unaware of these rights and come from countries where the rights do not exist in the first place.

Mr. OSUNA. Yes. And by the way, and I certainly share the sentiments that good counsel and adequate counsel make all the difference, not just for the immigrants, but also for the system. The 84 percent number, I should note, is in the detained context.

People that are detained while they are awaiting their hearings, 84–85 percent of those individuals do not have counsel. In the non-detained context, as Ms. Grisez mentioned earlier, it has improved, to some extent. And if cases go to the merits, most of those are actually—especially, for example, in Hartford, in your state, I think upward to 90 percent of people that go to merits hearings in the non-detained context in the Hartford immigration court are represented by counsel.

Adequate counsel is critical. There is no getting around that. And we have seen some improvements in the non-detained context, but we still have a long way to go on the detained.

Senator BLUMENTHAL. Any other members of the panel want to comment on that question?

Ms. WOOD. I would just agree with kind of Juan's comments and say, also, that in my experience, individuals that had things that have happened to them that are not—that maybe are not appropriate have also challenged those in Federal court and other places.

So there are also other opportunities, and often those cases are cases that are of great interest to counsel, pro bono groups and the like.

Ms. GRISEZ. Senator, one thing I think that is important here is the interagency work that is going on and will continue to go on, I am sure, between the Department of Justice and the Department of Homeland Security, because when you are talking about immigration policing and the enforcement side, that is in a different agency, as you understand, from where the immigration judges are.

So the immigration judges do not oversee ICE or the——

Senator BLUMENTHAL. I do understand and that is the reason why I asked the question.

Ms. GRISEZ. Right.

Senator BLUMENTHAL. And I think especially revealing was the preface to Director Osuna's answer, which was that he could not speak to ICE policy.

If we were talking about the FBI, there is no way that a Department of Justice official would say, "Well, I can't speak to what Federal agents are doing."

And that is the reason really for the question. Who is supervising? Who is exercising authority to make sure that those ICE agents comply with the Fifth Amendment and other constitutional guarantees?

Ms. GRISEZ. So I think the answer is right. The immigration judges, in a limited sense, when someone raises those issues, in some cases, will deal with them. Some immigration judges will not touch constitutional issues and they do not think they have jurisdiction over them, and they will leave that for the appellate process.

But, again, that plays back into your point that if you have a pro se person who does not know where the violations are or someone has not been able to have access to a lawyer, those claims are not getting made, and that is, I think, where a huge number of the problems occur, not just constitutional violations, but others are in proceedings that move very quickly, no lawyer, nobody to spot the problems.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And thank the witnesses here today for your excellent work on these issues. Thank you.

Chairman LEAHY. Thank you very much.

We are now going to recognize Senator Grassley. I have to go to the Appropriations Committee. Senator Franken, thank you very, very much for coming to take over.

Senator FRANKEN. My honor.

Senator GRASSLEY. I ask permission to put a statement in the record before I ask questions.

Chairman LEAHY. Without objection.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator GRASSLEY. Director, currently, the Office of Professional Responsibility at DOJ initiates investigations of immigration judges whenever a Federal appellate court issues a decision critical of the conclusions reached by the judge.

To me, this practice is the equivalent of investigating a Federal district judge for misconduct every time the judge is reversed by an appeal to the circuit court. It is extremely damaging to the morale of immigration judges to be subject to an investigation based on nothing more than having reached conclusions that are later challenged by a panel of Federal circuit judges.

Even worse are the repercussions for the administration of justice in our immigration courts. Under its practice, the Office of Professional Responsibility will usually investigate immigration judges only in cases where they deny relief that is later granted by a Federal court.

Consequently, the course of least resistance for immigration judges is to grant relief in many cases, despite their belief that the case might be without merit.

Immigration judges will naturally feel pressure to reach decisions that satisfy the most extreme appellate panel that might be assigned to their cases. This pressure will naturally result in immigration judges approving baseless asylum claims and applications for relief, and I believe that General Holder should end this practice.

But I want to ask your judgment. I understand the concept of an annual performance review. I understand OPR investigating a judge when a complaint is lodged. But why does OPR independently and on its own investigate immigration judges when the Federal courts reverse a decision and say that the judge should have ruled in favor of the alien?

How is that not intimidation? The Judges Union certainly thinks so. What do you say?

Mr. OSUNA. Without getting too much into the OPR mechanics there, I do not think it is quite accurate to say that OPR inves-

tigates any time that a Federal tribunal or appellate court reverses an immigration judge.

In my experience, though, peer investigations are quite rare. They happen only in certain instances where OPR deems it appropriate. But it is not in every case where an appellate court reverses an immigration judge's decision.

I do not believe that immigration judges are granting more asylum cases because of OPR investigations. I think there are other reasons for that. It was mentioned earlier that perhaps in the merits non-detained asylum context, representation is better. And, in fact, in my experience, from what I hear from immigration judges, that is the case in many cities, that representation of immigrants—of asylum-seekers in merits hearings is better.

I think that is probably more of an explanation as to why immigration judges are granting more cases these days.

Senator GRASSLEY. You could disagree with my characterization of it, but the Judges Union certainly thinks that is the case. And this came up in the House Judiciary Committee hearing on immigration courts last June.

So have you done anything to look into whether judges do, in fact, feel intimidation?

Mr. OSUNA. In my experience, immigration judges are not being intimidated into granting more asylum cases by OPR, by the possibility of an OPR investigation.

Senator GRASSLEY. So in other words, you feel that the union is completely wrong in their characterization. Well, let me move on.

In 2008, a Department of Justice attorney wrote a memo saying that only 19 percent of those ordered to be removed after appeal to the Federal court were actually tracked down by ICE and deported. Of the 8,000 aliens that appealed to the U.S. Court of Appeals, the Justice Department prevailed in 7,200 cases. Of the 7,200 cases with removal orders, only 1,375 were actually deported.

The conclusion is that the government is winning these cases, but ICE is not removing aliens, begging the question—what is the point?

So my question to you is, we have a process. People undocumented get an ample chance to appeal orders to leave the country. But at the end of the day, another branch of government ends up ignoring what the immigration judge, the Board of Immigration Appeals, and the Federal courts have decided.

Does that concern you?

Mr. OSUNA. I think that removal orders, once the process has been completed, should be enforced promptly. I think that that goes to the integrity of the process and it is necessary for the process to have the legitimacy in the eyes of the public.

I do think that ICE does the best it can with its resources to try to enforce removal orders, but, certainly, that is an important part of making sure that the process does have meaning.

Senator GRASSLEY. I hope I will have time for a couple more questions on a second round.

Senator FRANKEN [presiding]. Absolutely, or you can do it now.

Senator GRASSLEY. If I could do it now, I would.

Senator FRANKEN. Sure. Go ahead.

Senator GRASSLEY. Also, for you Director. On April 26, Attorney General Holder vacated a BIA decision to deport a alien from Ireland who was attempting to avoid deportation based on his civil union in New Jersey with a U.S. citizen.

The BIA held that the alien should be deported specifically because DOMA does not recognize same-sex marriage.

With an appeal pending in the Third Circuit, the attorney general vacated the BIA decision and ordered the Board to consider whether the appellant could be considered a spouse under New Jersey law and whether he would be considered a spouse under immigration law, if not for DOMA.

While the attorney general has the authority to vacate and overrule BIA decisions, this authority has rarely been used.

So my question to you is, does it concern you that the attorney general's interference in this matter, while within his authority, intrudes upon the independent judgment of BIA? And as the branch of DOJ that oversees the immigration court system in the BIA, were you or any of your staff consulted about the AG's decision to step in and did you recommend against it, given the importance of BIA's maintaining its independence?

Mr. OSUNA. Senator, it does not concern me. The attorney general does have, of course, the authority to certify and vacate any decision from the BIA. As you noted, it is an authority that is rarely granted and I think the attorney general certainly steps in when he deems it appropriate.

It does not concern me that that authority exists, because in my experience, it has not been used in an inappropriate way that would impinge on the independence of the BIA.

Senator GRASSLEY. But does it not concern you that there is interference when the courts have not decided that the DOMA law is unconstitutional?

Mr. OSUNA. Well, the attorney general took that action in that case because he felt that there were other issues apart from the constitutionality of DOMA that had to be fleshed out at the administrative level rather than in the Federal court in the third circuit.

I think the attorney general's decision lays those out in terms of the possible hardship of that issue and whether the civil union is even—should be even recognized as a marriage.

So I think that the attorney general felt that there were additional factual and legal issues that needed to be fleshed out by the BIA, possibly the immigration judge in that case, and that is why he took that action in that particular case.

Senator GRASSLEY. And my last question. Does not the fact that immigration appeals to the circuit court have declined significantly in the past few years indicate that the Board of Immigration Appeals is doing a better and more thorough job of handling its caseload?

Then, last, I am concerned about increasing the sizes of the Board and the impact that would have on efficiency. Are there any discussions underway at the Department about increasing the size of the Board of Immigration Appeals?

Mr. OSUNA. I wholeheartedly agree that the drastic decrease in the number of cases going to the appellate courts is an indicator that the BIA is doing a much better job than it used to do a few

years ago, and that has been a deliberate effort for the last couple of years.

And I am sorry, the second—the size of the Board. We are under discussions for a number of procedural issues at the BIA to deal with the streamlining of reforms that were put in place and whether there are any additional reforms available.

So far in discussions with the Department, we have not discussed increasing the size of the BIA.

Senator GRASSLEY. Thank you very much. Thank you, Mr. Chairman, for your courtesy.

Senator FRANKEN. You are welcome. Thank you.

Ms. Grisez, last year, the Advocates for Human Rights, a Minnesota-based immigration advocacy organization, submitted a comprehensive report to the United Nations on our Nation's immigration court system. One of their conclusions was the following quote: "The U.S. immigrant detention system contravenes the United States' obligations to protection of family unity. Family unity cannot be considered in mandatory detention cases, and the United States routinely fails to consider family unity when making discretionary detention decisions."

Do you agree with that conclusion and if so, why?

Ms. GRISEZ. Well, Senator, it is certainly true that under the current law, 236(c), providing for mandatory detention in certain cases, people are going to be detained in a way that disrupts family unity. There is no question about that.

The other problem I think is that detention has an effect not only on the conduct of the proceedings, but actually the outcome, because detention can cause breadwinners, obviously, to lose their income. Because of the delays in processing, it can cause people to lose their homes.

People, when they lose their jobs, can lose their insurance. They then lose medical care. So in some cases, the fact of detention itself has a coercive effect on the person in proceedings to actually abandon their claim and agree to depart, because the family cannot tolerate the economic impacts and emotional and psychological impacts of detention.

So I would certainly agree that although there are some cases where people absolutely need to be detained, there are others where detention is not necessary to secure the person's appearance and family unity and the health, economic and otherwise, of the family unit would be better maintained if persons were free from detention until the conclusion of their proceedings.

Senator FRANKEN. How long is a typical detention?

Ms. GRISEZ. Well, we heard earlier some statistics that an average is near a year. There are cases that are much longer, there are cases that are—if someone agrees to deportation right away and does not pursue any forms of relief, it can be less than 30 days.

So how long a case takes really depends on the facts and circumstances of the individual case.

Senator FRANKEN. Thank you.

Ms. Grisez, also, the American Bar Association's report cited a recent study published in the *Stanford Law Review* that found that in the three largest immigration courts, a quarter of the judges

granted asylum at rates that were more than 50 percent different from the overall courts' average grant rate.

The same study found that female judges grant asylum at a rate 44 percent higher than male judges. To what do you attribute these disparities and what do you think we need to do to fix them?

Ms. GRISEZ. Well, Senator, I would not be troubled by minor variations from judge to judge or from court to court, because there are a lot of different factors that go into that.

The caseloads are different, the sending countries in some courts are different, whether the population in a certain court is in proceedings because of criminal convictions or otherwise, all of those things are a factor.

But what concerns me is the disparity, for example, where the grant rate ranges from 8 percent to 93 percent.

Senator FRANKEN. This is within the same court.

Ms. GRISEZ. Right. But even within the same court, judges can be all over the map and that suggests to me, again, that some of the improvements that are already underway with more careful hiring, better training, closer supervision, should help bring the grant rates closer together, but there should never be a standard, a goal or a quota where every judge should be granting X percent of their cases.

Senator FRANKEN. No. But what accounts for the disparity and how should that be addressed? Is there any way to address that?

Ms. GRISEZ. Well, there are temperamental differences among individuals and, in the past, there has been a situation where much of the immigration hiring has come out of the previous trial attorney corps or others involved with law enforcement or prosecution.

So one possible explanation for the grant rates is folks that come from a prosecutorial or enforcement background, not the only explanation.

Senator FRANKEN. Well, we have sentencing guidelines in courts that were adopted to address the same kind of situation where you could be—depending on which judge you got, in the same court, you would get widely disparate sentences. And so there seemed to be—sentencing guidelines were made in order to put some kind of fairness in there so that you were not randomly getting a hanging judge or getting a judge that was going to let you go.

So I was just wondering, maybe, Mr. Osuna, do you have any opinion on doing something parallel to some kind of guidelines that could make these disparities less apparent?

Ms. OSUNA. Let me just review a little bit about what has been done about disparities and then talk about other possibilities.

When you look—and I agree with the characterization that there is such—with factually difficult and factually diverse cases, you do have to allow for some disparity, a few percentage points. That is not unique to the immigration court system. That is not unique to any court system.

However, I also agree that with similar cases in the same court, with similar fact patterns and similar countries with regard to asylum, wide disparties of 80 percentage points are troubling and should be looked at.

This has been dealt with by EOIR in terms of management initiatives. What the office of the chief immigration judge has done is

to take a look at those outlying judges, the ones that have very high or very low rates, and not to tell them that they are granting too many cases or denying too many cases, because you definitely do not want to do that with an independent adjudicator, but see what else is going on in the case, see what else is going on with the judge, see if there is some legal deficiency, some temperament deficiency, some remedial training that needs to be done.

Those judges are then mentored. They are given some specific targeted attention and the evidence that we have—and I think the organization that published that study in the *Stanford Law Review* actually has reported recently or in the past year or so, I believe, that the disparities have gotten better. In other words, they have narrowed, to some extent, and I attribute that to the management initiatives of the chief immigration judge that have dealt with this.

I think that we have to be very careful to mandate a system or a pattern of a grid that has been suggested in the past, that if a certain fact pattern falls into a certain part of a grid, then it is a grant of asylum, and if it does not—I would be opposed to that, because, again, in my experience, these are just way too diverse to really deal with it in those terms.

Senator FRANKEN. Thank you. Thank you for that answer.

I would like to turn to the Ranking Member. Do you have any further questions, Senator Cornyn?

Senator CORNYN. I do, Mr. Chairman. Thank you.

First, for you, Ms. Wood. Do you agree with the statement that lengthy wait times for removal proceedings allow illegal aliens to buildup equities for relief or establish qualifying relationships or employment to get relief from removal, and it also allows criminal aliens to remain in the United States and removable aliens to continue working while awaiting a decision in their case?

Ms. WOOD. I do.

Senator CORNYN. And is that another reason why it is important for us to get these numbers down? Because the longer justice is delayed, whatever the outcome may be, it basically works in favor of the alien who is seeking to stay here, even though they came into the country in violation of the law. Is that correct?

Ms. WOOD. Certainly, it works against kind of entire immigration enforcement system; to wit, the longer you stay, if you do not show up for your final immigration court hearing and you abscond and then you build equities in the community for 20 more years, you are more likely to, at the end of the day, be able to stay, that is unfair to people who are playing by the rules and people who are waiting in lines outside the country.

So it is very important to try to figure out how can we make our removal orders more enforceable. And I think to its credit, I do think ICE is trying to look at how can they keep better track of people during the lengthy appeals process. That is a challenge.

At times, they have not had their people's addresses and other things. But having some sort of monitoring or other ways to keep track of people, so that when they know when they are finally ordered removed, if they have gone through an appeals process, the Agency can actually locate them and encourage them to go home. If they do not go home, assist them home more directly, makes a lot of sense.

Senator CORNYN. As I indicated in my opening statement, I really think that the problem Congress and the Federal Government have is a credibility problem when it comes to our immigration system. And until such time as we regain the public's confidence with more uniformity, more predictability, less gaming of the system, then it is going to be hard for us to do the sorts of things I think we need to do to fix our immigration system. So I think that is an important point.

Ms. Grisez, on the point we were talking about earlier about appointment of counsel, I just want to ask you, do you believe that every alien should be entitled to an attorney prior to expedited removal? For example, aliens who walk across the border and who get turned around.

I guess what I am trying to do is test your—at what point you think the charges are sufficiently serious that it would warrant taxpayer expense to providing them a lawyer.

Ms. GRISEZ. I do not believe, Senator, that the ABA has a policy (off microphone.) I do not believe the ABA has policy favoring the appointment of counsel as part of the expedited removal process.

Our policy is that there should be a triage type of system where everybody coming in to removal proceedings, but that means Section 240 full removal proceedings, which, in the case of expedited removal, would be after passage of credible fear, that those persons should have access to a legal orientation program with appointment of counsel for vulnerable populations, such as mentally ill and children, and those cases where there has been identified eligibility for relief and the person is otherwise unable to find paid counsel or have pro bono counsel.

Senator CORNYN. Thank you for that clarification. I appreciate it.

Mr. Osuna and Ms. Wood, I want to ask you about the effect of the Supreme Court's decision in the *Zadvydas* case that I know you are familiar with. And for those who are not familiar with it, it limits the length of time that an alien may be detained.

Usually, if the alien is not removed within 6 months, he or she must be released, unless the alien is a national security threat or subject to mandatory detention as an aggravated felon.

In your experience and in your observation, Mr. Osuna, what effect does *Zadvydas* have on current immigration proceedings?

Mr. OSUNA. Well, I am not sure it has much effect on the proceedings themselves. Our immigration judges will hear bond appeals for people that are detained, whether they are—and usually it happens before removal proceedings are concluded.

Lately, there is some case law from the Ninth Circuit that may expand that a little bit. But I am not sure that I see much effect in terms of the *Zadvydas* decision itself on the court system as it exists.

There are implications for detention beyond that, but nothing necessarily on the immigration court system.

Senator CORNYN. I guess I would broaden my question and say I am not just focusing on the immigration court system. I am talking about on our ability to detain and remove aliens who are ordered, in effect, by the Supreme Court to have to be released in the community unless they are designated a national security threat or an aggravated felon.

Ms. Wood, do you have any observations?

Ms. WOOD. I think the *Zadvydas* decision has made it very difficult for the Agency sometimes to detain individuals who should be detained and also creates somewhat of a disincentive for countries that are non-cooperating in terms of getting cooperation to return people home.

It is incredibly unfair that if you happen to be an immigrant from a country who is cooperative on removal, then you are likely to be detained, you are likely to be removed. But if you are an immigrant from a different country, you are likely to get a removal order or not and then be released out into the community and be able to kind of go on with your life.

So the *Zadvydas* fix that you have looked at over a number of years I do think makes a lot of sense and would be very helpful for the Agency as a whole.

Senator CORNYN. If the chairman will allow me just to ask a quick followup on that.

Senator FRANKEN. Absolutely.

Senator CORNYN. This is something I am not sure most people really understand and appreciate, that part of our success in enforcing our own immigration laws is the willingness of the country of origin to accept those people to come back.

Are there countries that are sort of notorious for not allowing that or for being particularly difficult in accepting their own citizens for removal proceedings?

Ms. WOOD. There absolutely are countries that have been kind of historically difficult. China and India are among the countries that are the most difficult. And it is hard, because although there are some methods in the law which theoretically the Agency could use to try to convince those countries to cooperate, obviously, our dealings with China and India are so much broader than repatriation of Chinese or Indian nationals.

And so often it is very difficult for the Agency to push forward with something to help. That is an issue that we worked on very closely with Secretary Chertoff. I know that this Administration has worked on it.

And it is really troubling, because at the end of the day, you have a system that treats people from different countries differently and that is not what our country is about.

Senator CORNYN. To put a point on it, actually, the alien can benefit from his or her own country refusing to accept them back because the Supreme Court has said in *Zadvydas*, you cannot detain these people more than 6 months.

Ms. WOOD. That is right. And, you know, as a practical matter, you would not want to be in a position where the Agency had to detain people for really, really long periods of time if there was no reasonable likelihood of removal. But this sharp cutoff and having no alternatives does make it very difficult and I think hurts our negotiations with foreign countries, as well.

Senator CORNYN. Mr. Chairman, this morning, I noticed in the news clips that 513 individuals, I believe, were detained coming across the border in two trucks, which has to be a world record, including people from some of the countries that Ms. Wood mentioned, and this is coming across the U.S.-Mexico border, people

from countries all over the world, because of the well known pathways and human smuggling routes into the United States.

Thank you very much.

Senator FRANKEN. Thank you, Senator.

Before I gavel this hearing out, I ask unanimous consent to place in the record a report by the Katzmann study group, named for Judge Katzmann of the Second Circuit, on representation of immigrants.

[The report appears as a submission for the record.]

Senator FRANKEN. I also place in the record a large number of submissions from pro bono attorneys, law school clinic and legal aide providers, making suggestions for improvements in to the immigration courts. Without objection, I so order.

[The information appears as a submission for the record.]

Senator FRANKEN. I would like to thank all of you for your testimony today. The record will be held open for 1 week for questions and other materials.

This hearing is adjourned.

[Whereupon, at 12:22 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

# APPENDIX

## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Improving Efficiency and Ensuring Justice in the Immigration Court System"

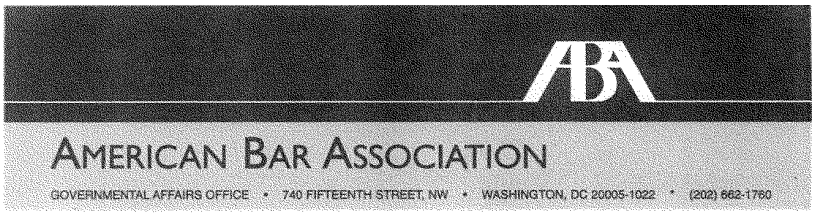
Wednesday, May 18, 2011
Dirksen Senate Office Building, Room 226
10:00 a.m.

Juan P. Osuna
Director of the Executive Office for Immigration Review
U.S. Department of Justice
Washington, DC

The Honorable Julie Myers Wood
President
ICS Consulting, LLC
Arlington, VA

Karen T. Grisez
Chair, Commission on Immigration
American Bar Association
Washington, DC

PREPARED STATEMENT OF KAREN T. GRISEZ




**Statement of**

**KAREN T. GRISEZ**

**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**to the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**for the hearing on**

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**May 18, 2011**

Chairman Leahy, Senator Grassley and Members of the Committee:

My name is Karen Grisez. I am Special Counsel for Public Service at the law firm of Fried, Frank, Harris, Shriver and Jacobson LLP and I currently serve as the Chair of the American Bar Association (ABA) Commission on Immigration. I am here at the request of ABA President Stephen N. Zack to present the views of the ABA on efforts to improve the efficiency and fairness of the immigration court system. We appreciate this opportunity to share our views with the committee.

**BACKGROUND**

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of *pro bono* legal representation programs.

As an organization of lawyers and the national voice of the legal profession, the ABA has a unique interest in ensuring fairness and due process in the immigration enforcement and adjudication systems. In 2010, the ABA released a report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.*[1] The report undertakes a complete examination of the structures and processes of the current removal adjudication system, beginning with the decision to place an individual in removal proceedings through potential federal circuit court review. The findings of this report confirmed that our immigration court system is in crisis, overburdened and under-resourced, leading to the frustration of those responsible for its administration and endangering due process for those who appear before it.

Ultimately the report found, and the ABA believes, that the goals of ensuring fairness, efficiency and professionalism would best be served by restructuring the system to create an independent body for adjudicating immigration cases, such as an Article I court or an independent agency. However, we realize this is an action for which the consideration, adoption and implementation would take a number of years. Therefore, the ABA also recommended a number of incremental reforms that could be made within the current structure, either through policy revision, regulation or legislation, which would make significant improvements in the operation of the immigration courts.

Since the release of our report, the Executive Office of Immigration Review (EOIR) has implemented a number of measures that represent a promising start toward improving the performance and reputation of the immigration courts. Some of these measures include:

[1] The full report and executive summary are available at http://www.americanbar.org/immigration.

completing the roll-out of the digital audio recording system; improving the hiring process; publishing a new ethics and professionalism guide for immigration judges; and establishing a more transparent and accessible complaint process. We commend the Department of Justice and EOIR for these efforts. However, many challenges remain to ensure that the immigration courts operate as efficiently as possible while upholding our traditions of fairness and due process for individuals whose lives are impacted by its operation.

**ADDRESSING THE NEED FOR ADEQUATE RESOURCES**

The ABA recognizes that EOIR is subject to a number of external pressures that greatly impact the effective operation of the immigration courts. Immigration enforcement efforts have increased exponentially in the last ten years and continue to expand. The number of noncitizens removed from the United States has increased from 69,680 in FY 1996 to 393,289 in FY 2009 – a more than 450% increase.[2] The number of Notices to Appear (NTA) issued by the Department of Homeland Security (DHS) to initiate removal proceedings grew by 36% in just two years, from 213,887 in FY 2006 to 291,217 in FY 2008.[3] These numbers are expected to increase as DHS focuses on apprehending and removing all criminal noncitizens, such as through the Secure Communities initiative.

This expansion of immigration enforcement activity has not been matched by a commensurate increase in resources for the adjudication of immigration cases. The combination of an ever-increasing caseload and chronically inadequate funding has brought the immigration adjudication system to a crisis point. As a recent report by the Transactional Records Access Clearinghouse noted, the number of pending cases before the immigration courts has reached an all-time high of 267,752, and the average wait time for these cases has risen to 467 days.[4]

There are various changes in procedures that could result in enhancing efficiency in the system if implemented, and we discuss several below. However, without question the most serious issue facing the immigration courts, and the one with the most significant impact on the speed and quality of case processing, is the lack of resources throughout the entire system.

The immigration courts simply have too few immigration judges and support staff for the workload for which they are responsible. In 2008, some 226 immigration judges completed an average of 1,243 proceedings per judge, not including bond hearings and motions, and issued an average of 1,014 decisions per judge. To produce these numbers, each judge must have issued an average of at least 19 decisions each week, or approximately four decisions per weekday, in addition to conducting their calendaring hearings, even while assuming no absences for vacation, illness, training, or conference participation. In comparison, in 2008, Veterans Law Judges decided approximately 729 veterans benefits cases per judge (approximately 178 of which involved hearings) and, in 2007, Social Security Administration administrative law judges

[2] U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 T.36 (2010).

[3] American Bar Association, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-12–1-14 (2010) (hereinafter REFORMING THE IMMIGRATION SYSTEM).

[4] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, IMMIGRATION CASE BACKLOG STILL GROWING IN FY2011 (2011), available at: http://trac.syr.edu/immigration/reports/246/.

decided approximately 544 cases per judge.[5] This workload disparity continues to increase. The number of new immigration court matters received is outpacing the number of matters decided; in FY 2010 the immigration courts received 325,236 matters and completed 287,207 matters.[6]

A lack of adequate staff support for the immigration judges compounds the problem. On average, there is only one law clerk for every four immigration judges, and the ratio is even lower in some immigration courts. The shortage of immigration judges and law clerks has led to very heavy caseloads per judge and a lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case.

We recognize that filling vacant immigration judge positions is a stated priority of EOIR and that the office has undertaken a hiring initiative in order to bring the judge corps to the full 284 authorized positions. However, even if all of those positions are filled and assuming the number of matters received remains constant at the FY 2010 level, immigration judges would still be deciding about 1,145 cases per year. We suggest hiring enough additional immigration judges to bring the caseload down to a level roughly on par with the number of cases decided each year by judges in other federal administrative adjudicatory systems (around 700 cases per judge annually) and providing for one law clerk per judge. The Department of Justice has requested an additional 21 judge teams for fiscal year 2012 and we urge Congress to fund this request as a matter of the highest priority.

One of the most serious problems with the shortage of immigration judges and staff is the extensive use of oral decisions made immediately at the close of the hearing without sufficient time to conduct legal research or thoroughly analyze the issues and evidence. With additional resources and more time allowed to decide each case, immigration judges could be required to provide more formal, reasoned written decisions, particularly in matters, such as asylum claims, where the complexity of the cases requires more thoughtful consideration than can be given during the hearing itself. At a minimum, written decisions need to be clear enough to allow noncitizens and their counsel, if any, to understand the basis of the decision and to permit meaningful appellate review. If the parties in a removal case decide to pursue an appeal, a record that includes a written decision would also allow more efficient consideration of the cases by the Board of Immigration Appeals (BIA) and federal circuit courts.

**INCREASING ACCESS TO COUNSEL AND LEGAL INFORMATION**

Any examination of the operations of the immigration courts would be incomplete without considering the impact of legal representation for noncitizens in the removal adjudication process. Access to legal representation and legal information, or lack thereof, has a significant impact on both the fairness and the efficiency of the immigration system. EOIR has put in place

[5] BD. OF VETERANS' APPEALS, FISCALYEAR 2008 REPORT OF THE CHAIRMAN 3 (2009), *available at* http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf; U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2008, at 2.F (2009), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2008/index.html.

[6] Executive Office for Immigration Review Office of Planning, Analysis, and Technology, FY 2010 STATISTICAL YEAR BOOK B7 Figs. 2, 3 (Jan. 2011), available at http://www.justice.gov/eoir/statspub/fy10syb.pdf.

several measures to provide noncitizens with assistance in obtaining representation, including the Legal Orientation Program (LOP) and the BIA Pro Bono Project.

Despite EOIR's commendable efforts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In fiscal year 2010, approximately 57% of these noncitizens were unrepresented. For those in detention, the figure is even higher – approximately 85% are unrepresented. Barriers impeding access to representation include the unavailability of the LOP to persons who are not detained, as well as over half of detainees; the inability of many persons to afford private counsel; and a number of systemic impediments, including remote detention facilities, restrictive telephone policies, and the practice of DHS transferring detainees from one facility to another without notice and routinely seeking changes of venue.

Representation has the potential to increase the efficiency of at least some adversarial immigration proceedings. Pro se litigants can cause delays in the adjudication of their cases due to lack of knowledge and understanding and, as a result, impose a substantial financial cost on the government. As a number of immigration judges, practitioners, and government officials have observed, the presence of competent counsel on behalf of both parties helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Increased representation for noncitizens thus would facilitate the more efficient processing of claims, lessen the burden on the immigration courts, and decrease appeal rates. This is particularly true in detained cases.

For example, not too long ago an associate in my firm accepted a pro bono immigration case then pending in the Ninth Circuit. The client had been detained for several years while his case was working its way through the system. He continued to pursue every appeal available to him. His circuit appeal was the first time he had access to a lawyer. After reviewing the case, the volunteer lawyer found that the client was correct about a procedural error in his case, but he did not actually qualify for any form of relief from removal. After being so informed by the lawyer, the noncitizen agreed to abandon his appeal and accept deportation. If this person had access to a lawyer earlier in the process, it is likely that significant time and resources, both in court time and detention costs, would have been saved.

One means of increasing access to representation and legal information is to expand the Legal Orientation Program. The LOP provides individuals in removal proceedings with information regarding basic immigration law and procedure before immigration courts. Depending on the noncitizen's potential grounds for relief, the LOP also provides a referral to pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state.

In addition to ensuring more fair and just outcomes, the LOP contributes to immigration court efficiency and may result in savings in detention costs. A study by the Vera Institute of Justice in 2008 indicates that cases for LOP participants move an average of 13 days faster through the immigration courts. Immigration judges report that respondents who attend the LOP appear in immigration court better prepared and are more likely to be able to identify the relief for which they may be eligible, and not to pursue relief for which they are ineligible. Because cases for

LOP participants move through the immigration courts more quickly, time spent in detention may be reduced and detention costs saved.

The cost savings from an expanded LOP program could be considerable. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population. In the last five years, the annual number of immigrants detained and the cost of detaining them has doubled. In 2010 alone, the U.S. spent approximately $1.7 billion to detain almost 400,000 immigrants. In the short term, Congress should provide funding for the LOP at the amount requested by the Department of Justice for fiscal year 2012. In the longer term, sufficient funding should be provided to expand the LOP nationwide and, at a minimum, make it available to all detained noncitizens in removal proceedings.

Aside from the argument that increasing representation makes the system more effective, there is strong evidence that representation also affects the *outcome* of immigration proceedings. In fact, a study has shown that whether a noncitizen is represented is the "single most important factor affecting the outcome of [an asylum] case." For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when they proceeded pro se.[7] More recently, in affirmative asylum cases (which are not before the court), the grant rate for applicants was 39% for those with representation and only 12% for those without it.[8] In defensive asylum cases (which are in immigration court), 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful.[9]

Another more recent study's findings show that "[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention."[10] The study analyzed representation in the New York immigration courts and found that 74% of individuals who were represented and released or never detained had a successful outcome; 18% of individuals who were represented but detained were successful; but only 3% of individuals who were unrepresented and detained were successful.[11] Representation, particularly for vulnerable populations, is therefore crucial – the outcome of an immigration case should be determined on the merits of an individual's claim, not on his or her ability to navigate this extremely complex system without assistance.

**RECOGNIZING PRIORITIES AND IMPLEMENTING SMART PROCEDURES**

While this imbalance between judges and cases is largely a function of insufficient funding and staffing for the immigration courts, there are also various policies and procedures that

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[7] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. Rev. 295, 340-41 (2007).
[8] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 30. Statistics cited are for the period from 1995 through 2007. An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.
[9] *Id.*
[10] The New York Immigrant Representation Study, PRELIMINARY FINDINGS 1 (2011), available at http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf.
[11] *Id.*

significantly contribute to the burgeoning caseload. In order to partly alleviate this burden, we recommend actions not only to increase the resources available to the courts, but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the immigration court system in the first place. This will enable the enforcement and adjudication functions to work together more effectively to ensure that those the government is most interested in removing are prioritized in the process.

**Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Litigation.**

Prioritization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system. Unfortunately, it has not been widely utilized in the immigration context. There are numerous circumstances in which a respondent is not likely to be removed regardless of the outcome of the legal case. The most obvious cases are those where the respondent is terminally ill or is the parent or spouse of someone who is critically ill, but there are other examples where it is clear from the circumstances at the beginning of the process that the interests in removing the respondent will almost certainly be outweighed on humanitarian or other grounds. In addition, citizens of countries with no functioning central government or with which the U.S. has no repatriation agreements are typically not removed as a practical matter. Nevertheless, under current policy, DHS insists on obtaining a removal order in such cases before discussing a stay of removal, deferred action, or another form of prosecutorial discretion. The ABA recommends that limited enforcement and adjudication resources should be preserved for conducting removal proceedings against those individuals within our country's stated enforcement priorities, such as those who present a true risk to our national security or public safety, and those who the government actually plans to remove.

DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are prima facie eligible for relief from removal, to concede eligibility for relief from removal after receipt of a clearly meritorious application, to stop litigating a case after key facts develop that make removal unlikely, or to waive appeal in certain appropriate types of cases. In 2010, ICE issued two internal memoranda outlining removal priorities and providing guidance to immigration officers in the use of discretion.[12] This is a positive development and we commend Assistant Secretary John Morton for this initiative. However, as some have noted, the ultimate success of this initiative "will ultimately be judged on whether it is implemented with consistency and accountability."[13]

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[12] Memoranda from John Morton, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Immigration and Customs Enforcement, June 30, 2010, available at: www.ice.gov/doclib/civil_enforcement_priorities.pdf and "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," Immigration and Customs Enforcement, August 20, 2010, available at: http://www.ice.gov/doclib/dro/pdf/aliens-pending-applications.pdf.
[13] Shoba Sivaprasad Wadhia, "Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion," Immigration Policy Center-American Immigration Council, December 2010.

One additional barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case from one hearing to another, with no single attorney having overall responsibility for the case. We recommend that, to the extent possible, DHS assign one ICE trial attorney to each removal proceeding. This would permit that attorney to become familiar with the facts and circumstances of the cases assigned to him or her and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice also would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

**Encourage Immigration Courts to Hold Pre-Hearing Conferences**

Another mechanism that could be utilized to promote efficiency is to increase the use of pre-hearing conferences. Federal regulations allow immigration judges to conduct pre-hearing conferences at their discretion. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, to resolve objections to documents or witnesses, and otherwise to simplify and organize the proceeding. They could provide the opportunity to confirm that all necessary background checks are complete and that cases are ready for trial, thereby eliminating continuances on the hearing date and the resulting waste of valuable court time. In those instances where it is clear that there is a particularly strong or particularly weak case, it may also present an opportunity to dispose of the case without using further court resources.

Despite these benefits, pre-hearing conferences are rarely used by the immigration courts. As an example, I have been representing respondents in immigration court for more than 15 years and have had the opportunity to participate in a live pre-hearing conference in only one case, plus telephonic conferences in two or three other matters. Recognizing that there are logistical issues that would need to be addressed, and reasons why conferences might not be appropriate in every case, the ABA supports a strong presumption in favor of immigration courts holding pre-hearing conferences in order to expedite subsequent proceedings.

**STREAMLINING THE ASYLUM PROCESS**

An unintended consequence of heightened enforcement efforts over the past decade, including increased use of detention through initiatives such as Secure Communities, is the substantially increased case processing times in immigration courts, especially for non-detained cases. Detained cases are necessarily and properly given priority on the dockets of the immigration courts. Unfortunately, this means that in many courts, non-detained merits hearings are being scheduled eighteen months to two years into the future. The impact of these delays is serious, particularly for asylum seekers whose past experiences have already left them traumatized and feeling a lack of control over their lives. For those with family members at risk or in hiding in their home countries, such delays are not only stressful but very dangerous. As a result, an asylum seeker who is otherwise eligible for release may have to make a strategic decision to remain in detention in order to ensure a hearing within a reasonable period of time. That the current system forces this kind of choice on a particularly vulnerable population is unacceptable, and efforts can and should be made to improve the asylum process.

**Authorize Asylum Officers to Approve Defensive Asylum Claims**

The current asylum process distinguishes between the treatment of affirmative asylum claims and defensive asylum claims. Applicants with affirmative claims have the opportunity to present their claims to asylum officers in non-adversarial proceedings, while defensive claims must be adjudicated in immigration court. In many instances this distinction is somewhat arbitrary. For example, a person who has successfully entered the country illegally, or a person who has entered legally but whose status has since expired, can apply for asylum affirmatively, while a person who is caught entering the country illegally, or a person who expresses an interest in applying for asylum while entering legally, will be treated as a defensive applicant. Such treatment of defensive claims adds to the substantial workload of immigration courts and ICE attorneys.

One way to reduce the caseload burden on immigration courts is to allow asylum officers to adjudicate, in the first instance, asylum claims raised as a defense to expedited removal, as is already done for minors in removal proceedings.[14] The United States Commission on International Religious Freedom has suggested that substantial efficiencies could be created and certain unfair effects ameliorated by allowing asylum officers to adjudicate asylum claims at the credible fear stage.[15] The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court as part of removal proceedings, just as it happens currently if an affirmative asylum application is not granted.

Since the total number of affirmative asylum applications processed by the Asylum Division has declined during the past decade, assuming the number of asylum officers remains fairly constant in the future, the increased workload involved in allowing asylum officers to adjudicate defensive asylum claims would likely be manageable. Moreover, asylum officers are specially trained in dealing with this particular population, as well as in rapidly changing country conditions and emerging migration trends. This reform could have a substantial impact on the immigration courts by diverting thousands of cases each year into a system that is less expensive, non-adversarial, and where the adjudicators are trained exclusively for asylum adjudication.

**Eliminate the One-Year Filing Deadline**

A major obstacle for asylum seekers who enter the U.S. is the requirement that applicants file their claims within one year of arrival in the country. A recent report found that the one-year deadline not only bars refugees who face religious, political and other persecution from receiving asylum in the U.S., but it also leads thousands of asylum cases – often considered the most time-intensive and factually and legally complex of all immigration cases – that could have been resolved by DHS to be referred to the immigration courts.[16] In fact, both asylum officers and

[14] *See* the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[15] UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL, PART I, at 66 (2005).

[16] Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency," September 2010, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

immigration judges spend a substantial amount of time in these cases examining whether the filing deadline was met or if the individual may be eligible for one of the exceptions to the deadline.

Genuine refugees often have good reasons for failing to file their claims immediately or soon after arrival. Factors such as physical and emotional trauma, language barriers and lack of access to counsel may hinder prompt applications. One recent study noted that it is likely that as a result of the deadline, since April 1998 DHS has rejected more than 15,000 asylum applications that would otherwise have been granted.[17] Eliminating the one-year deadline will restore fairness to and increase the efficiency of the process, preserving the limited resources available for evaluating asylum cases on the merits.

Authorizing asylum officers to adjudicate defensive asylum claims and removing the one-year filing deadline would provide some reduction in the immigration court caseload without suffering anything in the quality of adjudications. We note that both of these changes were included in the Refugee Protection Act, introduced by Chairman Leahy last year. We hope that this legislation will be reintroduced in the near future and that Senate acts upon it expeditiously.

**CONCLUSION**

Ensuring a fair and effective system for adjudicating immigration cases is in the interest of both the government and those individuals within the system. While progress has been made in a number of areas, there is ample evidence that significant problems remain. The Department of Justice, the Executive Office for Immigration Review and Congress must direct increased efforts to alleviating some of these problems, particularly the need for additional staffing and resources.

We recognize that our nation continues to face significant fiscal challenges and respect the difficult decisions that Congress must make in responsibly allocating limited resources. However, in many instances investing some additional funding in the near-term will ultimately result in savings over the mid- to long-term by enhancing efficiencies and decreasing operating costs. Most importantly, we must not sacrifice or undermine the fundamental principles of fairness and due process that exemplify the American justice system.

The American Bar Association looks forward to offering its assistance as a part of the effort to improve the immigration court system. Thank you again for this opportunity to share our views.

[17] REJECTING REFUGEES: HOMELAND SECURITY'S ADMINISTRATION OF THE ONE-YEAR BAR TO ASYLUM, Philip G. Schrag, Andrew Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, William and Mary Law Review, Volume 52, 2010.

PREPARED STATEMENT OF JUAN P. OSUNA

# Department of Justice

**STATEMENT OF**

**JUAN P. OSUNA**
**DIRECTOR**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**BEFORE THE**

**COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**

**HEARING ON**
**"IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM"**

**PRESENTED**

**MAY 18, 2011**

**Introduction**

Mr. Chairman, Senator Grassley, and other distinguished Members of the Committee, thank you for the opportunity to appear before you today to speak about the immigration court system. The Department is taking significant steps to further improve the immigration adjudication system, while managing more than 270,000 pending cases, the largest number the immigration court system has ever encountered.

As background, the Executive Office for Immigration Review (EOIR) administers the immigration court system, composed of both trial and appellate tribunals. The trial level consists of the immigration courts, which a Chief Immigration Judge oversees. Removal proceedings begin when the Department of Homeland Security (DHS) files with the immigration court a formal charging document, called a Notice to Appear (NTA), against an alien. EOIR's immigration judges must first decide whether the alien is removable from the United States based on the DHS charges and then whether the alien is eligible for and merits any relief or protection from removal. The immigration courts are high-volume tribunals that received more than 2.1 million matters, which include proceedings, bonds and motions, throughout the past six years. In Fiscal Year (FY) 2010, the courts received more than 325,326 proceedings, which are spread out among 268 immigration judges in 59 immigration courts. The Department has worked very hard to employ the resources Congress has provided to increase staffing and technology to handle this caseload in coming years.

The appellate level of EOIR is the Board of Immigration Appeals (BIA), which sits in Falls Church, Virginia. The BIA has nationwide jurisdiction and hears appeals of the decisions of immigration judges. The BIA is composed of 15 Board Members, supported by a staff of attorney advisers, and headed by a Chairman. Like the immigration courts, the BIA is a high-volume operation; in FY 2010, the BIA issued more than 33,000 decisions. In addition, the BIA issues binding precedent decisions interpreting complex areas of immigration law and procedure. Either the alien or DHS may file an appeal with the BIA. An alien who loses his or her appeal before the BIA may seek review of that decision in the federal courts. DHS, however, may not seek review of a BIA decision in federal court.

The vast majority of cases pending before an immigration judge today began with an enforcement action by DHS. Therefore, the immigration courts' caseloads are tied directly to DHS enforcement and detention activities. DHS determines both detention space allocations and the filing of charging documents (NTAs), and thus EOIR is in regular and continuing contact with DHS to anticipate and respond to caseload trends. This close coordination is important to allow our two departments to explore additional ways of handling the removal adjudication process more efficiently. This will ensure that we are focusing resources on the highest priority removal cases, those involving individuals with serious criminal convictions and others who pose a danger to our communities.

**Pending Caseload**

An issue of continuing public interest is EOIR's pending caseload. At the end of FY 2010, EOIR's immigration courts had 262,622 proceedings pending, marking an increase of more than 40,000 proceedings pending over the end of FY 2009. In the first half of FY 2011, that pending caseload grew by an additional 9,400. This caseload is directly tied to annual increases in cases filed in the immigration courts by DHS. In FY 2010, the immigration courts received 325,326 proceedings. By contrast, in FY 2007, proceedings received were 279,430.

The highest priority cases for EOIR are those involving detained aliens. These individuals are often detained by DHS because they have criminal convictions that may make them deportable from the United States. Others are detained because they pose a danger to the community or are a flight risk. Therefore, the efficient and timely adjudication of these detained cases are a high priority for EOIR, as well as for other immigration agencies. In June 2010, DHS announced its civil immigration enforcement priorities as they pertain to the apprehension, detention, and removal of aliens. Those priorities focus on national security, public safety, and border security. As DHS enforcement programs reach their full potential, EOIR is planning ahead and shifting resources to meet the anticipated corresponding increase in the agency's detained caseload.

EOIR anticipates that this emphasis on the removal of criminal aliens and others who pose a threat to public safety will continue as DHS programs such as Secure Communities continue to expand. There are no signs today of the case receipts slowing. In fact, due to the receipt of more than 200,000 matters during the first half of FY 2011, EOIR projects that the case receipts for this fiscal year will top 400,000. Of the case receipts so far this fiscal year, 41 percent are detained cases. Of the cases EOIR has completed in FY 2011, 43 percent were detained cases.

In a world of limited resources, the focus on placing a high priority on the adjudication of detained cases has implications for the non-detained side of the docket, including some cases initiated as a result of persons seeking asylum in the United States. EOIR, however, understands that its mission is the timely adjudication of all cases, detained and non-detained, and therefore continues to maintain goals for completing non-detained cases. These goals are based on both congressional mandate and EOIR management decisions.

Immigration judges – and all EOIR staff – understand the importance of asylum claims and we are working very hard to decide every case as quickly as possible while still giving appropriate time to consider all of the facts of these potentially life-changing cases. While we take seriously our responsibility to decide cases in an expeditious manner, the utmost priority for every type of case is ensuring that every fact is considered and every application of law is correct. To do otherwise would be in opposition to our mission of fair adjudication through uniform application of the Nation's immigration laws.

**Hiring**

A well functioning immigration court system begins with adequate resources. The Department and EOIR are fully committed to ensuring that the immigration courts have the appropriate number of immigration judges and support staff to make sure that the system operates efficiently, providing prompt adjudication of removal cases while giving each individual case the review that it merits. Since last year, the Department and EOIR have placed a great emphasis on the hiring of new immigration judges in order to address the rapidly rising caseloads caused by increased DHS enforcement.

Since 2008, the process by which EOIR hires immigration judges has changed substantially. Under the current process, EOIR places job opportunity announcements on the Department's website, and on the Office of Personnel Management's federal employment website, www.usajobs.gov. When EOIR advertises an immigration judge vacancy, the Department also notifies more than 120 well-established legal organizations. The multiple methods of announcing these important vacancies help ensure wide dissemination of the announcements to potential applicants with varied backgrounds and the strongest possible qualifications.

As a result of the screening and evaluation process, EOIR interviews the most highly rated candidates. Candidates are evaluated based on the candidate's temperament to serve as a judge, knowledge of the relevant law, experience handling complex legal issues, experience conducting administrative hearings, and knowledge of judicial practices and procedures. At the conclusion of the interviews, the EOIR Director and the Chief Immigration Judge identify the top candidates for each vacancy and they are referred to panels of senior Department officials for further evaluation and interviews. These panels make the final recommendations for selection by the Attorney General. The length of time from when a person applies for an immigration judge vacancy to when an appointed candidate enters on duty has been substantially reduced under the new process, from more than a year in some instances to a few months.

During FY 2010, and into the beginning of the second quarter of FY 2011, EOIR undertook a major hiring initiative that resulted in the hiring of more than 50 new immigration judges. While cut short due to budgetary restrictions on hiring and reduced by attrition, we were still able to net an increase of 36 immigration judges. The initiative involved the hiring of newly authorized immigration judges, which, when filled along with other vacancies, brought our immigration judge corps to a record high of 272 in December 2010. Normal attrition of approximately 10 immigration judges per year will decrease our corps as time goes on, and we are hopeful that Congress will approve President Obama's FY 2012 request for additional appropriations to allow us to continue our successful hiring initiative.

In addition, EOIR is focused on hiring judicial law clerks to assist the immigration judges. Law clerks are hired for two year terms. For FY 2010-11, the number of judicial law clerks in place is 86 and EOIR will be adding an additional 21 by

the beginning of FY 2012. These law clerks are critical to helping the immigration judges manage their large and complex caseloads.

**Training**

EOIR is proud of the new immigration judge hiring process. I believe, however, that it is not enough to hire the most qualified people – we must also be vigilant in providing new immigration judges with vigorous training before they hear their first case and in continuing to offer training to the entire corps. As such, EOIR established several new training initiatives and continues to work with resources available to ensure such maintenance.

In December 2009, EOIR added a new Assistant Chief Immigration Judge for training. This senior official is responsible for enhancing and maintaining adequate training programs for immigration judges and other court staff. To ensure that they are ready to hear cases fairly and promptly, EOIR now provides new immigration judges with six weeks of training. Further, they are assigned a mentor immigration judge to assist them throughout their first year on the bench. They are also required to take and pass an immigration law exam before they can begin adjudicating cases. A formalized review process is included as part of a new immigration judge's probationary period, which typically lasts two years. If performance issues arise, EOIR offers counseling, and additional training and mentoring before more formally disciplining an immigration judge.

EOIR also goes to great lengths to ensure that both new and experienced immigration judges receive continuing education. In addition to the new immigration judge training described above, EOIR held a legal training conference in the summers of 2009 and 2010. The week-long training conference was mandatory for immigration judges, members of the BIA, and BIA attorney advisors, and covered many substantive legal issues that come before the immigration courts, relating to asylum, criminal issues, bond proceedings, adjustment of status, and many other topics. The conference also covered topics ranging from handling immigration proceedings involving unaccompanied alien children and respondents with mental competency issues to combating immigration fraud and managing a courtroom.

Due to current budgetary restraints, EOIR is turning to its other established methods of training to ensure that we continue to bolster and fine-tune the immigration judges' knowledge.

**Accountability**

The Department of Justice expects not only legally correct decisions from its immigration judges and Board Members, but also the demeanor and temperament appropriate for delegates of the Attorney General. In March, EOIR released the Ethics and Professionalism Guide for Immigration Judges, which addresses important issues

such as judicial temperament, *ex parte* communications, and professional competence. The Guide will ultimately be a part of the revised EOIR Ethics Manual.

EOIR continues to monitor immigration judge performance through an official performance work plan and evaluation process, as well as EOIR's performance management program and the ACIJs' daily supervision of the courts. EOIR's website now houses a link to a summary of the complaint process, a flow chart and instructions for filing a complaint, and statistics related to the numbers and types of complaints filed and how they were resolved. EOIR remains committed to ensuring that any allegations of misconduct involving immigration judges are investigated and resolved, promptly and appropriately.

**Board of Immigration Appeals**

The BIA continues to enhance the quality of its decisions while still keeping up with the appellate caseload. One example is the BIA's use of affirmances without opinion (AWOs), which are controversial because they do not spell out the BIA's reasons for its decisions. In 2004, AWOs comprised more than 30 percent of the BIA's decisions. In the past few years the Board has steadily decreased the use of AWOs, to the point that, in March 2011, only two percent of the BIA's decisions were AWOs. At the same time, the BIA has improved the quality of its decisions by ensuring that they set forth the legal bases for the BIA's conclusions, to ensure that parties appearing before the BIA understand why the BIA made a particular decision.

Another mission of the BIA is to publish precedent decisions, which provide guidance to immigration judges and the parties in removal proceedings on the many complex legal issues that arise in these proceedings. The BIA has increasingly emphasized this part of its mandate, publishing more precedent decisions in the past four years than in any similar period since the late 1990s.

These changes at the BIA have been partially responsible for a welcome and declining caseload in the federal courts of appeals in the past three years. In both the 2009 and 2010 year-end reviews on the judiciary, Chief Justice Roberts reported that the workload in the regional courts of appeals declined, in part due to a decline in appeals of BIA decisions.

There are approximately 529 fewer appeals to the federal courts from decisions of the BIA now as compared to a year ago. The most significant decreases have been in the Second and Ninth Circuits, which traditionally have been the courts with the largest immigration caseloads. Overall, the number of BIA appeals going to the federal courts today are about half what they were at the high-water mark in 2005. In addition, the federal courts are affirming BIA decisions at a higher rate now. The percentage of BIA cases reversed by the courts declined from 17.5 percent in 2006 to 11.5 percent in 2010.

The federal court picture is complex, and there are various possible reasons for the decline in the federal courts' immigration caseload. These likely include legal and

procedural changes in the federal courts themselves. However, we believe that one reason for the decline is the changes at the BIA over the past few years outlined above, namely improvements in the clarity and quality of BIA decisions and the decline in the use of AWOs.

## Other Initiatives

### Legal Orientation Program

EOIR's Legal Orientation Program (LOP) provides information about immigration court proceedings to aliens in detention to help them make more informed and timely decisions about their cases, including assisting them in distinguishing between legitimate and meritless claims for relief from removal. The LOP helps to improve the efficiency of the immigration court and detention processes as well as access to basic legal services for aliens without legal representation. Starting in FY 2003 at six sites, the LOP has continued to expand and local non-governmental agencies are now carrying out the program at 27 sites across the country. In FY 2010, EOIR expanded the LOP to serve all detained aliens in the New York City area. The LOP now provides legal orientation, which includes legal information, self-help assistance, and pro bono referral, to over 60,000 detained aliens per year, amounting to roughly 50 percent of all detained aliens in removal proceedings.

The LOP is also being utilized for certain non-detained aliens who appear in immigration court. For example, last year EOIR launched a pilot program at the Miami Immigration Court. The program uses a local LOP contractor to provide LOP services to non-detained or released individuals with cases before the Miami Immigration Court who (1) have been unable to secure counsel after being given the opportunity to do so; and (2) the immigration judge believes do not understand the nature and purpose of the proceedings, such as those who might be mentally incompetent.

In October 2010, EOIR launched a program to provide legal orientation presentations to custodians of unaccompanied alien children. As authorized under the Trafficking Victims Protection Reauthorization Act of 2008, the purpose of this program is to inform the children's custodians of their responsibility to ensure the child's appearance at all immigration proceedings, as well as protecting the child from mistreatment, exploitation, and trafficking.

EOIR has been working with the Department of Health and Human Services, Office of Refugee Resettlement, and non-government partners to implement the LOP for the custodians program on a national scale. The program was initially implemented in four of the largest program sites, and was recently expanded to an additional nine sites, for a total of 13 sites that will potentially serve up to 75 percent of all custodians.

**Digital Audio Recording**

The technology available to assist the immigration courts and the BIA in carrying out their responsibilities has improved tremendously in the past few years. EOIR is using a Digital Audio Recording (DAR) system, which replaced the antiquated analog taping system in the immigration courts. DAR is a state-of-the-art recording system designed to achieve better quality and more easily accessible recordings of immigration court hearings. In August 2010, EOIR completed the installation of DAR, which is now in every immigration courtroom nationwide.

**Fraud and Abuse**

In 2007, EOIR established a Fraud and Abuse Program so that cases of immigration fraud and abuse can be referred to the appropriate investigative agencies for action. The Program's staff is on call to assist immigration court and BIA staff in identifying suspected fraud in immigration proceedings. An EOIR employee is able to refer identified cases to the Fraud Program staff, which reviews the information, conducts preliminary investigations, and forwards those cases with evidence of fraud to investigative agencies. The Fraud Program also receives referrals regarding improper activity by aliens, practitioners, and immigration consultants from many other sources, including the public.

**Sanction Authority/Frivolous Filings**

A draft EOIR civil money penalties proposed rule that relates to sanction authority in immigration proceedings is currently being developed by the agency. EOIR intends to submit this rule to the Office of Management and Budget for interagency review under Executive Order 12866 in the near future.

EOIR has, however, by way of a final rule effective January 20, 2009, expanded the grounds for disciplining attorneys and representatives who appear before immigration courts or the BIA. The rule also allows EOIR to sanction the parties and counsel for clearly defined categories of gross misconduct.

## Budget

The Department continues to seek the resources necessary to hire additional immigration judges, BIA attorneys, and other staff, to provide them with sufficient training and tools and to continue pursuing other improvement measures that will benefit the immigration court system and the parties who appear before EOIR. For FY 2012, the President's budget includes $329.8 million and 1,707 positions for EOIR, representing an increase of 125 positions (21 immigration judge teams and 10 Board of Immigration Appeals attorney positions). The resources the President requests are essential to our ongoing efforts to recruit, train, and equip top-quality immigration judges and court staff.

**Conclusion**

Mr. Chairman, Senator Grassley, and distinguished Committee Members, despite the rising caseload and budgetary restrictions that it faces, EOIR continues to make great strides. The EOIR staff – immigration judges, Board Members, attorney advisors, and support staff – are dedicated professionals who work every day to ensure efficient and fair immigration court proceedings, both at the trial and appellate levels. EOIR faces the demands of a large and increasing caseload, but, with Congress' continued support, the Department is confident that EOIR will effectively meet that challenge.

Thank you for your interest and for the opportunity to speak with you today. I am pleased to answer any questions you might have.

PREPARED STATEMENT OF HON. JULIE MYERS WOOD

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**Statement of Julie Myers Wood**

**President, ICS Consulting, LLC**

**Former Assistant Secretary, Immigration and Customs Enforcement,**

**Department of Homeland Security**

**Before the Committee on the Judiciary**

**United States Senate**

**April 18, 2011**

Good morning, Chairman Leahy, Senator Grassley, and members of the Committee. My name is Julie Myers Wood and I thank you for the opportunity to testify before you on improving efficiency and ensuring justice in the immigration court system.

As the former Assistant Secretary of Immigration and Customs Enforcement (ICE), a key agency charged to enforce existing immigration laws, I had an insider's perspective of the challenges that face us. Since the 1986 amnesty, inconsistent enforcement, coupled with an inefficient and restrictive pathway for legal access to the country, have left us with a broken immigration system. The immigration courts are a key component of this system. Individuals charged in immigration court often face multi-year delays in adjudication, no guidance as to their legal options, and end up with removal orders that aren't enforced by the government. It is therefore of little surprise that there are so many complaints about the lack of justice provided many immigrants as well as such high levels of noncompliance with judicial orders, regrettably devaluing the immigration court system.

As this hearing recognizes, a properly functioning immigration court system is critical to ensure that current immigration enforcement efforts are working, and any future reforms are successful. This is a substantial challenge. Overall, the immigration court system continues to take in more cases than it decides each year, causing an increasing backlog of unresolved cases. In fiscal year 2010, for example, the immigration courts received over 392,000 new cases, but only resolved 353,000.[1] The Department of Justice (DOJ) reported an increase of 12% in new cases from 2006 to 2010.[2] Each immigration judge has enormous responsibilities. With little support, they

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[1] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at B2.

[2] Id. at A1.

each manage an extremely large docket. In fiscal year 2010, for example, immigration judges completed an average of 1,300 proceedings per judge, many more than other administrative law judges in other fields and with far fewer law clerk resources to assist them.[3]

In addition, with the increased implementation of ICE's Secure Communities program, the court system is facing an ever-increasing number of criminal aliens that will be coming into contact with the system. In fiscal year of 2009, ICE administratively arrested 37,377 individuals through the Secure Communities program.[4] For fiscal year 2010, ICE administratively arrested more than 96,000 individuals through Secure Communities.[5] These numbers will continue to go up as ICE more fully implements the Secure Communities program. In the first quarter of 2011, ICE reported that 66% of all individuals arrested or charged in the United States will be electronically screened by SC IDENT/IAFIS interoperability, compared with only 30% in fiscal year 2009.[6] ICE is planning for 100% screening by 2013. This is likely to have a drastic affect on intakes into the immigration court. Although some individuals may go through streamlined procedures, such as administrative removals or reinstatements, not all will be eligible or appropriate for those programs. Many of these individuals will be permanent residents who have strong ties to the United States, but whose crimes have made them deportable, and who have every reason to fully challenge. This shift in the type of population coming into the court system will further tax judges and the system itself without new resources.

However, before addressing ways that the immigration court system can be improved, I would be remiss if I didn't highlight some progress that DOJ has made in improving the adjudication of immigration laws and restoring integrity in the immigration court system. Attorney General Holder has focused on providing resources and attention to the immigration court system. Since the beginning of fiscal 2010, the Executive Office of Immigration Courts (EOIR) has hired 51 immigration judges, resulting in an increase of approximately 16% more judges compared to fiscal year 2009.[7] The current administration also has taken some steps to address professionalism and ethics, areas in which immigration courts have come under substantial criticism. These items have included a recently issued "Immigration Judge Ethics and Professionalism Guide" and a mechanism to file complaints against immigration judges on-line.

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[3] Numbers were compiled from EOIR Statistical Workbook and EOIR description of number of current judges. See AILA-EOIR LIAISON MEETING AGENDA QUESTIONS, April 6, 2011, at 5, available at http://www.justice.gov/eoir/statspub/eoiraila040611.pdf.

[4] Immigration and Customs Enforcement, Secure Communities Quarterly Congressional Report for first quarter of 2011, available at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy111stquarter.pdf.

[5] Id.

[6] Id. at 5.

[7] See AILA-EOIR LIAISON MEETING AGENDA QUESTIONS, April 6, 2011, at 5, available at http://www.justice.gov/eoir/statspub/eoiraila040611.pdf.

Unfortunately, despite the hard work of those charged with enforcing current immigration laws, there is no panacea for addressing the court's issues, and while I address a few areas of potential improvement below, they will not resolve the problems in their entirety.[8] Review and reform of the entire immigration system and incentives is necessary to obtain a properly functioning immigration court and system. Years of band-aid fixes, changes in enforcement priorities, as well as under investment while enforcement funding has grown at faster rates, has left the court system needing serious attention. Absent overall reform, I see the areas of greatest needs as follows:

## I. Improving Efficiency Within the Immigration Court System

Although resources to apprehend and detain illegal immigrants have increased substantially over the past several years, resources have not increased proportionally for the immigration courts. In this budget environment, it is highly unlikely that sufficient resources are available for significant expansion of the immigration court system.

This is unfortunate because many immigrants already experience serious delays in adjudication before an immigration court. In some areas of the country it is not unusual for immigrants to wait more than a year to have their case first heard before an immigration judge.[9] These delays increase the likelihood that immigrants will develop additional ties to the United States during adjudication, and potentially abscond during the process.

### A. Internal Initiatives to Improve Efficiency

To improve efficiency with existing resources, Congress and DOJ should consider creating additional incentives for docket management, looking to techniques utilized in Article III federal courts as an example.[10] There is nothing in law that encourages judges to resolve cases promptly or deny excessive continuances, unlike the federal courts, which have the Speedy Trial Act for criminal cases. In fact, some have suggested that DOJ's Office of Professional Responsibility has investigated judges or otherwise criticized them for denying excessive continuances. If true, this does not incentivize judges to resolve matters promptly. Although EOIR utilizes some metrics to encourage judges to resolve certain categories of cases within a prescribed period of time, these metrics should be revisited and revised if necessary. Performance measurements must not be limited to timeliness, of course, and must also take into account quality and transparency.

Another idea that has been previously proposed and worth considering is increasing the number of supervisory judges or chief judges in areas with more than one

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[8] My testimony will focus on cases at the initial stages of review by immigration courts, and will not address potential improvements that could be made at the Board of Immigration Appeals or immigration cases that are reviewed by federal courts.

[9] According to the Immigration Court Backlog Tool, the average length of time to resolve an immigration case in the United States is 467 days. See http://trac.syr.edu/phptools/immigration/court_backlog/

[10] Russell Wheeler from the Brookings Institute provided some useful analysis and specifics on potential analytical tools in his testimony before a House Judiciary Subcommittee in 2010, available at http://www.brookings.edu/testimony/2010/0617_immigration_review_wheeler.aspx.

judge. These judges could have some role in bringing order to the calendars, and also managing issues of professionalism in the courts.[11]

Finally, increased training, particularly in identifying credibility, identifying fraud and treatment of asylum seekers would be helpful to ensure that judges have the expertise to make reasoned decisions correctly and in a timely fashion.[12]

### B. Methods to Reduce Volume of Cases that Need Immigration Court Approval or Require Full Court Proceedings.

Although generating internal efficiencies should assist in some improvements, these internal efficiencies are insufficient to fully address the existing backlog and expected influx of cases and ensure that the court system operates with some efficiency.

One way to increase court efficiency is to reduce the number of cases that must come before immigration courts for full hearings, without reducing overall removal numbers. This can be done by fully utilizing appropriate prosecutorial discretion, as well as by encouraging voluntary and mandatory mechanisms to remove appropriate cases from full immigration hearings while effectuating removal.

First, the enforcement agencies should continue to exercise appropriate prosecutorial discretion to ensure that resources are not wasted on inappropriate or ill-considered cases. As set forth in the current ICE memos on prosecutorial discretion, it is reasonable for the immigration enforcement agencies to consider whether there is a pending petition that could have a likelihood of success when determining whether initiating removal proceedings is appropriate. The active involvement of ICE attorneys early in the process can assist in ensuring the agencies make an appropriate determination, and avoid wasting court or detention resources on cases where adjustment is likely, the government is unlikely to prevail, or extenuating circumstances support discretion.

At the same time, it is important that the discretion be carefully tailored so that the agency is not creating incentives for individuals to come here illegally and break the law. A fact-based analysis must ensure that the prosecutorial discretion doesn't grant a wholesale exemption on whole categories of individuals without the approval of Congress, or make an executive branch decision to simply defer action on broad sections of immigration violators.

In addition to utilizing appropriate prosecutorial discretion, it makes sense to consider enhanced use of other methods that reduce the number of cases in immigration court. For example, the partial expansion of expedited removal should be considered. Expedited removal may be utilized for aliens who lack proper documentation or have

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[11] See, e.g., ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (prepared by the Arnold and Porter law firm) at Part 2 (2010) (discussing increasing number of supervisory judges).

[12] Id.

committed fraud or willful misrepresentation of facts to gain admission into the United States, unless the aliens indicate either an intention to apply for asylum or a fear of persecution.[13] Under expedited removal processes, administrative and judicial review are restricted to cases in which the alien claims to be a citizen, or was previously legally admitted under certain circumstances.

By statute, expedited removal may be utilized for individuals that have been in the country for up to two years.[14] However, the executive branch has not utilized the full statutory authority provided for expedited removal, but instead applied certain arbitrary limitations, including the most recent requirement that the alien be apprehended no more than 100 miles from the border and has spent less than 14 days in the country. There is no reason that the government could not take steps to administratively expand the current use of expedited removal, by, for example, focusing on certain known smuggling routes beyond 100 miles or slightly extending the current time period for eligibility (30 days vs. 14 days, for example). Another alternative would be to apply extended time and range limits for the use of expedited removal for immigrants who are convicted of a crime by state or local law enforcement.

Any extension of expedited removal would have to be managed closely to ensure that the existing credible fear process for asylum seekers continues to be strictly followed and appropriate training is provided for DHS officers. In addition, individuals processed under expedited removal procedures are subject to mandatory detention, so administrative expansion under current authorities would have to be carefully coordinated to avoid problems with ICE detention space.

Similarly, stipulated removals provide opportunities for immigrants who have voluntarily agreed to their removal to largely avoid the court process.[15] Again, it is important that the process be closely monitored to ensure that individuals are not forced into participating in the program, are fully informed about potential claims for relief, and understand the restrictions they are agreeing to in this process. However, for many individuals without valid claims to adjustment, stipulated removals allow them to resolve their situation promptly. A Ninth Circuit decision in 2010 criticized the process by which ICE had utilized stipulated removal, which significantly reduced stipulations all over the country for the rest of the fiscal year.[16] The agency purportedly has revised the process to conform to the Ninth Circuit ruling and make the notice more transparent, but there is more that could be done in this area to ensure that this tool is fully and appropriately utilized.

An additional mechanism that could be more aggressively utilized is the voluntary departure program. A voluntary departure is a mechanism by which eligible immigrants agree to leave the country and avoid many of the bars associated with stipulated removal

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[13] 8 U.S.C. § 1225.
[14] Id.
[15] 8 U.S.C. §1229a(d).
[16] United States v. Ramos, No. 09-50059, available at http://www.ca9.uscourts.gov/datastore/opinions/2010/09/24/09-50059.pdf.

or formal removal orders.[17] DOJ reports that 17% of all removals in the immigration court system are now voluntary departures, up from 10% only five years ago.[18] It is worth considering whether ICE could administratively create mechanisms to more uniformly notify individuals of the option of voluntary removal immediately, so that appropriate candidates might consider this option at the very outset of proceedings (rather than waiting till a master calendar hearing, or afterwards). For example, ICE could distribute information to individuals about the requirements and benefits of voluntary departure at the same time ICE distributes the required list of pro-bono legal providers. When statutory reforms are considered, it may be worth looking more broadly at who should be considered eligible as well.

Another voluntary program that could be expanded to reduce the burden on immigration courts is the rapid repatriation program, or Rapid REPAT program. This program supports removal efforts by enhancing the ability of ICE to remove criminal aliens from the country, and reducing the number of aliens that go through the full removal process. The Rapid REPAT program provides for conditional early release of qualifying non-violent criminal aliens on the condition that those aliens voluntarily agree to their removal, waive appeal rights associated with their state convictions and agree not to return to the United States.[19]

Arizona, Puerto Rico, Georgia, New Hampshire, New York and Rhode Island currently participate in the Rapid REPAT program, and according to ICE, as of late 2010, these localities have reported a savings of $445 million from the program. Rapid REPAT saves significant costs for federal taxpayers by reducing federal detention and court time, and leveraging limited federal detention resources. Thus, this program has the enviable result of encouraging non-violent illegal immigrants to go back to their home countries while making the immigration courts more efficient and saving taxpayers significant money.

## II. Ensuring Justice is Done

One of the greatest challenges to ensuring justice in immigration courts involves the number of individuals who are unaware of their options regarding representation or who represent themselves.

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[17] 8 U.S.C. §1229c.

[18] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at Q1.

[19] Importantly, under this program, aliens are not treated differently than U.S. citizens. The state must already have (or put in place) a parole structure that permits early release for eligible U.S. citizen criminals. If an alien participates, but then comes back into the United States illegally, the individual first serves the remainder of their state sentence and is subject to additional federal prosecution.

More than half of the immigrants in removal proceedings do not have representation, and 84% of detained immigrants do not have representation.[20] Without representation, many immigrants are often unaware of whether they have legitimate claims or not, and may incorrectly choose to concede or fight proceedings.[21] Although ICE attorneys and immigration judges routinely decipher legitimate claims by immigrants who are not represented by attorneys, the system should not rely on the ability of opposing counsel or overworked judges to identify valid claims.

Given the significant budget pressure, however, appointment of counsel for all indigent aliens is not currently feasible on a widespread basis. To ensure justice is fully done, it is worth considering whether limited appointment of counsel for indigent aliens is appropriate for those most vulnerable in the system, including immigrants who are not mentally competent, certain categories of asylum seekers and unaccompanied minors. These individuals are most likely to be fully disadvantaged without counsel.

With mentally ill immigrants who are not represented, there is a significant risk that well-meaning government attorneys and immigration judges will not always be able to identity potential issues and valid claims for these individuals. Pro bono attorneys are often unwilling to take on a case for a mentally incompetent individual because they are concerned about the potential liability issues or inability to fully communicate with their clients. Making limited funding available for these individual cases could partially mitigate the concern about handling these difficult, but important cases.

In the meantime, Congress should increase support of programs that provide basic education to immigrants about their rights, so that immigrants may make informed decisions about going through the court process or participating in some sort of voluntary removal option, like voluntary departure, stipulated removal or Rapid REPAT. The funding provided by the DOJ's Legal Orientation Program (LOP) has provided critical assistance in selected detention facilities, but it is extremely limited. Currently, the LOP operates in only 27 detention facilities, even though ICE places immigrants in more than 200 facilities. The LOP also only has one limited pilot program for a non-detained docket in Miami. Immigrants detained outside the targeted detention facilities often do not have similar presentations and may remain unaware of their options. The LOP should be expanded to all aliens who are detained and are not detained (including aliens on alternatives to detention), and provided early enough in the process so that immigrants may factor the presentations into their decision-making process. With this expanded reach, DOJ should analyze the results to help show the cost-benefits of the program. Just as individuals who are represented also often end up saving the court time and resources,

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[20] See, e.g., ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (prepared by the Arnold and Porter law firm) at Part 5 (2010).

[21] Indeed, the preliminary results of the New York Immigrant Representation Study indicate that a strong predictor of whether individuals will prevail on claims is whether they are represented. However, it is not clear that this analysis takes into account the understandable strong bias of pro bono advocates and for-profit attorneys to take on cases where they believe that they have a likelihood of success. As such, although significant, these numbers could be somewhat slanted. A summary of the preliminary findings is available at http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf.

individuals that are made aware of their rights may also reduce some unnecessary burdens on the court system.

In addition to the formal programs implemented by DOJ, other NGO and private sector mechanisms to encourage education and pro bono representation should be supported. For example, the pro bono community, with the assistance of the ABA, has developed a revised video that gives a brief introduction to legal issues immigration detainees face and potential options. This video will be played in all detention facilities. ICE should ensure that this electronic presentation is played in intake/processing centers and alternative to detention locations as well.

In sum, until Congress considers overall reform to the immigration system, the immigration courts will continue to face significant challenges. The continuing influx of cases requires the immigration court system to become more efficient with its limited resources. Efforts at efficiency, however important, should not trump the needs of the immigrants who come before the courts seeking an opportunity to remain in the United States. Increased attention to the challenges immigrants face with inadequate information and representation also will help ensure that the immigration court system provides justice to those who come before it.

I appreciate the opportunity to appear before you today and welcome any questions you may have for me.

PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

Statement of

# The Honorable Patrick Leahy

United States Senator
Vermont
May 18, 2011

Statement Of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Committee On The Judiciary
Hearing On "Improving Efficiency And Ensuring Justice In The Immigration Court System"
May 18, 2011

Immigration is an issue that has led to fierce debate, but no comprehensive solution over the last several years. Just a week ago, the President went to the border to renew the discussion and called for Congress to enact comprehensive reform, something I have long supported. While we struggle to attract bipartisan support for a comprehensive solution, the current system continues to be hobbled by a complex immigration statute and overburdened immigration courts. Today the Committee is taking a look at those courts.

The immigration courts have not attracted much attention in our immigration debates, but decisions made by immigration judges carry great weight. To an asylum seeker with a valid claim of persecution in her home country, a denial may be tantamount to a death sentence. If the courts do not operate fairly and efficiently, long delays are additional burdens. A successful petitioner may not be able to reunite with her family or bring her children away from danger and to the United States during the pendency of her case. In my home state, Vermont Immigration and Asylum Advocates assists hundreds of immigrants and asylum seekers each year, and works hard to overcome the challenges to winning a claim.

Let me give you an example of what I am concerned with: The Associated Press recently reported on an asylum seeker who had been jailed and tortured for supporting the political opposition in Cameroon. Her husband died behind bars for his activism. Her brother and mother were tortured. This woman, who fled and had to leave behind two sons and a 20-month-old daughter, waited for five years for her case to be resolved by the immigration courts. Five years while her children were separated from her. By the time she completed all the steps to bring her children to the United States, her daughter, who she had last seen as an infant, had reached the age of 10.

The pace of justice in the immigration courts is too slow. The courts operate under the Executive Office for Immigration Review, or EOIR, within the Department of Justice. They have struggled for years under heavy caseloads, insufficient staffing, and technological weaknesses. The Federal Circuit Courts have excoriated the immigration courts and the administrative appeals board for shoddy work, including denials of due process, bias against immigrants, and unreasoned opinions. Under the previous administration's Justice Department, the hiring of immigration

judges was politicized, with candidates vetted for political affiliation, voting records, and personal views on abortion, rather than immigration law expertise.

The courts have come a long way since that point. The Obama administration revamped the personnel policies and hired immigration judges with higher qualifications and a diversity of backgrounds. Clerks and support staff have been added. Training and technology have both improved. I want to commend our witness, Juan Osuna, Director of EOIR, for his leadership in steering this ship onto a steady course. Just at this moment, however, new challenges have arisen that are not of the courts' making.

The heavy emphasis on enforcement by the administration has led to a sharp increase in caseloads. At the same time, the Department of Justice faces budget cuts across the board, and can no longer hire judges to keep up with the caseload. As a result, the case backlog rose 44 percent from the end of fiscal year 2008 to the end of the calendar year 2010.

And so the example of the asylum seeker from Cameroon has become all too typical. The average time to complete a case in immigration court is over 15 months. Cases involving claims for relief, such as asylum or protection against torture, average more than 23 months.

I called this hearing not to criticize the immigration courts, but to have a constructive discussion about how they can be improved. We should ask what the courts can do with current resources to increase efficiency and improve the quality of adjudication. How many new judges and support staff are needed to bring the case backlog under control? What innovative steps are being taken by nongovernmental entities, such as the New York Immigrant Representation Study, launched by Judge Robert Katzmann of the Second Circuit Court of Appeals? How can bar associations, law firms, and non-profit organizations contribute?

We are joined by experts who understand all aspects of this challenge. In addition to Mr. Osuna of EOIR, I welcome Julie Myers Wood, the former Director of U.S. Immigration and Customs Enforcement, who brings an enforcement perspective. We also welcome Karen Grisez, the Chair of the ABA Commission on Immigration, which released a comprehensive study on immigration adjudication in 2010, the most significant report of its kind in more than a decade.

I believe the challenges facing the immigration courts are not partisan or ideological. We all want courts to operate fairly and efficiently and serve the interests of justice. Today, I hope we will discuss how best to achieve those goals. I welcome our witnesses and look forward to their testimony.

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PREPARED STATEMENT OF RANKING MEMBER CHUCK GRASSLEY

**STATEMENT OF SENATOR GRASSLEY FOR THE SENATE JUDICIARY COMMITTEE HEARING – "IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM"**

**MAY 18, 2011**

Mr. Chairman. I'd like to say a few words.

I want to thank Senator Cornyn for serving as the ranking member for this hearing.

Although I'm open to listening, I have serious concerns with the recommendations for changing the court system set forth in the 2010 American Bar Association report.

I don't agree that a wholesale restructuring of the immigration court system is necessary. In particular, I'm hesitant to support creating either a specialized Article I court or a brand new agency to oversee the system.

Also, I have concerns about proposals to change the scope and standards of appellate review by either the Board of Immigration Appeals or the federal courts of appeals.

Rather, we should be looking to fix inefficiencies in the current system and to improve the immigration process. As part of this effort, I believe that expedited removals are a helpful tool and should be utilized more often.

I have to say that I'm troubled by the Obama Administration's approach to immigration. The Administration's approach appears to be based on a selective enforcement of the law --- begrudgingly enforcing some court orders, while disregarding hundreds of thousands of court orders it does not agree with.

Specifically, it appears that the Administration has made a conscious decision not to enforce hundreds of thousands of removal orders issued by the immigration courts and the federal courts of appeals. The Administration only enforces removal orders when an alien has been convicted of the most serious of crimes.

According to the statistics from the Executive Office for Immigration Review for 2009 and 2010, 52,517 aliens failed to appear for their court dates.

Based on the Administration's removal priorities, --basically convicted felons and border seizures only, -- this likely means 52,517 fugitives for just two years alone. And that's on top of hundreds of thousands of unenforced court orders from previous years.

In addition to the non-enforcement of removal orders, I continue to be troubled by reports that the Obama Administration has ordered government attorneys to dismiss pending removal cases on a wholesale basis.

Just yesterday, when Senator Cornyn asked John Morton, the Assistant Secretary of Immigration and Customs Enforcement, about the ordering of wholesale dismissals, his answer was less than clear.

Protecting our borders and citizens and enforcing our immigration laws is something that is absolutely required of the President and his Administration to fulfill their constitutional oaths.

The same is true for enforcing immigration court orders. The Executive Branch shouldn't get to selectively enforce orders. Each and every court order must be enforced.

Americans' commitment to compassion is unprecedented. Our immigration system is a powerful expression of that commitment.

However, an absolute commitment to the rule of law is the bedrock of our democratic form of government. Our laws are enacted by Congress as the representatives of our citizens. And those laws must be followed by all, --- including this Administration.

Unfortunately, the selective enforcement of the law is a recurring pattern with this Administration.

QUESTIONS SUBMITTED TO KAREN T. GRISEZ BY SENATOR CORNYN

**SENATOR CORNYN QUESTIONS FOR THE RECORD**
**5-19-2011**

## Questions for Karen T. Grisez

**Article I Courts**

One recommendation from the ABA is that we create an Article I court for immigration proceedings. This view is supported by some immigration judges who think it would give them more autonomy and more time to render decisions in cases.
I have drafted a bill to create an Article I court using the bankruptcy and tax courts as a model.

(1) What do you think of creating an Article I court?
(2) How long would it take for DOJ to transition its attorneys and board members to such a system?

**Legal Orientation Program**

It seems like there is agreement that the legal orientation program is one way we could streamline court proceedings. However, there is some opposition to using taxpayer money to fund the program.

(1) What do you think about using a portion of the fees collected from applications and petitions and using the revenue to fund expansion of the Legal Orientation Program nationwide?
(2) How much would it costs to expand the program nationwide?

QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR CORNYN

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

**SENATOR CORNYN QUESTIONS FOR THE RECORD**
**5-19-2011**

## Questions for Juan Osuna

**Removal Proceeding Dismissals**

Last year, the press reported that immigration courts in Houston were dismissing cases across the country, including cases involving criminal aliens. According to the reports, Houston was not the only location where cases were being dismissed or terminated in large numbers.

(1) Were you aware these reports?
(2) Did the Attorney General issue any directives or guidelines to Immigration Judges regarding case termination?
(3) Do you have any statistics on the numbers of cases that have been dismissed in all immigration courts and the reasons for such dismissals?
(4) [If no] Please provide a response to my staff as soon as possible.

**Immigration Caseloads in State Courts**

Recently, Judge Minton Murray, a state judge in Cameron County, Texas indicated that his court (as well as the county probation officers, U.S. attorneys, and mandatory psychiatrists) are drowning in workload from juvenile offenders who are illegal aliens.

Most of the kids are 15-16 years old and acted as drug mules. Many of the kids have come in multiple times after being "round-robin'd" by CBP. Judge Murray said he can detain some juveniles and even get the U.S. Attorney to prosecute but in most cases they either plead out and get probation or are simply let go and returned over the border by CBP. Judge Murray says state courts like his desperately need resources to handle the workload.

(1) Have any of you heard similar complaints from other state courts?
(2) How often do state courts refer cases to ICE or DOJ for removal proceedings?

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**In Absentia Removal Orders**

One of the frustrations for Immigration Judges is when an alien fails to appear for a hearing. Failure to appear means a valuable time slot that could have been allocated to another case is lost. IJs also have no ability to compel aliens to appear in court, such as through a bench warrant or subpoena.

(1) How many in absentia removal orders do IJs issue each year?
(2) What can be done to ensure that an alien appears for their immigration court hearing?

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(1) What do you think about using a portion of the fees collected from applications and petitions and using the revenue to fund expansion of the Legal Orientation Program nationwide?
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QUESTIONS SUBMITTED TO HON. JULIE MYERS WOOD BY SENATOR CORNYN

**SENATOR CORNYN QUESTIONS FOR THE RECORD**
**5-19-2011**

## Questions Julie Myers Wood

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## QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR FEINSTEIN

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

Senator Dianne Feinstein
Written Questions to Juan P. Osuna, Director of the
Executive Office for Immigration Review

**California Backlog in Immigration Cases**

At the end of last year, Los Angeles alone accounted for approximately 16 percent of the total U.S. immigration court backlogs. According to a February 2011 report by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the State of California has the longest immigration court wait times in the Nation. Wait times for cases pending in California's immigration courts average 639 days, compared to a national average of 467 days. The backlogs in Los Angeles exceed the State's average with current wait times averaging 744 days.

- *What steps has the Executive Office for Immigration Review taken to reduce the large backlogs that are present in Los Angeles and throughout the State of California?*
- *In response to these backlogs has the Executive Office for Immigration Review reassigned immigration judges and support personnel from other states to work in California since California has the largest number of backlogged cases in the Nation? If not, why not?*
- *Are immigration courts utilizing available technology, such as video conferencing, to help manage caseloads in California?*
- *What resources, in addition to hiring more immigration judges, do you need to alleviate these backlogs?*
- *How many immigration judges are needed to eliminate the current backlogs in cases?*

**DHS Enforcement**

I understand that Immigration and Custom Enforcement (ICE) has increased its detention bed space throughout California. ICE has entered into contracts with the Santa Ana county jail, the Theo Lacy Jail in Orange County, and the James A. Musick facility in Orange County to secure more space to house detained immigrants.

- *How does your office plan to address the capacity problem in the immigration judge corps in light of the Department of Homeland Security's plan to increase the number of detention beds in the Los Angeles area?*

**Impact of Immigration Court Delays on Asylum Seekers and Vulnerable Populations**

I am particularly concerned about the impact the backlogs have on those who seek asylum and other vulnerable populations, such as unaccompanied children. These backlogs in immigration cases cause some individuals to wait a year or more for a hearing date, which may be continued more than once. In addition, when delays this long exist, witnesses disappear or die or the conditions in the country from which the immigrant has migrated to the United States can change.

- *Given the very large case load that immigration judges handle, how does your office ensure that judges are devoting an appropriate amount of time and consideration to each case?*

- *Does the Executive Office for Immigration Review take steps to mitigate the harm done to immigrants who face delayed access to immigration courts?*

Last year, the Executive Office for Immigration Review created the new position of Assistant Chief Immigration Judge for Vulnerable Populations. I applaud the creation of this new position, as it has the potential to greatly enhance your office's ability to address the unique issues faced by asylum seekers and unaccompanied children.

- *Can you provide an update on the hiring process of the Assistant Chief Immigration Judge for Vulnerable Populations? Was this position also subjected to the hiring freeze at the Justice Department?*

**Unaccompanied Alien Children**

In December 2008, the Unaccompanied Alien Child Protection Act was signed into law as part of the Wilberforce Trafficking Victims Protection Reauthorization Act. The law specifically required the Justice Department, the Department of Homeland Security, and the Department of Health and Human Services to coordinate the drafting and issuance of regulations that take into account the special needs of unaccompanied alien children while in deportation proceedings. Today, over two years since the enactment of the law, these regulations have still not been issued.

- *Why haven't these regulations been implemented since over two years have passed since the bill was signed into law?*

- *Do you have a specific timeline you can provide for when those regulations will be finalized?*

- *If not, can you please follow-up with my staff on a specific timeline for issuing these regulations to ensure that the special needs of these children are met?*

**Immigration Fraud Prevention**

In 2009, the Executive Office for Immigration Review developed a pilot program to warn immigrants about the dangers of notario fraud.

- *What was the outcome of this pilot program? Was an assessment performed by your office to measure or assess the effectiveness of the pilot program?*
- *What additional steps has the Executive Office for Immigration Review taken to prevent immigration fraud?*

**Streamlining of Cases by Board of Immigration Appeals**

From 2001 to 2009, the immigration caseload in the Ninth Circuit increased significantly due to more litigants appealing decisions by the Board of Immigration Appeals to the Ninth Circuit. I understand that the Board of Immigration Appeals has recently worked to improve the quality of its decisions in an attempt to decrease the number of appeals to the federal Circuit Courts.

- *Please describe the efforts that have been made by the Board of Immigration Appeals to decrease appeals to federal circuit courts.*
- *What impact have these efforts had on the immigration caseload of the Ninth Circuit?*

**Legal Orientation Program**

Since 2003, the Executive Office for Immigration Review has funded a Legal Orientation Program that seeks to educate individuals in removal proceedings so that they can make more informed decisions about their cases. Currently, the Legal Orientation Program is offered in detention facilities in San Diego, Lancaster, and San Pedro, California.

- *Does the Executive Office for Immigration Review plan to expand the Legal Orientation Program to other cities in California to help reduce the backlogs?*

QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR GRASSLEY

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

**QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY**

**TO**

**JUAN OSUNA**

**DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:**

**"IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM."**

**HELD ON MAY 18, 2011**

1. At the hearing, I asked you about the hundreds of thousands of unenforced removal orders issued by immigration judges, the Board of Immigration Appeals ("BIA") and the federal courts of appeals.

You responded as follows:

> I think that removal orders, once the process has been completed, should be enforced promptly. I think that that goes to the integrity of the process. And it is necessary for the process to have legitimacy in the eyes of the public. ...

At a different point in the hearing, you also testified:

> I don't view the immigration court system in isolation or as a standalone component. ..., [E]very removal case before an immigration judge begins with a DHS enforcement action, and therefore the Department of Justice and EOIR are in constant contact with DHS and other agencies in order to anticipate and respond to caseload trends.

(a) As you do not view the immigration court system in isolation from enforcement efforts, what are you doing to increase the prompt enforcement of all removal orders in non-detained cases?

(b) Have you discussed the issue of promptly enforcing removal orders in non-detained cases and the backlog of unenforced orders with the Attorney General? If so, when did that conversation take place and what was the substance of it? If not, why not? If you haven't done so already, will you speak with the Attorney General now and report back to me?

(c) Have you discussed the issue of promptly enforcing removal orders in non-detained cases and the backlog of unenforced orders with Secretary Napolitano? If so, when did that conversation take place and what was the substance of it? If not, why not? If you haven't done so already, will you speak with Secretary Napolitano now and report back to me?

2. During the hearing, Senator Cornyn asked Julie Myers Wood whether it was within DHS Secretary Napolitano's discretion to expand the category of cases that are subject to expedited removal. Ms. Wood responded as follows:

> It is. By statute right now, the agency would have up to two years if an individual had been in the country up to two years. Right now, they're doing if an individual has been in the country up to 14 days and a hundred miles from the border.
>
> You could certainly target, ..., certain smuggling routes where it's easy to see that people have only been in the country kind of a certain amount of time. Or you could look in certain detention facilities; people who are convicted of state and local crimes, where it's also easy to show that they've been in the country for a short period of time. And that might be a good category. ...
>
> Also, cases that are appropriate for voluntary departures and prosecutorial discretion, just weeding those out up front. ...

(a) Identify which portions of Ms. Woods' testimony quoted above that you agree with, if any, and why.

(b) Identify which portions of Ms. Woods' testimony quoted above that you disagree with, if any, and why.

(c) If you agree with any of Ms. Woods' suggestions, set forth what you are doing to see that the Department of Homeland Security ("DHS") implements them.

(d) Will you discuss the issue of expanding the use of expedited removals with Secretary Napolitano and report back to me?

3. During the hearing, I asked you about the practice or policy of the Office of Professional Responsibility ("OPR"), whereby it initiates an investigation of an immigration judge whenever a federal appellate court issues a decision critical of the conclusions reached by the judge.

You responded:

> ... without getting too much into the OPR mechanics there, ... I don't think it's quite accurate to say that OPR investigates any time that a federal tribunal or appellate court reverses an immigration judge. In my experience, OPR investigations are quite rare. They happen only in certain instances where OPR deems it appropriate. But it's not in every case where an appellate court reverses an immigration judge's decision.

On further review, my understanding is that OPR investigates an immigration judge whenever a federal court finds that the judge violated an alien's due process rights. Indeed, I understand that OPR investigates even if no court had previously found a violation of due process under the circumstances (in other words, the case involved an issue of first impression).

(a) Why does OPR independently and on its own investigate immigration judges under these circumstances? How is this not intimidation?

(b) Do you believe it would be appropriate for the Judicial Conference or the Congress to investigate a district judge every time a circuit court holds that the district judge erred by not finding a due process violation? If not, then how are OPR's investigations justified?

(c) For each of the last five years, how many investigations of immigration judges has OPR initiated without any complaint having been filed against the immigration judge?

(d) What criteria does OPR use to determine whether to commence an investigation of an immigration judge on its own? If the criteria are contained in a document, provide a copy.

(e) What guidelines or criteria govern OPR's *sua sponte* investigations of immigration judges? If the guidelines or criteria are contained in a document, provide a copy.

4. At the hearing, I noted that the immigration judges' union believed that these *sua sponte* OPR investigations are inappropriate and that judges feel or could easily feel intimidated. I then reminded you that the issue was raised less than a year ago at a hearing before a subcommittee of the House Judiciary Committee, a hearing at which you testified.

I then asked you whether you had looked into whether judges do, in fact, feel intimidated.

You did not answer my question. Instead, you stated: "In my experience, immigration judges are not being intimidated into granting more asylum cases by the possibility of an OPR investigation."

I would, however, like an answer to my question.

(a) Since the House subcommittee hearing last year, have you done anything to look into whether judges do, in fact, feel intimidated? If so, describe in detail what you have done.

(b) Have you met with the leadership of the judges' union to discuss this issue? If not, why not?

(c) I believe that you should meet with the leadership of the judges' union to discuss this issue. If you have not already done so, will you do so now? If you will, identify when that meeting will take place and report the results of that meeting to me. If you will not meet with the union, set forth the basis for refusal to do so.

5. During the hearing, I asked you about the Attorney General's decision in *In re: Dorman*, 25 I&N Dec. 485 (A.G. 2011) (Interim Decision No. 3712). By that decision, he vacated a BIA decision to deport an alien from Ireland who was attempting to avoid deportation based on his civil union in New Jersey with a U.S. citizen. In sum, the BIA had held that the alien should be deported because the Defense of Marriage Act ("DOMA") does not recognize same-sex marriage.

(a) Is the immigration judge in the *Dorman* case being investigated by OPR based on his or her decision in the case?

(b) Are any of the members of the BIA panel from the *Dorman* case being investigated by OPR based on their decision in the case?

6. Are there categories of DHS decisions that are adverse to aliens that are currently subject to review by an immigration judge and/or the BIA, where the availability of review should be eliminated, thereby reducing immigration judges' and/or the BIA's caseloads?

7. For each of the past five years, how many orders of removal have been entered each year by immigration judges? In other words, how many aliens were denied any relief and how many aliens were granted some form of relief by an immigration judge that permitted them to remain in the United States?

8. For each of the past five years, how many orders of removal were affirmed by the BIA? In other words, how many aliens were denied any relief by the BIA and how many aliens were granted some form of relief by the BIA that permitted them to remain in the United States?

9. For each of the past five years, excluding voluntary departures, how many cases have been terminated by immigration judges without a final decision on the merits?

10. For each of the past five years, excluding voluntary departures, how many cases terminated by immigration judges without a final decision on the merits, were affirmed by the BIA?

11. For each of the past five years, how many cases have been administratively closed?

12. How many cases are in the system that have been administratively closed (a) for one year or less, (b) for more than one year, but less than five years, (c) for five years or more, and (d) for ten years or more, without being reopened by DHS or the alien?

13. During the hearing, Karen Grisez of the American Bar Association testified:

> Far too often I see people pursuing appeal after appeal after appeal every time a judge asks them, do you accept my decision or do you want to appeal? ... I constantly see people -- pro se people pursuing appeals to the BIA, aggravated felons with no relief under the law, and their appeal is, I want another chance, I'll never do it again. And while the cases may be sympathetic and there may be a lot of equities, there is no legal relief. And those cases shouldn't be in the system under the current law.

But Ms. Grisez also praised the BIA for moving away from using affirmances without opinions ("AWOs") to issuing lengthier decisions. She also praised the BIA for using more three-member panel review as opposed to single-judge review. Indeed, the ABA's 2010 report advocates against AWOs and argues that the BIA's regulations should be changed to require BIA panels to issue written opinions that respond to all non-frivolous arguments in all cases.

Case management is a job for judges. It is a standard practice in the federal courts of appeals that cases are affirmed without formal opinions. Indeed, local court rules have long provided for this procedure. Similarly, the federal courts of appeals regularly employ screening judges or have staff attorneys screen appeals.

(a) In light of the high number of frivolous appeals before the BIA, do you agree that the members of the BIA should independently decide the best case management procedures to employ without pressure from outside groups, either directly or indirectly?

(b) Do you agree that when BIA members are forced to write a formal opinion when one is not needed, other cases receive less attention and less prompt attention?

(c) Do you believe BIA members should have the discretion to utilize AWOs whenever they believe appropriate and without regulations barring them from utilizing the procedure?

(d) What is the current policy of the Executive Office for Immigration Review ("EOIR") regarding the BIA's ability to use AWOs? Are any changes being contemplated? If so, what changes are being considered?

(e) What is EOIR's current policy regarding the BIA's utilization of a single-judge panel versus three-judge panels? Are any changes being contemplated? If so, what changes are being considered?

14. Ms. Grisez and the ABA also appear to maintain that more written decisions by the BIA will result in fewer appeals being filed by aliens. However, common sense and the lack of enforcement of removal orders dictate that requiring BIA members to write decisions will not reduce the number of appeals filed.

(a) Do you agree that requiring BIA panels to write decisions addressing certain arguments will not reduce the number of appeals filed?

(b) If you do not agree, what documented proof do you have that requiring BIA panels to write decisions will reduce the number of appeals filed?

(c) Does the EOIR currently require BIA panels to issue written responses to all non-frivolous arguments? If so, when was that requirement implemented? If not, is such a requirement being contemplated by the EOIR?

15. Mark H. Metcalf, a former immigration judge, submitted a written statement in connection with the hearing. At pages 19-25 of his written statement, he writes:

> Trial courts are popularized as stingy, denying relief to aliens as a product [of] poor scholarship, intemperate demeanor and bigotry. Both DoJ—through Attorney General statements calling judges "abusive"—and EOIR—through skewed numbers—have encouraged this perception.
>
> EOIR reports deportation verdicts make up 80% of trial court decisions and, by extension, that aliens receive favorable judgments around 20% of the time. Accuracy reveals something very different. Accuracy reveals aliens receive favorable judgments three times more often—in fact, 60% of the time. From 2000 through 2009—ten fiscal years—trial courts decided 486,032 cases in which aliens filed applications—that is lawsuits—to defeat deportation efforts. The courts gave favorable verdicts to aliens in 295,617 cases.

That the courts have been typecast as openly hostile or bigoted is no surprise. EOIR's numbers and narratives suggest courts seldom grant relief and that removal orders typify the courts. To create this impression, EOIR did what it nearly always does. It mixed apples with oranges.

EOIR compared these 295,617 favorable decisions—decisions coming from lawsuits defending against deportation—and compared them to all decisions made by the courts, those with and without lawsuits. With comparisons like this, grant rates were bound to appear extremely low and, as accurate numbers reveal, the truth is something entirely different.

In the last ten years, trial courts made decisions in 2,124,022 cases, but only 486,032 of these decisions involved suits in which aliens defended against deportation efforts. In other words, 1,637,990 aliens filed no lawsuits—in fact did not seek to remain in the U.S.—and in nearly every case consented to removal. When the 295,617 cases that received favorable judgments are compared to 2,124,022 decisions made from 2000 through 2009, rulings that favored aliens were a scant 13.9% of all verdicts. It is EOIR's comparing dissimilar cases—combining cases in which aliens opposed removal by filing lawsuits with cases in which aliens filed no lawsuits opposing removal and, instead, consented to removal—that drives down the percentage of favorable judgments.

The critical distinction—the distinction EOIR never makes—is the difference between cases that have applications and those without applications. What EOIR never tells Congress or the public is that only cases with applications—in other words lawsuits defending against deportation—can potentially receive favorable judgments and only cases with applications can potentially be appealed. Without applications—without lawsuits seeking relief from removal efforts—there cannot be judgments favoring aliens and there cannot be appeals in the event these applications are denied.

Filing an application—a lawsuit to remain in the U.S.—is key. When only cases with applications are compared—in other words comparing apples to apples—the true picture of a court generous with relief emerges. And asylum isn't the only type of relief in which grant rates are high. Examination of adjustment and cancellation cases over the last 10 years shows aliens received favorable judgments 75% of the time. Out of 204,096 applications seeking these types of relief, trial courts granted 153,057 applications. EOIR's same apples and oranges math that buries accurate numbers enabled EOIR to tell Congress that appellate rates are low—only 8% in 2009. Scrutiny shows just how untrue this is.

Since 2000, 98% of all removal orders involving aliens who filed suits to remain in the U.S. were appealed. This lone statistic shows that aliens with applications for relief—in other words lawsuits to remain in the U.S.—appeal deportation orders nearly all the time, while the courts' annual reports state the exact opposite.

Never in any year did EOIR report that appellate rates exceeded 17%. Applications like asylum, adjustment of status and cancellation of removal—all of them suits that defend against deportation—enable aliens to file appeals when deportation verdicts are issued. EOIR's statements to Congress—statements that declare *"Only a relatively small percentage of immigration judge decisions are appealed to the BIA"*—are simply not credible. They are—as are so many of EOIR's statements—deceptive.

Since 2000, aliens appealed 214,404 out of 218,589 removal orders in which aliens filed lawsuits to remain in the U.S. In other words, aliens appealed nearly every removal order in which their lawsuits to stay in the U.S. were denied. The idea that appeals are few is simply false and despite the absolute importance of these numbers in understanding immigration courts—and the people whose cases they judge—these numbers were never shared with Congress. EOIR has misrepresented trial and appellate dynamics in the same way it misrepresented how frequently aliens evade court. And it did it the same way.

To get the low number on appellate rates, EOIR once more lumped together dissimilar cases. EOIR mixed together cases where aliens filed lawsuits to defend against deportation—whose removal orders can be appealed—with cases where aliens filed no lawsuits whose removal orders cannot be appealed. Aliens who file no lawsuits— another way of saying aliens who submit no applications to defend against deportation—are more often than not in detention and usually consent to removal. They consent to removal—with the assurance they will soon be freed in their native countries—and, as a result, do not and cannot appeal.

What EOIR does is under-report appellate rates by including cases that cannot be appealed in the first place—while telling Congress with the straightest of bureaucratic faces that appellate rates are very low, when, in fact, they are very high. Much like calculating failure to appear rates based largely on aliens in detention who always appear in court, this loose math gives a false impression that is never corrected. Call it bad bookkeeping, call it poor thinking or call it what it is—gaming the numbers. Whatever the label, this practice shields the courts from critical analysis and delivers unreliable numbers to the public. Other faulty practices lead to other failures that loom just as large and hurtful.

Since only cases with applications can later be appealed, it is these cases—and a history of nonenforcement of their removal orders—that prompt a closer look. Applications reveal an alien's place of residence, his employment and the identities of family members—family members the alien often lives with. When an alien is ordered removed—in other words, his application is denied—actual removal, despite abundant information about him, seldom occurs.

(Footnotes omitted).

What is your response to Judge Metcalf's statement?

16. During the hearing, with regard to appeal rates, you testified as follows:

> ... In terms of the multiple levels of appeals, 90 percent of immigration judges' decisions never get appealed beyond the immigration judge states. In other words, the immigration judge's decision in 90 percent of the cases -- in fact, it's more than that; it's about 92 percent these days -- ends right there.
>
> In detained cases, cases tend to move very, very quickly for the most part nationwide. Detained cases, the appeal rate there is even smaller than the national average. I'm not sure what it is, but it is about half of the regular appeal rate, meaning that it's close to 4 (percent) or 5 percent of the -- of the nationwide average of 8 (percent) to 10 percent. So I think it's an important big-picture item to talk about because, again, the vast majority of cases never go beyond the immigration judge stage.

(a) Do your appeal figures include cases or rulings from which no appeal can be taken? In other words, are the 4-5% and 8-10% figures you testified about the result of factoring in cases or rulings from which no appeal can be taken? If so, for each of the last ten years, after recalculation, what are the numbers and the percentages for appeals (to both the BIA and the federal courts of appeals) in (i) detained and (ii) non-detained cases, when the non-appealable cases or rulings are excluded from the calculations?

(b) Describe in detail the method used in reaching the appeal rates discussed in your testimony. What cases and rulings are included in and excluded from the calculations of these appeal rates?

(c) For detained cases, non-detained cases, affirmative asylum applications, defensive asylum applications and appeals to the federal courts, set forth the numbers and percentages of appeals reported by EOIR for each of the last ten years and explain the method(s) of calculation.

(d) If the percentages from your testimony are based on calculations that included cases or rulings from which no appeal could be taken, how do you justify this method of calculation?

(e) How do you reconcile Judge Metcalf's statement quoted above with the appeal figures referenced in your testimony quoted above?

QUESTIONS SUBMITTED TO HON. JULIE MYERS WOOD BY SENATOR GRASSLEY

**QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY**

**TO**

**JULIE MYERS WOOD**

**FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:**

**"IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM."**

**HELD ON MAY 18, 2011**

1. During your testimony at the hearing, you made the point that stipulated orders of removal could and should be increased.

What can the Department of Homeland Security and the Executive Office for Immigration Review do to increase the use of stipulated orders?

2. Currently, the Immigration and Nationality Act ("INA") permits judges to find asylum applications (but no other type of application) frivolous. However, the regulation only allows a judge to find an asylum application to be frivolous if it is based on a knowingly false statement (not if it has no basis in fact or law, as the law generally defines frivolous conduct).

Could regulatory or statutory changes be made to give immigration judges the authority to find more conduct to be frivolous and to thereby prevent meritless litigation and appeals?

If so, describe the regulatory and/or statutory changes that could be implemented.

## QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR KLOBUCHAR

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

**Questions for the Record**
Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System"
May 25, 2011
Submitted by Senator Amy Klobuchar

**Questions for Juan Osuna**

In your written testimony, you mentioned that EOIR established a Fraud and Abuse Program so that cases of immigration fraud and abuse can be referred to the appropriate investigative agencies for action.

1. How successful has this program been?

2. What other preventative efforts have you been engaging in to deter fraud in the immigration system?

3. Do you think the current challenges facing our immigration courts affect border security efforts?

QUESTIONS SUBMITTED TO KAREN T. GRISEZ BY SENATOR LEAHY

**Written Follow Up Questions of Senator Leahy**
**Hearing On "Improving Efficiency**
**And Ensuring Justice In The Immigration Court System"**
**May 18, 2011**

**Questions for Karen Grisez**

**1. Access to Counsel**

Judge Robert Katzmann of the Second Circuit Court of Appeals recently led a study on representation, called the New York Immigrant Representation Study, which found that access to counsel greatly improves an immigrant's chance of winning his case. This does not mean the immigrant can game the system. An asylum seeker must still meet all the requirements of our law to win relief. But with such a complicated law, counsel is essential to presenting a complete case. You have represented immigrants in court as a *pro bono* attorney. In a practical sense, how do attorneys make the system function better? How could the appointment of counsel actually lead to cost savings for the immigration courts?

**2. The Effect of the Case Load on Asylum Seekers**

Immigration Judges have to manage an extraordinary case load. Each judge completes, on average, 1,500 cases per year. You have represented asylum seekers throughout your career. What is the effect of this case load, and of the resulting delays, on asylum seekers with valid claims? Do they ever give up because the wait is so long?

**3. Legal Orientation Programs**

How do Legal Orientation Programs help asylum seekers and other immigrants who may fear persecution or torture at home, but face deportation from the United States?

**4. Prehearing conferences**

How could wider use of pre-trial conferences enhance the quality of justice for asylum seekers? Is it your view that immigration judges need to participate in all pre-trail conferences, or can most be held between the parties without requiring a judge to preside?

**5. Increase in the Immigration Court's Caseload**

What does the American Bar Association recommend with regard to the spike in the case backlog? Are there steps that the courts can take to reduce the pressure on the system? Are there some cases that do not need to be referred to deportation proceedings?

**6. The Effect of Delays on Attracting *Pro Bono* Attorneys**

I received a number of letters from attorneys in private practice who manage *pro bono* representation for their firms. They explained that one negative result of long delays in scheduling hearings is the difficulty in finding attorneys to take the cases *pro bono*, especially when a case is delayed for two years or more, making it virtually impossible to plan against other potential future assignments. Have you seen this in your practice? Are attorneys declining to take asylum cases?

## QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR LEAHY

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

**Written Follow Up Questions of Senator Leahy**
**Hearing On "Improving Efficiency**
**And Ensuring Justice In The Immigration Court System"**
**May 18, 2011**

**Questions for Juan Osuna**

**1. Detained Docket Pushing Non-Detained Cases to the Back of the Line**

There is a strong emphasis on moving the cases of detained immigrants quickly. This makes perfect sense, because the American taxpayers spend a great deal of money on immigration detention -- over $100 per person per day. One result, however, is that non-detained immigrants move to the back of the line for hearings in immigration court. This can create a Hobson's choice for an asylum seeker, who may be able to schedule a hearing on his claim in 60 to 90 days if he does not seek release from detention. If he is released, he may have to wait two or more years to have a merits hearing scheduled on his case. How can we address this situation?

**2. Access to Counsel**

Does the Department support broad access to counsel for immigrants, and especially for asylum seekers? Can the courts quantify gains in efficiency when an asylum seeker has an attorney?

**3. Case Initiation: Allowing Certain Asylum Cases to Originate in the Asylum Office**

Currently, some asylum seekers begin their claim before a trained Asylum Officer at the Department of Homeland Security, while others, including those who arrive at our borders seeking asylum, must begin their case in immigration court. I introduced a bill last year, the Refugee Protection Act, which would allow these "arriving aliens" to start in the Asylum Office.

What are the efficiencies to be gained by allowing "arriving alien" asylum seekers to bring their cases to the Asylum Office first, rather than to the immigration courts?

Do we need to worry about fraudulent claims slipping through the Asylum Office?

**4. Disparity among immigration judges: "Refugee Roulette"**

A 2009 book, titled *Refugee Roulette*, found that the chance of an asylum seeker winning her case in immigration court was significantly affected by the judge who heard the case. (Ramji-Nogales, et al, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York University Press, 2009.) For example, as asylum seeker from China claiming religious persecution might stand an 80% chance of winning her case in one court room and a 10% chance in the courtroom next door.

What is EOIR doing to reduce the documented disparity in adjudications from one courtroom to the next?

**5. Legal Orientation Program**

The Legal Orientation Program (LOP) provides information on immigration law to detained immigrants in deportation proceedings. The plain truth is that LOPs lead many immigrants to determine that they have no legal case and should return home. Where LOPs operate, there is a 13-day decrease in the average length of detention, saving money for American taxpayers, who currently pay over $100 per person per day to detain immigrants in deportation proceedings. I have long supported federal funding for this cost-saving program.

Can you quantify the cost of nationwide LOPs against the cost savings of reduced detention days? How much would it cost to provide LOPs across the nation? Would such expansion effectively pay for itself?

**6. Prehearing conferences**

Federal regulations allow immigration judges to schedule pre-hearing conferences to narrow issues, to allow parties to stipulate to certain issues, and to simply exchange information. Pre-trial conferences can also be held by the parties, without need for the judge to participate. Both the Appleseed Foundation and the ABA found that pre-trial conferences are rarely used by the immigration courts.

Do you agree with former Chief Immigration Judge David Neal that pre-trial conferences "narrow the issues" and "foster both more efficient proceedings and more efficient use of limited ... resources."? ("Assembly Line Injustice," Appleseed, May 2009, at p. 23, available at http://www.appleseednetwork.org/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf.) Would you support requiring pre-trial conferences when one party so requests? Could this be done with the immigration judge's approval but not necessarily require the judge's participation in each conference?

QUESTIONS SUBMITTED TO JUAN P. OSUNA BY SENATOR SESSIONS

[Note: At the time of printing, the Committee had not received responses from Juan P. Osuna.]

**Senator Jeff Sessions**
**Questions for the Record**
**Juan Osuna, Director, Executive Office for Immigration Review**
**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

1. At the hearing, you testified that cases involving detained aliens are given priority by the EOIR and that the EOIR emphasizes removal of criminal aliens and others who pose a threat to the community.

   a. For each of the last five years, how many cases involving Level I offenders have been voluntarily dismissed by the government? For each case, identify which crimes the aliens were convicted of and in which jurisdiction.

   b. For each of the last five years, how many cases involving Level II offenders have been voluntarily dismissed by the government? For each case, identify which crimes the aliens were convicted of and in which jurisdiction.

   c. For each of the last five years, how many cases involving Level III offenders have been voluntarily dismissed by the government? For each case, identify which crimes the aliens were convicted of and in which jurisdiction.

2. A 1989 GAO report found that "[a]liens have nothing to lose by failing to appear for hearings, and, in effect, ignoring the deportation process." The report concluded that disregard for the courts stemmed from "a lack of repercussions" because few aliens are actually deported. In 2003, the Department of Justice's Inspector General reached the same conclusion, finding that no more than 3 percent of asylum seekers ordered deported were actually removed from the United States.

   a. What can be done to incentivize aliens to comply with deportation orders?

   b. For each of the last five years, please provide the number of aliens who have failed to appear in court. Please provide both the number of those held in detention pending trial that failed to appear and the number of those who were free pending trial that failed to appear.

3. To date, how many deportation orders remain unenforced?

   a. Of those, how many were issued against those who had previously disobeyed removal orders?

   b. Of those, how many were issued against aliens that were permitted to remain free during trial?

   c. Of those, how many were issued against aliens whose criminal convictions resulted in deportation rulings?

d. Of those, how many were issued against aliens who entered into fraudulent marriages?

e. Of those, how many were issued against individuals who overstayed their visas?

f. Of those, how many were issued against individuals in expedited asylum proceedings?

4. By regulation, the Department of Justice does not monitor Immigration Judges' orders.

a. Would it be helpful for EOIR to implement mechanisms to match Immigration Courts' removal orders with actual deportations? Please explain your answer.

b. Do you agree that that would be helpful information for EOIR to have? Please explain your answer.

c. Do you agree that these statistics are relevant to whether the court system is effective? Please explain your answer.

5. For each of the last five years, how many applications for relief have been granted? Please provide a description of each type of application for relief and the total for each type.

6. According to EOIR's 2009 Yearbook, failures to appear in court dropped to historically low levels with only 11 percent of alien litigants failing to keep their court dates. Please provide both the number of aliens included in this percentage who were free pending their court dates and the number of aliens included in this percentage who were detained pending their court dates.

7. According to EOIR's 2009 Yearbook, Immigration Courts completed 69,442 applications by aliens to defend against deportation. Of that number, how many applications were claims for asylum? Please provide a description of the cases included in that number that were not applications for asylum.

8. For each of the last five years, please provide both the number of cases in which aliens opposed removal and received favorable judgments and the number of cases in which aliens consented to removal and received favorable judgments.

RESPONSES OF HON. JULIE MYERS WOOD TO QUESTIONS SUBMITTED BY SENATORS CORNYN AND GRASSLEY

**SENATOR CORNYN QUESTIONS FOR THE RECORD**
**5-19-2011**

## Questions Julie Myers Wood

**Removal Proceeding Dismissals**

Last year, the press reported that immigration courts in Houston were dismissing cases across the country, including cases involving criminal aliens. According to the reports, Houston was not the only location where cases were being dismissed or terminated in large numbers.

(1) Were you aware these reports?

A: Yes, I was aware of these reports.

(2) Did the Attorney General issue any directives or guidelines to Immigration Judges regarding case termination?

A: I do not have any knowledge regarding whether the Attorney General issued any directives regarding case termination or dismissals in 2010 and/or the spring of 2011.

(3) Do you have any statistics on the numbers of cases that have been dismissed in all immigration courts and the reasons for such dismissals?

A: No.

(4) [If no] Please provide a response to my staff as soon as possible.

**Immigration Caseloads in State Courts**

Recently, Judge Minton Murray, a state judge in Cameron County, Texas indicated that his court (as well as the county probation officers, U.S. attorneys, and mandatory psychiatrists) are drowning in workload from juvenile offenders who are illegal aliens.

Most of the kids are 15-16 years old and acted as drug mules. Many of the kids have come in multiple times after being "round-robin'd" by CBP. Judge Murray said he can detain some juveniles and even get the U.S. Attorney to prosecute but in most cases they either plead out and get probation or are simply let go and returned over the border by CBP. Judge Murray says state courts like his desperately need resources to handle the workload.

(1) Have any of you heard similar complaints from other state courts?

A: I have not personally heard any similar complaints, although I am aware of the issue.

(2) How often do state courts refer cases to ICE or DOJ for removal proceedings?

A: ICE would be in the best position to provide specific numbers in terms of referrals.

**Article I Courts**

One recommendation from the ABA is that we create an Article I court for immigration proceedings. This view is supported by some immigration judges who think it would give them more autonomy and more time to render decisions in cases.
I have drafted a bill to create an Article I court using the bankruptcy and tax courts as a model.

(1) What do you think of creating an Article I court?

A: The bankruptcy and tax courts certainly provide a useful, and successful model when considering the appropriateness of Article I courts for the immigration system. There could be many positive benefits to enhancing the immigration court system in this manner, and such a move could help underscore that immigration courts and judges should be taken seriously, and their orders followed. It is certainly possible that a move to an Article I court system could further encourage high quality applicants to seek positions on the immigration bench, which would help strengthen the system. That being said, it is not clear to me that the systemic problems inherent in our current immigration system would be transformed merely with court re-organization. It would be important to assess the overall expected costs and benefits of such a dramatic move before moving forward.

When reviewing court statistics for the last several years, for example, it is clear that a large percentage of IJ time is taken up addressing motions for continuances or other routine motions. Merely creating an Article I court system will not reduce this IJ time. If court re-organization is considered, it also might be worth looking at whether something akin to magistrates could be created to address these routine motions and allow IJs to spend more time focusing on their core duties resolving immigration cases.

(2) How long would it take for DOJ to transition its attorneys and board members to such a system?

A: DOJ is in the best position to answer this question.

**Legal Orientation Program**

It seems like there is agreement that the legal orientation program is one way we could streamline court proceedings. However, there is some opposition to using taxpayer money to fund the program.

(1) What do you think about using a portion of the fees collected from applications and petitions and using the revenue to fund expansion of the Legal Orientation Program nationwide?

A: In my view, such a proposal makes good sense, and would help ensure that the program is not under-funded.

(2) How much would it costs to expand the program nationwide?

A: DOJ would be in the best position to respond to this question.

**QUESTIONS FOR THE RECORD FROM SENATOR CHARLES GRASSLEY**

**TO**

**JULIE MYERS WOOD**

**FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:**

**"IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM."**

**HELD ON MAY 18, 2011**

1. During your testimony at the hearing, you made the point that stipulated orders of removal could and should be increased.

What can the Department of Homeland Security and the Executive Office for Immigration Review do to increase the use of stipulated orders?

A: First, standardize the process. Currently, the use and extent of stipulated orders vary considerably across the country. In some locations, Immigration Judges (IJs) conduct a streamlined process, while ensuring due process. In other locations, the judge-imposed requirements for stipulated orders are extremely time-intensive. Federal court review of stipulated removal procedures has also affected local practice in some areas.

To remove the inconsistencies and ensure best use of stipulated orders, DHS should conduct a review of nationwide practices for stipulated orders, and identify the best practices for stipulated removals, and the areas where stipulations are utilized most successfully. With this knowledge, DHS should engage in rulemaking as contemplated under the INA to standardize the stipulated order process, and ensure that all IJs follow a consistent procedure. Moreover, if necessary, DHS should submit a request for legislation to ensure stipulated removals can be fully utilized.

In addition to standardizing the process, DHS attorneys should identify categories of cases that are most amenable to stipulated removal and ensure that information about stipulated removal and stipulated removal options are offered promptly in those cases.

2. Currently, the Immigration and Nationality Act ("INA") permits judges to find asylum applications (but no other type of application) frivolous. However, the regulation only allows a judge to find an asylum application to be frivolous if it is based on a knowingly false statement (not if it has no basis in fact or law, as the law generally defines frivolous conduct).

Could regulatory or statutory changes be made to give immigration judges the authority to find more conduct to be frivolous and to thereby prevent meritless litigation and appeals?

If so, describe the regulatory and/or statutory changes that could be implemented.

A: It is certainly possible that regulatory or statutory changes could be made to provide immigration judges with the authority to find more conduct frivolous. However, I have

not reviewed this area extensively, and am not in a position to give a firm recommendation. One area to explore is whether there might be a possibility to model an immigration court rule after Federal Rule of Civil Procedure 11, which provides a mechanism for challenging frivolous civil litigation and allows for sanctions. One countervailing concern that should be considered, however, is whether the expansion of the ability to litigate over sanctions and frivolous conduct would further reduce the time immigration judges spend on their core mission of deciding immigration cases.

RESPONSES OF KAREN T. GRISEZ TO QUESTIONS SUBMITTED
BY SENATORS CORNYN AND LEAHY

**SENATOR CORNYN QUESTIONS FOR THE RECORD**
**5-19-2011**

## Questions for Karen T. Grisez

**Article I Courts**

One recommendation from the ABA is that we create an Article I court for immigration proceedings. This view is supported by some immigration judges who think it would give them more autonomy and more time to render decisions in cases.
I have drafted a bill to create an Article I court using the bankruptcy and tax courts as a model.

(1) What do you think of creating an Article I court?

**MS. GRISEZ: As you note, the ABA's recent study on the immigration removal adjudication system recommends the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases. The study evaluated several potential models, including the option of an independent agency. An Article I court would be viewed as more independent than an agency because it would be a wholly judicial body; and is likely, as such, to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government.**

**By attracting and selecting the highest quality lawyers as judges, an Article I court is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a highly professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decisions without the need to appeal to a higher tribunal. When appeals *are* taken, more articulate decisions at the trial level should enable reviewing bodies to be more efficient in their review and decision-making and should also decrease remands for additional explanations or fact-finding. Such improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.**

(2) How long would it take for DOJ to transition its attorneys and board members to such a system?

**MS. GRISEZ: Since the selection, tenure and removal of judges under an Article I court would differ significantly from the current system, transitional measures would be needed for the existing judges employed by EOIR. With the over 280 judgeships currently authorized (more if recommendations to increase the number of immigration judges are implemented) this will likely be a multi-year process. In a new Article I immigration court, the ABA recommends that appellate and trial judges should have fixed terms, which should be relatively long as in other Article I courts (e.g., 8 to 10 years for trial judges and**

**12 to 15 years for appellate judges). To facilitate an efficient transition and minimize short-term disruption, existing judges and BIA members would serve out the remainder of the new fixed terms, which are deemed to have begun at the time of their prior appointment to current positions, and would then be eligible for reappointment thereafter. This would provide a rolling process for the appointment of new Article I judges that would allow the immigration court to effectively handle the existing caseload during the transition.**

Legal Orientation Program

It seems like there is agreement that the legal orientation program is one way we could streamline court proceedings. However, there is some opposition to using taxpayer money to fund the program.

(1) What do you think about using a portion of the fees collected from applications and petitions and using the revenue to fund expansion of the Legal Orientation Program nationwide?

**MS. GRISEZ: In general, the ABA opposes requiring applicants for immigration benefits to bear the costs of activities not directly related to application processing. Fee increases in recent years already may place naturalization and other immigration benefits out of reach of many low-income immigrants. Application fees should not be so excessive as to prevent otherwise eligible individuals from accessing benefits, and initiatives that benefit the immigration removal adjudication system as a whole should be funded through federal appropriations rather than through application fees. In addition, diverting fees from application processing and other critical functions would certainly increase the already long waiting periods for certain petitions and applications to be adjudicated by USCIS. This may have the result of adding even more cases into the immigration removal adjudication system.**

(2) How much would it costs to expand the program nationwide?

**MS. GRISEZ: During FY 2010, the Legal Orientation Program (LOP) operated in 27 detention facilities with a budget of $4.7 million and reached 60,000 of the over 380,000 individuals held in immigration detention. In addition, $2 million was provided for an LOP for legal custodians of unaccompanied children. An expansion of LOP to reach all detained individuals obviously would require additional resources; however, we do not currently have a specific cost estimate for such an expansion. Factors influencing the answer would include the number of detainees, total number of facilities, and the remoteness of the detention facilities to be served. Expanded use of Alternatives to Detention in appropriate cases would enable LOP to be provided in a non-detained setting, further decreasing the costs for reaching those individuals.**

**It is important to note that in addition to ensuring more fair and just outcomes, the LOP contributes to immigration court efficiency and may result in savings in immigration court**

**and detention costs. A study by the Vera Institute of Justice in 2008 indicates that cases for LOP participants move an average of 13 days faster through the immigration courts. Immigration judges report that respondents who attend the LOP appear in immigration court better prepared and are more likely to be able to identify the relief for which they may be eligible, and not to pursue relief for which they are ineligible. Because cases for LOP participants move through the immigration courts more quickly, time spent in detention may be reduced and detention costs saved.**

**The cost savings from an expanded LOP program could be considerable. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population. In the last five years, the annual number of immigrants detained and the cost of detaining them has doubled. In 2010 alone, the U.S. spent approximately $1.7 billion to detain almost 400,000 immigrants. Therefore, increasing funding for the LOP should be considered as a wise investment that has the potential to result in significant cost savings throughout the immigration adjudication and detention system.**

**Written Follow Up Questions of Senator Leahy**
**Hearing On "Improving Efficiency**
**And Ensuring Justice In The Immigration Court System"**
**May 18, 2011**

**Questions for Karen Grisez**

**1. Access to Counsel**

Judge Robert Katzmann of the Second Circuit Court of Appeals recently led a study on representation, called the New York Immigrant Representation Study, which found that access to counsel greatly improves an immigrant's chance of winning his case. This does not mean the immigrant can game the system. An asylum seeker must still meet all the requirements of our law to win relief. But with such a complicated law, counsel is essential to presenting a complete case. You have represented immigrants in court as a *pro bono* attorney. In a practical sense, how do attorneys make the system function better? How could the appointment of counsel actually lead to cost savings for the immigration courts?

**MS. GRISEZ: Representation has the potential to increase the efficiency of at least some adversarial immigration proceedings. Pro sé litigants are by definition unfamiliar with immigration laws and court procedures. Their lack of knowledge and understanding, particularly when combined with a language barrier, can create delays that impose a substantial financial cost on the government. As a number of immigration judges, practitioners, and government officials have observed, the presence of competent counsel on behalf of both parties helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Immigration Judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens thus would facilitate the more efficient processing of claims, lessen the burden on the immigration courts, and decrease appeal rates. This is particularly true in detained cases.**

**Approximately 85% of individuals in immigration detention do not have legal representation. In addition, because of the lack of easily accessible and understandable legal materials available (sometimes virtually non-existent due to shortcomings at some detention facilities), detainees often have no alternative for obtaining information about their removal proceeding or the substantive forms of relief that might be available to them. In these instances, immigration judges often must spend extensive time explaining the removal process or in some instances may grant multiple continuances to afford a detainnee time to seek counsel. Appointed counsel in appropriate cases, particularly for those not competent to represent themselves such as children and the mentally ill, would help to significantly increase the efficiency of the immigration courts.**

**Most importantly, the presence of counsel makes it more likely that all meritorious claims for relief will be identified and all corroborating evidence obtained and presented. A just result, as well as a speedy one, must be the goal of a fair system.**

**2. The Effect of the Case Load on Asylum Seekers**

Immigration Judges have to manage an extraordinary case load. Each judge completes, on average, 1,500 cases per year. You have represented asylum seekers throughout your career. What is the effect of this case load, and of the resulting delays, on asylum seekers with valid claims? Do they ever give up because the wait is so long?

**MS. GRISEZ: Detained cases are necessarily and properly given priority on the dockets of the immigration courts. Unfortunately, this means that in many courts, non-detained merits hearings are being scheduled eighteen months to two years into the future. The impact of these delays is serious, particularly for asylum seekers whose past experiences have already left them traumatized and feeling a lack of control over their lives. For those with family members at risk or in hiding in their home countries, such delays are not only stressful but very dangerous. In some cases, family members are in life or death situations. As a result, an asylum seeker who is otherwise eligible for release must sometimes make a strategic decision to remain in detention in order to ensure a merits hearing within a reasonable period of time. Others who are not detained are forced to live in shelters or squeeze into space donated by friends, relatives, or church groups during lengthy waits for hearing dates. Even if they find lodging, some must work without authorization to feed themselves or their families, thereby creating an adverse discretionary factor that may impact the outcome of their case. Even worse, as you suggest, there are some asylum seekers who, either facing lengthy detention or already having been detained for a significant period, decide to withdraw their claims because they simply cannot cope with prolonged detention.**

**3. Legal Orientation Programs**

How do Legal Orientation Programs help asylum seekers and other immigrants who may fear persecution or torture at home, but face deportation from the United States?

**MS. GRISEZ: The Legal Orientation Program (LOP) provides individuals in removal proceedings with information regarding basic immigration law and procedure before immigration courts. Depending on the noncitizen's potential grounds for relief, the LOP also provides a referral to pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state. If the basis for a detainee's fear does not appear to qualify him for asylum under U.S. law, the detainee may decide to abandon his case and accept removal.**

**The LOP is particularly critical for those who may be fleeing persecution. Like others in the immigration system, these individuals often have a lack of understanding of our laws and procedures due to cultural, language or educational barriers. Asylum seekers also may suffer from physical and emotional trauma, and have an inherent mistrust of uniformed officials. Although funded through the Executive Office for Immigration Review, LOP**

**services are provided to detainees by staff or volunteers from non-governmental organizations in detention facilities around the country. Asylum seekers and others receiving these services are more likely to share their stories and to trust the information they receive through these independent third parties. They receive critical information about the corroborative evidence required pursuant to the Real ID Act, and about their obligation to obtain written translation of foreign documents. Most importantly, because of the remote location of most immigration detention facilities, they are far more likely to be matched with pro bono counsel than they would be absent the LOP.**

**4. Prehearing conferences**

How could wider use of pre-trial conferences enhance the quality of justice for asylum seekers? Is it your view that immigration judges need to participate in all pre-trial conferences, or can most be held between the parties without requiring a judge to preside?

**MS. GRISEZ: Existing Federal regulations allow immigration judges to conduct pre-hearing conferences at their discretion. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, to resolve objections to documents or witnesses, and otherwise to simplify and organize the proceeding. They could provide the opportunity to confirm that all necessary background checks are complete and that cases are ready for trial, thereby eliminating continuances on the hearing date and the resulting waste of valuable court time. In those instances where it is clear that there is a particularly strong or particularly weak case, it may also present an opportunity to resolve the case without using further court resources.**

**Based on my experience, a pre-trial conference without a judge's participation could resolve procedural issues such as non-completion of background checks or a missing government file. However, most cases presenting legal issues or requiring rulings on admissibility of documents or witness testimony could be handled better with the judge's involvement.**

**5. Increase in the Immigration Court's Caseload**

What does the American Bar Association recommend with regard to the spike in the case backlog? Are there steps that the courts can take to reduce the pressure on the system? Are there some cases that do not need to be referred to deportation proceedings?

**MS. GRISEZ: While immigration enforcement activities and funding have increased exponentially in the last decade, this has not been matched by a commensurate increase in resources for the adjudication of immigration cases. Ultimately, to bring the caseload to a manageable level, Congress must provide funding to increase the number of immigration judges, law clerks and support staff.**

**However, the caseload could be partially alleviated by revising certain DHS policies and procedures to decrease the number of cases being put into the court system. For example, prosecutorial discretion, while used widely in the criminal justice context, has been**

**underutilized in the immigration context. DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are prima facie eligible for relief from removal, to concede eligibility for relief from removal after receipt of a clearly meritorious application, to stop litigating a case after key facts develop that make removal unlikely, or to waive appeal in certain appropriate types of cases. This would allow for more strategic decision-making, ensuring that the U.S. prioritizes the cases of people we most want to remove, such as those who pose a true threat to public safety or national security.**

**We would also recommend giving DHS attorneys greater control over the initiation of removal proceedings and, to the extent possible, assigning one DHS trial attorney to each removal proceeding. These measures would increase efficiency by eliminating the need for multiple attorneys to become familiar with the same case, and facilitate the exercise of prosecutorial discretion where appropriate.**

**In addition, there are a number of changes to the process for adjudicating asylum cases specifically that could improve immigration court efficiency overall. First, the one-year filing deadline for asylum applications could be eliminated. Asylum officers and immigration judges spend a substantial amount of time in these cases examining whether the filing deadline was met or if the individual may be eligible for one of the exceptions to the deadline. Eliminating the one-year deadline would preserve limited resources available for evaluating asylum cases on the merits. Second, asylum officers could be allowed to adjudicate, in the first instance, asylum claims raised as a defense in expedited removal proceedings, as is already done for minors in removal proceedings. The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court as part of removal proceedings, just as it happens currently if an affirmative asylum application is not granted. This reform could have a substantial impact on the immigration courts by diverting thousands of cases each year into a system that is less expensive, non-adversarial, and where the adjudicators are trained exclusively for asylum adjudication.**

**6. The Effect of Delays on Attracting *Pro Bono* Attorneys**

I received a number of letters from attorneys in private practice who manage *pro bono* representation for their firms. They explained that one negative result of long delays in scheduling hearings is the difficulty in finding attorneys to take the cases *pro bono*, especially when a case is delayed for two years or more, making it virtually impossible to plan against other potential future assignments. Have you seen this in your practice? Are attorneys declining to take asylum cases?

**MS. GRISEZ: It is certainly true that associates considering taking on pro bono cases in the current economic climate need to consider whether they can provide zealous representation in their pro bono matters while still meeting their firms' billable hour expectations. Recently, I have noticed associates asking more specific questions about the time commitment involved in potential pro bono matters as well as the likely scheduling of**

**events such as discovery deadlines, briefing due dates, and court appearances. They want a manageable time commitment and matters that they can readily fit into their other workload. Young associates can find it difficult to commit to a case that will likely be scheduled for a merits hearing a year or 18 months in the future, because they have no idea what other matters they may be assigned to by that time. This problem is not limited to asylum cases, but the lengthy case processing times, especially in non-detained cases, have made individual asylum cases more difficult to place.**

SUBMISSION FOR THE RECORD


**Written Statement of the**
**American Civil Liberties Union**

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Before the Senate Judiciary Committee

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

Wednesday, May 18, 2011

**Introduction**

The American Civil Liberties Union (ACLU) is a non-partisan public interest organization dedicated to upholding our constitutional and other legal protections. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. On behalf of over a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we respectfully submit this statement for the record of the Senate Judiciary Committee's hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System."

While the ACLU commends certain recent efforts by the Executive Office for Immigration Review (EOIR) to reform immigration proceedings by means of changes including the appointment of additional immigration judges,[1] severe problems remain that infringe daily upon immigrants' constitutionally-guaranteed due process right to a full and fair hearing. In addition, common-sense, time-and-money-saving improvements such as e-filing remain unrealized. We are concerned that EOIR is not sufficiently engaged with, nor adequately responding to, suggestions and complaints expressed by immigrants and their counsel – as well as academic, professional, and non-profit stakeholders, including the National Association of Immigration Judges[2] – about the fundamental flaws in current immigration adjudication.[3] The backlog of cases is "more than a third higher (44 percent) than levels at the end of FY 2008,"[4] compounding the immigration system's difficulties in achieving just outcomes through fair hearings.

In this statement, the ACLU focuses on three aspects of immigration adjudication that need urgent attention: (1) access to immigration counsel; (2) the interdependence of immigration detention reform and the immigration court system; (3) and immigration court procedures that negatively affect litigants' basic rights.

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[1] While more judges are a positive development, the ACLU encourages EOIR to increase its efforts to diversify the immigration bench. A comprehensive study of asylum cases concluded that an immigration judge's prior work experience had a statistically significant impact on his or her rate of granting asylum. Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication" 60 Stanford L. Rev. 295, 345 (2008). Moreover, to give one example of homogeneity, currently there are 11 male Board of Immigration Appeals members and 3 female BIA members. Appointing temporary Board Members from the ranks of senior EOIR counsel is not a solution, as their independence is at risk based on their short terms and subordinate permanent positions. In the context of a massive caseload, it is puzzling that EOIR requested 10 new staff attorney positions at the BIA for fiscal year 2012 but no new BIA members. EOIR must also improve and make fully transparent its presently anemic complaint procedures.

[2] Julia Preston, "Lawyers Back Creating New Immigration Courts." New York Times (Feb. 8, 2010) (quoting Immigration Judge Dana Marks, president of the National Association of Immigration Judges, saying that immigration hearings can seem "like holding death penalty cases in traffic court").

[3] *See, e.g.*, Immigration Court Observation Project of the National Lawyers Guild, *Fundamental Fairness: A Report on the Due Process Crisis in New York City Immigration Courts* (May 2011) *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf.

[4] TRAC Immigration, "Immigration Case Backlog Still Growing in FY 2011" (Feb. 7, 2011) *available at* http://trac.syr.edu/immigration/reports/246/.

**I. Without access to court-appointed counsel, immigration proceedings will continue to violate due process regularly, particularly for vulnerable groups such as immigrants with mental disabilities, juveniles, and asylum-seekers.**

A fundamental problem with the immigration court system is that people facing permanent deportation are not afforded court-appointed immigration counsel. People must pay for their own legal representation or else represent themselves against a government trial attorney in complicated immigration hearings which could have permanent consequences including deportation, separation from U.S. citizen family members, termination of employment and severing of financial and community ties to the U.S.

The American Bar Association concluded last year that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the non-citizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes non-citizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"[5] In too many cases, asylum-seekers who came to the United States to flee torture or persecution in their homeland will be unable to make those claims in immigration court without legal assistance; indeed, asylum seekers who have legal representation are three times as likely to be granted asylum.[6] In expedited removal cases, which truncate proceedings by denying immigrants the opportunity to appear before an immigration judge, the disparity is even starker: only 2 percent of unrepresented claimants were granted relief as opposed to 25 percent of represented claimants.[7]

It is short-sighted to force pro se litigants, regardless of their competency, to navigate a byzantine immigration system on their own. Each case that is fairly and accurately processed from the start obviates the need for and costs of appeals, thereby helping the long-overburdened immigration and appellate courts. Adequate process is not only constitutionally due to those facing deportation but also more efficient for the immigration system as a whole.

In this context, expansion of EOIR's Legal Orientation Program to achieve universal coverage for immigrant detainees is an imperative first step.[8] But more must also be done expeditiously to address the crisis of all unrepresented immigrants, many of whom have meritorious claims to lawful status including U.S. citizenship.[9] The absence of court-appointed

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[5] ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.* (2010), 5-8, *available at* http://new.abanet.org/immigration/pages/default.aspx. The ABA has used the term "notario fraud" as an umbrella description of a variety of methods by which "[i]ndividuals who represent themselves as qualified to offer legal advice or services concerning immigration or other matters of law, who have no such qualification, routinely victimize members of immigration communities." Notarios have the equivalent of a law license in many Latin American countries and get easily confused with notaries in the United States.

[6] Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* at 8 (2009) *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf.

[7] *Reforming the Immigration System, supra*, at 5-9.

[8] *See generally* Sam Dolnick, "As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions" New York Times (May 3, 2011).

[9] Indeed, in October 2010, the ACLU filed a federal damages action on behalf of a U.S. citizen with a mental disability who was erroneously deported after he was unable to prove his citizenship in immigration court, where he proceeded pro se. *See* "ACLU Files Lawsuits After Government Wrongfully Deports U.S. Citizen With Mental

counsel is particularly damaging for vulnerable populations such as immigrants with mental disabilities. A comprehensive report issued in July 2010 by the ACLU and Human Rights Watch (HRW) concluded that "immigrants with mental disabilities are often unjustifiably detained for years on end, sometimes with no legal limits."[10] More recently, a March 2011 report by the Department of Homeland Security (DHS) Office of Inspector General concurred that "[s]ome detainees are seriously impaired by mental illness and may be unable to coexist with others in detention or participate in immigration proceedings."[11] The ACLU/HRW report recommended that the Justice Department, including EOIR, and DHS enact comprehensive protections for immigrants with mental disabilities, specifying inter alia: appointed counsel; independent competency evaluations automatically triggered by indications of an individual's inability to participate meaningfully in his or her proceedings; authority for immigration judges to terminate proceedings independently in appropriate cases; and an end to the currently authorized, improper practice of custodians appearing on behalf of detainees who are incompetent.[12]

After decades of inattention, the Board of Immigration Appeals recent decision in *Matter of M-A-M-*,[13] recognized that guidance with respect to immigrants with mental disabilities was overdue. Nevertheless, this recognition still falls short of providing constitutionally-required assistance, notably appointed counsel, to ensure respect for the due process rights of this vulnerable group. In the absence of an effective and structured system with meaningful safeguards, the ACLU of Southern California and the ACLU of San Diego had to intervene in March 2010 to secure the release of two "lost" detainees with mental disabilities who had been forgotten for more than four years – without a single bond hearing – after their cases were closed because they were incompetent to understand proceedings without counsel.[14]

Unfortunately these cases are not unique. Other detainees with mental disabilities languish within the removal system, as detailed in a pending class-action lawsuit filed in August 2010 by the ACLU and other groups. This legal action originated from a need to vindicate the rights of immigrants like Ever Francisco Martinez-Rivas, a 31-year-old lawful permanent resident who came to the U.S. at the age of nine. He has been diagnosed with schizophrenia so severe that he gets confused when given simple directions. Martinez-Rivas has been medically termed "a gravely disabled person," yet the government intended to deport him without evaluating his mental competency to proceed without a lawyer or providing him with counsel so he could have a meaningful opportunity to defend against deportation.[15]

As a federal district judge wrote in December 2010 when she granted an injunction requested by two of the lawsuit's plaintiffs, "any relief short of providing a Qualified

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Disabilities." (Oct. 13, 2010), available at http://www.aclu.org/immigrants-rights/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental-disabili.

[10] *Deportation by Default* (July 2010) *available at* http://www.hrw.org/en/reports/2010/07/26/deportation-default-0.

[11] DHS, Office of Inspector General, *Management of Mental Health Cases in Immigration Detention* at 2 (Mar. 2011) *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_11-62_Mar11.pdf.

[12] *Id.* at 82.

[13] 25 I. & N. Dec. 474 (BIA 2011).

[14] "Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years" (Mar. 31, 2010) *available at* http://www.aclu-sc.org/releases/view/103017.

[15] For the class action complaint, *see* http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf.

Representative for Plaintiffs . . . would be both ineffective and inadequate in providing them with meaningful access to participate in their immigration proceedings."[16] Universal legal orientation and an appointment of counsel mechanism for unrepresented immigrants are necessary minimum measures without which routinely full and fair hearings in the immigration courts – and the added beneficial savings of time and money for the government – will not be possible to achieve.

## II. EOIR must become an active participant in furthering Immigration and Customs Enforcement's (ICE's) detention reforms.

Lack of representation for immigrants results from a variety of causes beyond the absence of legal orientation and appointed counsel programs. Some of these contributing factors could be ameliorated by improving immigration detention policies and practices that make it more difficult for immigrants to access counsel and communicate with existing counsel. A prime example is the counter-productive transfer of individuals in immigration detention away from family, community, and legal resources. Advocacy groups have reported on and decried "how transfers can result in unfair treatment of detainees facing immigration proceedings."[17] Due process and immigration court efficiency are both ill-served by removing litigants from their relatives, counsel, and witnesses.

More broadly, EOIR and ICE need to cooperate on achieving with dispatch the "major reforms" to the civil immigration detention system promised almost two years ago.[18] Significant delays in court proceedings mean that immigration detainees may spend years in detention waiting for their cases to be heard. Because detention correlates with negative effects such as mental health problems, detainees may become unable to present their cases in court as a result of their confinement. In this and other respects, Immigration adjudication and detention are inextricably linked, with failings in one arena having major repercussions for immigrants' due process rights in the other. EOIR must be an active and full participant when ICE discusses and plans civil detention reforms. Stakeholders deserve regular and thorough consultation with both agencies in order to communicate their concerns and ideas.

The paramount goal of detention reform is to detain only those who absolutely must be detained. Compliance with mandatory detention requirements does not require the incarceration of individuals who finished serving their criminal sentences years ago and have since been leading productive lives.[19] Many of these individuals pose no danger or flight risk. While detention may be warranted in individual cases, these immigrants are entitled to bond hearings to determine if their detention is necessary. Moreover individuals are subjected to mandatory

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[16] Amended Order re: Plaintiffs' Motion for a Preliminary Injunction, *Franco-Gonzales v. Holder*, No. CV-10-02211 (C.D. Cal. Dec. 27, 2010) 42-43.

[17] Letter from Human Rights Watch to Secretary of Homeland Security Janet Napolitano re: ICE review of detainee transfer policy (Feb. 25, 2011) *available at* http://www.hrw.org/en/news/2011/02/25/us-reform-unfair-immigration-detainee-transfer-policy; Human Rights Watch, *Locked Up Far Away* (Dec. 2009) *available at* http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0.

[18] "ICE Announces Major Reforms to Immigration Detention System" (Aug. 6, 2009) *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm.

[19] *See, e.g.*, *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (holding that detention of lawful permanent resident three and a half years after his release was unauthorized and noting that "petitioner has had no further criminal conduct").

detention for prolonged periods far in excess of the 45-day to five-month period contemplated by the Supreme Court when it upheld mandatory detention, notwithstanding the increasing number of federal court decisions concluding that such practices are impermissible.[20] EOIR and ICE should adopt detention policies that demonstrate a commitment to ending overincarceration in order to avoid the serious constitutional problems that current policies are creating.

The prospect of continued detention coerces many detainees to abandon meritorious claims to stay in the U.S. EOIR and ICE should act cooperatively to reduce the government's use of detention and achieve enormous cost savings by expanding community-based alternatives to detention (ATD), which are far less costly than detention in prison-like settings – $8.88 per person per day for ATD as compared to $122.[21] All bond and custody decisions should be reviewed by an immigration judge and ICE should bear the burden of showing why detention is necessary, i.e., why conditions of supervision, including electronic monitoring, would not be sufficient. EOIR should also undertake a close examination of the legal doctrine and procedural requirements for immigration judges' bond decisions, which exhibit a lack of consistency and are not required to be transcribed, thereby hampering appellate review and wrongly keeping immigrants in detention as a first resort.[22]

### III. EOIR should undertake a comprehensive review of language access services and ensure the required sharing of evidence by the government in immigration courts.

One of the most pervasive problems in immigration proceedings is the failure to guarantee translation of an immigrant's proceedings. The 2010 ACLU/HRW report observed "bond hearings that were not translated for the detainees who were of limited English proficiency."[23] Impartial observers are shocked to discover that "[i]n most jurisdictions . . . Immigration Court interpreters render only those statements made by and directed to respondents."[24] EOIR is an agency that serves a population with acute language access needs, yet many of its proceedings fail the most elementary test of intelligibility for immigrants whose lives, families, and futures are at stake. The ACLU urges EOIR to make language access a top priority, including the translation of immigration forms and the provision of interpretation services in detention facilities, and to draw lessons and shared resources from the experience of criminal and civil institutions with tested comprehensive interpretation services.

A second defect that affects an enormous number of immigration cases is the government's failure to produce information necessary to the immigrant's case. Discovery

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[20] *See, e.g., Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (construing 236(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid serious constitutional problem), *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (construing 236(c) as only authorizing mandatory detention for period of time reasonably needed to conclude proceedings promptly); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).

[21] Statement of John Morton, "The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement" U.S. House of Representatives Committee on Appropriations, Subcommittee on Homeland Security (Mar. 18, 2010); ICE, "Protecting the Homeland: ATD Nationwide Program Implementation Report" at 9 (Feb. 1, 2010).

[22] All immigration court hearings should be transcribed as a basic tenet of fundamental fairness.

[23] *Fundamental Fairness*, *supra*, at 9.

[24] *Id.* at 11.

deadlines are frequently flouted by government attorneys without imposition of sanctions. In addition, despite the plain language of the Immigration and Nationality Act and the clear holding of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011), the ACLU has received reports that DHS is refusing to provide immigration files without a Freedom of Information Act request.

Lack of language access and government disrespect for its procedural responsibilities are recurring issues faced by immigration court practitioners. To achieve the fair legal playing field required by the Constitution, these flaws must be remedied.

**Conclusion**

The ACLU applauds the Senate Judiciary Committee's discussion of "Improving Efficiency and Ensuring Justice in the Immigration Court System." Our statement aims to demonstrate that improvement in efficiency and the assurance of justice are mutually reinforcing objectives. Improvements in legal representation, detention, and court procedures would benefit every participant in the immigration courts and cost savings frequently flow from improved process. Indeed, true systemic reform will result only when policymakers are genuinely committed both to enacting best practices and to realizing the fair immigration hearings our Constitution requires.

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Testimony of the American Immigration Lawyers Association

Submitted to the Committee on the Judiciary of the Senate
Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System"
May 18, 2011

The U.S. immigration court system is in a state of crisis. Administered by the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice (DOJ), this system suffers from deeply rooted problems that are eroding its capacity to fulfill its primary mission: "to adjudicate immigration cases in a careful and timely manner . . . while ensuring the standards of due process and fair treatment for all parties involved."[1]

As EOIR's mission statement states, ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. Yet the immigration court system continues to suffer from lack of adequate legal representation for respondents in removal proceedings, extended delays for respondents who are detained, and a lack of meaningful appellate review. Six out of ten respondents, including asylum seekers, children, and mentally ill respondents, appear before the immigration court without legal counsel, an appallingly low rate of representation for matters that deeply impact people's lives and sometimes can make the difference between life and death. For those in detention, 83 percent of respondents are unrepresented. System-wide there is inadequate judicial review at the appellate level as seen in the "streamlining" reforms at the Board of Immigration Appeals that have sacrificed the quality of judicial review and the quality of the Board's decisions.

Another critical problem is the extremely high caseloads of immigration judges and the growing backlog of immigration cases. The immigration

[1] http://www.justice.gov/eoir/orginfo.htm.

court receives a high volume of nearly 400,000 new cases annually,[2] and each immigration judge handles, on average, 1200 cases per year.[3] The lack of adequate financial and other resources has resulted in overworked judges and staff and has compromised the system's ability to assure proper review of every case. Court statistics show that the grant rates for cases are highly disparate among judges thus giving rise to criticism that outcomes may turn on who or which court is deciding the case rather than established principles and rules of law. Such disparities have made the immigration judiciary vulnerable to perceptions that its ranks are biased and lacking in professionalism.

Nothing short of a structural overhaul of the entire system is needed. Until a complete reform can be implemented, however, the American Immigration Lawyers Association (AILA) recommends that DOJ and EOIR immediately implement *interim* reforms within the trial level courts and the appellate Board of Immigration Appeals (BIA). As an association with more than 11,000 active members practicing immigration law before every sitting immigration judge, AILA offers unparalleled expertise and direct experience with the functioning of the immigration court system.

## I. IMMIGRATION COURT RESOURCES

**Increased number of Immigration Judges and staff support:** The current number of immigration judges (IJs) and support staff is wholly insufficient to handle the number of cases referred each year to the immigration court system. While Congress has appropriated ever increasing sums of money to DHS for immigration enforcement, the immigration court system remains severely under-funded, making it ill-equipped to accommodate the burgeoning court dockets or meet case completion timelines. Congress's inadequate funding for EOIR is the principal reason for this continuing problem.

In FY 2010, EOIR received 393,000 matters for adjudication, far more than the immigration judge corps can timely handle.[4] As a result, the backlog of unresolved cases that has long-plagued EOIR continues to grow. At the end of FY 2010, the number of cases awaiting resolution before the Immigration Court reached a new all-time high of 261,083, a 40% increase from just two years ago.[5] Wait times for case resolution have also grown. In FY 2010 it took an

[2] FY 2012 Congressional Budget Submission, Administrative Review and Appeals (ARA), Department of Justice, p. 5, available at http://www.justice.gov/jmd/2012justification/pdf/fy12-ara-justification.pdf.
[3] *Immigration Court: Troubled System, Long Waits*, ABC news, April 19, 2011, available at http://abcnews.go.com/US/wireStory?id=13336782.
[4] *See supra*, n.2.
[5] *As FY 2010 Ends, Immigration Case Backlog Still Growing*, TRAC Reports, Inc., October 21, 2010, available at http://trac.syr.edu/immigration/reports/242/.

average of 280 days to complete a case, an increase of 47 days from FY 2009.[6] For cases in which the court granted some form of immigration relief, the average was 696 days, or nearly two years.[7]

These ever-increasing case completion times have a real impact on those immigrants waiting for their cases to be resolved. For asylum seekers who fled without their families, a delay in case resolution means prolonged separation and continuous worry about the safety of their loved ones. For individuals who are detained, a delay can have a devastating emotional and financial impact on their families, while at the same time costing taxpayers millions of dollars in extra detention costs.

With the funding it has available, EOIR has made important efforts to address this crisis. In the last 18 months, EOIR has hired 38 more IJs, bringing the total to 270.[8] The court backlogs and wait times, however, are destined to grow until the Immigration Courts are given funding that is proportionate with the increases given for DHS's enforcement purposes. Last year, DHS deported just under 400,000 individuals, a record-breaking number. With nationwide deployment of Secure Communities expected by 2013, those numbers, and the numbers of immigration cases received by the court, will also increase. Although the President's FY2012 budget submitted to Congress in February requests funding to hire 21 additional IJs and related staff, far more judges and staff are needed. Even in this time of fiscal crisis, Congress should fund EOIR at the level requested in the President's budget and grant continued increases until sufficient staffing levels are reached.

**Timely hearings for detained cases:** A backlogged court system results in unnecessary and oftentimes prolonged detention for respondents taken into ICE custody. Although current protocols call for scheduling detained respondents for a hearing on custody issues within three days of DHS filing the NTA with the court or receipt of a motion for a bond hearing, many immigration courts are unable to meet this goal due to the high volume of cases it must handle. Thus immigrants eligible to be released on bond remain in detention for additional days or weeks, resulting in hardship to the individual and unnecessary expense to taxpayers.

For immigrants ineligible for bond, the situation is more dire. Many detained respondents are scheduled for merits hearings more than six months after their initial appearance before an IJ, and in some cases without a prior finding as to whether the individual is even removable as charged. For individuals locked away in detention centers and the families left to cope without them, detention lasting for many months causes undue strain, emotional and financial hardship,

[6] *Immigration Courts Take Longer to Reach Decisions*, TRAC Reports, Inc., November 11, 2010, available at http://trac.syr.edu/immigration/reports/244/.
[7] *Id.*
[8] *See supra,* n. 3.

and lasting damage. For asylum seekers who come to the U.S. seeking safety and freedom, prolonged detention compounds their stress and suffering and inhibits their ability to begin recovering from the physical and psychological damage inflicted by persecution and torture.

Immigration judges presiding over detained cases must have manageable dockets to prevent respondents ready to move forward with their cases from being forced to languish in detention solely due to a lack of court resources. AILA believes it is reasonable to require that an initial hearing on removability be set within 14 days, unless a delay is requested by the respondent. A short timeframe would not prejudice DHS, as the agency has ostensibly reviewed the merits of its charges and gathered the necessary evidence prior to or upon arresting and detaining the respondent. Similarly, detained respondents should be scheduled for a hearing on the merits within a reasonable period, either 60 days from the initiation of the case or alternatively no more than 30 days after a finding of removability by the IJ, unless more time is requested by the respondent. We note that EOIR has established timeframes for the completion of detained cases in the 2011 High Priority Performance Goals DOJ presented to the President.

Importantly, while all respondents have an interest in timely court hearings, it is vital that EOIR affirm the authority of immigration judges to grant a respondent's reasonable request for a continuance. Respondents must be afforded time to adequately prepare their cases, which may require obtaining evidence from overseas, tracking down medical and other records, and finding expert witnesses—tasks made more difficult by detention. Special consideration should also be given to pro bono attorneys and law school clinics that often begin representing a client after multiple hearings have already occurred or may have other constraints. Ultimately, the goal should be a court system that functions efficiently to ensure that respondents do not remain in detention simply for a lack of court resources but with sufficient flexibility to protect the due process rights of respondents.

**Timely BIA Decisions for Detained Respondents:** Currently, detained aliens commonly wait up to a year while their appeals to the BIA are being reviewed. Although appeals filed by detained respondents are placed on a separate docket from those who are not detained, there is no deadline for when the BIA must render a decision after the parties' briefings have been filed. The BIA should establish a deadline of three months for resolving cases involving detained respondents.

**Bond appeals:** Currently, in most cases the BIA decides bond appeals contemporaneously with appeals related to the case in chief, either as to removability or eligibility for relief. Bond appeals directly raise the personal liberty interest of the respondent to be freed from detention. While the bond appeal is pending, the respondent has no recourse but to remain in detention, often for many months. By contrast, in federal and state courts matters affecting liberty issues

are more expeditiously addressed. AILA recommends that the BIA set a 10-day deadline for the IJ to create and forward a bond memorandum (which memorializes the basis for the decision in lieu of a formal record), as well as conform to a 14-day deadline in which the BIA must decide bond appeals after briefing has been completed.

## II. IMMIGRATION COURT EFFICIENCY

The Immigration Court system suffers from severe underfunding, resulting in huge backlogs, delays in case resolution, and overworked and under resourced immigration judges. Funding for additional court personnel is vital but so too is putting in place policies that promote efficiency and expending resources to create a more efficient court system that will prove less costly in the long term.

**IJ Decisions:** AILA has long been concerned about the quality of IJ decisions, including the common practice of issuing oral decisions which often fail to sufficiently describe the underlying reasoning for the decision. Unless waived by the parties, IJs should be required to issue a written decision in any decision that clearly provides the factual and legal bases for the decision, addressing all arguments raised. Moreover, IJs are disadvantaged by not having a transcript of the hearing to facilitate review of all of the evidence prior to entry of a decision. This is particularly true when merits hearings are continued midstream for many months. In all cases, the immigration court system should provide written transcripts contemporaneous with the time of the IJ hearings, not merely access to recordings of the hearings. Provision of transcripts during the adjudication phase will permit the IJ to review the actual record, rather than having to rely on notes and written pleadings to make a decision. Furthermore, an accurate and contemporaneous record will allow the respondent to intelligently evaluate whether an appeal is warranted, and if so, to clearly indicate the reasons for appeal.

**Electronic Filing System:** The immigration courts and the BIA must implement an electronic filing system, similar to those offered by federal and state courts. The paper-based system now in place is antiquated and inefficient, results in unnecessary delays in cases when filings are misplaced or lost, and unnecessarily burdens respondents and attorneys who live or practice far from the immigration court. Detained, pro se respondents are at a particular disadvantage under the current system, since mail at detention centers is often unreliable and interrupted by lockdowns or other disturbances. It often takes weeks, if not months, to resolve a late filing issue, and requires proof that a detainee may not be able to access. In some cases, detained respondents have been denied the right to appeal or even to pursue an application for relief because of the current paper filing system. In addition to handling applications and other filings, an electronic system should have the capacity to handle fee collection, as well as requests for fee waivers. Until a complete electronic filing system can be implemented, priority should be given

to the immediate implementation of an electronic system for filing of notices of appeals and appeal briefs, motions to reopen, and emergency stays of removal, including the payment (or arrangements for later submission payment) of any required fees.

**Legal Orientation Program:** The Legal Orientation Program (LOP) was created to inform immigrant detainees about immigration law and the immigration court process. Through grants from the Executive Office of Immigration Review, nonprofit legal service organizations provide the program at 27 detention facilities across the country, reaching around 15 percent of the immigrants held in detention each year. The LOP group and individual presentations provide detainee immigrants with basic information about their rights under immigration law, eligibility for relief from removal, how to accelerate the removal process, and how to represent themselves in front of the immigration court. Eighty percent of immigrants in detention go through the removal process without an attorney. Although LOP is not a substitute for legal representation, it is the only opportunity for most detainees to obtain information about their rights and responsibilities under the law, information vital for them to be able to make informed decisions about how to proceed. In addition to helping protect due process rights of pro se respondents, LOP offers significant fiscal benefits. Research shows that program participants move through the immigration court process an average of 13 days faster than detainees who do not have access to LOP, resulting in less time spent in detention, and significant savings for both the immigration court and the DHS immigration detention system. The Attorney General has recognized LOP as a "critical tool for saving precious taxpayer dollars." Congress should fund LOP at a level that guarantees every detainee in immigration detention access to this valuable resource.

## III. DUE PROCESS IN IMMIGRATION COURTS

**Access to Counsel:** Among the most serious flaws in the U.S. immigration system is its failure to ensure that every respondent appearing in immigration court proceedings is guaranteed legal counsel and to provide counsel paid for by the government when the respondent cannot afford a private attorney. This responsibility does not rest exclusively with EOIR, but until a system is established to ensure counsel the immigration court system will not be able to dispense justice in a fair and meaningful way for all who appear before it. EOIR/DOJ should explore all available options to begin a program that provides counsel paid for the by the government. Such a program could start with a pilot that focuses on particular populations, such as those who are mentally incompetent or juveniles, but the long-term goal must be to expand the program to reach all respondents in immigration court proceedings at both trial and appellate levels.

The common use by Immigration Customs and Enforcement (ICE) of detention facilities that are located in remote regions presents serious challenges to the goal of providing access to counsel.

Small towns and rural areas have far fewer practicing immigration lawyers or non-profit legal service organizations. Individuals who already have legal counsel experience great difficulty maintaining contact with their counsel when they are transferred to remote detention facilities. AILA urges EOIR and ICE to work collaboratively to establish transfer and case management protocols that will have the least detrimental impact on access to counsel and relationships with counsel.

Finally, the lack of oversight over the practice of immigration law has made it far easier for unscrupulous individuals to prey upon those needing legitimate legal services. "Notario" cases and other situations where someone misrepresents the nature of the services they are qualified to provide are among the more serious examples. EOIR currently manages the program that accredits non-lawyer professionals to represent respondents in proceedings before the immigration courts and agencies. This program is essential to facilitating the delivery of immigration legal services to thousands of people annually. AILA urges DOJ and EOIR to provide more resources to this program, to expand its capacity to monitor accredited representatives, and to discipline those who do not comply with basic standards of practice.

**The government's burden to prove removability under INA 240(c)(3):** DHS clearly bears the burden of establishing removability, and presumably has reviewed each NTA and supporting evidence for legal and factual sufficiency prior to initiating proceedings. In the vast majority of cases, removability is not challenged. However, when it is, IJs frequently do not require DHS to meet its burden. Other preliminary matters, such as motions to suppress challenging the validity of the underlying arrest, should also be resolved during the initial phase of removal proceedings. However, IJs will often avoid these threshold issues by collapsing the inquiry of removability or validity of the arrest, and eligibility for relief into one step, thereby requiring respondents to prepare expensive and complicated applications, prior to even considering whether the government has sustained its burden of establishing removability. This practice not only implicates fundamental questions of fairness and due process, but implies an improper "presumption" of deportability that undermines the independence and neutrality of the immigration courts. In addition, it creates even more barriers to representation. Respondents who have some economic means may still not have sufficient resources to pay an attorney to prepare an entire case for relief as well as pay unnecessary application fees. Pro bono attorneys are forced to expend valuable resources presenting every avenue of relief for a single client, rather than using those resources to represent multiple clients. IJs should follow the statute and require that the government to first prove removability before requiring the respondent to demonstrate eligibility for relief. Resolving these threshold issues in advance of any relief phase will efficiently resolve cases that lack of legal or factual basis to proceed, before expending scarce court resources.

**Stipulated Orders:** Stipulated orders are motions filed with the immigration court in which the immigrant admits that she is removable from the U.S. and gives up all due process rights, including the right to apply for relief from removal or appeal the order of removal. Stipulated orders offer the possibility of considerable savings for DHS. A person provided an in-person hearing spends on average 41 days in detention while someone who does not require a hearing spends on average 16 days. With pressure on DHS to increase the number of removals per year and at the same time cut costs, stipulated removals are particularly appealing. As a result DHS has begun seeking stipulated orders not only for immigrants in ICE custody, but also for those with ICE holds who are still in pretrial detention in the criminal system and, as a result, have no access to LOP or even a library with immigration law materials. These are not the serious criminals who will go through immigration court proceedings while serving their prison sentences but rather include the 60 percent of individuals swept up by Secure Communities who have never been convicted of a serious offense or any offense.

In some cases, stipulated orders are beneficial to immigrants who want to be deported as quickly as possible. However, for immigrants who are unrepresented and unfamiliar with the immigration law and court proceedings, stipulated removals can result in the unknowing and involuntary waiver of rights, and, ultimately, the deportation of individuals eligible for relief from removal. At particular risk are immigrants who are illiterate, have low levels of education, have little familiarity with the American court system, or are victims of violence and may be eligible for VAWA, U-visa, or T-visa relief but are unaware of these options. Although ICE obtains the signature of the immigrant, ultimately, it is the immigration judge who decides whether to grant or deny the motion for removal. EOIR should put in place a policy that an immigration judge cannot grant a stipulated order motion signed by a pro se respondent until the respondent has appeared before the IJ—who as an obligation to determine whether the respondent is eligible to apply for relief from removal—or at least has attended an LOP presentation. Such a policy will help ensure that the due process rights of pro se respondents are protected.

**Video Hearings:** Videoconferencing is now a staple in many immigration courts across the country for respondents in immigration detention or criminal custody. With many detention centers located far from city centers, videoconferencing eliminates the need to establish immigration courts in remote locations or to expend time and money transporting immigrants to and from court. However, videoconferencing also poses numerous due process concerns. For the reasons described below, AILA recommends first that EOIR ensure detained respondents are always provided the option of having in- person removal hearings. Second, as DHS moves forward with detention reform, including moving detention centers from remote areas to areas closer to city centers, it is imperative that EOIR work together with DHS to ensure that these facilities have courtrooms for in-person hearings.

Conducting a hearing via a television screen necessarily makes communication through body language, eye contact, facial expressions, and intonations of voice less effective. This is particularly concerning for applicants seeking asylum and other protections where IJs must make credibility assessments based not just on what is said, but also on demeanor. These communication barriers also diminish the accuracy of translations, negatively impacting the ability of a respondent to participate in the hearing. Videoconferencing raises more practical concerns as well. A respondent's lawyers must choose between attending the hearing with the client—and thereby be able to communicate more freely with the client throughout the hearing—or appearing in person before the IJ. In a jail setting, IJs must rely on guards, rather than trained court personnel, to assist the court. In some cases, respondents have been provided the wrong form, resulting in delays in their proceedings or even removal orders as a result of missed filing deadlines. For respondents unaccustomed to videoconferencing technology, appearing before a judge via a television screen can be a surreal experience, negatively impacting their ability to meaningfully participate in their own removal proceedings. In short, video hearings are not a substitute for in-person hearings.

**Emergency motions:** All emergency motions for a stay of removal involve an imminent threat of deportation, and many involve threat of deportation to conditions of torture, persecution, and other threats to life and physical safety. Emergency motions for stays deserve the same attention in immigration court as they receive in federal district courts. The immigration courts should specify a procedure for which a designated judge can be contacted day or night for an emergency motion to be adjudicated. Currently the immigration courts provide no written procedure specifying how the immigration courts should process motions for emergency stays of removal. Many courts do not have an assigned judge who hears such cases. In other situations, the lack of a designated judge or confusion over who is responsible has resulted in disagreements as to which judge should decide the motion. Similarly, denial of an emergency stay should be subject to an automatic stay, allowing the respondent to obtain review of a denial, either before the BIA or before the Federal Courts, as appropriate.

## IV. BOARD OF IMMIGRATION APPEALS AND DUE PROCESS

**Affirmances without opinion:** AILA applauds the recent steps the BIA has taken to reduce the practice of issuing "affirmances without opinion." In order to reduce the rate of affirmances without opinion, however, the BIA has greatly increased the number of very brief decisions. Such conclusory opinions are not necessarily better than an affirmance without opinion. Abbreviated decisions which fail to fully articulate the reasons for the decision are even more difficult to review, requiring a hybrid review of both the IJ and BIA decisions, making meaningful review by the Circuit Courts elusive at best, and often resulting in unnecessary

remands for a new decision or further proceedings. Except in very limited circumstances, the BIA should issue full written opinions that explain the basis for the decision and address each relevant legal issue raised by the parties.

**Single member review:** The BIA regulations should be amended to make review by three-member panels the default practice and to require three-member panels in all "non-frivolous merits cases that lack obvious controlling precedent." Single member review should be permitted only in purely ministerial or minor procedural motions, as well as motions unopposed by DHS.

**Automatic stay of removal after the BIA issues a final order:** Once the BIA has made a final determination on a case, the respondent has the legal right to seek review of the order and a stay of removal at the Circuit Court within 30 days. Unfortunately, given the complexity of such review, and no interim limitation on the respondent's removal unless a stay is granted, respondents are often deprived of a meaningful right to seek judicial review. The BIA should adopt a rule that prohibits DHS from executing a final order prior to a respondent having the opportunity to seek review and/or a judicial stay, unless specifically waived by the individual. In addition, an automatic stay of removal should be granted upon the filing of a motion to reopen with either the BIA or an IJ. The stay should remain in effect throughout the process of judicial review of such motion. The automatic stay could be waived by the non-citizen after a knowing and voluntary advisal of his or her right to file a PFR or motion to reopen.

**Precedent:** AILA has long urged the BIA to issue precedent decisions on a regular basis to ensure national uniformity in the adjudication of similar legal issues and consistent treatment of discretionary circumstances. This guidance is even more critical in view of the disparate results between different IJs and in different jurisdictions. To this end, the BIA should increase the annual number of precedent decisions issued.

AILA cautions, however, that issuance of a particular decision as a precedent is ill-advised when the respondent is not represented by counsel (or was not represented by competent counsel). The inherent deficiencies in such a record impugn the value of such a case as a basis on which to interpret the statute or to illustrate the law as applied. Accordingly, AILA recommends that the BIA should not issue precedent in cases where the respondent is not represented by counsel, where the record reveals potential ineffective assistance or other error by counsel, or alternatively, that the BIA should be required to seek relevant *amici curae* in reviewing such cases. The BIA should also establish a system to ensure that respondents in cases where precedent will be established receive adequate counsel including counsel provided at government expense.

SUBMISSION FOR THE RECORD

AMERICAN IMMIGRATION COUNCIL

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Testimony of the American Immigration Council

Submitted to the Senate Committee on the Judiciary
Hearing on
"Improving Efficiency and Ensuring Justice in the Immigration Court System"

May 18, 2011

*Introduction*

Immigration courts have long suffered from crushing backlogs that can delay the scheduling of hearings for years at a time. Additionally, noncitizens who appear before these courts often suffer serious due process violations. With the dramatic and rapid escalation of immigration enforcement, too little attention has been paid to the many challenges facing our immigration court system.

The backlogs in our nation's immigration courts are bigger today than at any time in U.S. history. In many U.S. cities, noncitizens must wait eighteen months or longer for a hearing before an immigration judge. These backlogs not only delay the removal of noncitizens with no lawful claim to remain in the United States, but also impose hardships on individuals—such as asylum seekers—whose status and ability to work remain in limbo until their cases are resolved. The troubles that have long faced our immigration court system have been magnified and compounded by the Department of Homeland Security's increasing reliance on state and local law enforcement agencies. So long as the federal government continues to expand its enforcement efforts through programs like Secure Communities, while ignoring the need for court reform, our nation's immigration courts will continue to be flooded beyond capacity.

Moreover, noncitizens in removal proceedings historically have been denied many rights that Americans have come to expect from a fair system of justice. Unlike criminal defendants, noncitizens who cannot afford an attorney have no right to appointed counsel. Noncitizens can also be removed on the basis of hearsay and other evidence that would be excluded in federal courts. Vulnerable noncitizens, including those who lack mental competency, are often deported without inquiries into their ability to comprehend the proceedings against them.

And the immigration court system remains largely exempt from crucial checks and balances like judicial review. Federal court oversight is important not only because of the high stakes involved in immigration cases, but because of the potential for error that accompanies the growing volume of cases and limited resources. Moreover, because the majority of noncitizens do not have lawyers, federal court review adds an important layer of protection; courts can catch

inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws.

For far too long, immigration courts have failed to provide a fair, efficient and effective system of justice for noncitizens in this country. The American Immigration Council is grateful for this opportunity to highlight certain problematic aspects of the immigration court system that have long been a focus of our litigation and advocacy efforts.

*Access to Counsel*

Access to counsel lies at the very core of our legal system and is integral to ensuring that noncitizens facing removal receive fair process and a meaningful opportunity to be heard. Whether a person has legal representation is perhaps the most critical factor in obtaining a favorable result in immigration court.[1] Despite the importance of counsel, a staggering number of individuals in removal proceedings are forced to proceed without legal representation. In FY 2010, 57 percent of all noncitizens in proceedings did not have lawyers. In other words, 164,742 noncitizens faced the daunting and often insurmountable task of navigating a complicated maze of procedural rules, statutes, regulations, and court decisions on their own.

Not surprisingly, cost often is a barrier to representation, especially for detained noncitizens. However, cost is not the only impediment. Transfers from the place of arrest to a detention center in a different state make it more difficult to retain a lawyer, particularly in remote locations where there are few lawyers and even fewer pro bono resources. Transfers also may disrupt existing attorney-client relationships.

Given the gravity of removal—which can range from permanent separation from family in the United States to a threat of persecution in an asylum-seeker's country of origin—indigent noncitizens should be appointed counsel. Appointed counsel would not only help protect the rights of noncitizens and ensure more just outcomes in removal cases, but also would make removal proceedings more efficient. Because non-attorneys generally are unfamiliar with the complex laws and rules governing immigration court hearings, immigration judges must spend precious time getting them up to speed. In addition, unrepresented noncitizens with no available relief may unwittingly file frivolous appeals. Lawyers can help streamline the process.

[1] The Government Accountability Office found that asylum applicants who had lawyers were more than three times as likely to be granted asylum as those who did not. GAO, *Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* at 30 (2008), *available at* http://www.gao.gov/new.items/d08940.pdf. Similarly, a comprehensive study of asylum outcomes by academics concluded that whether an asylum seeker was represented in court was "the single most important factor" affecting the outcome of the case. Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007), *available at* http://www.acslaw.org/files/RefugeeRoulette.pdf.

*Effective Assistance of Counsel*

The courts and the Department of Justice long have recognized that the right to counsel must necessarily include a remedy for ineffective assistance of counsel. Over twenty years ago, the Executive Office for Immigration Review (EOIR) established a framework for evaluating ineffective assistance of counsel claims and providing remedies.[2] This framework, however, has proven to be severely flawed. It has elevated form over substance; resulted in protracted litigation and unnecessary expenditure of resources; pitted lawyers against one another; and most significantly, deprived noncitizens of their only opportunity to present their cases.

In November 2009, the American Immigration Council submitted to EOIR written suggestions for how to improve the framework for adjudicating ineffective assistance of counsel claims.[3] The American Immigration Council also suggested revisions that would reduce the number of motions to reopen for ineffective assistance and other reasons; reduce the amount and duration of litigation in the administrative and federal courts over procedural and clerical mistakes; and help ensure that all noncitizens in removal proceedings have their day in court.

*Protections for Noncitizens Who Lack Mental Competency*

Every year, untold numbers of noncitizens with mental disabilities are deported from the United States without access to counsel or any assessment of their cognitive capabilities. This issue has taken on greater urgency following extensive reports of the challenges such individuals face in removal proceedings, as well as alarming reports of the mistaken deportation of U.S. citizens.

The entry of removal orders in cases involving noncitizens who lack mental competency raises significant questions under both the Constitution and the Immigration and Nationality Act (INA). The Due Process Clause of the Fifth Amendment mandates that *all* noncitizens, including those present in violation of law, receive a full and fair hearing. The INA also calls for procedural safeguards to "protect the rights and privileges" of mentally incompetent noncitizens.[4] At a minimum, such safeguards should include appointed counsel for noncitizens who are not competent to proceed on their own. Additional safeguards, including the appointment of a guardian *ad litem*, may be required for noncitizens who are so severely incapacitated that they cannot understand and assist with their hearings even with the assistance of counsel.

Earlier this month, the Board of Immigration Appeals issued a precedent decision adopting a test for Immigration Judges to assess a noncitizen's capacity to participate in a removal hearing in cases where there are "indicia of incompetency."[5] The decisive factors are whether the noncitizen understands the nature and object of the proceedings, can consult with an attorney or representative (if there is one), and has a reasonable opportunity to examine adverse evidence,

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[2] The framework is set out in the Board of Immigration Appeals' decision *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

[3] These suggestions are available at http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf.

[4] 8 U.S.C. §1229a(b)(3); INA § 240(b)(3).

[5] *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

present favorable evidence and cross-examine government witnesses. If there is good cause to believe that a noncitizen lacks sufficient competency to proceed, the Immigration Judge must evaluate and implement appropriate procedural safeguards to ensure a fair hearing.

While the Board's decision was a welcome first step, many concerns remain. For example, while the Board properly held that the Department of Homeland Security must disclose evidence in its possession relating to a noncitizen's mental competency, significant doubt remains that the government can provide a neutral competency assessment in the first place. The decision also fails to acknowledge that legal representation is indispensable to help noncitizens who lack mental competency navigate the complex maze of immigration law. Finally, the decision provides only a cursory discussion of how to proceed in cases involving noncitizens whose mental disabilities are so severe that no procedural safeguards would ensure a fair hearing. More comprehensive guidance will be necessary to protect the due process rights of noncitizens who lack mental competency.

*Employment Authorization Asylum Clock*

The INA requires asylum applicants to wait 150 days after filing an application to apply for a work permit. However, due to problems with the Employment Authorization Document (EAD) asylum clock—which measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization—asylum applicants often wait much longer than the legally permitted timeframe to receive a work permit. During this time, applicants must generally rely on others for financial assistance. Some eventually are forced to work without authorization at serious risk of exploitation while they wait for decisions on their asylum cases.

Many of these problems result from inconsistent and overly broad interpretations by immigration judges (IJs) of what constitutes "delay requested or caused by the applicant," which, pursuant to regulation, causes the clock to stop.[6] Attorneys report that IJs fail to properly implement the clock and, in some cases, appear predisposed toward preventing asylum applicants from accumulating time toward eligibility for employment authorization. The backlogs at the immigration courts can magnify these problems. When a respondent requests a continuance to seek counsel or prepare for a hearing, IJs often stop the clock until the next hearing date, which may be many months later and long after the reason for the delay has been addressed.

Many EAD clock problems, and suggested solutions, are addressed in a comprehensive report issued by the American Immigration Council and Penn State Law School's Center for Immigrants' Rights, "Up Against the Clock: Fixing the Broken Employment Authorization Clock."[7] The report offers recommendations that would help ensure asylum applicants become eligible for employment authorization without unnecessary delays and closer to the timeframe outlined in the INA.

[6] 8 C.F.R. §§ 208.7(a)(2) and 1208.7(a)(2).

[7] http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf.

*Departure Bar to Motions to Reopen*

EOIR bars noncitizens from pursuing motions to reopen or reconsider a final order of removal after they have left the United States. Over the past several years, the so-called "departure bar," codified at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), has been the subject of protracted litigation in numerous courts of appeals. To date, five appellate circuits have found that the bar to motions to reopen from outside the United States is unlawful.[8] Challenges to the bar are pending in at least two circuits.[9] The departure bar is inconsistent with Congress's intent when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). One of Congress's goals in enacting IIRIRA was to encourage prompt removal and departure from the United States upon the completion of immigration proceedings. Yet the departure bar has created an incentive for noncitizens with removal orders to ignore such orders and remain in the United States—because complying with the order would mean foreclosing an opportunity to exercise their statutory right to file a motion to reconsider or reopen, a right that is especially compelling if factual or legal circumstances change. Thus, contrary to congressional intent, the departure bar actually undermines the goal of encouraging compliance with removal orders.

Moreover, when Congress enacted IIRIRA, it took the significant step of codifying the right to file motions to reopen and reconsider. As the Supreme Court has said, the motion to reopen is "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings."[10] Not only does the departure bar preclude reopening when there is new evidence or arguments that may affect the outcome of removal proceedings, but it also deprives EOIR of authority to adjudicate motions to remedy deportations wrongfully executed, whether intentionally or inadvertently, by DHS. At present, immigration judges and the Board of Immigration Appeals are powerless to adjudicate motions to correct wrongful deportations, even under the most egregious circumstances. The simplest solution to this problem is for EOIR to remove the departure bar from the regulations. In August 2010, we filed a petition for rulemaking asking the agency to do just that; to date, however, EOIR has not acted on our petition.

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The American Immigration Council is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy and the value of immigration to U.S. society. The Legal Action Center (LAC) is the litigation and legal resources arm of the American Immigration Council. The mission of the LAC is to protect the legal and constitutional rights of noncitizens, and to ensure that immigration law is interpreted and

[8] *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). *But see Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

[9] *Prestol Espinol v. Attorney General*, No. 10-1473 (3d Cir. *argued* April 27, 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500 (10th Cir. petition for rehearing en banc *filed* March 8, 2011).

[10] *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (internal quotations, citations omitted).

implemented in a manner that is sensible and humane. The LAC has established itself as a leader in litigation, information-sharing, and collaboration among immigration litigators across the country. The LAC is also one of the leading providers of legal resources for immigration advocates, including in-depth practice advisories, trainings and litigation meetings.

SUBMISSION FOR THE RECORD

# THE NINTH CIRCUIT'S INTERNAL ADJUDICATIVE PROCEDURES AND THEIR EFFECT ON PRO SE AND ASYLUM APPEALS

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**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**
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ABSTRACT

The immigration bureaucracy includes multiple administrative agencies including the asylum officers' corps, immigration judges, Board of Immigration Appeals, and also the federal courts. When there is a breakdown or backlog in one part of that bureaucracy, given that the system is hierarchical in structure, problems that occur lower in the appeals chain can radiate to affect the lower federal courts, particularly specific U.S. Courts of Appeals. Because the Supreme Court exercises it certiorari function to select for adjudication only a very small number of cases, 80-100 cases, from over the 7,000 cases appealed to it every year, it is realistically the U.S. Courts of Appeals that serve as the court of last resort for federal litigants, including immigrant litigants. But the U.S. Courts of Appeals, a court of general jurisdiction, also suffer from a lack of resources and are affected when hit with large numbers of immigration appeals. This article focuses on how the triaging procedures of Ninth Circuit Court of Appeals can negatively affect the appeals of two vulnerable groups of litigants: pro se aliens in removal proceedings, and aliens claiming political asylum.

## I. INTRODUCTION

Can the adjudicative procedures within a court influence or skew legal outcomes? Most existing studies of court rules and norms and their effect on judicial decision-making focus on *formal* rules of legal institutions. While these studies are valuable, few focus on the lower federal courts or state courts, and even fewer focus on the *informal* processes, which include: the adjudicative procedures and rules that govern how cases are processed, assigned to judges or to staff attorneys, and whether cases are tracked to obtain more or less scrutiny by the judges. Pro se aliens and/or aliens who are asylum

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claimants are arguably two of the most vulnerable litigant groups to come before federal courts. Because aliens who wish to contest their deportation or removal from the U.S. are operating under the civil and not criminal law regime, alien litigants fighting their expulsion from the country are not provided legal counsel at public expense. They may of course obtain counsel at their own expense or find pro bono counsel to represent them. Furthermore, with defensive claims of asylum, applicants may be incarcerated, making gaining access to counsel even more difficult.[2] Aliens claiming the protection of political asylum do so because they cannot or will not return to their home countries on account of their alleged "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[3] The central staff of the Ninth Circuit reports that approximately fifty percent of all the immigration appeals that arrive at that circuit are asylum appeals.[4] If an adjudicator makes an error in either type of case, the alien faces severe consequences. In a typical removal case, the alien is deported and banished from the country. In the case of asylum applicants, such a decision may mean that the alien will be sent back to a country in which his or her life could be in danger.

Vulnerable litigants like asylum applicants and pro se litigants are further disadvantaged by a complex system that is in crisis. The U.S. immigration system is characterized not only by the intricacy of immigration law, but also administrative shortcomings at every level that can snowball quickly for aliens who suffer erroneous denials early in the process.[5] It is precisely in this area of law that competent counsel is most needed. Even though most aliens who appear before the U.S. Courts of Appeals are represented, according to the Ninth Circuit judges and other U.S. Courts of Appeals judges, the immigration field suffers a disproportionate number of incompetent and predatory counsels compared to other fields of law. All these factors combine to necessitate vigorous and meaningful judicial review even as the adjudicative procedures of the Ninth Circuit sometimes conspire to limit review by Article III judges in large classes of cases.

Much of the data used in this article is based on seven in-person interviews with judges of the Ninth Circuit, one phone interview with a judge, and several interviews with the circuit's central staff.[6] The number of judges interviewed represents twenty-five

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[2] *Cf.* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 11-16 (2009) (for a more detailed account of the asylum process); at 14, ("Defensive applicants are usually detained (jailed) by DHS after apprehension. A small number are released on bond (or on their own recognizance) before their immigration court hearings, while most remain detained through their hearings and any subsequent appeal.").

[3] *See* 8 U.S.C. § 1101(a)(42) (2010) for the statutory requirements in applications for asylum.

[4] Interview with central staff, 9th Cir. (June 12, 2007).

[5] ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 3 (2010).at 173-186.

[6] In this article, the citation of all the Ninth Circuit judges' and staff's interviews deviates from standard Bluebook format for citing interviews because the anonymity of the judges had to be protected. Very few of the judges would have consented to the interviews and the email follow-up questions if the responses would identify them. Moreover, the data was collected and governed by Internal Review Board ("IRB") procedures that protect human subjects. Under IRB rules, for a project to be classified as "exempt," as this project was, the interview data must be kept anonymous. Accordingly, the names of the judges have been withheld as well as the city and state of the interview. Given that Ninth Circuit judges may have their chambers located in any state within the circuit, and that in some cities, there is only one judge who has

percent of the active judges on the Ninth Circuit.[7] Federal judges, although they speak frequently before legal audiences, rarely consent to media or scholarly interviews. Consistent with the only two other social science scholarly works, the interviews with the judges and central staff of the Ninth Circuit are all cited anonymously and do not include any other identifying information of the judges, other than the active status of seven judges and the senior status of one judge.[8] These interviews were invaluable because they provided not only an insider's account of the internal adjudicative procedures of the circuit, but also because without these interviews, much of the internal procedures of the circuit would not be accessible to scholars and the public.

## II. WHAT MAKES IMMIGRATION APPEALS SO DIFFICULT?

Pro se and political asylum appeals filed by aliens in immigration cases present special challenges to any court that other types of cases, even immigration cases, would not. For pro se immigration claims, the greatest trouble is navigating the intricacy of immigration law itself. The byzantine nature of immigration law presents difficulties even to the most seasoned immigration lawyer, much less pro se applicants. Immigration law has been described by the Second Circuit, in *Tim Lok v. INS,* as having a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges."[9] Therefore, while all alien litigants must contend with the maze of immigration laws, those aliens filing pro se claims in immigration proceedings are at the most severe disadvantage among all types of alien litigants, because they have no one to guide them through the maze.

Given the severity of deportation, and although no right to counsel exists under the Six Amendment in the deportation and asylum contexts, Congress has stipulated through legislation that aliens in deportation proceedings are entitled to counsel as part of the due process package of protections available to them, albeit not government appointed counsel.[10] From the federal courts' reading, Congress intended to provide aliens access to counsel as part of their due process protections in removal proceedings. At least nine circuits have recognized that these due process violations can occur as they pertain to availability of counsel, or specifically ineffective counsel in cases in which incompetent or negligent counsel negatively affected the outcome of the case and was, "the cause of the forfeiture of relief."[11] Although aliens do not have a right to publicly

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their chambers there, in effect, to identify the city in those instances, would be to identify the judge. Finally, to avoid the cumbersome he/she and his/her, I have changed all the pronouns to feminine; therefore the gender of the pronoun may not match the gender of the judge.

[7] All of the in-person interviews were conducted in the summer of 2007, although this article is also based on an additional number of follow-up emails sent to some of the judges that I initially interviewed. These follow-up emails spanned from 2007 to 2010.

[8] *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 19 (2002); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS, 18-19 (2002).

[9] Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

[10] See 8 U.S.C.§ 1362 (Feb. 2010) on alien's right to counsel.

[11] *See* M. MARGARET MCKEOWN AND ALLEGRA MCLEOD, *The Counsel Conundrum, in* REFUGEE ROULETTE at 292, 304 n. 46. (Jaya Ramji-Nogales et al. eds., 2009)

appointed counsel, they do enjoy the assurances that the procedural process by which they are rendered removable is fair.

Within an area of law that is already known for its complexity, the subset of asylum law is also known for imprecise legal standards. Asylum applicants must meet the legal definition of a "well-founded fear of persecution" by showing that they have been persecuted based on their "race, religion, nationality, membership in a particular social group, or political opinion."[12] It is a definition that is simultaneously very broad and extremely restrictive. On the one hand, "social group" and "political opinion" can encompass a range of groups and activities. On the other hand, the asylum definition does *not* include extending protections to persons fleeing civil war and strife, famine, natural disaster, widespread crime waves, or lack of economic opportunity.

Moreover, bureaucratic adjudicators and judges have difficulty deciding asylum cases even when the legal definition can be clearly applied because of the nature of asylum claims compared to other types of immigration cases. In asylum cases, applicants reach U.S. shores often with little but the clothing on their backs, and sometimes they attempt to enter the country with fraudulent documents because it was the only way they could flee a dangerous situation. All these applicants have in the way of evidence to support their asylum claim is the story they bring with them. Frequently there is an absence of material evidence, including physical evidence of torture, or documentation of other kinds of persecution. Moreover, adjudicators must have some knowledge of an array of countries across the globe, because so much of the granting of asylum depends on which groups are in power, which are being oppressed, and the reasons for the oppression. Judge C indicated, for example, that the "law in this area is not difficult, but the volume is difficult," especially because of the intensive factual review required in asylum claims.[13]

## III. THE NINTH CIRCUIT AS IMMIGRATION APPEALS "SPECIALISTS": A DOUBLE-EDGED SWORD

Among the eleven Courts of Appeals and the Federal Circuit, the Ninth Circuit is synonymous with immigration appeals. This situation was true historically as the circuit courts and district courts of the western states led the way in defining nascent immigration law. In the contemporary period, the Ninth Circuit continues to play a prominent role in immigration law by adjudicating the bulk of the nation's immigration appeals. The concentration of immigration cases in the Ninth Circuit is due to the confluence of circuit jurisdictions' conformity to state boundaries and immigration settlement patterns. Twenty-seven percent of all legal and illegal immigrants that come to the United States settle within the state of California alone, which is in the Ninth Circuit's jurisdiction.[14] The clustering of immigration cases in the Ninth Circuit, while other U.S. Courts of Appeals handle only a small number of immigration cases, has been a double-

[12] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2006).
[13] Interview with Judge C (June 13, 2007).
[14] Migration Policy Institute, Frequently Requested Statistics on Immigrants and Immigration in the U.S. (Dec. 2010) http://www.migrationinformation.org/USfocus/display.cfm?ID=818#7 (last visited Apr. 25, 2011).

edged sword for the circuit, its personnel, and for the many alien litigants in immigration proceedings.

Among the eleven Courts of Appeals, the Federal Circuit and the D.C. Circuit, the U.S. Court of Appeals for the Ninth Circuit, also has the largest appellate docket comprised of all kinds of cases besides immigration appeals. This Circuit has been equipped to handle volume for many years dating back to the tenure of Chief Judge James R. Browning. One innovation that began in 1982 was the creation and institution of the formal "screening" or "Submission Without Oral Argument Program" that was modeled on the Fifth Circuit's similar system.[15] When appeals arrive at the Ninth Circuit, the central staff first checks for jurisdiction. Then, if the circuit does have jurisdiction, the cases are assigned numerical weights. The weights reflect the number of legal issues and the difficulty of these issues and are used to aid the staff in assigning the appeals in a way that balances judges' workloads. The higher the weight, the more difficult and complex the issues and the higher the number and page count of the supporting documents in the appeal.[16]

The assigned "weight" of the case also determines whether the case is tracked to oral argument (the higher weighted ones) or screening.[17] Essentially, the goal of routing some cases to receive more or less attention from Article III judges is to conserve time allocated to judicial review on a circuit that is stretched thin because of the volume of cases. The screened appeals are those that are routine, meritless, or hopeless and therefore "not to require full-scale judicial involvement."[18] In my interviews, the central staff and several judges referred to this procedure as "triage" or triaging the appeals.[19] They also reported a crucial piece of information for the purposes of this article, the fact that *all pro se cases are automatically sent to screening panels*.[20] While many of the pro se claims might well be routine and hopeless, the worry among some of the judges was that they might be missing some needles in that big haystack. Aspects of the screening procedures can work against uncovering these needles.

Beginning in 2002, the Ninth and Second circuits experienced a flood of immigration appeals popularly called "the immigration surge."[21] The immigration surge was triggered by a specific set of reforms undertaken in 2002 in which the BIA streamlined its adjudicative procedure, that led to a flood of cases that hit the U.S. Courts of Appeals and the Second and Ninth Circuits in particular. These two circuits had to scramble to keep up with the case crunch. Others have already written about and assessed the Second Circuit's main response to the surge of immigration cases, which was to

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[15] John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 867-686 (1991). Screening is also authorized by Rule 34(a) of the Federal Rules of Appellate Procedure.

[16] For examples of S weight cases or 7 weight cases, see LAW, *supra* note 2, at 160.

[17] LAW, *supra* note 5, at 159-160.

[18] *Id.* at 873.

[19] Interviews with central staff (June 12, 2007)

[20] *Id.*

[21] The term "immigration surge" seems to have first appeared in the Sept. 2003 article, *Immigration Appeals Surge in Courts*, THE THIRD BRANCH (e-newsletter produced by the Administrative Office of the U.S. Courts), *available at* http://www.uscourts.gov/news/TheThirdBranch/03-09-01/Immigration_Appeals_Surge_in_Courts.aspx (last visited May 1, 2011).

reluctantly abandon its long cherished commitment to providing oral argument in most cases in favor of routing asylum cases to screening track.[22]

To be sure, the recent surge of immigration appeals in the Ninth Circuit has caused the circuit and its personnel much consternation, but not all the effects of immigration appeals concentration in the Ninth Circuit are negative. Because immigration appeals make up such a large portion of the Ninth Circuit's docket, that circuit has grown very accustomed to hearing and adjudicating these cases. For example, Judge C described, the aliens benefit from "economies of scale" in this circuit because the staff and judges are very accustomed to hearing immigration appeals.[23] Judge D stated that, "We [the Ninth Circuit] can deal with immigration cases. It's an advantage to the aliens that this circuit is making immigration law."[24] She noted that, in comparison, "The Supreme Court does not know much about and has very little experience with immigration."[25] Judge A felt that it was a "benefit" to aliens that the Ninth Circuit handles most immigration appeals because, "We've [the Ninth Circuit] developed expertise in this area."[26] Given the complicated nature of immigration law, it is perhaps true that it is to the alien's benefit that his or her case is adjudicated in the Ninth Circuit, by judges and central staff who have been forced to become immigration experts out of necessity. For better or worse, that circuit handles the daily bulwark of the nation's immigration appeals. Therefore, any changes to immigration law or the rest of the immigration bureaucracy will have ripple effects that inevitably will disproportionately affect the Ninth Circuit.

## IV. SCREENING A "NECESSARY EVIL:" HOW IT CAN DISADVANTAGE PRO SE AND ASYLUM APPLICANTS

Professor Oakley described screening procedures as "a prevalent modern response to the crisis of volume at appellate courts."[27] As Judge C confirmed, the Ninth Circuit did not need to adopt new procedures for the onslaught of immigration appeals that hit it beginning in 2002 because the court was already "geared for volume."[28] Instead, the court just "tweaked the old processes" to accommodate the immigration appeals.[29] The decisions of the Second and Ninth Circuits to send more and more immigration appeals to screening panels as their primary survival strategy had a number of consequences for all involved, but may have put pro se cases and asylum cases in particular jeopardy. Recall that the Ninth Circuit's policy is to send all pro se cases to its screening track. Screening increases the risk of missing routine looking cases that may have complex legal issues buried, taxes the cognitive functions of judges because of the repetitive nature of the

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[22] John Palmer, *Symposium on Immigration Appeals and Judicial Review: The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 974 (2006).
[23] Interview with Judge C (June 13, 2007).
[24] Interview with Judge D (June 13, 2007).
[25] *Id.*
[26] Interview with Judge A (June 13, 2007).
[27] John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 867-686 (1991), at 873.
[28] Interview with Judge C (July 26, 2007).
[29] *Id.*

bundled cases, and can skew the eventual outcomes by limiting the level of judicial scrutiny each appeal receives.

Presumably, given the case weighting and related calendaring procedures of the Ninth Circuit, the cases with complex and numerous legal issues are routed to the oral argument track. In these oral argument appeals, judges have the supporting documents in the case and they spend significant time reviewing these documents in their chambers before oral argument actually takes place. By contrast, the screening process involves judges sitting on screening panels two or three days per month and listening to staff's oral presentation of cases. In an effort to achieve consistency and because asylum cases in particular lend themselves to this type of treatment, the central staff attempts to "bundle" cases for screening panels. Screening panels can be constructed around a specific legal issue, such as a panel on 212(c) claims, a type of waiver available before 1996 that granted relief from deportation. Because a grant of asylum must take into consideration specific country conditions, screening panels are also constructed around a particular nationality, for instance, a panel devoted to only Guatemalan asylum claims ("Guatemalan day") or a panel hearing asylum claims based on China's "one child only" policy.[30] The central staff reported that sixty percent of all immigration appeals are sent to screening tracks, with the remaining forty percent sent to decision panels.[31]

Judges are typically provided with no information about an appeal in advance of the screening panel's meeting. Judges may ask for the supporting files and documents in advance of the screening session, but very few do. Judge G reported that while the judges are provided with all the materials at the screening panel meeting, "most judges do not receive anything in advance."[32] At the oral presentation by staff, the staff attorneys present written proposed dispositions of the cases. Judge G suggests that there are several possible outcomes for the screened appeals. The screening panel judges can accept the staff-prepared written disposition as is, or after changes proposed by the screening panel judges have been made. If judges want more time to read through the supporting documents, the cases can be "put over" or deferred, but only briefly, "like to that afternoon or to the next day."[33] Even these short delays "do not happen very often."[34] A third option is for any one judge to request that the case be "kicked," which means that the case is kicked over to the oral argument track. Judge G noted also that, "this list isn't a set of options, just my reflection of how the process works."[35]

None of the interviewed judges liked the screening procedures, but they accepted them given the court's busy docket. Professor Oakley sums up the rationale for busy circuits' screening systems: "In one way or another screening programs seek to divert the least difficult cases to a separate decisional track involving a significantly lesser degree of personal attention by the judges."[36]

One cost to the judges from moving sixty percent of the immigration appeals through screening panels and "bundling" cases is that while the method effectively

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[30] LAW, *supra* note 5, at 165.
[31] Interview with central staff (June 12, 2010).
[32] E-mail from Judge G, Ninth Circuit, to Anna O. Law, Associate Professor of Political Science, DePaul University (Oct. 7, 2010, 12:19:00 CST) (on file with author).
[33] *Id.*
[34] *Id.*
[35] Interview with Judge G (July 6, 2007).
[36] Oakley, *supra* note 27, at 860.

speeds up processing, the judges may suffer mental fatigue from the monotony. After sitting through staff presentations of as many as 100 to 150 cases in a two or three-day period, the judges on these screening panels must make decisions based on those oral descriptions. Judge D complained that screening is "too mechanistic and it doesn't give you time to think about it."[37] In reference to the screening system in general but not immigration appeals in particular, Judge Kozinski has written, "After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible."[38] Conversely, Judge Posner of the Seventh Circuit has written that one of the benefits of oral argument is that, "It also provides a period of focused and active judicial consideration of the cases. During the argument, the judge, unless peculiarly given to woolgathering, is thinking about the case and nothing else."[39]

While there are studies noting the higher pro-alien grant rate in published versus unpublished cases, the more salient issue is the degree of scrutiny involved in these cases based on their routing to screening or oral argument, a decision which precedes the decision to publish or not publish an opinion.[40] Increasing the number of screening panels may indeed increase the speed with which cases can be processed, and the judges seemed to find the bundling of cases helpful because they believed it raised their level of consistency in adjudicating similar cases.[41] But extrapolating from Judges Kozinski and Posner's comments on screening and oral argument, one could conclude that the bundling process, in combination with the increased use of screening panels, poses the danger of eroding the judges' concentration and perhaps lowering their threshold of belief in applicants' credibility when judges hear the same story again and again.[42]

There is potential cost to aliens whose claims have been routed to screening panels as well. The disadvantage to the alien in screened cases is due to the degree of concentration and scrutiny a judge is able to bring to an appeal. This fact can affect the final disposition of the case. Issues of mental weariness aside, the interviews indicated that a judge's level of sympathy for aliens seemed to correlate with how much time the judge spends with these cases, which in turn may skew the outcome toward a particular disposition. Judge E confirmed this notion when she explained, "You get into a case far enough and you start second-guessing the fact finder."[43] She noted that the deeper one digs into the case and scrutinizes the record, the more likely one will find grounds for reversal. In fact, the panel's review of a case is not limited to only the legal issues presented in the briefs. Yet, a major determinant of the level of scrutiny a judge can bring

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[37] Interview with Judge D (June 13, 2007).

[38] Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 7 (2007).

[39] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 161 (1996).

[40] David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit,* 73 U. CIN. L. REV. 817, 845-47 (2005).

[41] Interview with Judge A (June 12, 2007)

[42] Kozinksi, *supra* note 39 at 7 and Posner, *supra* note 40 at 161.

[43] Interview with Judge E (July 26, 2007). *See also* Suntharalinkam v. Gonzales, 458 F.3d 1034, 1040-1049 (9th Cir. 2006) (illustrating an example of "getting into a case far enough" for the fact finder to make a second guess, where the panel majority contested the IJ's credibility determination on eight different points).

to an appeal is whether the case goes through the screening route or the oral argument route.

With the realization that the degree of scrutiny can determine the outcome, the increasingly frequent use of screening panels also invites increased exercises of specific kinds of strategic behavior by judges who may wish to reach one legal outcome over another. On a screening panel, a decision must be unanimous. If the panel of three judges cannot reach a consensus, the judge who does not agree to sign on to the opinion can "kick" the case back to the argument track. Approximately ten to fifteen percent of all the court's cases get "kicked."[44] Because of the rule that any one judge can kick a case, several judges indicated that the composition of the screening panel matters greatly, and one judge can strategically slow down a case for the purpose of obtaining more thorough scrutiny by an Article III judge. Judge F noted that even though they are pressed for time on a screening panel that is designed to move cases along more quickly than the oral argument track, "some judges pay attention anyway and kick the case or [otherwise] slow down the screening."[45] She added disapprovingly, "Some judges are willing to let several hundred go through [with little scrutiny], but they would also do this even for oral argument cases." Judge F added that she knew of another judge who "would *automatically* kick any cases involving U.S. citizen children" because she believed that the deportation of an alien parent is the de facto deportation of the citizen children.[46]

The degree of scrutiny for immigration appeals by an Article III judge, particularly in asylum appeals, can influence the outcome of the case because judges are able to exercise their discretion after taking a much closer look at the appeals. The concept of discretion and particularly how it operates in legal decision-making is nebulous, and ironically, because of its lack of concrete definition, it can play an important role in immigration cases. In fact, the use of discretion in immigration appeals has become a point of contention in the Ninth Circuit, particularly with respect to the "level of deference" that is owed to administrative decision makers.[47] One of the reasons for the frequent exercises of discretion by appellate judges in order to reach a ruling favorable to aliens is that many of the Courts of Appeals simply do not have confidence in the accuracy of the administrative adjudicators in immigration.[48] Judge B was quick to point out that the level of confidence that Ninth Circuit judges have in the decisions of other administrative adjudicators, such as those rendering decisions in social security, tax, and veterans cases, is much higher than toward the administrative fact-finders in the immigration system.[49] Therefore, the problem is not that administrative law appeals are inherently difficult, but that *immigration* appeals are uniquely difficult because the judges

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[44] E-mail from Judge B, Ninth Circuit, to Anna O. Law, Associate Professor of Political Science, DePaul University (Dec. 19, 2007, 17:49:00 CST) (on file with author); *see also* e-mail from Judge F, Ninth Circuit, to Anna O. Law, Associate Professor of Political Science, DePaul University (Dec. 19, 2007, 18:05:00 CST) (on file with author).

[45] Interview with Judge F (June 13, 2007).

[46] *Id.* She refers to immigration cases where a "mixed status" family is affected; these are families that have members of dissimilar immigration statuses.

[47] Interviews with Judges E and G (June 26, 2007 and July 6, 2007, respectively).

[48] LAW, *supra* note 5, at 128.

[49] Interview with Judge B (June 13, 2007).

are expecting to find errors where they might not be in other areas of administrative law.[50]

The interviews made clear that judges' review of cases are not limited to reviewing the legal issues laid out in the briefs. Several judges interviewed stated that although Congress had tried to statutorily instruct the Courts of Appeals to defer to the Attorney General's exercises of discretion with regards to both the facts of the case and the legal conclusion, the hands of the appellate judges were not completely tied. Judge F relayed that, in her view, if a Court of Appeals judge agrees with the previous decision-making body's conclusion, she can simply state that the Attorney General has exercised his discretion and that the case is no longer within the jurisdiction of the federal courts.[51] Conversely, Judge E explained that, despite the statutory directive that federal courts should not second-guess the Attorney General or her designated entities, "[e]gregious cases get sent back to the BIA regardless of discretion."[52] But an exercise of discretion requires a fairly thorough review or "digging" into a case, especially asylum cases, which often require intensive review of the factual record. Judges on screening panels do not have time to thoroughly review the record.

## VI. CONCLUSION

With so many aspects of law and legal institutions to study, legal scholars and practitioners often do not look at the internal adjudicative procedures of courts. However, procedures of the U.S. Courts of Appeals not only shape legal outcomes, but the Courts of Appeals are also realistically the final say for most immigration cases because the Supreme Court takes so few cases. This article has demonstrated that the internal adjudicative procedures put in place in the Ninth Circuit to accommodate its heavy docket have noticeable negative consequences for pro se aliens and asylum applicants, but especially for pro se asylum applicants. The fact that the Ninth and Second Circuits must triage some cases to obtain deeper review by Article III judges can work against these litigants because the success of their appeal can turn on the degree of judicial scrutiny. Judge D ended her interview by registering her strong concern that the adoption of and heavy reliance on screening panels in her circuit had "fundamentally altered the nature and degree of judicial review" and had the effect of creating "weakened" judicial review.[53] She opined that the Ninth Circuit had in effect adopted certiorari-like functions akin to those at the Supreme Court.[54] These same cert-like functions may harm certain types of aliens.

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[50] Interview with Judge B (June 13, 2007). *See generally* IMMIGRATION REPORTS SERIES, TRANSACTION RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/reports (last visited Apr. 25, 2011) (reporting on problems that plague parts of the immigration bureaucracy); RAMJI-NOGALES ET AL., *supra* note 2, at 45.

[51] Interview with Judge F (July 27, 2007).

[52] Interview with Judge E (July 26, 2007).

[53] Interview with Judge D (June 13, 2007).

[54] *Id.*

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## Immigration court: Troubled system, long waits

**By Sharon Cohen**
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CHICAGO — Every morning, they don their black robes, take their seats and listen to the pleas of a long line of immigrants desperate to stay in America. The pace is fast, the pressure intense, the stories sometimes haunting. The work, these judges say, is exhausting:

"The volume is constant and unrelenting.' ... 'There is not enough time to think.' ... 'Nobody gives a damn about us!' ... 'I know I couldn't do this job if I were not on medication for depression or did not have access to competent psychological care myself.' ... 'I cannot take this place anymore. What a dismal job this is!'"

These are the voices of immigration judges who determine the fate of tens of thousands of people every year — illegal border crossers, visa violators, refugees who flee China, El Salvador, Iran and other countries, each making a case to remain here.

These judges are at the heart of a bloated immigration court system saddled by explosive growth, a troubled reputation and a record backlog, according to one estimate, of nearly 268,000 cases. The problems are drawing increased scrutiny of a little-seen world where justice can seem arbitrary, lives can remain in limbo for years — and blame seems to be in abundance.

There are lawyers who accuse immigration judges of bias, stall tactics and incompetence. Judges who criticize lawyers as unprepared. Advocacy groups that say some immigrants don't even understand the proceedings — and in extreme cases, end up unfairly deported.

"It is a maddening system," says Chuck Roth, director of litigation at the Heartland Alliance's National Immigrant Justice Center. "It really doesn't get us anywhere toward justice."

And that's no surprise, says Laura Wytsma, a former immigration government lawyer in Los Angeles who does pro-bono work on asylum cases.

"When you take so many things .... inadequate resources, hostile judges, overly aggressive government lawyers, laws that don't make sense, an immigration bar that generally is not the caliber of civil litigators, language barriers, poor translation," she says, "you've got a system with so many broken parts, it's a wonder it functions at all." Put aside the toll the system exacts on immigrants and their families. These courts, some say, are a bureaucratic disaster.

"This has nothing to do with whether you think someone should be deported or not. What this boils down to is this — if you're going to have a court system, you have to do it right," says Malcolm Rich, director of Chicago Appleseed Fund for Justice, a legal research and advocacy group. "By doing it wrong — the way we're doing it now, we're wasting tens of millions of dollars."

Though he hears evidence and makes rulings, Zerbe is not part of the judiciary, but an employee of the Justice Department. These are civil proceedings. And in immigration court, people have no right to a lawyer; if they can't afford one or find one to donate their time, they're on their own.

This afternoon, most people represent themselves. And most don't speak English. So almost every word is repeated — once by the judge or immigrant, once by an interpreter.

A Palestinian man with weary eyes sits before the judge, holding his head in his hands, and in rapid-fire Arabic he describes his plight: He has no money, no job, no work papers. He can't see his children; it's unclear why.

He has brought along a friend who tells Zerbe: "He's looking for justice."

The judge calls in a professional interpreter — who translates via phone hookup — and the man explains he has been smuggled through Spain, Mexico and other places. The U.S. government wants him out. He's not sure what to do. Fight to stay. Or go home, he says, to Palestine. The judge points out that's not a United Nations-recognized country. (The man's home is on Israel's West Bank.)

"Why don't you want to help me?" the man says, his voice raw with despair. "Why are you so upset?"

"I'm not upset," the judge says evenly. "I'm just trying to get a solution."

Zerbe patiently explains that while he's sympathetic, this isn't the time or place to discuss family or work, just immigration.

"All I know about you is one sheet of paper," the judge says.

Zerbe suggests the man consult a legal aid attorney before deciding. He agrees and will have another day in court.

So will a Polish couple fighting charges they overstayed their visa. "We have a lawyer for nine years who didn't do a good job representing us," the woman announces, dressed smartly in a black suit, standing next to husband.

Zerbe grants them a nine-month delay.

"Thank you judge," the woman says with great relief. "Have a good day."

A baby-faced man can't afford a lawyer. When Zerbe asks if he thinks he can represent himself, he hesitantly says, "I'll try."

He faces deportation to Mexico. He hasn't lived there since he was 2, when his parents crossed the border illegally. Now he's 22. He was snared by authorities for twice violating a court order to stay away from an ex-girlfriend; he spent time in jail.

"Are you willing to leave the U.S. voluntarily?" Zerbe asks.

"If I have to, yes," he replies in a near whisper, glancing back at a young woman who nervously rubs a forefinger over her mouth.

But he won't this day. He announces he wants asylum, declaring he fears Mexico's drug trafficking violence. Zerbe says those general conditions don't qualify him. There's another catch: Applications generally have to be filed within a year of arrival — which, of course, is impractical since he was 2 at the time.

The young man gets a few months to consult a lawyer. He walks out stiffly in polished black shoes.

There's one more asylum case. A Mongolian woman is worried her political beliefs will cause her harm if she is sent back. She says her husband was beaten in Mongolia So why, the judge asks, through a translator, is she there, not her husband? There's no immediate explanation.

He glances at a computer screen for a BBC timeline showing the Mongolian elections. He notes there is no State Department travel ban.

The judge tells the woman's attorney — who says he's studying the language — to marshal the required documents and jokes he'll be proficient by the time he returns to present his case.

The next court date: Feb. 27, 2013.

In Los Angeles, it took five years for a Cameroon mother who was raped and beaten to win asylum. For a time, her three children in Africa didn't know she was alive— she feared she'd jeopardize their safety if she contacted them.

In Phoenix, it was a nine-year wait for a Haitian refugee who lost his home and business after being detained because of a clerical error.

And in Chicago, a nurse from India who came here to work — leaving her young son for what she thought would be a short time — is still trying to untangle herself from red tape more than eight years later.

The courts' backlog of nearly 268,000 cases at the end of 2010 marked a 44 percent increase in 2½ years, according to the Transactional Records Access Clearinghouse, a statistical research group at Syracuse University. The federal agency that runs the courts — the Executive Office for Immigration Review — has responded by hiring 38 more judges — there are now 270 — and 90 others, including clerks, in the last 18 months.

In congressional testimony last year, Juan Osuna, now acting director of the office, outlined steps being taken to improve the courts, including new staff, more training and better hiring practices. The courts came under fire during the Bush administration when it was discovered some Justice Department aides were choosing judges based on their politics.

But there's no magic wand to erase more than a quarter-million cases.
Judges handle, on average, more than 1,200 matters a year, leaving them so overwhelmed they mostly issue oral decisions "that sometimes are not fully researched or based in law or fact," according to a 2010 report commissioned by the American Bar Association.

"You sit there, listen to a case, then there's a five-minute break, and you render the decision," says Dana Leigh Marks, president of the National Association of Immigration Judges. "It keeps us up at nights as judges. You worry — are you making the right decision, particularly when someone has a criminal record."

Marks, a judge in San Francisco, likens her job to "dealing with death penalty cases in traffic court" because the stakes are so high, the resources so scarce.

What makes the work even tougher is the heat from superiors to move fast, says Bruce Einhorn, a former immigration judge in Los Angeles for 17 years.

"No one ever received any plaudits for slowing down the assembly line," he says. "It was always push, push, push. ... Whether it was intended or not, the agency's pressure was always in favor of speed."

Judges aren't the only ones being squeezed.

Wytsma, now a private lawyer, says when she worked for the government during the late 1990s, she often didn't have enough preparation time and had to appear in court without documents or case files. Once, while fighting to remove a child molester, she scrambled for days looking for missing records — and found them just in time.

Even when lawyers and judges are doing their jobs, some argue the system doesn't work because there's so little accountability.

Mark Metcalf, a former Miami immigration judge writing a book about the courts, says hundreds of thousands of immigrants haven't showed up for their hearings in the past decade, and asylum seekers ordered deported rarely leave.

"There's no rule of law," he says. "It is in disarray."

The Office of Immigration Customs and Enforcement, which removes people here illegally, disputes suggestions that it lets people slip through the system, saying it has fugitive teams pursuing leads of those who have absconded or disobeyed court orders, In fiscal year 2010, almost 392,000 immigrants were deported, according to ICE. While the agency's top priority is those who pose a danger, it "does not turn a blind eye" to those who aren't convicted criminals and they accounted for about half those removed, according to Brian Hale, chief spokesman.

Even so, it's a monumental task monitoring so many people.

The courts completed more than 353,000 matters — that's how they refer to legal proceedings — in the year ending in September. That's almost 40 percent more than a decade earlier, according to federal statistics.

Among the reasons for the spike: ICE has stepped up its enforcement. And a sweeping 1996 immigration law gave prosecutors and judges less flexibility in dealing with those here illegally.

"By making the laws more restrictive in some ways, it has made it a litigation paradise," Marks says. "Now cases are fought much harder on legal technicalities and that slows things down."

The average wait for a case to be resolved is longest in California — 639 days — or about 21 months, followed by Massachusetts with 615 days, according to a February report by TRAC, the Syracuse-based group.

Delays can buy time with a family or the chance to find witnesses or develop evidence; Some immigrants also cling to the hope if they hold on, the laws will change in their favor.

But long waits also are financially and emotionally draining. It's just not the detention costs to taxpayers, but also the incalculable impact of keeping families divided, and sometimes — in asylum cases — children in jeopardy thousands of miles away.

Mamadou Balde spent three years in detention in Alabama after federal agents arrested him at his home in Georgia in 2007. He'd already left the country voluntarily after entering illegally almost a decade earlier, returning to Guinea.

He was jailed and tortured in Guinea, his lawyer says, but escaped and eventually made his way back (again illegally) to the U.S. to rejoin his wife, Dieynabou, who had also been seeking asylum.

Balde, a 53-year-old diabetic, says detention was an ordeal: He says he was denied proper medical and dental care and was unable to get a prescription for reading glasses. He lost three teeth, he says, suffered from gout, got sick from eating spoiled food and became so depressed he wanted out — even if it meant returning to Guinea. "I was suffering a lot and not knowing what was going to happen. I didn't want to be there anymore," Balde says through an interpreter. "I thought I was going to die there. ... I lost my self-esteem. It was almost like I was losing my mind."

He became so desperate, "he would beg me to go home (to Guinea)," says H. Glenn Fogle, his lawyer in Atlanta, who urged him to keep fighting: "I said, 'We can win this one.'"

And he did.

Last August, Fogle won asylum for Balde and his wife on appeal.

Balde reunited with Dieynabou and their three children. "They give me hope," he says. "It's absurd to think that anybody can navigate this system without a lawyer," says Rachel Rosenbloom, an assistant professor at Northeastern University School of Law. Not knowing English is an enormous obstacle. So is the seemingly impossible task of an amateur from another country trying to decipher U.S. immigration law, which baffles even seasoned attorneys.

Yet, more than half those in deportation proceedings and 84 percent of those detained don't have lawyers, according to the ABA-commissioned report.

Having one made an enormous difference to a Filipino woman in Chicago.

The woman, a legal permanent resident for nearly 20 years, was ordered removed after two petty theft convictions. She already suffered from depression, but when ICE detained her, she didn't get her proper medication, her condition worsened and she began hearing voices, says Roth, of the National Immigrant Justice Center.
The woman appeared several times in immigration court. She told the judge she didn't have a lawyer and couldn't competently represent herself — and still was ordered out, Roth says.

It wasn't until she gave up and was set to leave the country when lawyers from Roth's group met her. They had her case reopened and won the right for her to remain. In 2009, she walked out of detention after 10 months. She met her infant granddaughter the first day.

"Our client lost her home, was separated from her family, and nearly was deported to a country she barely knew ... and she was one of the lucky ones," Roth says.
Hers is not an isolated case.

A survey of courts in Chicago, Los Angeles and New York — based on interviews and observations of proceedings — found "countless" incidents of immigrants treated in a "denigrating" way who couldn't understand what they were being asked or told. That report, published in 2009, by the Appleseed Foundation, also found frightening instances of poor translation.

One glaring example: An immigrant testified fire trucks were called to hose down political demonstrators. The interpreter just used the word "fire" when translating — leaving the judge with the disastrous impression the immigrant was setting fires.
On his last day, a dozen years later, in 2008, he had 1,464.

No matter how hard he worked, he says, cases kept coming "like a flow out of a spigot. You can't turn it off."

Judges have burnout and stress levels on par with prison wardens, according to a survey reported in 2009 in the Georgetown Immigration Law Journal.

In anonymous comments accompanying the survey, 59 judges described the strains and identified common problems: inadequate resources, including not enough clerks and interpreters. The fear of not recognizing bogus asylum claims. The anguish of hearing real horror stories of forced sterilization, rape, beatings and torture.

Gembacz says he learned to distinguish between bona fide cases and suspicious ones — asylum seekers, for instance, who seemed to be reading a script provided by Chinese "snakeheads," professional paid smugglers, that included almost the same words others had used weeks earlier.

There were times, though, he felt constrained by the law.

Gembacz remembers one Mexican man who crossed the border illegally more than 15 years earlier, married, had two children, spoke English, built a successful business and paid good wages to 17 employees — "someone you think you wouldn't mind living next door to you.'"

But the man broke the law, leaving Gembacz no choice but to order the couple deported, leaving them in tears.

"It was one of those rough decisions that you really didn't want to make," says Gembacz, who also is a former government immigration lawyer.
"You get a switch in your mind when you walk out of the building, you have to turn it off," he adds. "That's very difficult to do. You're running over testimony in your head, you're

thinking of decisions. You can't continue to second guess and try the cases in your mind."

Judicial decisions, though, can become the target of blistering criticism. In Chicago, for example, a federal appeals panel in 2008 condemned a judge in a Nigerian asylum case, saying it was an "absurd proposition" to suggest if the man were ordered home, he "could evade imprisonment, mistreatment and possibly death by approaching his jailers and trying to buy his way out."

In California, the appeals court has criticized one judge several times. In one case, it said she showed "obvious bias," badgering the person with "loaded, pejorative questions." In another, the panel said she "did not conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes." And in a third, it said her conduct "exhibits a fundamental disregard for the rights of individuals."

Wytsma, the Los Angeles attorney, says it's sometimes hard for judges to grasp the plight of those appearing before them.

"Judges seem to view these cases of what it's like to live in the U.S.," she says. "They can't imagine leaving a child behind. They don't understand you don't have documents to prove you miscarried. They fail to appreciate the difference in culture. It's sometimes surreal."

For others, the hard part is simply getting heard. Alla Eddine Janjary, a Moroccan, overstayed his visitor's visa but thought he'd be able to get a green card because his wife is a U.S. citizen. They completed the paperwork, they say, and were assured it would be a smooth process. Janjary, 25, even visited family in Morocco. Months after returning, he learned the government wanted him out.

At his first — and only — court hearing in Seattle, Janjary says the judge told him, "Everything is going to be fine. Don't worry." That was in 2008. His next hearing is in November. His lawyer says his case is moving slowly because the judge considers it low priority.

It's anything but to Janjary, an emergency medical technician whose job prospects and travel are limited without a green card. "Not being able to see my family, not being able to plan things ahead. ... I have no appetite for anything," he says. "It's unbelievable." His wife, Patricia, a nurse, says she understands the court's schedule, but is scared and frustrated.

"There are so many things we want to do, places we want to go, but we have to wait," she says. "And the wait is really hard, since we don't know what the results are going to be. We're trying to do all we can to move forward and live a normal life."

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**A long wait, mother looks to court for reunion**

By Sharon Cohen
AP National Writer / April 5, 2011

Olga Guzman knew there was no way she'd be able to crawl in the chilly waters of the Rio Grande. Not with a bulging belly and a child due in weeks.

So when the "coyote"-- the smuggler she'd paid $2,500 to get her from Mexico to Texas -- told her to hide, she couldn't. She was quickly apprehended by border patrol agents -- and just as quickly declared she wanted asylum.

That was September 2005. More than 5 1/2 years later, she's still waiting to explain why in immigration court.

Guzman claims her common-law husband in Guatemala beat and threatened her with a machete, leaving her so scared and desperate that she fled without telling her four young children.

"It was so, so sad to leave them but I had no other option," Guzman says through a translator. "Every time he would look at me, he would threaten to kill me and I just couldn't do it."

She did odd jobs for two months, working her way north through Mexico, saving to help pay a smuggler to get across the river to Brownsville, Texas. Her daughter was born in the U.S. 17 days later.

Guzman's bid for asylum has stalled for various reasons: a government request for more time, a judge's retirement, the crowded docket -- and, her lawyer says, a reluctance among immigration judges to tackle cases involving battered women.

Some judges "have a hard time seeing domestic abuse claims through the same lens as they do other asylum cases," says Ashley Huebner, Guzman's lawyer at the Heartland Alliance's National Immigrant Justice Center. "They tend to see them as isolated private matters involving two people in an intimate relationship."

Critics argue abuse claims are hard to document and changing policy could open the floodgates, with millions of women streaming across the border. Advocates say it's difficult for most abused women to flee, make it to America and win in court.

In one celebrated case, a Guatemalan woman who'd accused her husband of pistol-whipping and savagely beating her waged a 14-year legal battle before being granted asylum in 2009.

Guzman, now 35, lives in Indiana near her sister with her two youngest daughters, 5 and 4. She has a job at a fast food restaurant (her lawyer secured a work permit) and she talks regularly with her four children -- they range from 8 to 14 -- in Guatemala.

"My kids often tell me, `Don't just leave us here. We want you with us. Why don't you come back?' I say, `You need patience. The process is long.'"

Her next hearing is set for February 2012, her case recently was transferred to a new judge -- for a third time.

"Every day," she says, "is like an eternity."

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SUBMISSION FOR THE RECORD

**More judges, less delay: Finding ways to fix 'massive crisis' in immigration courts**

SHARON COHEN, AP National Writer

April 11, 2011

The mother from Cameroon came to immigration court bearing scars: She'd been imprisoned back home, she said, beaten with cables, burned with cigarettes and raped repeatedly, contracting HIV. Her husband had died behind bars; her three children she'd left behind were struggling to survive.

She was seeking asylum, hoping to remain in Los Angeles and bring her children there. They were on their own after their grandmother died, living in a bamboo hut without water or a toilet, begging for food. For years, the mother, who'd fled Cameroon, had no contact with her kids, fearing she'd jeopardize their safety. When she finally did, her oldest son — gravely ill with malaria — sent her a letter:

"Ever since you left us mum, six years now, life has become so miserable, hope God intervains," the 20-year-old wrote. "Our greatest desire is to be beside you and ... acquire the love we need from you mama."

If the system had worked, this kind of asylum case would have been resolved promptly. But this was immigration court, where justice often moves at a glacial pace. Files were lost. Background checks delayed. Hearings scheduled at least 12 times over five years. The woman's lawyers, fearing their fragile client had become suicidal, were so alarmed they appealed to two members of Congress — not to intervene, but to call attention to what they say is a system in desperate need of reform.

"So many things are wrong, it's hard to know where to start," says Judy London, one of two Los Angeles lawyers who represented the Cameroon mother.

Some steps are being taken to fix the courts — federal officials are adding judges, improving training, reducing the influence of politics. But critics say these reforms are too little and long overdue. They follow a flurry of studies, congressional testimony and calls to do something about the crush of cases, complaints about erratic judges and delays that can leave thousands of immigrants in limbo for years.

Malcolm Rich, director of Chicago Appleseed Fund for Justice, a legal research and advocacy group that has studied the courts, is hopeful the spotlight will have an impact. "Can I predict it with certainty?" he asks. "Of course not. But we do have people in place who want to improve the way these courts are run."

One of the most immediate changes is the addition of 38 judges and about 90 others, including clerks, in the past 18 months. They'll help address a staggering backlog of nearly 268,000 cases at the end of last year, according to the Transactional Records Access Clearinghouse, a research group affiliated with Syracuse University.

That's far short of about 100 judges called for in an American Bar Association-commissioned study released last year. But Dana Leigh Marks, head of the union representing the judges, says "it's a very important first step and we hope they'll continue to follow through on the massive crisis that we face."

More staff, though, seems unlikely now; a temporary hiring freeze is in effect.

Judges deal with an overwhelming caseload. They completed, on average, more than 1,500 cases each in fiscal year 2009, Marks testified last summer in a congressional hearing. That can mean as many as nine trials a day — some involving potentially life-and-death matters.

"The consequences for the people in court are very, very high," says Marks, a San Francisco judge. "They may fear persecution in their homeland. That's a valid defense to deportation, even if they are in the United States illegally. ... If we're wrong, it's almost equivalent to sentencing someone to death."

The caliber of immigration judges themselves was at the heart of a recent political scandal that revealed how cronyism had tainted the system.

An internal Justice Department report in 2008 concluded that top advisers to then-Attorney General Alberto Gonzales broke the law by choosing immigration judges over a two-year period based on political loyalties rather than qualifications. That practice was "systematic in nature," according to the report. Several hires had little or no experience in immigration law.

The report noted the Executive Office for Immigration Review — the department running the courts — was occasionally allowed to publish vacancies but no one was considered without the proper political pedigree. As a result, numerous slots remained open for long periods despite pleas for more judges.

In congressional testimony last year, Juan Osuna, now acting director of the office, said "significant steps" had been taken to improve the courts, including changes in hiring practices. His office, he said, notifies more than 120 legal groups of vacancies and casts a wide net for those with the right skills, experience and proper "demeanor and temperament."

He outlined other reforms, including better training, a more open complaint system and

more thorough rulings in the appeals stage.

In 2004, for instance, more than 30 percent of the decisions upheld by the Board of Immigration Appeals didn't explain the reasons. That has been reduced to 4 percent, Osuna testified.

His office also says it has made substantial progress in complying with nearly two dozen changes recommended by the Justice Department in 2006. Those proposals came amid reports of wide disparities in asylum granted by judges working in the same city.

Among other improvements: a digital recording system, testing of new judges, and programs to deal with, report and monitor questionable conduct by judges.

But some say serious flaws remain. An extensive three-year study by TRAC, the research group, said while there was progress, the plan to fix the courts "has failed to achieve many of its ambitious purposes."

And Laura Wytsma, a lawyer who worked on the Cameroon case, has her doubts about a turnaround.

"There are too many other priorities for the federal government ... it's so far down the totem pole," says Wytsma, a former government immigration lawyer. "There are no politicians accountable to this constituency (the immigrants). They are not wealthy. They have no voting power. They have none of the things that put any pressures on the powers that be to make change. I'm not optimistic at all."

London, her partner on the case, also says while there are "very competent judges," she's not "confident there has been anything done to stop the more egregious behavior we see again and again."

Both lawyers are among a growing chorus of legal advocates urging the court become a separate institution — similar to bankruptcy court — removed from the Justice Department.

They and others say the current system gives the appearance prosecutors (who work for the Department of Homeland Security) and judges have the same client: the federal government.

"It's really about the independence of the judges," says Karen Grisez, a Washington lawyer who heads the ABA's committee on immigration. "Right now, the attorney general can hire and fire the immigration judges. ... Judges can be reassigned or disciplined if they're perceived as too lenient or have too many continuances."

But establishing a separate court is costly and time-consuming, and many say it's not likely to happen without a major overhaul of immigration laws, if then.

Grisez says progress can be made immediately by providing the most vulnerable — children and mentally ill — with appointed lawyers. (In immigration court, people can hire a lawyer or find free representation, but often end up defending themselves.)

"It's the biggest travesty of all" to expect kids and emotionally disturbed people to represent themselves in an adversarial hearing with complex laws, Grisez says. A report last year found some U.S. citizens with mental disabilities were detained and even deported because they couldn't navigate the courts alone.
The courts plan to hire an assistant chief judge to deal specifically with vulnerable populations.

Marks, president of the National Association of Immigration Judges, has her own "wish list." She wants judges to have transcripts of cases so they can read them and do legal research rather than ruling moments after testimony is over. Oral decisions, she says, can cause trouble.

"Sometimes you will say something succinctly or in shorthand or without it being in context," she says, "and that's when some of the judges are accused of being prejudiced or biased." Some appellate decisions have harshly criticized rulings by immigration judges.

Marks says it's sometimes hard to find the root of the problem. "When the system is broken so severely, it's impossible to tell what the cause is — whether someone is buckling under the stress of the work of whether the person is a bad fit for a job," she says.

But it will take more than extra staff to create a fair, efficient court, says Rich, the legal advocate.

He says both sides should meet before trial to dispense with easier cases, leaving more time for difficult ones so an immigrant facing deportation after being charged with shoplifting, for instance, is not treated the same as one accused of drug dealing.

"No matter what the situation is, every case is basically given the same level of scrutiny and the same level of resources," he says. "It's not an efficient way of running a court system. If you had that in the state and federal courts, they would grind to a halt. It ends up being unfair to some people and doesn't serve the public interest."

Last year, U.S. Immigration and Customs Enforcement — which is charged with removing those ordered deported — issued two memos to help ease the court backlog.

One said that since ICE lacked the resources to deport everyone here illegally, priority should be given to those who are most dangerous. The second recommended that ICE offices review and dismiss certain cases if appropriate, including those where there isn't enough evidence, hasn't been adequate notice of a hearing or there are alternative ways to remove someone.

Critics pounced, claiming it was an attempt to create a backdoor amnesty, a charge the agency firmly denied. ICE says it placed more people in immigration proceedings in the last fiscal year than ever before. Calling for discretion is a way "to avoid wasting tax dollars and resources within our overburdened courts on cases that are likely to be granted relief anyway," said Brian Hale, chief ICE spokesman.

Even those pushing to streamline the system say certain steps, such as law enforcement checks, are absolutely necessary. "Nobody should arrive on our doorstep on Monday and be granted asylum on Friday," Wytsma says. "That will never happen."

But she says there's no reason it should have taken the Cameroon mother five years.

The woman, now 37, first sought asylum in late 2004, a year after fleeing her homeland in desperation. She and her husband had been jailed and beaten, her lawyers say, after holding a meeting of a political opposition party in their home.

She eventually was freed; he was not. She was still nursing her 20-month-old daughter when she left. Her case bogged down in court, but in mid-2007, her lawyers were hopeful of a breakthrough when the woman's brother made it to Los Angeles. He, too, had been tortured in Cameroon and the lawyers believed his testimony would offer compelling evidence to buttress her story.

The brother quickly won asylum. (He also delivered heartbreaking news to his sister: Her husband had died in prison. Her mother, tortured and raped, contracted AIDS and died. Her father had died, too.)

But her fight stalled — the government was still working on background checks four years into the case. Diagnosed with severe post-traumatic stress disorder, she became so frustrated that she began talking about returning to Cameroon, telling her lawyers she couldn't abandon her children. She knew, too, she'd likely be arrested or even killed if she did go back.

Finally, in late 2009, she was granted asylum.

"We were two people with 40 years of legal experience thinking it shouldn't be so difficult to move this case along, but we won it by the hair of our chinny chin chin,"

London says.

This woman's ordeal, she says, highlights the flaws in the system. "If a judge or the government had looked at this case early on ... I don't think these children would have ended up fighting for their lives," she says.

The children were eventually located in Cameroon. By then, two were seriously ill; all were begging.

When the lawyers couldn't get the judge to expedite the case, they bypassed the courts and won permission through a branch of Homeland Security for the children to come to the U.S. The approval, London says, was based on evidence they faced life-threatening living conditions in Cameroon.

The two brothers, 22 and 18, and their 10-year-old sister, arrived last fall.

"There's an old adage — justice delayed is justice denied," Wytsma says. "That's particularly true here. When you have children exposed to malaria who almost died, when you have kids who lived in squalid conditions, a little girl separated from her mother in the most formative years of her life, I don't think anyone can say no harm."

Sharon Cohen is a national writer for The Associated Press, based in Chicago.

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SUBMISSION FOR THE RECORD

**Written Testimony on Behalf of Appleseed, Texas Appleseed and Chicago Appleseed**
**Before the**
**Committee on the Judiciary**
**United States Senate**
**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**
**May 18, 2011**

Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit written testimony on the important issue of the fair and effective operation of the U.S. immigration court system. People take great risks to come to this country. While not all are entitled to stay, we believe that part of America's promise is fair treatment from our government officials and the opportunity to be heard in court. Appleseed believes that the members of the Judiciary Committee share our desire that all those who pass through our immigration courts – whether they return to their native lands or are allowed to stay in the United States – will feel like the treatment they received at the hands of our government will be honest, fair, efficient, and in compliance with our legal standards.

Appleseed, Chicago Appleseed, and Texas Appleseed (collectively, Appleseed) are part of a nationwide network of public policy law centers that – through extensive research and analysis, advocacy and pro bono partnerships[1] – work for greater educational, economic, and social justice. Appleseed regularly issues public reports in a variety of areas, including immigration, legal representation for persons with mental illness, school reform, and financial services for low-income individuals. Over the last two years, Appleseed has issued several reports that discuss the functioning of the immigration court system:

- Of all the reports, Assembly Line Injustice, issued in 2009 and available at http://bit.ly/appleseedALI, most directly addresses the workings of immigration courts by chronicling the systemic problems facing the immigration court system and proposing practical, achievable reforms. The report focuses on the role of the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) and the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE), each of which plays a crucial role in the workings of the immigration courts.

- In 2010, Texas Appleseed issued Justice for Immigration's Hidden Population, available at http://bit.ly/hiddenpop, which examined the treatment of immigrants with mental disabilities in the immigration court and detention systems. The report additionally made recommendations to aid in the identification and accommodation of individuals with mental disabilities and increase the transparency, accountability and efficiency of the immigration and detention court systems' treatment of these individuals.

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[1] Appleseed extends its warm thanks to its pro bono partners whose investigations, analysis, writing, and production informed not only our reports, but this testimony, which was prepared by Akin Gump Strauss Hauer & Feld LLP on behalf of Appleseed.

- Just last month, in April 2011, Appleseed and Appleseed México jointly issued Children at the Border, available at http://bit.ly/mxuacs, documenting DHS's failure to screen unaccompanied Mexican minors at the border (as required by the Trafficking Victim Protection Reauthorization Act (TVPRA)), resulting in these children being denied the protections of TVPRA and the immigration court process.

While all three reports contain findings relevant to this Committee's investigation of the immigration court system, Assembly Line Injustice examines the issue most acutely. In 2009, after 18 months of investigation that included interviews of more than 100 stakeholders, Appleseed published Assembly Line Injustice, a report documenting the dysfunction of the U.S. immigration courts. The report's findings focused on nine issues that impact immigration courts' accuracy, efficiency, and legitimacy: (1) selection of judges; (2) court resources; (3) judicial and DHS counsel professionalism; (4) DHS case handling; (5) translation; (6) videoconferencing; (7) availability of court records; (8) helping unrepresented respondents; and (9) improved function of the Board of Immigration Appeals (BIA). In each of these areas, Appleseed made several pragmatic recommendations to improve the accuracy, efficiency, and legitimacy of the system, nearly all of which can be achieved through unilateral Executive Branch action.

For the last six months, Appleseed has been assessing the extent of improvements that have been made to the immigration court system since Assembly Line Injustice was published in 2009. During this time, we have also been evaluating the developments in the treatment of immigrants with mental disabilities. This effort has involved interviewing stakeholders, observing immigration courts in action, visiting detention centers, reviewing relevant literature, and requesting official documents from EOIR and ICE.[2]

During this in-depth review of the progress toward a better immigration court system, Appleseed found that EOIR and ICE have responded in part to our recommendations. We applaud EOIR's effort to make several key improvements, including (1) hiring dozens of new immigration judges (IJs), a number of whom come from backgrounds other than serving as DHS trial counsel, as well as 90 other staff, including clerks; (2) designating a specific Assistant Chief Immigration Judge (ACIJ) to be responsible for training and another to be responsible for conduct and professionalism; (3) publishing a new Ethics and Professionalism Guide; (4) creating a web site link for public complaints about unprofessional IJ conduct; (5) eliminating BIA decisions made by single members affirming IJs without written opinion (known as AWO's); and (6) launching a new online IJ Benchbook. All of these steps are intended to create a larger, better trained, more diverse, and more professional IJ corps as well as generate more considered decisions on appeal. Moreover, it is apparent from our discussions with EOIR that its leadership is committed to making pragmatic and achievable improvements to the system. We also applaud the appointment of Juan Osuna to lead EOIR. Mr. Osuna was an extraordinarily helpful and thoughtful source for Appleseed's Assembly Line Injustice and Immigration's Hidden Population

[2] Appleseed submitted FOIA requests to EOIR and ICE on December 8, 2010, but we have not yet received any of the requested information from either agency.

reports. He has long been an advocate at DOJ for better treatment of immigrants and for better functioning systems, and we are confident he will bring this attitude to his work at EOIR.

While we are encouraged by the improvements that have been made regarding a number of the topic areas of concern, more work needs to be done to bring the reality – and the perception – of fair play and equal justice to the immigration court system. For instance, no real progress has been made in eliminating the necessity of FOIA request by respondents to obtain case-related records. In short, respondents are required to FOIA records about their own case that are of the type that are routinely provided in discovery in normal civil litigation, leading to delays and a waste of administrative resources. Likewise, EOIR must make greater strides in improving fairness in proceedings conducted by videoconference. Our current findings, similar to those in our 2009 report, indicate that videoconferencing facilities and equipment are of poor quality and that the process is chaotic and confusing, resulting in a process that, in many cases, is fundamentally unfair to respondents. In order to address these problems, last year Appleseed submitted detailed recommendations regarding the IJ Benchbook chapter on videoconferencing to EOIR and its Chief Judge, but to our knowledge, no such changes have been incorporated. Regarding BIA issues, while AWO's have been practically eliminated, many appeal decisions consist of no more than a paragraph of boilerplate language. Finally, our recent court observations found that translation services are inadequately performed and some cases are conducted without the benefit of foreign-language translation at all even though the immigrant does not speak or understand English.

Significantly, none of the implemented or potential improvements (e.g., fixing the court record FOIA problem) can change the one essential fact that plagues the system: the immigration court system is drowning in cases. As a recent EOIR report confirms, the system remains seriously backlogged in cases. Among other things, this backlog causes extensive delays in asylum cases, in which individuals are fleeing persecution.[3] These findings are echoed by the Transactional Records Access Clearinghouse (TRAC), a non-partisan research institute based at Syracuse University, which found that the courts' backlog of 268,000 cases represented an increase of 44 percent in the past two and a half years.[4] The anecdotal evidence supports the statistics: IJs have been quoted as saying "the volume is constant and unrelenting" and "there is not enough time to think."[5]

While more IJs have been hired, Appleseed believes that the best budget-neutral solution to this problem is not within EOIR's control since it does not control its own docket. Rather, in the absence of a devotion of substantial new resources, the backlog can be solved only by a more widespread and thoughtful use of prosecutorial discretion by DHS and improvements in how cases are staffed and handled. With increased ICE apprehensions, which necessarily lead to an increase in the filing of immigration court cases, the dockets at immigration courts have become

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[3] *See* FY 2009 Statistical Year Book, U.S. Department of Justice, Executive Office for Immigration Review (March 2010), *available at* www.justice.gov/eoir/statspub/fy09syb.pdf

[4] *See* Immigration Case Backlog Still Growing in FY 2011, Transactional Records Access Clearinghouse (February 2011), *available at* http://trac.syr.edu/immigration/reports/246/

[5] *See* Immigration court: Troubled System, long waits by Sharon Cohen, Associated Press (April 9, 2011), *available at* http://www.vcstar.com/news/2011/apr/09/immigration-court-troubled-system-long-03/.

hopelessly backlogged. Only by DHS managing its priorities – for example, by stringently focusing its efforts only on those who are likely to pose a danger to our community – can EOIR manage its own docket. Such steps could help alleviate the system of cases not worthy of the expenditure of precious government resources – the same considerations that drive prosecutorial discretion in the criminal justice system. Significantly, the effective use of such prosecutorial discretion and improved handling of cases would not require additional appropriations.

Immigration cases are handled by a vast corps of DHS trial counsel employed within approximately 27 Offices of Chief Counsel (OCC) spread across the United States. Although they number in the hundreds, there are clearly not enough government trial attorneys to handle the crushing size of the current immigration caseload in a timely manner. Because budgetary concerns considerably limit the ability of DHS to significantly increase the number of its trial attorneys, it is incumbent upon DHS to employ other methods to improve both the efficiency and fairness of the manner in which immigration cases are handled. Under the current system, pre-hearing conferences are almost nonexistent, robbing the parties and the court of the opportunity to meet and attempt to stipulate to facts and narrow issues. As a result, merits hearings take longer than they might otherwise and many cases go to full merits hearings when they could be eliminated entirely through pre-hearing settlement. Additionally, because DHS typically assigns its trial attorneys to specific courtrooms to handle whatever cases arise on the schedule that day, there is lack of continuity of trial counsel on many matters, thus, impeding better communication with respondent counsel, and trial counsel are often woefully unprepared having, by DHS's own account, only 20 minutes on average to prepare for a case. Litigation of extraneous issues leads to delay, meaning that detained immigrants are housed at government expense longer, at a significant daily cost to the taxpayer.

In its 2009 Assembly Line Injustice report, Appleseed described this problem and made three key recommendations to alleviate the burden on DHS counsel and the system as a whole: (1) assign a trial attorney to each case; (2) mandate pre-hearing conferences at the request of either party; and (3) enforce DHS's policy encouraging the prosecutorial discretion. From our recent review, it appears that several OCC's have moved toward a greater use of vertical prosecution (i.e., assigning one attorney (or team) to handle each case); however, because of critical understaffing this approach cannot be fully implemented. For instance, at master calendar hearings (the hearings used by the court to address preliminary and procedural issues in cases and set them for hearings on the merits) as many as 70 different cases might be heard in rapid succession on a given day, and thus, it is impossible to rotate the limited government attorneys at a moment's notice. Nevertheless, certain OCC's thereafter assign a specific attorney (or team) to each case after the master calendar stage. This approach should be universally adopted. The practicality of mandating pre-hearing conferences is also extremely difficult given the critical understaffing of DHS trial counsel. Government attorneys are either always in court or preparing for court.

Appleseed submits that the one recommendation that is not hamstrung by understaffing is the greater use of prosecutorial discretion. Moreover, this approach is perhaps the most suitable to ameliorate the issue of understaffing, which, given the realities of the U.S. budget, is not likely to change significantly. Although ICE has sanctioned the use of prosecutorial discretion in public

memoranda,[6] our findings from field interviews indicate that it is rarely used. It is unclear whether the reluctance or failure to actually exercise prosecutorial discretion lies primarily with DHS trial counsel, their supervising Chief Counsels, or within the leadership of ICE. Although Appleseed has interviewed a number of Chief Counsels as part of its update report work, the Office of the Principal Leal Adviser (OPLA) would not allow us to explore this issue in such interviews. As we set forth in Assembly Line Injustice, DHS trial counsel should focus their efforts and scarce resources on the highest priority cases – those in which the government seeks to remove immigrants who are a danger to national security or their communities – and cease the practice of refusing to negotiate, charging ahead with losing cases, and challenging even the clearest of issues at trial and on appeal. Although prosecutorial discretion alone will not eliminate the overwhelming immigration case backlog, it could go a long way toward ameliorating the problem and helping to create more fair and efficient immigration court system.

Over the past year, some improvements have also been made in how the immigration courts treat individuals with mental disabilities. In Immigration's Hidden Population, Appleseed found that immigration courts lacked any standards or guidance for determining when and how to hold a hearing to evaluate the ability of a mentally disabled respondent to participate in proceedings. Indeed, as noted in the report, EOIR itself acknowledged in 2009 that "[t]here are no rules or any guidelines or any laws related to determining mental competency...". Appleseed's recommendations included that EOIR: (1) provide IJ's with at least 3 hours per year of training on handling cases involving respondents with mental disabilities and provide guidance in the IJ Benchbook; (2) create a special mental health docket to allow judges with specialized training to hear cases involving respondents with mental disabilities;[7] (3) develop procedures for hearings to evaluate a respondent's mental capacity; and (4) adopt regulations for the appointment of guardians and counsel. These recommendations also included specific suggestions for capacity evaluations and appointment of counsel.

EOIR has made some significant efforts to address the problems identified in Immigration's Hidden Population. In May 2011, BIA issued its first decision setting forth criteria for evaluating whether a respondent is competent to participate in immigration court proceedings. In April

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[6] *See* Memorandum from John Morton, ICE Assistant Secretary, Re: Civil Immigration Enforcement Priorities: Priorities for the Apprehension, Detention and Removal of Aliens (June 20, 2010); Memorandum from Will J. Howard, ICE Principal Legal Advisor Re: Prosecutorial Discretion (October 24, 2005); Memorandum from Doris Meisner, INS Commissioner Re: Exercising Prosecutorial Discretion (November 17, 2000).

[7] The DHS Reply Brief to an Amicus Brief submitted by Texas Appleseed and the American Immigration Council in the Matter of J B-Z (April 2011) made recommendations regarding a mental health docket. If EOIR implements a mental health docket, DHS recommended that: (1) cases be identified as early as possible for referral to the docket; (2) the docket be used for the entire immigration proceedings and not merely competency assessment; (3) immigration judges for the mental health docket receive special training; (4) there be a list of pro bono counsel willing to represent incompetent respondents, a list of qualified guardians, and a list of neutral mental health specialists who could conduct competency assessments. These recommendations are largely in line with Texas Appleseed's recommendations in Immigration's Hidden Population. We go further in our recommendations, advocating for representation for all detainees with mental disabilities, court-funded mental health evaluations, and the use of the docket for all cases involving mental disabilities and not merely cases with incompetent respondents. The overlap in recommendations provides strong evidence that such a docket would benefit the entire system, allowing more efficient court proceedings while ensuring the due process rights of respondents with mental disabilities.

2010, EOIR published a new chapter in the IJ Benchbook that provides some guidance for handling cases involving respondents with mental disabilities.[8] Around the same time, EOIR announced that it would appoint an ACIJ for Vulnerable Populations; as of today, this ACIJ has not been formally appointed, though we understand that the position is to be filled in the near future. We also understand that DOJ is actively considering how counsel might be appointed for vulnerable populations consistent with Congressional mandates.[9] In a May 2010 report to Congress on competency and the immigration courts, EOIR noted plans for a pilot program in the Miami Immigration Court in the non-detained docket. The pilot allows the immigration judge to contact the local legal orientation program (LOP) provider to find pro bono counsel in the event of concerns about the mental competency of an unrepresented respondent. A second pilot cited in the same report focuses on developing a list of pro bono attorneys to assist in detained cases where the respondent is incompetent and unrepresented. While we encourage such pilot efforts, simply relying on existing LOP and pro bono capacity is unlikely to fully address the need for representation.

Perhaps the most significant recent development in the area is *Matter of M-A-M-*,[10], in which the BIA vacated an order of removal and remanded the case to the immigration court for failure to inquire whether the respondent was competent to participate in the proceedings. The BIA set forth a framework for determining competency, holding that when a respondent presents "indicia of incompetency" – which can include in-court observations and evidence, such as mental health reports – the IJ must determine whether the respondent "is competent to participate in immigration proceedings."[11]

*M-A-M-* then set forth the test for competency, requiring the IJ to determine whether the respondent "has a rational and factual understanding of the nature and object of the proceedings, can consult with an attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses."[12] The BIA suggested that IJs can accept a wide variety of information to assess competency, including psychiatric evaluations. *M-A-M-* established that DHS has an obligation to produce any evidence in its possession "that would inform the court about the respondent's mental competency."[13] The BIA further stated that immigration courts should consider transferring venue so that a respondent can access family support, mental health care, and counsel.[14] Considering all the available evidence of competency, an IJ must then decide "whether the respondent is sufficiently competent to proceed

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[8] *See* News Release: EOIR Expands Immigration Judge Benchbook (April 23, 2010), *available at:* http://www.justice.gov/eoir/press/2010/MentalHealthBenchbookrelease04232010.pdf.

[9] *See Amended Order re: Plaintiffs' Motion for a Preliminary Injunction, Franco-Gonzales v. Holder*, No. CV-10-02211 (C.D. Cal. Dec. 27, 2010), pages 42-43. (Ruling that the government must afford "qualified representation" to two mentally disabled detainees who had been in prolonged immigration custody, "whether pro bono or at the Defendant's expense."). In this case, the government arranged for pro bono representation for bond hearings and for BIA appeals of their immigration cases.

[10] *See* 25 I & N Dec. 474 (BIA 2011), *available at* http://www.justice.gov/eoir/vll/intdec/vol25/3711.pdf.

[11] *Id.* at 479, 484.

[12] *Id.*

[13] *Id.* at 480.

[14] *Id.* at 481.

with the hearing without additional safeguards" and this decision and the supporting reasoning must be articulated by the IJ.[15]

The BIA articulated a number of safeguards in the event a respondent is found incompetent. These safeguards "include, but are not limited to

> refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent's appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.[16]

*M-A-M-* represents a significant step in the right direction, setting forth standards for when a competency determination must be made, how it must be made, and what procedural protections may be available for respondents deemed incompetent. Nonetheless, *M-A-M-* falls short of providing the specific guidance needed by immigration courts, DHS attorneys, and respondent's counsel. For example, the BIA simply suggests the kinds of evidence of mental disability a court might consider, without providing any direction on how an immigration court might, for example, secure a mental health examination. It remains unclear to what extent an IJ can order DHS to secure a mental health examination by a neutral evaluator.

The BIA's suggestions for procedural safeguards, while impressive in their breadth and in empowering IJs to participate in proceedings more actively, also lack the specifics to guide IJs in many cases, particularly with respect to guardians. For instance, does the immigration court have the power to appoint a guardian, and when is it required to do so? What are the criteria for appointment of, and the qualifications for, guardians? Can an attorney suffice without a guardian? As Appleseed noted in Immigration's Hidden Population, ethical considerations limit an attorney's ability to act in the best interests of a client, and many respondents with mental disabilities cannot adequately assist counsel without the participation of a guardian. The BIA also avoided the recurring question of whether an IJ can terminate proceedings where the available safeguards cannot ensure a fair hearing for the respondent.

In March of 2011, the DHS Office of Inspector General (OIG) published Management of Mental Health Cases in Immigration Detention. The management review report supported BIA's finding in *M-A-M-* that establishes the obligation of DHS attorneys to share with the court available information about a respondent's mental health. Recommendation number 13 in the report directs ICE to "establish protocols for retaining and sharing mental health information in Alien

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[15] *Id.*

[16] *Id.* at 483.

registration files."[17] ICE concurred with the recommendation but has not yet made a decision to establish protocols regarding inclusion and sharing of mental health information in the alien registration file. Given the new obligation established in *M-A-M-*, both DHS attorneys and respondents would benefit from clear guidance to fulfill ethical and legal obligations to raise competency concerns with the court.

The OIG report also identifies deficiencies in the system for identifying a custodian in the event that a respondent is found incompetent and directs ICE to issue guidance.[18] We believe that ICE and detention facility personnel should be prohibited from speaking on behalf of a mentally incompetent detainee in immigration court proceedings because of the serious conflict of interest this situation creates. Current regulations appear to endorse this troubling situation, and should be reviewed and revised to ensure fair and efficient immigration court proceedings for respondents with mental disabilities.[19]

Appleseed continues to believe that comprehensive regulations are needed to address all aspects of proceedings involving individuals with mental disabilities. IJs must be empowered to require that respondents with mental disabilities have counsel and guardians, and to terminate proceedings upon a finding that a fair hearing cannot be held in the circumstances. Notice and comment rulemaking would also allow EOIR to solicit and benefit from a wide range of experiences, expertise, and opinions.

The new mental health section in the IJ Benchbook, available at http://www.justice.gov/eoir/vll/benchbook/tools/MHI, has many of the same strengths and weaknesses of the decision in *M-A-M-*, which is not surprising, as the BIA noted that the Benchbook was a significant source for its decision *M-A-M-*.[20] The Benchbook provides a number of helpful suggestions to IJs, but again lacks the force of requirements and leaves IJs room to adopt new procedures in each case. While some flexibility is helpful to IJs, the Benchbook fails to provide concrete guidance for common issues like the process for competency hearings and the appointment of guardians.

Anecdotal reports of immigration court decisions on issues related to mental disabilities present a mixed record. It appears that an increasing number of judges are willing to find *pro bono* counsel for respondents with mental disabilities, to order competency evaluations, and to exercise their equitable powers to appoint guardians, even in the absence of specific guardian regulations and even when a respondent is represented. For instance, in one case in Baltimore, the IJ found *pro bono* counsel for the respondent, ordered DHS to provide a mental health evaluation, and appointed a guardian (the respondent's brother), who testified on behalf of (but in addition to) the respondent, who suffered from significant mental disabilities. However, this case took nearly 18 months to adjudicate, hardly a model of efficiency. In another case in Arizona, the immigration judge terminated proceedings against a respondent with mental disabilities on

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[17] Management of Mental Health Cases in Immigration Detention, Department of Homeland Security Office of Inspector General (March 2011) at 29-30.

[18] *Id.* at 30-31.

[19] 8 C.F.R. §1240.4

[20] 25 I & N Dec. at 476 n.1.

the grounds that he could not effectively communicate with counsel. Accordingly, the court found that proceeding "would deprive the respondent of a full and fair hearing," and therefore he was required to terminate proceedings to discharge his duty under 8 C.F.R. § 1003.10(b) to "take any action consistent with [his] authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."

On the other hand, the number of appeals to the BIA by respondents with mental disabilities indicates that some judges are falling short of providing the necessary procedural safeguards. For example, in an Arizona case from earlier this year, the immigration judge came to a questionable conclusion about a respondent's competency, noting, "I am going to find that he's not completely competent, but I'm not going to find that he's totally incompetent." The judge asked the government attorney to find someone from the detention center to appear with the respondent to help with the case, a concerning practice that creates a conflict of interest and compromises fairness of immigration proceeding for respondents with mental disabilities.

SUBMISSION FOR THE RECORD

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Prepared for Submission in the Record for

Hearings on

Improving Efficiency and Ensuring Justice in the Immigration Court System

Committee on the Judiciary, United States Senate
May 18, 2011

Mr. Chairman, Ranking Member Grassley, Members of the Committee:

Thank you for the invitation to submit this statement in connection with your hearings on challenges facing the Justice Department's immigration courts, with special attention to asylum cases. We are, respectively, a law professor with a major concentration in immigration law and procedure who also practiced immigration law for 12 years with a major international law firm, and a former deputy director of the Federal Judicial Center who is now engaged in policy research about aspects of United States judicial systems.

Immigration adjudication, as you know, has been the object of extensive assessment in recent years. We have agreed to undertake a study of immigration removal adjudication for the consideration of the Administrative Conference of the United States.[1] The Administrative Conference is an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures. The study on immigration removal adjudication that we are undertaking is described on the Conference's website at http://www.acus.gov/research/the-conference-current-projects/immigration-adjudication/. Included there are outlines of the research as we envisioned it in early April, 2011.

We plan to explore the feasibility of procedural, management, and technological adjustments that might ease workload pressures within the Executive Office for Immigration Review (EOIR) in respect to the intake of cases; case management practices both in preliminary and later stages; enhancing access to representation, especially for detainees; court management; and practices of the Board of Immigration Appeals. Our study will focus on adjustments with no major resource implications and those that have not necessarily been thoroughly discussed in recent assessments.

This statement briefly describes our research objectives and includes some tentative observations. Our schedule calls for the submission of our final report in February 2012.

**Origination of removal cases**

Prosecutorial policies of three units of the Homeland Security Department drive immigration court workload—Customs and Border Protection (CBP), Citizenship and Immigration Services (CIS), and Immigration and Customs Enforcement (ICE). ICE trial attorneys represent the government in removal proceedings in immigration court, regardless of the source of the Notice to Appear (NTA)—the

[1] This statement was prepared in consultation with the Administrative Conference of the United States, but the views expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees.

document that these agencies serve on the non-citizen and file in the immigration court, thus initiating proceedings. In our preliminary inquiries, we have heard widely divergent estimates of the proportion of NTAs that originate with ICE as opposed to the other two agencies.

We will explore whether DHS components might provide more effective and efficient adjudication of some case categories that now receive initial adjudication in the immigration courts. For one example, affirmative applications for asylum (those initiated by non-citizens not subject to an NTA) now begin with the CIS asylum corps. If the asylum corps cannot grant asylum and the non-citizen appears removable, the corps refers the matter to the immigration courts. By contrast, if DHS orders removal of a non-citizen who then makes an asylum claim (a defensive application), the matter goes directly to the immigration court, with no asylum corps review. It may be more effective, however, to have the asylum corps provide an initial assessment of defensive as well as affirmative applications with subsequent immigration court review. The benefits to the defensive asylum seeker might include more rapid resolution of approvable cases, an initial assessment in a less formal setting by an asylum corps trained to conduct interviews involving sensitive issues, and access to a resource center for researching country conditions not usually available to busy immigration judges. We emphasize that this is an example of a possible area of study, not a recommendation ready for incorporation in our report.

We will seek to clarify why certain cases require immigration court review while others are appropriate for disposition by DHS, and whether other categories of cases now subject to immigration court adjudication could be efficiently resolved by non-adversarial adjudication with sufficient administrative review and record-keeping protections. We will also examine whether the immigration judge time that administrative removals save is greater than the time immigration judges spend on non-citizens' motions to reopen such proceedings in order to challenge the sufficiency or accuracy of such removal orders.

**Preliminary immigration court case management procedures and staffing alternatives**

We will assess immigration judges' use, or potential use, of pretrial management techniques that other American courts use to narrow or eliminate issues in litigation and identify other issues that may need special briefing. Some have suggested that the "master calendar" might be adapted for that purpose; it is the preliminary proceeding in which an immigration judge advises respondents of their representation rights, ascertains the need for an interpreter, and determines if further, factual hearings are necessary.

We will also assess whether current staff resources within EOIR could afford some immigration courts the assistance of "pro se law clerks." In other courts, these staff law clerks screen pro se submissions and respond orally and in writing

to questions posed by pro se litigants about legal procedure and other court processes. They do not provide legal advice. Given that a majority of immigration court respondents proceed pro se, establishing these positions might provide significant benefits. The availability of a pro se office may be particularly important in detention settings, where as few as 10 percent of the non-citizens have counsel.

**Representation of non-citizens**

Respondents in removal proceedings may be represented by counsel but only at no cost to the government. Providing pro bono or paid representation to respondents in remote detention facilities is especially difficult. We will consider the feasibility of technological innovations that might enhance detained respondents' access to legal advice, including secure telephonic links in detention centers to allow pro bono, law school clinic, and other providers to counsel detainees. We will also explore whether in-place video links, used for removal proceedings, might be made available to provide such counseling. Other technologies worth exploring include those enabling detainees to make calls to their home countries for evidence, and explaining basic rights to detainees by videos as a complement to non-profits' oral presentations under EOIR's Legal Orientation Program.

We will assess the costs and benefits of non-lawyer representation of non-citizens, which EOIR currently allows in specific circumstances, and we will try to itemize the benefits *to the government* of enhanced representation of respondents (such as reduced detention costs for aliens whom private counsel persuade have no prospect of gaining relief from removal).

**Case management practices generally; video hearings**

We will assess the impact of the Chief Immigration Judge's 2008 *Immigration Court Practice Manual*, which sets forth presumptively required procedures for parties in removal litigation, including whether the *Manual* complicates the efforts of pro se respondents. We will assess the consequences of immigration judges' inability to impose sanctions on government attorneys for problematic behavior—not surprisingly, we have encountered divergent views of the extent of such behavior.

Immigration courts are making increasing use of their statutory authority to conduct both master calendar and merits proceedings by video technology, where the immigration judge, the government attorney, the respondent, and respondent's counsel if any, are not physically co-located. The Administrative Conference recently conducted an analysis of the use of video technology by some federal agencies and is considering a recommendation regarding the use of that technology in non-immigration administrative adjudications. There are good faith disagreements over the degree to which adversary proceedings by video—especially criminal-like proceedings when the fact-finders must assess credibility—replicate fact-finding in a traditional judicial setting. Video, however,

also has obvious advantages, and, in any event, is here to stay in immigration court proceedings. Thus, we will assess how to take advantage of its benefits and mitigate whatever disadvantages it has.

**Immigration court management**

Immigration judges are supervised by nine Assistant Chief Immigration Judges, who each have responsibility for several of the over 50 immigration courts nationwide. We will assess the feasibility of the more typical management structure in most American courts, i.e., a chief judge for each multi-judge court. Recent analyses of U.S. trial courts suggest strong links between effective chief judges and high performance.

Judicial performance evaluation has been a source of controversy between EOIR leadership and some immigration judges. The links, however, between well-constructed performance evaluation and good judicial performance have been well-established in other judicial settings. We will try to apply that experience to immigration courts.

**Board of Immigration Appeals: impact on federal court filings and immigration court implementation of BIA decisions**

The BIA has been the object of considerable attention since the attorney general in 2002 reduced its size and mandated truncated procedures (e.g., single member "affirmances without opinion"). One result, many believe, was the spike in appeals from the BIA to the courts of appeals. That spike peaked in 2006; for most courts of appeals, appeals from the BIA as a proportion of all appeals are back at 2002 (but not 2001) levels.

We will consider the literature on and evaluations of BIA procedures and consider reforms that might improve BIA efficiency, improve immigration court adjudication, and/or lessen the rate of appeal to the federal courts. Given the extensive attention to BIA procedures in the literature, we do not intend to conduct much original research with respect to them.

Thank you again for the invitation to submit this statement.

SUBMISSION FOR THE RECORD

HIAS

May 16, 2011

Honorable Senator Patrick Leahy
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the Hebrew Immigrant Aid Society (HIAS), which has been the international migration arm of the American Jewish community for 130 years, we write in response to the call for comments for the hearing "Improving Efficiency and Ensuring Justice in the Immigration Court System." Throughout our history, HIAS has assisted over 4.5 million refugees and vulnerable migrants by providing overseas assistance, resettlement in communities nationwide, and citizenship and other integration-related services. The cornerstone of HIAS' mission has been to assist refugees and asylum seekers.

Among the significant problems causing the backlog in immigration court, which are particularly onerous on asylum seekers, vulnerable immigrants, and immigrant family members, are: 1) The One Year Filing Deadline; 2) The Inability of Asylum Officers to Fully Adjudicate the Claims Of Detained Asylum Seekers; 3) The Administration of the "Asylum Clock"; and 4) The Inability of Immigration Judges to Administratively Close Removal Proceedings without the Consent of the Office of Chief Counsel of Immigration and Customs Enforcement (the prosecutorial arm of USCIS).

By addressing these issues, the current backlog in the immigration courts would be reduced.

## I. BY ELIMINATING THE ONE YEAR FILING DEADLINE, MORE CASES COULD BE ADJUDICATED AND COMPLETED BY THE ASYLUM OFFICE WITHOUT BURDENING THE IMMIGRATION COURT DOCKET.

An immigrant who is not detained who initiates the process of applying for asylum will receive an affirmative asylum interview at one of the eight local asylum offices.

In 1996 when the one year filing deadline was implemented under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), the USCIS (formerly INS) asylum office had a backlog of over 120,000 cases. Currently, the asylum office has a minimal

backlog and is relatively current with its receipts. The imposition of the one year filing deadline has caused the asylum office to refer to immigration court many claims that would have been granted but for the applicant's failure to meet the one year filing deadline. Ultimately, the one year deadline policy shifted the backlog from the asylum office to the immigration court to the detriment of the asylum seekers, attorneys, the asylum corps, and immigration court judges and staff, especially in terms of time, cost, and workload

By eliminating the one-year filing deadline, cases that would normally be adjudicated at the asylum office, but for the one year filing deadline, would retain the jurisdiction of the asylum office. This will ensure not only that fewer cases will be referred to the immigration court but that cases that could be appropriately adjudicated by the asylum office are. Additionally, while the docket of the immigration court has drastically expanded, that of the asylum corps has been substantially reduced. Shifting the workload burden and re-allocating the appropriate resources would ultimately be beneficial to not only the asylum seekers who seek a more expedited process but would streamline the judges' docket to focus the scope of their review to asylum claims with factual and legal issues that require a more sophisticated level of adjudication, rather than those cases which were merely referred because they were time-barred.

## II. ASYLUM OFFICERS SHOULD BE EMPOWERED TO FULLY ADJUDICATE THE CASES OF DETAINED ASYLUM SEEKERS WHO HAVE PASSED THEIR CREDIBLE FEAR INTERVIEW.

Asylum seekers who are apprehended upon arrival at a port of entry due to lack of valid documentation are detained. They are then granted a credible fear interview in which an asylum officer makes the threshold determination whether or not they have a cognizable claim for asylum.[1] If the asylum seeker "passes" the credible fear interview, s/he is then referred to removal proceedings before an immigration judge who will fully hear the asylum claim as a defense in the context of removal proceedings.

Credible fear interviews are conducted by asylum officers, yet the asylum officers are not given plenary authority to hear and grant a claim for asylum as are their counterparts in the Asylum Office who adjudicate affirmative asylum claims.

We propose that the role of the asylum officers be enlarged to allow them the authority to conduct follow up interviews of detained asylum seekers after their credible fear interviews, which would be the equivalent of the interview conducted in the affirmative asylum context. By enlarging the role of asylum officers in this manner, fewer detained aliens would be referred to removal proceedings before an immigration judge because many cases could be granted by the asylum officer in this manner.

[1] 8 CFR § 235.6(a)(ii)

Allowing asylum officers to grant relief to detained asylum seekers simply taps into the extensive training that they already have as adjudicators. Asylum officers are already trained in asylum law and country conditions and have the knowledge and expertise to decide asylum claims. Since asylum officers are already qualified to conduct a full asylum interview, it is duplicative and wasteful of resources to automatically refer detained asylum seekers to removal hearings if they have already demonstrated through a credible fear hearing that they have a cognizable claim for asylum. This proposal would shift the burden from the most beleaguered branches of the immigration court which hear detained cases to the asylum corps that has more available resources and could timely adjudicate these cases to everyone's benefit.

## III. THE IMMIGRATION COURT SHOULD BE RELIEVED OF THE BURDEN OF ADMINISTERING THE "ASYLUM CLOCK." THE "ASYLUM CLOCK" SHOULD BE BASED ON A COUNT OF CALENDAR DAYS AND SHOULD NOT BE SUBJECT TO BEING STOPPED.

Another aspect of the immigration court system which burdens immigration judges, court administrators, asylum seekers and their advocates alike is the "Asylum Clock." Currently, asylum seekers are eligible for employment authorization if one hundred eighty days (180) have elapsed before their case heard is by an immigration judge from the time of the filing of the asylum application.[2] However, the calculation of this day count ("the asylum clock) is subject to the discretion of immigration judges who have the power to "stop the clock" until the final merits hearing, for instance, if an asylum seeker needs more time, for instance, to find an attorney, to retrieve documents from abroad or to otherwise prepare his or her case.[3] However, due to the extent of the immigration court's current backlog, the final merits hearing might not be held for more than one or two years after the asylum seeker initially applied for asylum.

In addition to their other tasks as adjudicators, immigration judges and their clerks are required to prescribe a code for each of their cases after each hearing which dictates the progression or stoppage of the asylum clock.[4] What this means is that the immigration court is further burdened by becoming the gatekeeper as to asylum seekers' eligibility for employment authorization until the final merits hearing is held.

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[2] 8 CFR § 208.7(a)(1), 1208.7(a)(1)

[3] 8 CFR § 208.7(a)(2), 1208.7(a)(2)

[4] Michael J. Creppy, Chief Immigration Judge, U.S. DEPT. OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Operating Policies and Procedures Memorandum (OPPM) 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes* (June 16, 2005), www.justice.gov/eoir/efoia/ocij/oppm05/05-07.pdf, (last visited on May 11, 2011)

This system does not serve anybody well. Immigration judges and court administrators are forced into the position of having to adjudicate requests to "restart" the clock separate and apart from deciding asylum cases on the merits. The one hundred eighty day period corresponds to the desired completion goal for asylum cases set by statute.[5] And therefore, many immigration judges are motivated to stop the clock so that they are perceived as meeting their case completion goals.[6] In the meantime, the lengthy pendency of removal proceedings due to the backlog leaves many asylum seekers with their clock stopped as one year or more may elapse until they have their final hearing on the merits. Asylum seekers who are already vulnerable are left in the position of not being able to support themselves as they wait for their final hearing.

We propose that that the underlying regulations regarding employment eligibility be reformed so that the one hundred eighty day period strictly corresponds to *calendar* days and never be subject to being "stopped" by an immigration judge. This would eliminate the burden on immigration judges and court administrators of concerning themselves with the setting of the clock and the adjudication of requests to restart the clock. Rather, it allows them to focus their attention on deciding cases on the merits.

## IV. IMMIGRATION JUDGES SHOULD BE EMPOWERED TO ADMINISTRATIVELY CLOSE REMOVAL PROCEEDINGS WITHOUT THE REQUIREMENT OF THE CONSENT OF IMMIGRATION AND CUSTOMS ENFORCEMENT.

USCIS and the immigration court should conduct a thorough review of immigration applications and petitions which may not be required to be adjudicated in immigration court. These cases could be more easily shifted to USCIS officers, who are less costly to employ and more numerous than immigration judges, and could be expedited to the benefit of all immigrants, including the most vulnerable.

One example could be adjustment of status cases based upon marriage-based petitions in removal proceedings without serious criminal issues. These could more timely be adjudicated by USCIS officers if the attorney of record just needs to administratively close the case in immigration court and forward it USCIS for adjudication, instead of having a delayed trial date years later. Not only would this reduce the burden on the immigration court, but permit and facilitate family reunification, again leaving the required and most needed cases for the purview of the immigration court.

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[5] INA § 208(d)(5)(A)(iii)

[6] Though not strictly in the asylum context, reference to the overarching motivation of immigration judges to meet case completion goals over the potential eligibility of an immigrant in removal proceedings for relief is discussed in *Hashmi v. Att'y Gen*, 531 F.3d 256 (3rd Cir. 2008).

In addition, the device of administrative closure of removal proceedings is currently stymied because an immigration judge cannot, at his or her own discretion, administratively close proceedings without the consent of the Office of Chief Counsel of Immigration and Customs Enforcement.[7] If immigration judges were empowered to administratively close cases *sua sponte*, they could regain control over their dockets and appropriately delegate adjudicative authority to USCIS.

## CONCLUSION

Even with these recommendations, the task of relieving the backlog in the immigration court's docket to provide for expeditious hearings on asylum claims is a formidable one. Truly eliminating the backlog may ultimately require the hiring of additional immigration judges and support staff, due in large part to the increase in applications for relief and an increase in the numbers of immigrants who end up being referred to removal proceedings through interaction with local law enforcement officials. It also requires improved coordination between the prosecutorial arm of the Department of Homeland Security and the Department of Justice to promote the provident commencement of removal proceedings. Nevertheless, our recommendations would be a step in the right direction to mitigate the backlog and improve adjudications for asylum seekers and vulnerable immigrants.

We thank you for your consideration of these comments.

Sincerely,

Mark Hetfield
Senior Vice President,
Policy and Programs

[7] In re Alba Luz Gutierrez-Lopez, 21 I&N Dec. 479, 480 (BIA 1996).

SUBMISSION FOR THE RECORD

human rights *first*

**Statement of Human Rights First**

**United States Senate Committee on the Judiciary**
**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**May 18, 2011**

**Introduction**

Human Rights First applauds the Senate Judiciary Committee for holding a hearing on the immigration court system, focusing on improving efficiencies and ensuring justice. Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. As part of this effort, we seek to ensure that refugees have access to asylum by advocating for fair asylum procedures, by pressing for U.S. compliance with international refugee and human rights law, and by helping individual refugees win asylum through our *pro bono* asylum legal representation program. Human Rights First and our volunteer lawyers have helped victims of political, religious, and other persecution from Burma, China, Colombia, Congo (DRC), Iraq, Zimbabwe, and many other countries gain asylum and protection from persecution in this country. Our asylum advocacy is informed by the experiences of our refugee clients and their *pro bono* lawyers.

The immigration court system within the Executive Office for Immigration Review (EOIR) is in a state of crisis and is not adequately serving the interests of the U.S. government or the applicants appearing before it. Through our partnership with law firms in New York, New Jersey, Washington DC, Virginia, Maryland and elsewhere, Human Rights First sees first-hand the hardship that court backlogs and extended processing times create for our asylum clients. For example, as of May 2011, judges in the Arlington and New York Immigration Courts are regularly scheduling asylum merits hearings on the non-detained docket for dates in late 2012 and, in some instances, as last as 2014. While they wait over one and a half years, and often longer, for their claims to be heard, many asylum seekers remain separated from their spouses and children, who may be in grave danger in their home countries.

Applications must be pending for at least six months prior to an asylum applicant being eligible for work authorization. For some asylum seekers, even if their cases have been pending for well over six months, they end up being barred entirely from obtaining work authorization throughout the duration of their asylum adjudication due to the arbitrary methods that immigration courts use to calculate the "asylum clock." Some asylum seekers with cases pending before the immigration courts, unable to work legally, are becoming destitute as

savings disappear and the hospitality of the friends or family members fade. They may face homelessness and be forced to live on the streets or find beds in unsafe homes or shelters in which abuse and exploitation are rampant. The longer a case is pending, the longer medical needs go unchecked or unattended to, with free medical services few and far between and often provided on a "lottery" basis and/or restricted to legal residents. During this time, experiencing the crushing reality of isolation and extreme poverty, many asylum seekers find themselves in an agonizing state of legal limbo, with their greatest fear frequently being that after such a long and difficult struggle, the United States will return them to a place where they face torture, arbitrary detention, or even death.

In this statement, Human Rights First offers three specific recommendations for actions Congress can take to support EOIR in efforts to improve the system: (i) provide appropriations to increase staffing and resources at EOIR to hire more immigration judge teams, including law clerks, so that caseloads are more manageable and judges have time to issue well-reasoned, written decisions; (ii) provide adequate appropriations to EOIR to expand the successful Legal Orientation Program (LOP), which provides detained respondents in removal proceedings with basic legal information and reduces court processing times by an average of 13 days, to all immigration detention facilities nationwide; and (iii) eliminate the one year asylum filing deadline that leads cases that could have otherwise been resolved by the Department of Homeland Security (DHS) to be referred to the immigration courts, causing further delays and preventing asylum cases from being adjudicated on their merits. These steps would help reduce the backlogs, improve efficiencies for detained cases, and allow for higher quality adjudications.[1]

***i) Provide appropriations to increase staffing and resources at the Executive Office for Immigration Review (EOIR) to hire more immigration judge teams, including law clerks, so that caseloads are more manageable and judges have time to issue well-reasoned, written decisions.***

The immigration court system within EOIR is comprised of 59 immigration courts and 268 immigration judges who, in FY 2010, received more than 392,961 matters, an increase of 12% since FY 2006.[2] Of these, 32,961 were asylum cases, which are often considered the most complex – factually and legally – of cases before the immigration courts and may carry life or death consequences for the applicant.[3]

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[1]To read Human Rights First's more comprehensive recommendations on improving the immigration courts see "Renewing the U.S. Commitment to Refugees: Recommendations for Reform on the 30th Anniversary of the Refugee Act," March 2010, available at http://humanrightsfirst.org/wp-content/uploads/pdf/30th-AnnRep-3-12-10.pdf; See also Human Rights First's recommendations for reform of the immigration courts, January 2006, available at http://www.humanrightsfirst.org/2006/07/31/wide-disparities-in-immigration-court-asylum-denials/.

[2] U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, available at http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[3]Id.

EOIR has been underfunded, understaffed and overwhelmed for several years. As recent studies – including the American Bar Association Commission on Immigration's 2010 report, *"Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases"* – have found, staffing shortages and inadequate resources at the immigration courts have contributed to massive backlogs, extended adjudication times, and insufficient time for judges to properly consider evidence and formulate well-reasoned opinions.[4] The Transactional Records Access Clearinghouse (TRAC) reported that the backlog of cases in December 2010 was 267,752 and the average time for a case pending in immigration courts as of February 2011 was 467 days, a 2.6% increase from September 2010 and a 44% increase from FY 2008.[5]

The caseloads of immigration judges are staggering. The American Bar Association reported that in 2008, each immigration judge completed an average of 1,243 proceedings and issued an average of 1,014 decisions. To keep pace with these numbers, each judge needed to issue an average of at least 19 decisions each week, or approximately four decisions per weekday. In most immigration courts, there is only one law clerk per every four immigration judges, leaving one law clerk to support an average of 4,972 cases per year. In some courts, the ratio of clerks to judges is even worse. Caseloads in comparable federal administrative courts, by contrast are much more manageable. In 2008, Veterans Law judges decided approximately 729 veteran benefits cases per judge (approximately 178 of which involved hearings) and in 2007 Social Security Administration administrative law judges decided approximately 544 cases per judge.[6]

A well-functioning immigration court system that has adequate resources to adjudicate cases in a thorough and timely manner and guarantees that individuals facing removal from the United States understand their rights, responsibilities and legal options is essential to allowing the United States to fairly and expeditiously adjudicate asylum claims and ensure that this country does not mistakenly return refugees – individuals who have a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group, or political opinion[7] – to countries where they face persecution. For this reason, Human Rights First urges Congress to provide EOIR with sufficient funding to hire additional immigration judge teams, including law clerks, so that case loads are more manageable, backlogs are contained, and processing times are more reasonable.

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[4] American Bar Association Commission on Immigration, *"Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases,"* at ES-28 (February 2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.authcheckdam.pdf. [Hereinafter ABA Report].

[5] *"Immigration Case Backlog Still Growing in FY 2011,"* Transactional Records Access Clearinghouse *(2010),* http://trac.syr.edu/immigration/reports/246/.

[6] ABA Report at ES-28.

[7] INA §101(a)(43).

***ii) Provide adequate appropriations to EOIR to expand the successful Legal Orientation Program (LOP), which provides detained respondents in removal proceedings with basic legal information and reduces court processing times by an average of 13 days, to all immigration detention facilities nationwide.***

The increase in EOIR's detained docket has exacerbated the stress of overwhelming caseloads for immigration judges as detained cases are prioritized and heard on an expedited basis. The number of immigrants going through the immigration detention system on an annual basis increased by over 83.5% between FY 2001 and 2009, growing from an annual population of 209,000 in FY 2001 to 383,524 in FY 2009.[8] The percentage of EOIR's detained cases has similarly increased, with 30% of individuals in proceedings held in detention in FY 2006 and 44% in FY 2010.[9] In real numbers, EOIR's detained docket has increased from 95,783 in FY 2006 to 125,580 in FY 2010.[10]

Detention substantially impedes an individual's ability to secure legal representation. The ABA Report found that less than half of immigrants in proceedings during the last several years had the benefit of representation but, for those in detention, only about 16% were represented.[11] With approximately 84% of detained immigrants appearing before the courts without legal representation, immigration judges are increasingly burdened by presiding over cases presented by individuals who are ill-informed and unprepared to make educated decisions about their cases. These factors make the court process less efficient and more prone to reaching improper conclusions.

In a September 2008 report, the Government Accountability Office found the likelihood of an asylum claim being granted by an immigration judge increased significantly for those who had legal representation.[12] The study, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, found that represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients.[13] A 2005 report by the bi-partisan U.S. Commission on International Religious Freedom (USCIRF) similarly found that arriving asylum seekers with legal counsel were granted asylum at a rate of 90 percent more than those who did not have counsel.[14] In response to the USCIRF report, EOIR commented, "Non-

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[8] See Lutheran Immigration and Refugee Service, "Annual Detention Population, Fiscal Years 1994 – 2011," available at http://www.lirs.org/atf/cf/%7Ba9ddba5e-c6b5-4c63-89de-91d2f09a28ca%7D/CHARTANNUAL%20IMMIGRATIONDETENTIONPOPULATION100804.PDF.

[9] See supra note 1.

[10] See supra note 8.

[11] ABA Report at ES-7.

[12] U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, 30, GAO-08-940 (Sept. 2008), http://www.gao.gov/new.items/d08940.pdf.

[13] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009) at 45-46.

[14] U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892.

represented cases are more difficult to conduct. They require far more effort on the part of the judge."[15]

While not a substitute for legal representation, EOIR's highly effective Legal Orientation Program (LOP) – managed through a contract with the Vera Institute for Justice, which subcontracts with local non-profit legal service providers – has succeeded in providing basic legal information to some of the 84% of detained immigrants who are unrepresented. LOP offers basic legal information to immigrant detainees so that they can understand their legal options. When possible, LOP connects individuals with possible claims for relief – including asylum seekers – to pro bono resources but given the rural location of many detention facilities and the overall lack of pro bono (or even low bono) legal services, attorneys are often unavailable or unable to take detained cases.

LOP has received widespread bi-partisan praise from members of Congress, NGOs, government officials, immigration judges and others for promoting the efficiency and effectiveness of immigration court proceedings and for reducing court time by an average of 13 days.[16] Despite its success, LOP is available in only 27 of more than 250 detention facilities nationwide. Given that few programs offer as many benefits as LOP, Human Rights First recommends Congress appropriate funding sufficient to expand LOP to all detention facilities holding immigrants in removal proceedings.

***iii) Eliminate the one year asylum filing deadline that leads cases that could have otherwise been resolved by the Department of Homeland Security (DHS) to be referred to the immigration courts causing further delays and preventing asylum cases from being adjudicated on their merits.***

The one year asylum filing deadline contained in §208(a) of the Immigration and Nationality Act (INA) pushes the cases of credible refugees into the overburdened immigration courts, thereby diverting limited time and resources that could be more efficiently allocated to assessing the actual merits of asylum applications.[17] A September 2010 report by Human Rights First found that the one year asylum filing deadline not only bars refugees who face religious, political and other forms of persecution from receiving asylum in the United States, it leads thousands of asylum cases that could have been resolved by DHS to be referred to the immigration courts.[18]

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[15] Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices 8 (Dec. 2004), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

[16] For more information about the Vera Legal orientation Program, *see* Legal Orientation Program, Vera Institute of Justice, http://www.vera.org/project/legal-orientation-program.

[17] The deadline bars an applicant from asylum if she cannot demonstrate by "clear and convincing evidence" that her application was filed within one year of her arrival in the United States, absent a finding of "changed" or "extraordinary" circumstances that would excuse her delayed filing. Examples of changed and extraordinary circumstances can be found at 8 C.F.R. § 208.4(a)(4) – (5).

[18] Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency," September 2010, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

For example, a Congolese nurse and human rights advocate, who escaped torture with the help of Congolese nuns, filed her application for asylum affirmatively with the DHS Asylum Office but, based on the filing deadline, her case was denied and referred to the immigration court because she could not prove the date she entered the United States. After three years of litigation, an immigration judge finally granted her "withholding of removal," which requires a higher burden of proof but does not provide the permanent protection of asylum.[19] There are thousands of cases, just like this, clogging immigration judges dockets that should – and could, but for the one year deadline – be resolved by DHS in the first instance.

According to DHS Statistics, between 1998 – when the filing deadline went into effect as a bar to asylum – and 2010, more than 53,400 applicants have had their requests for asylum denied, rejected or delayed because of the filing deadline.[20] Many of these cases are referred to the immigration courts for further adjudication and are piled on top of the court's growing backlog of cases. A recent independent, academic analysis of DHS data concluded that during this time period it is likely that, if not for the filing deadline, more than 15,000 asylum applications – representing more than 21,000 refugees – would have been granted asylum by DHS without the need for further litigation in the immigration courts.[21] Given staffing shortages, fiscal challenges and the enormous backlogs immigration judges are facing, Congress should commit to making targeted fixes – such as by eliminating the one year asylum filing deadline – to prevent cases from being referred into the immigration courts that could have been resolved by DHS in the first instance, thus alleviating some of the burden on the courts and improving efficiencies in the process overall.

**Conclusion**

The solutions to the complex and myriad problems in the immigration courts are multi-faceted, requiring an infusion of targeted resources, a series of legislative changes, improved interagency coordination between the Departments of Homeland Security and Justice, and better training, oversight and quality assurance measures of immigration judges and U.S. Immigration Customs Enforcement trial attorneys and agents. Nevertheless, the above recommendations are concrete actions Congress can take now to support EOIR in efforts to reduce the backlogs, improve the efficiencies for detained cases, and allow for higher quality adjudications of asylum applications.

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[19] Id at 11.
[20] Id at 1.
[21] Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum," William and Mary Law Review, December 2010, *available at* http://wmlawreview.org/files/Schrag.pdf.

SUBMISSION FOR THE RECORD

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May 25, 2011

Dear Senator Leahy:

Thank you and members of the Senate Judiciary Committee for convening a hearing on **"Improving Efficiency and Ensuring Justice in the Immigration Court System."** We appreciate the opportunity to submit a statement in connection with the administration of justice for immigrants in removal proceedings.

Baker & McKenzie is an international law firm with close to 4,000 attorneys in multiple countries.

For more than 20 years, Baker & McKenzie attorneys have provided *pro bono* legal assistance to asylum seekers and refugees through the National Immigrant Justice Center's *pro bono* program. More than 250 associates and partners have worked on more than 150 cases. We have a strong commitment to providing *pro bono* assistance in these cases because of the international nature of our firm and the extreme effect that the outcomes of these cases have on the lives of the immigrants and their families. However, our recent experience in immigration court has made it very difficult for Baker & McKenzie to continue providing this *pro bono* representation.

**Impact on Justice**
From our experience, it is clear that the immigration court system is not being given resources sufficient to engage in a thorough, accurate, and timely adjudication of the myriad claims which come before the immigration courts. We have witnessed these failures firsthand.

Of course, our primary concern is that immigration cases, particularly asylum cases, be correctly adjudicated on the merits. When the immigration court system gives short shrift to cases, it runs the risk of wrongly deporting an individual. In asylum cases, that means returning them to face persecution, torture or death; in other cases, it means lifelong separation from friends and family. It is our particular sense that immigration courts are not giving proper consideration to asylum cases implicating the one-year filing deadline, instead granting lesser forms of protection from removal such as Withholding of Removal.

**Impact on Access to Representation**
But we also write to note that on a practical level, the lack of resources in the immigration court system is making it harder and harder for us to accept immigration cases for *pro bono* representation. The lack of sufficient judges and law clerks leads to extended delays in immigration court hearings, as well as an epidemic of rescheduled hearings which often occur at the last minute.

Together, delays and cancellations have a significant chilling effect on the capacity of our firm to continue providing *pro bono* representation in immigration cases. For example, we have a case with a merits hearing scheduled for July 1, 2013. The master calendar hearing

took place on November 16, 2009. At that hearing, the merits hearing was scheduled for August 3, 2011; however on September 24, 2010 the merits hearing was continued by the Court sua sponte to July 1, 2013, almost four years after the master calendar hearing.

At the most basic level, these immigration court inefficiencies require us to spend substantially more time per case than would otherwise be required. For instance, when we prepare witnesses and evidence for a hearing scheduled in 2009, and then the hearing is rescheduled until 2011, we must prepare for that hearing again as it approaches; and when it is again rescheduled (an experience we've repeatedly had), we must prepare again. This dynamic is complicated by the natural flow of personnel at a major law firm; a substantial percentage of attorneys (particularly younger attorneys) change employment every year, and whenever that happens, we must locate a new attorney to handle their *pro bono* matters. Thus, increasing a case's adjudication time from two to five years exponentially increases the likelihood that an entirely new team of attorneys will handle the case before completion; which, again, substantially increases the amount of time which we must devote to the case.

Particularly in these difficult economic times, our *pro bono* resources are not unlimited. If one case takes 200 hours instead of 50 hours, that prevents us from committing to representing other meritorious cases. Moreover, while historically, attorneys who took an immigration case *pro bono* often took on subsequent immigration cases after the first case was completed, we find that happening much less frequently as these cases have become progressively more delayed.

These barriers to *pro bono* representation are unfortunate and unnecessary. There are many attorneys in our firm who are eager to provide assistance to those in need and eager to gain experience in court. For immigrants and asylum-seekers, legal representation can mean the difference between winning and losing the case; and we believe that the increased number of *pro se* cases is likely to have cascading impacts on the immigration court system, because those cases cannot be handled as efficiently as represented cases.

**Recommendations**
Additional immigration judges are needed; but it is our observation that immigration courts also lack basic court infrastructure, such as dedicated judicial law clerks, electronic case filing systems, and modern docketing systems used by the federal courts to such good effect. The immigration court system lacks a magistrate system, although many cases might otherwise be resolved by alternate mechanisms (such as a referral of a case the Asylum Office), mechanisms which would likely produce resource savings for the government as well as more accurate results for our clients. The immigration court rules do not subject government attorneys to the authority of the immigration judges; this might go some way toward explaining why we find it nearly impossible to get opposing counsel to return our phone calls. Improving the system would require additional resources, but even more, it requires the political will to take steps to force the system to change.

These barriers to representation cannot be allowed to persist. The necessary resources and attention must be given to these cases by the Department of Justice, to ensure that the system respects the rights of all concerned.

Sincerely,

Hugo Dubovoy


Written Statement of Human Rights Watch

United States Senate
Committee on the Judiciary

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

May 18, 2011

Mr. Chairman and members of the Committee, thank you for the opportunity to submit a statement for today's hearing on improving efficiency and ensuring justice in the immigration court system.

Human Rights Watch is an independent organization dedicated to promoting and protecting human rights in some 90 countries around the globe. We work to secure increased recognition of and respect for internationally recognized human rights in the United States, focusing on issues arising from excessive punishment and detention, insufficient access to due process, and discrimination.

Human Rights Watch welcomes the steps taken by the Executive Office for Immigration Review (EOIR) in recent years to improve access to immigration courts, including its expansion of the Legal Orientation and Pro Bono Program (LOP). We believe, however, that more steps should be taken to achieve the goal of fair and efficient treatment of all cases handled by the immigration courts. We know that this is a goal we share with EOIR as well as with members of this Committee.

## I. The Backlog of Immigration Court Cases Violate Rights

The Obama administration's stepped-up enforcement of immigration laws has resulted in a significant increase in the number of immigration proceedings, but without a concomitant increase in funding for more EOIR courtrooms, judges, or other necessary personnel, it has compounded the backlog of pending cases. The Transactional Records Access Clearinghouse has recently reported the number of pending cases before immigration courts is at an all-time high, at over 267,000 pending cases as of December 2010.[1] As of February 2011 the average wait time for immigration cases was 467 days.[2] There are valid inefficiency concerns with such extraordinary backlogs, especially at a time of fiscal downturn in the United States. A related concern is how these backlogs harm the fundamental human rights of immigrants. Human Rights Watch would like to provide you with three such examples.

First, and most fundamentally, backlogs mean that non-citizens will face unnecessary delays in the resolution of their cases. The International Covenant on Civil and Political Rights (ICCPR), to which the United States is party, provides that everyone has the right to liberty and must have an opportunity to challenge deprivation of liberty before a court.[3] The Human Rights Committee, which monitors compliance with the ICCPR, states that this right applies to all deprivations of liberty, including immigration detention.[4] Legal proceedings should not involve unnecessary delay in their final resolution.[5] While this standard is geared towards criminal defendants who face deprivation of liberty at a trial, they are relevant to immigration proceedings where a person is detained.

Second, many detained immigrants face longer periods of detention because of EOIR backlogs. The American Immigration Lawyers Association reported in 2009 that detained non-citizens in the New York area who were eligible for some sort of immigration remedy were having cases scheduled

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[1] Transactional Records Access Clearinghouse at Syracuse University, "Immigration Case Backlog Still Growing in FY 2011," http://trac.syr.edu/immigration/reports/246 (accessed May 12, 2011).
[2] Ibid.
[3] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, Article 9(1) "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;" ICCPR, art. 9(4).
[4] Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V at 95 (1982).
[5] UN Human Rights Committee, General Comment no. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law, HRI/GEN/1/Rev.1 (1984), art. 14.

seven to eight months into the future.[6] Many of these non-citizens remain in detention during these extended periods due to the severe and expansive mandatory detention laws passed in the US in the mid-1990s, which in turn have a deleterious effect on asylum seekers and other vulnerable groups, such as torture victims.

These mandatory detention laws require the detention of many asylum seekers. The United Nations High Commissioner on Refugees in 1999 issued Guidelines on the Detention of Asylum Seekers stating that "[a]s a general rule, asylum seekers should not be detained," and that "the use of detention is, in many instances, contrary to the norms and principles of international law."[7] Mandatory detention laws also require the detention of lawful permanent residents convicted of certain crimes, even if the crimes were not of a violent nature and the lawful permanent resident has strong family and community ties and is neither a flight risk nor dangerous. In discussing immigration detention, the UN Human Rights Committee has stated that detention is arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."[8] Immigration detention should therefore only be used in those cases in which legitimate government interests cannot be fulfilled through any other means. The detention, additionally, should be as limited as possible, and not arbitrarily extended due to a bureaucratic backlog in cases.

Third, non-detained asylum seekers whose cases are pending in backlogged immigration courts are often faced with the substantial hardship of being barred from work authorization for months or years. Because asylum seekers, like other aliens, do not have the right to court-appointed legal representation, and because they are barred from work authorization from the moment they apply for asylum for the first 180 days, unless granted asylum sooner, they are compelled in most cases to seek out pro bono attorneys or to proceed pro se. It is not uncommon, therefore, that pro bono attorneys seek continuances because they do not have adequate time to prepare a case. When such continuances are filed, the 180-day clock stops ticking. While the continuances are pending, and immigration courts struggle to reschedule the necessary hearings in the midst of the case backlog, asylum seekers are barred from working for very long periods of time, which forces them either not to be able to meet their basic needs, placing an onerous burden on social services or community organizations to support them, or forces them to work illegally in highly exploitative situations. This, in effect, becomes a deterrent to their right to seek asylum.

***Recommendations:***

- Congress should reexamine the effectiveness and cost of mandatory detention laws.
- Until EOIR backlogs can be eliminated or reduced, Congress should eliminate or decrease the duration of the bar on work authorization for asylum seekers, as well as the clock-stopping rule.

## II. Fair Treatment of Asylum Seekers and Other Immigrants Will Reduce Backlogs

Part of the solution to backlogs lies in better procedures to ensure fundamental fairness in immigration courts. Human Rights Watch has reported on two distinct factors that have added to the

[6] EOIR/AILA Liaison Meeting Agenda Questions and Answers, March 19, 2009, http://www.justice.gov/eoir/statspub/eoiraila031909.pdf (accessed May 13, 2011).
[7] Office of the United Nations High Commissioner for Refugees, "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers," February 1999 (detention of asylum seekers is "inherently undesirable").
http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf (accessed May 13, 2011).
[8] A v. Australia Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 , April 30, 1997, para.9.2.

EOIR backlog, but that also threaten immigrants' rights to fair treatment in immigration courts. First, US law allows for practically unfettered transfers of immigrant detainees between detention facilities across the country. Such relocations interrupt court proceedings and delay case resolutions, inevitably adding to the backlog in immigration cases. They also separate detainees from their attorneys, witnesses, families, and support networks. Second, the US fails to provide basic safeguards to vulnerable non-citizens in immigration proceedings, particularly persons with mental disabilities. These vulnerable non-citizens are often unable to participate meaningfully in their proceedings, which leads to significant delays.

Congress should work to address these two systemic failures in the immigration system. By doing so, Congress will be both protecting the human rights of non-citizens in immigration proceedings and, at the same time, helping to reduce the considerable backlog in the immigration court system.

**Detainee Transfers Impede EOIR's Ability to Hear Cases Expeditiously**

Immigration and Customs Enforcement (ICE) oversees the nation's largest system of incarceration—over 300 different facilities, from small local jails to large dedicated facilities run by ICE. ICE has almost unlimited power to transfer detainees between facilities, and the agency does not shy away from doing so: in the ten years between 1999 and 2008, over 1.4 million detainee transfers took place.[9] While certain detainee transfers may be necessary, ICE has declined to set reasonable limits to its transfer power. Interference caused by a poorly timed and careless transfer serves to delay court proceedings and likely contributes to the backlog.

Human Rights Watch has documented numerous situations where transfers directly interfered with the non-citizen's ability to access counsel or to retain counsel once transferred.[10] Detainees are often transferred hundreds or thousands of miles away from their families and home communities before they have been able to secure legal representation. Despite laudable efforts to implement LOP programs in some of these remote locations, almost invariably there are fewer prospects for finding an attorney in the remote locations to which detainees are transferred. Detainees must therefore go through the entire complex process of defending their rights in immigration court without legal counsel.[11] One detainee told Human Rights Watch:

> In New York when I was detained, I was about to get an attorney through one of the churches, but that went away once they sent me here to New Mexico.... All my evidence and stuff that I need is right there in New York. I've been trying to get all my case information from New York ... writing to ICE to get my records. But they won't give me my records; they haven't given me nothing. I'm just representing myself with no evidence to present.[12]

Transfers make the ongoing task of maintaining an attorney-client relationship much more difficult, and sometimes even sever the relationship completely. An attorney in El Paso told us simply, "it's a regular occurrence that people lose their attorney after transfer."[13] Some detainees lose their attorneys completely after transfer because of changes in the law in the new jurisdiction, because

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[9] Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the US*, December 2, 2009, http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0, p. 5.
[10] Ibid.
[11] For a detailed discussion of the impact of transfers on detainees' ability to secure or retain counsel, see Locked Up Far Away, http://www.hrw.org/en/node/86760/section/8.
[12] Kevin H. (pseudonym), Otero County Processing Center, Chaparral, New Mexico, February 11, 2009.
[13] Human Rights Watch, *Locked Up Far Away*, p. 50.

logistical challenges make ongoing representation impossible, or because the immigration judges in the new location will not allow their attorneys to appear via telephone or video and the detainee cannot afford to pay for an attorney to travel to the new location. Losing an attorney forces a detainee to find other counsel or to resort to representing himself in immigration proceedings. Either way, the transfer ensures that proceedings will be delayed as the detainee and the court must grapple with the lack of representation.

In addition, although most detained non-citizens have the right to a timely "bond hearing"—a hearing examining the lawfulness of detention (a right protected under US law as well as human rights law)—our research shows that detainees are transferred without taking into account their scheduled bond hearings, which burdens immigration courts and creates duplicative work. One immigration attorney we interviewed told us: "We've ... had cases where people are given a bond in city A and before the family can even post the bond in city A, they are transferred to El Paso—and then find that their bond is cancelled by the immigration judge down here."[14] In such a situation, the decision in the original bond hearing becomes a nullity and a waste of court resources.

Finally, an immigrant has a right, protected under both international human rights and US law, to present a defense to removal.[15] The long-distance and multiple transfers documented by Human Rights Watch often make it impossible for non-citizens to produce evidence or witnesses relevant to their defense, which slows down court proceedings and contributes to the backlog. A legal permanent resident originally from the Dominican Republic, who had been living in Philadelphia but was transferred to Texas said,

> I had to call to try to get the police records myself. It took a lot of time. The judge got mad that I kept asking for more time. But eventually they arrived. I tried to put on the case myself.[16]

If a transferred immigrant wants to try to return to the original court to be closer to his or her attorney, evidence, and witnesses, the non-citizen must file for a change of venue, an additional proceeding that can add to the court backlog. One attorney told Human Rights Watch that she had to file a "phone book" worth of documents to make a successful case to change venue.[17]

These are just a few examples of how transfers can interfere with court proceedings, leading to delays and additional court hearings. To prevent this unnecessary use of scarce court resources, ICE should be prohibited from transferring any immigration detainee who is represented by counsel, or whose rights would otherwise be hindered by a transfer. Fair treatment at the hands of immigration courts is often synonymous with efficient treatment and reduction in the immigration court backlog.

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[14] Ibid., p. 61.

[15] ICCPR, art. 13: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." See also Immigration and Nationality Act, Sec. 292, 8 USC 1362: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

[16] Human Rights Watch interview with Miguel A. (pseudonym), Port Isabel Service Processing Center, Los Fresnos, Texas, April 23, 2008.

[17] Human Rights Watch, *Locked Up Far Away*, p. 64.

***Recommendations:***

- In order to reduce court backlogs, Congress should place reasonable checks on ICE's transfer authority.
- Until transfers are reduced or eliminated, EOIR should issue guidance for immigration judges that encourages changes of venue to locations (and discourages changes of venue away from locations) where the detainee has counsel, family members, community ties, or other key witnesses, unless the detainee so requests or consents, or unless other justifications exist for such a motion apart from ICE agency convenience.
- EOIR should issue guidance for immigration judges that gives priority to in-person testimony, but when such testimony is not possible, requires judges to allow video or telephonic appearances by family members and other key witnesses. Any decision to disallow these types of appearances should be noted on the record along with the reason for the decision.
- Until EOIR backlogs can be eliminated or reduced, ICE and EOIR should prioritize efficient handling of custody reviews and bond hearings, respectively.

**Lack of Counsel for Vulnerable Populations Contributes to the Backlog**

Despite the proven effectiveness of LOP programs, and efficiencies when immigrants are represented by counsel, the refusal of the Department of Justice to provide counsel to vulnerable populations in immigration proceedings, particularly persons with mental disabilities, violates immigrants' rights to a fair hearing, leads to unnecessary delays, and adds to the courts' backlog.

The ICCPR provides for the right to legal representation during deportation.[18] Moreover, UN principles governing all detainees state that a detainee should receive legal assistance if he or she is unable to afford a lawyer.[19] Recognizing that individuals with mental disabilities may need additional support and assistance in court, the Convention on the Rights of Persons with Disabilities (CPRD)—which the United States signed in 2009 but has not ratified—provides for the right to legal assistance so that individuals with mental disabilities can participate in proceedings concerning their rights. The CRPD requires that governments "ensure effective access to justice for persons with disabilities ... including through the provision of procedural and age-appropriate accommodations" and further "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[20]

The US immigration court system, complicated and adversarial at the best of times, is particularly confusing for people with mental disabilities, who may find it difficult to follow proceedings or provide credible evidence to lawyers and judges without legal representation and adequate support. Human Rights Watch has documented cases of non-citizens, many of whom were asylum seekers and victims of torture, who did not know what a judge was or what the judge asked; who were delusional or experienced hallucinations; who could not read or write, tell time, name their birth place, or say what day it was; and who did not understand the concept of deportation.[21] Individuals with mental disabilities interviewed by Human Rights Watch doubted they could explain their claims without a lawyer:

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[18] ICCPR, art. 13.

[19] Body of Principles for the Protection of Persons Under Any Form of Detention and Imprisonment, principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988).

[20] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res.61/106, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 13.; Ibid., art. 12.

[21] Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, July 25, 2010, http://www.hrw.org/en/reports/2010/07/26/deportation-default-0.

> "If I say something stupid or I lose my papers, I just have to be careful with the judge ... I want help in my case. I need help," said Angelo, a 45-year-old [legal permanent resident] from Mexico with an unspecified mental disability and long history of hospitalization.[22]
>
> Sebastian, a 50-year-old non-citizen from Cuba taking multiple psychotropic medications, told us, "For me court is difficult because I don't understand what they are telling me. The judge asks me questions and I have to answer because I have no one to represent me. I told the judge that I can't represent myself because of my nerves and I need an attorney," he said.[23]

While US immigration law does not afford a right to free legal representation in immigration proceedings, court-appointed lawyers could clearly assist persons with mental disabilities and EOIR to examine their cases more expeditiously. Human Rights Watch has interviewed a number of immigrant detainees in proceedings who spoke of multiple hearings and multiple continuances without resolution that could have been avoided if they were represented.

For example, Fernando C., a legal permanent resident from Mexico who had been in the US for 40 years, and who was unable to remember his date of birth or why he was on medication, said that he had been to see the judge five times since arriving in Port Isabel: "I tell him I can't represent myself and I need help. The judge just gives me extensions to see if I can get a lawyer ... It's hard because I have something wrong with my head, and I have trouble deciding what to tell him."[24]

Christopher A., a non-citizen from Kenya with bipolar disorder who had been detained for ten months when interviewed, said that he had had "four or five" court dates without a lawyer and "desperately" needed one. "The judge said if I don't have a lawyer in April he will just have to make a decision," he said.[25]

The Immigration and Nationality Act provides that if "it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien."[26] The Attorney General and the Department of Justice have thus far failed to prescribe any such safeguards. By not offering the safeguard of legal representation to this vulnerable group, the Department of Justice is adding to the pending case backlog faced by EOIR.

***Recommendations***

- Congress should mandate the Department of Justice to appoint counsel to persons with mental disabilities in immigration proceedings. In the meantime, the Attorney General should review whether provision of counsel in certain circumstances would help to facilitate proceedings and reduce delays in the resolution of cases.
- EOIR should develop regulations and guidelines for immigration judges to ensure that the rights of people with mental disabilities are protected in the courtroom, including by:
    - Setting a standard for competency to proceed in an immigration hearing;

[22] Ibid., p. 53.
[23] Ibid., p. 53.
[24] Ibid., p. 54.
[25] Ibid., p. 74.
[26] Immigration and Nationality Act, Sec. 240(3), 8 USC 1229a(b)3.

- Eliminating the regulation that a person who is "mentally incompetent" can be represented by the "custodian," meaning the warden of the facility where he or she is detained; and
- Directing immigration judges to order a mental health evaluation where competency is in question.

* * *

In conclusion, the growing backlog in immigration courts is due to a number of factors that have gone untended over time. Two of these factors, unfettered transfers and refusal to appoint counsel to persons with mental disabilities, are government practices that: 1) violate due process and other basic human rights of non-citizens; 2) result in delayed case resolutions and add to the pending case backlog; and 3) could be easily addressed with regulatory or statutory changes. We urge the Committee to act to ensure that these practices are modified to address the problem of the EOIR backlog and to come into compliance with international human rights standards.

Human Rights Watch believes that the immigration court system, as currently administered, is in the throes of a vicious cycle. Government policies that violate the due process rights of non-citizens in proceedings add to the pending case backlog. The backlog, in turn, creates more due process concerns. Fair treatment of asylum seekers and other immigrants will certainly better protect their fundamental rights, but it will also reduce the costly and inefficient backlogs currently plaguing EOIR and the system of courts it administers.

We thank the Chairman and the Committee for their interest in this matter and for their consideration of our recommendations.

SUBMISSION FOR THE RECORD

EMBARGOED TO MAY 3, 2011

## THE NEW YORK IMMIGRANT REPRESENTATION STUDY PRELIMINARY FINDINGS

The New York Immigrant Representation Study (NYIRS) is a two-year project of the Katzmann Immigrant Representation Study Group and the Vera Institute of Justice to ascertain and document the representational needs of indigent New Yorkers facing removal proceedings, the scope and nature of free legal services presently available, and the gap between the need for representation by indigent noncitizens facing removal and the legal defense services available to them. In the coming year NYIRS will seek input from a broad range of sources concerning ways to meet the identified unmet representational needs and, using that input, will propose a series of solutions and steps to meet those needs in the near to medium term.[1]

The following preliminary findings were derived from Executive Office for Immigration Review (EOIR) data regarding immigration court proceedings from October 2005 through July 2010, which Vera matched with a list provided by U.S. Immigration and Customs Enforcement (ICE) of people apprehended in New York from October 2005 through December 2010.[2] NYIRS analyzed representation at the New York Immigration Courts (26 Federal Plaza, Varick Street, three Institutional Removal Program sites north of New York City), and for individuals apprehended in New York but transferred elsewhere.

**The two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.** Either factor in a case, being detained but represented or not detained but unrepresented, drops the success rate dramatically. When neither factor is present, the rate of successful outcome drops even substantially more.

| | |
|---|---|
| Represented and released or never detained ------ | 74% have a successful outcome |
| Represented but detained ---------- | 18% have a successful outcome |
| Unrepresented but released or never detained ---- | 13% have a successful outcome |
| Unrepresented and detained ---------- | 3% have a successful outcome |

**A striking percentage of detained and non-detained immigrants appearing before the New York immigration courts do not have representation.** Data indicate that in New York City 60% of detained immigrants and 27% of non-detained immigrants do not have counsel by the time their cases are completed. The data demonstrate how significantly detention reduces access to representation. Moreover, these numbers surely understate actual representation rates, as many New Yorkers are removed not through immigration court proceedings but rather through administrative procedures, where they are even less likely to obtain representation.[3]

**The lack of representation for detained individuals is aggravated by the fact that ICE transfers almost two thirds (64%) of those detained in New York to far-off detention centers (most frequently, in Texas, Louisiana, and Pennsylvania), where they face the greatest obstacles to obtaining counsel.** Individuals who are transferred elsewhere and who remain detained and out of New York are unrepresented 79% of the time.

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[1] We acknowledge with much appreciation the generous support of the Leon Levy Foundation in conjunction with the Governance Institute and the pro bono involvement of the participants of the Immigrant Representation Study Group.

[2] The statistics derived from EOIR data were compiled and analyzed by the Vera Institute of Justice. They do not constitute official EOIR statistics.

[3] Immigration Enforcement Actions: 2009, Annual Report, DHS Office of Immigration Statistics (Aug. 2010).

**The vast majority (92%) of representation in immigration proceedings in New York is provided by private attorneys.** Seven percent of the representation is provided by non-profit organizations (with one accredited representative alone accounting for almost half of that 7%), 1% by pro bono attorneys, and less than one half of 1% by law school clinics. For people whose cases finish while they are detained, however, private attorneys account for only 64% of the cases with representation; the accredited representative referred to in the prior sentence accounts for 28% of the detained represented cases; other non-profits account for 3%, pro bono 6%, and law school clinics less than one quarter of 1%.

**There is also a significant unmet need for competent representation.** The Study Group on Immigrant Representation observes that these preliminary findings, which show quite clearly that those with legal representation fare far better than those without, do not address a critical problem that needs to be examined in a future analysis – the lack of adequate counsel and its impact on the administration of justice.

All immigrants facing removal, whether or not detained, should have competent counsel. Anecdotal evidence suggests that a major problem exists as to the quality of representation, even in the substantial numbers of non-detainee cases where relief ultimately is obtained. One indicator of the extent of this problem is that there are currently 52 New York attorneys who have been either expelled or suspended by EOIR from the practice of law before the immigration courts and the Board of Immigration Appeals.[4] Indeed, anecdotal evidence suggests that the success rates at 26 Federal Plaza are in no small measure attributable to the robust role played by many judges in ensuring that incompetent counsel do not harm respondents. In all too many cases, the already over-burdened immigration judge expends considerable effort doing what the lawyer is supposed to do – for example, developing the record where the lawyer simply lacks experience or, even in the case of experienced counsel, fails to submit documents corroborating the noncitizen's account, fails to prepare a witness, or to rehabilitate a respondent after a problematic cross-examination. As a consequence, the immigration court functions far less efficiently than it would if there were adequate representation, and thus the integrity of the administration of justice is frustrated.

Increasing the pool of adequate counsel is thus imperative as is addressing the problem of counsel who do not serve their clients well. Concern with the quality of immigrant representation has been noted at all levels of the judicial system. See, for example, Richard A. Posner and Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011) ("the judge groups … agreed that immigration was the area in which the quality of representation was lowest."); Robert A. Katzmann, *The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor*, 11 GEO. J. LEGAL ETHICS 3, 10 (2008) ("Often times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different."); Noel Brennan, *A View From the Immigration Bench*, 78 FORDHAM L. REV., 623 , 626 (2009) ("I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it."); Vera Institute of Justice, *Moving Forward: The Role of Legal Counsel in New York City Immigration Courts*, 23-25, http://www.vera.org/content/moving-forward-role-legal-counsel-new-york-city-immigration-courts (2000) (noting the poor quality of private representation in contrast to representation by non-profit agencies).

*A full report on the NYIRS findings will be forthcoming. For more information on these findings or on the forthcoming report, contact Professor Peter Markowitz at Benjamin N. Cardozo School of Law, 212-790-0340.*

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[4] http://www.justice.gov/eoir/profcond/chart.htm

SUBMISSION FOR THE RECORD

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May 16, 2011

**VIA EMAIL**

Office of Senator Patrick Leahy, Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

Thank you and members of the Senate Judiciary Committee for convening a hearing on **"Improving Efficiency and Ensuring Justice in the Immigration Court System."** We appreciate the opportunity to submit a statement in connection with the administration of justice for immigrants in removal proceedings.

I, as well as members of my Firm, have provided *pro bono* legal assistance to asylum seekers and refugees through the National Immigrant Justice Center's *pro bono* program for many years now. I personally have a strong commitment to providing *pro bono* assistance in these cases because it is an opportunity to assist the under-served population with one of the most difficult bodies of law. However, my recent experience in immigration court has made it very difficult for me, as well as other pro bono attorneys who participate in this program, to continue providing this *pro bono* representation.

**Impact on Justice**
From my experience, it is clear that the immigration court system is not being given resources sufficient to engage in a thorough, accurate, and timely adjudication of the myriad claims which come before the immigration courts. I have witnessed these failures firsthand.

Of course, my primary concern is that immigration cases, particularly asylum cases, be correctly adjudicated on the merits. When the immigration court system gives short shrift to cases, it runs the risk of wrongly deporting an individual. In asylum cases that means returning them to face persecution, torture or death; and/or lifelong separation from friends and family. It is my particular sense that immigration courts are not giving proper consideration to asylum cases implicating the one-year filing deadline, instead granting lesser forms of protection from removal such as Withholding of Removal.

**Impact on Access to Representation**

But I also write to note that on a practical level, the lack of resources in the immigration court system is making it harder and harder for me and other to accept immigration cases for *pro bono* representation. The lack of sufficient judges and law clerks leads to extended delays in immigration court hearings, as well as an epidemic of rescheduled hearings which often occur at the last minute.

Together, delays and cancellations have a significant chilling effect on the capacity of continuing to provide *pro bono* representation in immigration cases. For example, I have personally been involved in a withholding of removal case that started in 2005. My client was detained while we waited for the immigration court to complete his trial on the merits. Although the first part of the trial took place in November of that year, the immigration judge scheduled the rest of the trial in December, and then he terminated the hearing the morning it was to take place and did not offer a new date. After months of contacting the court for a new date, the immigration judge finally held the remainder of the trial and denied my client's claims. My client continued to sit in detention while the case moved through the BIA and was finally reversed by the Seventh Circuit Court of Appeals. For well over two and a half years my client sat in detention during this inhumane process. Upon remand, the immigration judge again denied my client's claims, and we have now waited for a ruling from the BIA for over two years. Although we succeeded in having my client released from detention after the Seventh Circuit's ruling, he continues on in limbo without identification or status while he waits.

At the most basic level, these immigration court inefficiencies require us to spend substantially more time per case than would otherwise be required. For instance, when we prepare witnesses and evidence for a hearing scheduled in 2009, and then the hearing is rescheduled until 2011, we must prepare for that hearing again as it approaches; and when it is again rescheduled (an experience we've repeatedly had), we must prepare again. This dynamic is complicated by the natural flow of personnel at a major law firm; a substantial percentage of attorneys (particularly younger attorneys) change employment every year, and whenever that happens, we must locate a new attorney to handle their *pro bono* matters. Thus, increasing a case's adjudication time from two to five years exponentially increases the likelihood that an entirely new team of attorneys will handle the case before completion; which, again, substantially increases the amount of time which we must devote to the case.

Particularly in these difficult economic times, our *pro bono* resources are not unlimited. If one case takes 200 hours instead of 50 hours, that prevents us from committing to representing other meritorious cases. Moreover, while historically, attorneys who took an immigration case *pro bono* often took on subsequent immigration cases after the first case was completed, we find that happening much less frequently as these cases have become progressively more delayed.

These barriers to *pro bono* representation are unfortunate and unnecessary. There are many attorneys in our firm who are eager to provide assistance to those in need and eager to gain experience in court. For immigrants and asylum-seekers, legal representation can mean the difference between winning and losing the case; and we believe that the increased number of *pro*

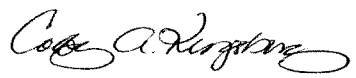
*se* cases is likely to have cascading impacts on the immigration court system, because those cases cannot be handled as efficiently as represented cases.

**Recommendations**

Additional immigration judges are needed; but it is our observation that immigration courts also lack basic court infrastructure, such as dedicated judicial law clerks, electronic case filing systems, and modern docketing systems used by the federal courts to such good effect. The immigration court system lacks a magistrate system, although many cases might otherwise be resolved by alternate mechanisms (such as a referral of a case the Asylum Office), mechanisms which would likely produce resource savings for the government as well as more accurate results for our clients. The immigration court rules do not subject government attorneys to the authority of the immigration judges; this might go some way toward explaining why we find it nearly impossible to get opposing counsel to return our phone calls. Improving the system would require additional resources, but even more, it requires the political will to take steps to force the system to change.

These barriers to representation cannot be allowed to persist. The necessary resources and attention must be given to these cases by the Department of Justice, to ensure that the system respects the rights of all concerned.

Very truly yours,



Colby A. Kingsbury

CAK

SUBMISSION FOR THE RECORD

Lutheran Immigration and Refugee Service

www.lirs.org

**Statement of Lutheran Immigration and Refugee Service**

**Senate Judiciary Committee**

**May 18, 2011 Hearing: "Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**BALTIMORE, May 18, 2011**—Lutheran Immigration and Refugee Service (LIRS), the national organization established by Lutheran churches in the United States to serve uprooted people, is grateful for Senator Leahy's decision to hold a public hearing and undertake a critical examination of the challenges faced by the Department of Justice's Executive Office for Immigration Review (EOIR).

"LIRS and our broad network of social ministry organizations, churches and church leaders are committed to ensuring that U.S. immigration policies are consistent with our country's fundamental values and afford justice to all," says Linda Hartke, LIRS President and CEO. "The first two essential steps in this direction are providing EOIR with funding for robust and efficient case adjudication and custody determinations and expanding funding for Legal Orientation Program to cover all detention centers that house immigrants."

**Limited Funding for EOIR Limits Access to Fair Process in Immigration Proceedings**
With approximately 84% of detained immigrants appearing before the courts without an attorney, immigration judges are increasingly burdened by presiding over cases presented by individuals who are ill-informed and unprepared to make educated decisions about their cases.[1] These factors make the court process less efficient and more prone to reaching improper conclusions. Dana L. Marks, an immigration judge in San Francisco and the president of the National Association of Immigration Judges, said that judges often feel asylum hearings are "like holding death penalty cases in traffic court."[2]

**Increased Immigration Enforcement, Yet Limited Funding Support for Courts**
Despite generous congressional support for Department of Homeland Security's (DHS) immigration enforcement initiatives, EOIR has not received sufficient support to keep up with the cases. From FY 2004 to 2010, DHS's budget for border and interior enforcement grew by over $6 billion. During this time period, EOIR's budget increased by just over $100 million.

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[1] Vera Institute for Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, May 2008, http://www.vera.org/download?file=1780/LOP percent2BEvaluation_May2008_final.pdf.

[2] *"Lawyers Back Creating New Immigration Courts,"* The New York Times, February 8, 2010, http://www.nytimes.com/2010/02/09/us/09immig.html.

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Between FY 2001 and 2009, the number of immigrants detained by the federal government increased from 209,000 to 383,524. The dramatic growth in detention has contributed to the overwhelming caseloads for EOIR's immigration judges, as most non-citizens in detention are pursuing their immigration cases. The backlog of cases at the immigration courts is 44% higher than at the end of FY 2008 and the average time for a case pending in immigration courts is now 467 days.[3] The number of cases pending in the immigration courts is at an all-time high.

**EOIR's Legal Orientation Program Improves Immigration Court Efficiencies But Its Reach is Limited**

The vast majority of detained immigrants are unrepresented by legal counsel in their legal proceedings before the court. EOIR's Legal Orientation Program (LOP), operational only 27 of the approximately 250 detention facilities nationwide, helps to fill in important gaps.

LOP improves the efficiency and effectiveness of the immigration court process, producing significant cost saving benefits to the government. According to an EOIR-commissioned report, LOP participants conclude their immigration court cases an average of 13 days faster than detainees who do not receive LOP. A reduced duration of immigration court proceedings leads to a reduction in detention time. The report also reveals the following findings:

- EOIR's immigration judges have praised LOP for better preparing immigrants to identify forms of relief and to recognize when no forms of relief are available.
- Detention facility staff have also observed a reduction in behavioral problems when detainees have access to legal information.
- LOP participants who are released on bond or their own recognizance are more likely to appear for future court hearings than those who did not participate in the program.

The case below demonstrates the benefits of LOP to non-citizen detainees and to improving the efficiency of the immigration courts.

> *Since 1991, Somalia has been enduring an ongoing civil war. In the late 1990s, Mr. Mukatr Allie, a young Somali boy, was living with his uncle because he had a medical condition that could not be addressed in his village. He returned to his village and discovered that his house had been ransacked. His father and three brothers had been killed. He didn't know where his mother or his eight other siblings were. His uncle then abandoned him, leaving him all alone. At the encouragement of a neighbor, he escaped to Nairobi. He remained there for a few years, but faced repeated harassment by the local police.*
>
> *He fled again in search of safety and protection passing through Europe, the Caribbean and South America. In April 2010, at the age of 21, he crossed the U.S.-Mexico border. Mr. Allie would later say, "I didn't feel safe. There was no justice, a lot of corruption. My original idea wasn't to come to the United States. I just needed to get out." DHS officials apprehended and transferred him to the Northwest Detention Center, a privately run jail in Tacoma, Washington.*
>
> *Mr. Allie was afraid to return to Somalia because he was opposed to Al Shabaab, an Islamic insurgent group that has been designated as a terrorist organization by the*

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[3] *"Immigration Case Backlog Still Growing in FY 2011,"* Transactional Records Access Clearinghouse *(2010)*, http://trac.syr.edu/immigration/reports/246/.

*United States government. Al Shabaab controls central and south Somalia. Mr. Allie thought that he would be targeted if he were deported.*

*The Northwest Immigrant Rights Project (NWIRP), a member of LIRS's Asylum and Immigration network, met Mr. Allie while providing LOP presentations. NWIRP, the local LOP provider, recognized that he was eligible for asylum. In June 2010 Mr. Allie filled out and submitted his own asylum application and LOP connected him with pro bono legal counsel for further assistance in court proceedings. In his August 2010 asylum hearing, an immigration judge approved his asylum application. He was released from jail, nearly 5 months after arriving to the United States.*

*Had Mr. Allie not received basic legal information through LOP, he may not have known that he was eligible for asylum. Moreover, if he did not know about his eligibility for asylum and how to fill out the application, he likely would have asked the immigration judge for more time to determine what his legal option – wasting valuable court time and resources.*

For individuals, LOP educates detained immigrants so that they can, at the very least, understand their legal options and responsibilities and make more informed decisions about their immigration cases. Immigrants in detention are often housed in areas that are far from friends, family, attorneys, and other social services providers. LOP helps to mitigate the isolation of detention by providing detainees with basic information on forms of relief from removal, how to accelerate repatriation through the removal process, how to represent themselves without an attorney, and how to obtain legal representation.

**LIRS recommendations to Congress:**

- **Provide EOIR with robust funding.** U.S. immigration courts need more staff and resources to address the overwhelming number of cases being referred by DHS and to allow them the time and legal support to carefully consider their cases
- **Expand LOP funding to cover all detention centers that house immigrants.** Increased LOP funding would improve immigration court efficiencies and ensure that individuals in detention receive basic information.
- **Eliminate the one-year filing deadline for asylum seekers.** U.S. laws must be changed to ensure the efficient use of EOIR and DHS resources and the protection of bona fide refugees.
- **Extend initial jurisdiction of all asylum cases filed by children under the age of 21 to DHS's Asylum Office.** A change in law is needed to best utilize the expertise and strengths of DHS Asylum Officers, reduce the burdens on immigration courts and prevent vulnerable children from having to face adversarial asylum proceedings.

LIRS welcomes refugees and migrants on behalf of the Evangelical Lutheran Church in America, the Lutheran Church—Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS is nationally recognized for its leadership advocating with and on behalf of refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations, and for providing services to migrants through over 60 grassroots legal and social service partners across the United States.

If you have any questions about this statement, please feel free to contact Eric B. Sigmon, Director for Advocacy at (202) 626-7943 or via email at esigmon@lirs.org.

To read the April 5, 2011 *Associated Press* article, "Immigration Courts: Troubled System, Long Waits, click here: http://bit.ly/gK17b4.

To read the June 11, 2010 *Seattle Times* article about Mr. Mukatr Allie and other East African asylum seekers, click here: http://bit.ly/b3NBr8.

To read Department of Justice Attorney General Eric Holder's remarks on the Legal Orientation Program, click here: http://1.usa.gov/aWMrXb.

To read the LIRS statement in support of the Refugee Protection Act, click here: http://bit.ly/9gMMR4.

To read the LIRS statement on DHS's new parole policy, click here: http://bit.ly/lkQLom.

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May 16, 2011

**Via Email**

Office of Senator Patrick Leahy, Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

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WASHINGTON, D.C.

Dear Senator Leahy:

Thank you and members of the Senate Judiciary Committee for convening a hearing on **"Improving Efficiency and Ensuring Justice in the Immigration Court System."** We appreciate the opportunity to submit a statement in connection with the administration of justice for immigrants in removal proceedings.

I have the pleasure and privilege of serving as pro bono counsel to Winston & Strawn LLP, an international law firm of nearly 1,000 attorneys with 15 offices worldwide. In addition to serving commercial clients on a variety of complex legal issues, Winston & Strawn annually devotes in the range of 40,000 – 50,000 hours to pro bono clients who are unable to afford legal services.

Among other pro bono activities, Winston & Strawn devotes substantial time to representing persons seeking asylum in the United States after fleeing from persecution in their native countries. For more than 15 years, Winston & Strawn attorneys have provided *pro bono* legal assistance to asylum seekers and refugees in partnership with the National Immigrant Justice Center's *pro bono* program. More than 130 associates and partners have worked on more than 80 cases. Despite this long-standing commitment to asylum-seekers, our recent experience in immigration court has made it very difficult for Winston & Strawn to continue providing this *pro bono* representation.

**Impact on Justice**

From our experience, it is clear that the immigration court system is not being given resources sufficient to engage in a thorough, accurate, and timely adjudication of the myriad claims which come before the immigration courts. We have witnessed these failures firsthand.

Of course, our primary concern is that immigration cases, particularly asylum cases, be correctly adjudicated on the merits. When the immigration court system gives short shrift to cases, it runs the risk of wrongly deporting an

individual. In asylum cases that means returning them to face persecution, torture or death; in other cases, it means lifelong separation from friends and family. It is our particular sense that immigration courts are not giving proper consideration to asylum cases implicating the one-year filing deadline, instead granting lesser forms of protection from removal such as Withholding of Removal.

**Impact on Access to Representation**

But we also write to note that on a practical level, the lack of resources in the immigration court system is making it harder and harder for us to accept immigration cases for *pro bono* representation. The lack of sufficient judges and law clerks leads to extended delays in immigration court hearings, as well as an epidemic of rescheduled hearings which often occur at the last minute.

Together, delays and cancellations have a significant chilling effect on the capacity of our firm to continue providing *pro bono* representation in immigration cases. For example, we have represented since July 2007 a young Iraqi national who fled persecution in that country as a result of his cooperation with the U.S. war. His case has been re-scheduled four time and the initial hearing on the merits is scheduled for December 2011, nearly 4 ½ years after we initially appeared before the Immigration Court. Similarly, we represent an ordained minister from Equatorial Guinea whose case was referred to the Immigration Court in November 2007. The initial hearing on the merits is scheduled for September 2011. Multiple attorney teams have been recruited to handle both cases during our representation of these clients.

At the most basic level, these immigration court inefficiencies require us to spend substantially more time per case than would otherwise be required. For instance, when we prepare witnesses and evidence for a hearing scheduled in 2009, and then the hearing is rescheduled until 2011, we must prepare for that hearing again as it approaches; and when it is again rescheduled (an experience we've repeatedly had), we must prepare again. This dynamic is complicated by the natural flow of personnel at a major law firm; a substantial percentage of attorneys (particularly younger attorneys) change employment every year, and whenever that happens, we must locate a new attorney to handle their *pro bono* matters. Thus, increasing a case's adjudication time from two to five years exponentially increases the likelihood that an entirely new team of attorneys will handle the case before completion; which, again, substantially increases the amount of time which we must devote to the case.

Particularly in these difficult economic times, our *pro bono* resources are not unlimited. If one case takes 200 hours instead of 50 hours, that prevents us from committing to representing other meritorious cases. Moreover, while historically, attorneys who took an immigration case *pro bono* often took on subsequent immigration cases after the first case was completed, we find that happening much less frequently as these cases have become progressively more delayed.

These barriers to *pro bono* representation are unfortunate and unnecessary. There are many attorneys in our firm who are eager to provide assistance to those in need and eager to gain experience in court. For immigrants and asylum-seekers, legal representation can mean the

difference between winning and losing the case; and we believe that the increased number of *pro se* cases is likely to have cascading impacts on the immigration court system, because those cases cannot be handled as efficiently as represented cases.

**Recommendations**

Additional immigration judges are needed; but it is our observation that immigration courts also lack basic court infrastructure, such as dedicated judicial law clerks, electronic case filing systems, and modern docketing systems used by the federal courts to such good effect. The immigration court system lacks a magistrate system, although many cases might otherwise be resolved by alternate mechanisms (such as a referral of a case the Asylum Office), mechanisms which would likely produce resource savings for the government as well as more accurate results for our clients. The immigration court rules do not subject government attorneys to the authority of the immigration judges; this might go some way toward explaining why we find it nearly impossible to get opposing counsel to return our phone calls. Improving the system would require additional resources, but even more, it requires the political will to take steps to force the system to change.

These barriers to representation cannot be allowed to persist. The necessary resources and attention must be given to these cases by the Department of Justice, to ensure that the system respects the rights of all concerned.

Sincerely,

Gregory A. McConnell

SUBMISSION FOR THE RECORD

**NATIONAL ASSOCIATION OF IMMIGRATION JUDGES**
**Office of the President**
**120 Montgomery Street**
**San Francisco, CA 94104**
**415-705-0140**

**Statement of**

**National Association of Immigration Judges**

**Before the Senate Committee on the Judiciary**

**on**

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**May 18, 2011**

Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a written statement on behalf of the National Association of Immigration Judges ("NAIJ") to the Committee on the important topic of "improving efficiency and ensuring justice in the Immigration Court system." The NAIJ has long been on record explaining why far-reaching structural reform and reorganization of this system is long overdue and desperately needed.[1] In light of the focus of the current hearing, we direct our comments on actions that can be taken immediately to greatly improve the efficiency of the Courts while also ensuring justice.

## Who We Are

The NAIJ is the certified representative and recognized collective bargaining unit representing the approximately 262 Immigration Judges presiding in 59 courts throughout the U.S. states and territories.[2] NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO. The opinions offered represent the consensus of our members, and may or may not coincide with any official position taken by the U.S. Department of Justice ("DOJ").

Immigration Judges are a diverse corps of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts, and even successful arguments at the U.S. Supreme Court. Some are former INS prosecutors, others former private practitioners. Our

ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States.

**What We Do**

The proceedings over which we preside rival the complexity of tax law proceedings, with consequences that can implicate all that makes life worth living, or even threaten life itself.[3] At first blush, any observer can appreciate the high stakes of an asylum case. The people who appear before our court include lawful permanent residents who have lived virtually their entire lives in the United States, vulnerable unaccompanied minors, and sometimes individuals who are actually United States citizens although they might not realize that they derived such status through operation or law or may have difficulty mustering the necessary evidence to prove the factual basis of their claim. Credibility determinations are frequently based on the testimony of only one witness, the applicant. The Immigration Judge must evaluate that testimony through the proper lens selected from a myriad of diverse political, cultural and linguistic contexts. Circuit courts are asking for an increasingly intricate credibility analysis: mandating that an applicant be provided an opportunity to explain each and every inconsistency that is noted, often a painstaking and confusing process. Political scientists, academic scholars and psychologists are being presented as expert witnesses in increasing numbers in these proceedings, and their complicated testimony must be synthesized, analyzed and appropriately weighed by an Immigration Judge.

Most legal observers are stunned to see the Spartan conditions under which Immigration Judges hold hearings. We have no court reporters, no bailiffs in non-detained settings and, in addition to our judicial duties, we are responsible for operating the recording equipment that creates the official administrative record of the proceedings. While digital audio recording has finally been implemented nationwide, it is no panacea for many of the shortcomings which have long plagued our transcripts.

At the conclusion of hours of painstaking direct- and cross-examination, Immigration Judges render an extemporaneous oral decision, often lasting 45 minutes or more. These decisions are generally rendered without the benefit of a judicial law clerk's research or drafting assistance because the ratio of judges to law clerks remains inadequate for the task. Immigration Judges cannot refer to a transcript when rendering their decisions, as written transcripts of the proceedings are created only after their decision is appealed.

**The Problem**

The system has been struggling to accommodate the evolving demands of circuit courts' holdings, which require more in-depth rationales, at a time when the Immigration Judges are

facing increased pressures to complete more cases at a faster pace without sufficient law clerks or the necessary time off the bench to research and draft decisions. To put this in context, it should be noted that while the average district court judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2010 Immigration Judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges.[4] Under these circumstances, it is not surprising that recent studies found that Immigration Judges suffered greater stress and burnout than prison wardens or doctors in busy hospitals.[5]

Despite the complexity of the task for Immigration Judges, resources for the Immigration Courts have not kept pace with the meteoric rise in allocations for the Border Patrol and Immigration and Customs Enforcement ("ICE") or the increased DOJ focus on enforcement of criminal laws relating to immigration violations. As ICE's budget rises and provides for better-prepared prosecutions in immigration court, the private bar and applicants respond as well with more voluminous and better-prepared cases. The increasing formality of the evidence being proffered presents a huge challenge for the 85% of respondents who are unrepresented and requires a significant amount of additional judicial time to conduct hearings and evaluate such cases.[6] Simply put, Immigration Judges continue to be inundated as they struggle with chronically inadequate resources.

**Changes (or Lack Thereof) in the Last Five Years**

On August 9, 2006, then Attorney General Alberto Gonzales proposed 22 specific measures he deemed necessary to improve the quality of performance by the Immigration Courts. An essential element of that proposal was the stated intention to seek budget increases to hire more judges and judicial law clerks, acknowledging that improved performance and service to the public are dependent upon adequate resources. Disappointingly, when this effort was evaluated at the two-year mark, there were actually eight fewer Immigration Judges than had been employed at the time of the Attorney General's proposal, with a total of 28 Immigration Judge positions vacant.[7] It was only by December of 2010 that 23 of those 28 positions were filled.[8] In addition, the DOJ has repeatedly failed to keep pace with an annual 5% attrition rate for Immigration Judges.

Because of the sluggish pace of hiring, by the end of December 2010 the number of cases pending in the Immigration Courts reached an all-time high of 267,752 and the length of time matters remained pending increased by an estimated 20%.[9] This pending caseload represented a 44% increase over the number of cases pending at the end of FY 2008.[10]

Although the pace of hiring improved somewhat, during this same time waves of new cases are buffeting the immigration courts, especially in the detained settings, with more expected to follow. In the first nine months of FY 2010, the policies of the current administration and the "Secure Communities" program, which is rapidly expanding, have resulted in almost a doubling of the rate of removals that have taken place in the past five

years.[11] While these "removals" include some cases that are not brought before the Immigration Court, there has been a major impact on Court dockets. The Department of Homeland Security ("DHS") has "prioritized criminal aliens for enforcement action," but such "criminal" aliens include those convicted of traffic violations.[12] In addition, a recent unpublished Ninth Circuit Court of Appeals case has called the procedures for "stipulation orders of voluntary removal" into serious question.[13] As a result, both DHS and Immigration Judges are hesitant to use this mechanism, at least without taking significant additional precautions that result in added time to the docket. When the effects of these trends are combined, the impact results in longer processing times for vulnerable populations such as asylum seekers and juveniles.[14]

Additionally, the need for annual, in-person training conferences was another crucial element contained in the proposed improvement measures, based on an acknowledgment of the inferiority of other training mediums. Unfortunately, this proposal has also failed to materialize. Two out of five conferences since 2007 have not been held in person. The annual Immigration Judge Training Conference was cancelled in 2008 and 2011, once again substituting a far inferior alternative, CD audio lectures.[15] The cancellation of in-person training conferences neither improves efficiency nor ensures justice.

All of these problems – delays in hiring new judges, increased backlogs, significant enhancement of DHS enforcement efforts, doubts cast on the legitimacy of stipulated removal orders, and a lack of training for judges – are coalescing to create another "perfect storm": a court system that is incapable of handling the cases before it in an efficient and competent fashion. Absent immediate steps, this "storm" will overwhelm the Immigration Court system and undermine public confidence.

**Steps to Take Now To Improve the Immigration Court System**

**1. Senior Status Judges**

The immediate hiring of more Immigration Judges and judicial law clerks is essential to alleviate case backlogs and the stress caused by overwork, which lead to many problems that undermine the optimal functioning of the Immigration Court system.

There are several ways that this problem can be addressed. The first is obvious: fill vacancies promptly, preferably with candidates who possess strong immigration law or judicial backgrounds and who will be able to "come up to speed" quickly. While we acknowledge that the Executive Office for Immigration Review ("EOIR") has rededicated itself to this task, a hiring freeze mandated by the DOJ coupled with a cumbersome hiring and clearance process continue to jeopardize any enduring success on this front. In addition, recent instances where Immigration Judges have been unable to survive their probation period may very possibly dissuade high quality lawyers from leaving stable jobs or law practices to become Immigration Judges.

NAIJ strongly advocates an additional approach to address this long-standing problem: institute senior status (through part-time reemployment or independent contract work) for retired Immigration Judges. In the National Defense Authorization Act ("Act") for FY 2010, Public Law 111-84, Congress facilitated part-time reemployment of Federal employees retired under CSRS and FERS on a limited basis, with receipt of both annuity and salary. Assuming the Act's applicability to retired Immigration Judges, reemployment under those provisions would provide an immediately available pool of highly trained and experienced judges who could promptly help address pressing caseload needs in a cost-efficient manner. The benefits of such an approach are numerous and would be enormous. The Immigration Judge corps would not lose the expertise and talent of retired judges. Their institutional memory, depth of knowledge of immigration law and procedure and their hands-on judicial experience would be particularly valuable during this period of rapid expansion and assimilation of new judges. Creating senior status for retired Immigration Judges would provide the Immigration Courts with access to trained judges who could comprise a flexible, rapid response team, available to address unexpected caseload fluctuations or to assist in training or mentoring new Immigration Judges. We firmly believe it would be a highly effective way to keep the Immigration Judge workforce nimble and responsive to the changing needs of the immigration justice system.

**2. Development of a Principled Methodology for Budget Requests and Resource Allocations**

Unfortunately, operating in a resource starved environment is nothing new for the Immigration Courts. For years, there has been a persistent lack of correlation between allocations for increased enforcement actions, which generate larger dockets, and funding for the Immigration Court system. Long-term planning for Immigration Court growth has either been absent or ineffective. In the April 2009 Omnibus Appropriations Act (Public Law 111-8), Congress recognized that there has been a lack of a consistent, principled methodology to address the needs of the Immigration Courts. Funds were allocated to the National Academy of Sciences to develop a method to create defensible fiscal linkages between the DOJ and Department of Homeland Security. Despite this provision, no discernible results have been forthcoming. This is a crucial project that must be pursued in order to provide a durable solution to this persistent problem.

The NAIJ also strongly endorses implementation of a closely related tool: a case weighting system, modeled after the one employed by the federal district courts. Such an approach would provide insight into how to maximize the resources that are allocated to the EOIR. It is well recognized that different case types present different levels of burden on the adjudicating courts, so that the mix of cases filed in a court is an important factor in determining the amount of work required to process the court's caseload. For more than thirty years, federal district courts have utilized case weights derived from detailed studies of the different events that a judge must complete to decide a case (*e.g.*, hold hearings, read briefs, decide motions, and conduct trials) and the amount of time required to accomplish those events. The tasks performed

by Immigration Judges are virtually identical to those of other trial level judges and justify the application of this approach in our administrative structure. We believe that this type of analytical approach would prove to be an invaluable tool in identifying the level of resources needed by individual Immigration Courts to meet caseload burdens as well as clarifying the needs of our court system as a whole. We also advocate study of other factors which have been found by the federal judiciary to influence their workload in addition to mere caseload measures, such as the economies that can be achieved through automation, technology and program improvement.

**3. Chronic Shortage of Resources**

The persistent lack of resources to help judges perform their jobs adequately in light of changing expectations by the federal appellate courts and frequent changes in the law have pushed the system to the breaking point. This problem can be dramatically improved within the present organizational structure through consistent, adequate funding.

Public confidence that the Immigration Courts are functioning properly and fulfilling their stated mission of dispensing high quality justice in conformity with the law can only be assured by giving judges the tools to do their jobs properly. Currently, complex and high stakes matters, such as asylum cases which can be tantamount to death penalty cases, are being adjudicated in a setting that most closely resembles traffic court. Providing increased resources to improve the quality of performance of the Immigration Courts is the only realistic way to earn and retain public confidence in this system, and it would be cost effective. Additional resources would contribute greatly towards reducing the costs of detention of respondents in proceedings, and it is widely believed that it would have the enormous collateral benefit of reducing the number of immigration cases that are appealed to the federal circuit courts of appeals.

There are several areas where resources need to be augmented. NAIJ believes that the prevailing norm regarding support staff and tools is inadequate. There should be a ratio of no less than one judicial law clerk for every two Immigration Judges. Additional resources also need to be devoted to increasing the number of bailiffs, interpreters and clerical support staff. State of the art equipment such as laptops, printers and off-site computer access are still not provided routinely to Immigration Judges and should be mandated.

Written decisions should become the norm, not the exception, in a variety of matters, such as asylum cases, cases involving contested credibility determinations and cases that raise complex or novel legal issues. The present system relies almost exclusively on oral decisions rendered immediately after the conclusion of proceedings: written decisions are the exception to this rule. These oral decisions are no longer adequate to address the concerns raised by federal courts of appeals regarding the scope and depth of legal analysis. Immigration Judges should be provided the necessary resources, including judicial law clerks and sufficient time away from the bench, to issue written decisions in any case where they deem it appropriate. This expenditure

would be cost-effective; it would likely yield the collateral benefit of reducing the number of appeals and remands, as the quality of decisions is virtually certain to rise with the additional time for considered deliberation.

Immigration Judges' schedules need to be modified to provide adequate time off the bench for meaningful, ongoing training, with sufficient follow up time to assimilate the knowledge gained, to implement the lessons learned and to research and study legal issues.

The current system of "case completions goals" and "aged case" prioritization should be eliminated because it is fundamentally flawed. There are so many priorities assigned that judges, who are those in the best position to manage their dockets effectively have lost the ability to do so. Case completion goals have not been aspirational, as they were alleged to be when implemented, nor have they been tied to resource allocation, which is the only legitimate function they might serve. Cases should be decided in accordance with due process principles. If case processing is taking too long, more judges should be hired. Instead, with every case a priority, the stress on judges has reached unbearable levels, contributing greatly to questionable conduct in court and arguably fostering ill-conceived decision making. It is clear that the toll such stress is taking on Immigration Judges is a large contributing factor to retirement at the earliest possible opportunity, which then exacerbates the pressing need to hire new judges and undermines judicial corps stability.

**4. Sanctions Authority**

With the crushing volume of cases facing Immigration Judges, they need to be able to run their courtrooms as efficiently as possible; this necessarily requires the ability to discipline attorneys who come before the court unprepared.[16] Despite legislation that provides Immigration Judges with the authority to sanction attorneys by civil monetary penalties, the DOJ has failed to promulgate implementing regulations for over fifteen years.[17] Current procedures for attorney discipline apply only to respondents' representatives who engage in "criminal, unethical or unprofessional conduct" and do not apply to attorneys who represent the federal government.[18] Since this process is one-sided, some Immigration Judges are reluctant to use it, believing it would create the appearance of a lack of impartiality. The end result is that Immigration Judges are without a viable, even-handed mechanism to punish recalcitrant attorneys. This omission deprives Immigration Judges of a critical tool necessary for them to assure maximum effectiveness in the adjudication of cases.

**5. Legislative Action Needed**

The NAIJ would be remiss if we failed to briefly mention the most important, overarching, and durable priority for our nation's Immigration Courts: the need to provide an institutional structure which will ensure judicial independence and guarantee transparency. The current structure is fatally flawed and allows for continuing new threats to judicial independence, a condition exacerbated by current DOJ policies and practices. This problem manifests itself in

several ways – from unrealistic case completion goals to an unfair risk of arbitrary discipline of judges. Disciplinary actions against Immigration Judges have become more frequent, and are often over petty matters. DOJ has informed Immigration Judges that they are, as a matter of legal ethics, to consider themselves as attorneys who represent the U.S. Government in litigation, even as it presents Immigration Judges to the public as impartial adjudicators. One official ethics opinion flatly stated that "an Immigration Judge is not truly a judge of any court." This position is in constant tension with the judicial role, which requires Immigration Judges to be fair and impartial. The strain of personal ramifications from individual discipline and ethical ambiguities are undermining morale and interfering with judicial performance at the very time that the workload for Immigration Judges has become overwhelming.

The solution we propose, which is also advocated by the American Bar Association and the American Immigration Lawyers Association, is to remove EOIR from the DOJ and the oversight of the Attorney General. The current court structure is marked by the absence of traditional checks and balances, a concept fundamental to the separation of powers doctrine. Because terrorism issues are being increasingly raised in immigration court proceedings and the Attorney General has broad prosecutorial authority in that realm, the situation creates an inescapable structural conflict which calls into question the wisdom of leaving the Immigration Courts within the DOJ. The NAIJ firmly believes the time has come to establish an Article I Immigration Court.

Regardless of where the Immigration Court is ultimately located, the definition of "immigration judge" in the Immigration and Nationality Act, §101(b)(4), must be amended to guarantee decisional independence and insulation from retaliation or unfair sanctions for judicial decision making. The new statutory definition should include specific language that makes it clear that traditional employee performance evaluations may not be utilized because of the impartial, adjudicative duties of the position. The statute should provide that Immigration Judges will be held to the ethical standards established by the American Bar Association Model Code of Judicial Ethics. Finally, it is essential that the statute explicitly state that no discipline or adverse action may be taken against a judge for the judicial exercise of independent judgment and discretion in the adjudication of cases. Should it be helpful to the Committee, the NAIJ would be pleased to offer proposed language for this purpose.

**Closing**

Mr. Chairman, the NAIJ deeply appreciates the work of the Committee and stands ready to assist in any way that we can to improve the Immigration Courts so that efficiency is improved and justice ensured. Thank you.

Dana Leigh Marks, President, NAIJ

[1] *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigration Bulletin 3 (2008); *An Independent Immigration Court: An Idea Whose Time Has Come*, Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary, 107th Cong., 2d Sess. 15 (2002).

[2] Last December, the Executive Office for Immigration Review ("EOIR") announced that the Immigration Judge Corps had reached 270 members. News Release, *The Executive Office for Immigration Review Swears in Nine Judges, Judge Corps Reaches 270 serving in 59 Courts* (Dec. 20, 2010) <http://www.justice.gov/eoir/press/2010/IJInvestiture12172010.pdf>. However, it should be noted that, at present, 13 members of the corps serve as managers and supervisors, either full- time or for the majority of their time. In addition, since that announcement was made, several Immigration Judges have retired or left EOIR. Although five more judges did come on board since the announcement, DOJ has now imposed a hiring freeze. Hence, the actual number of full time Immigration Judges is 262, virtually the same number that Attorney General Gonzales said should have been immediately in place five years ago.

[3] *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). These cases have also been analogized to criminal trials, because fundamental human rights are so inextricably tied to these enforcement-type proceedings. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government,* 44 Admin. L. Rev. 261, 276 (1992).

[4] U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, prepared by the Office of Planning, Analysis and Technology, January 2011, <www.justice.gov/eoir/statspub/fy10syb.pdf>.

[5] To better understand the personal toll these working conditions have wrought on Immigration Judges, *see Burnout and Stress Among United States Immigration Judges*, 13 Bender's Immigration Bulletin 22 (2008); *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Georgetown Immigr. L.J. 57 (Fall 2008 CQ ed.) <https://articleworks.cadmus.com/geolaw/zs900109.html>.

[6] For an inside perspective from an Immigration Judge on the topic of attorney representation, including the laudable efforts by New York pro bono programs, *see*, Noel Brennan, *A View From the Immigration Bench*, 78 Fordham L. Rev. 623 (2009).

[7] Transactional Records Access Clearinghouse ("TRAC"), *Efforts to Hire More Immigration Judges Fall Short* (July 28, 2008), <http://trac.syr.edu/immigration/reports/189/>.

[8] TRAC, *Immigration Courts Taking Longer to Reach Decisions* (Nov. 1, 2010), <http://trac.syr.edu/immigration/reports/244/>.

[9] TRAC, *Backlog in Immigration Cases Continues to Climb* (Mar. 12, 2010), <http://trac.syr.edu/immigration/reports/225/>.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *United States v. Ramos*, No. 09-50059 (9th Cir. Sept. 24, 2010.)

[14] EOIR's statistics show a 42% decrease in the number of asylum applications filed with the Immigration Courts from FY 2006 to FY 2010. U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, prepared by the Office of Planning, Analysis and Technology, January 2011, <www.justice.gov/eoir/statspub/fy10syb.pdf>. Nevertheless, when not detained, they are the applicants most dramatically impacted by longer case processing times, an outcome which can be especially difficult for individuals suffering from anxiety or Post Traumatic Stress Disorder or those separated from family members who may remain at risk in their homeland.

[15] EOIR already announced that its 2011 Immigration Judges' Training Conference scheduled for July will not be an in-person conference. *See also*, TRAC, *Bush Administration Plan to Improve Immigration Courts Lags* (Sept. 8, 2008) <http://trac.syr.edu/immigration/reports/194/>.

[16] *Assembly Line Injustice, Blueprint to Reform America's Immigration Courts*, Chicago Appleseed Fund for Justice, May 2009, at 11.

[17] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-589 (1996), codified as amended at § 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(1) (2006).

[18] *See* 8 C.F.R. §§ 1292.3(a)(1)-(2).

SUBMISSION FOR THE RECORD


**Statement for the Record**

**Senate Judiciary Committee**

**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**May 18, 2011**

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

We are concerned that the Executive Office of Immigration Review (EOIR) within the Department of Justice is insufficiently funded to ensure quality adjudication of cases. While the Department of Homeland Security has seen a dramatic increase in funding for identifying, apprehending, detaining, and removing non-citizens, EOIR has not received comparable increases to handle the extra workload. There must be parity in funding between DOJ and DHS to ameliorate the increasing financial and operational strains on DOJ that result from increased DHS enforcement.

Managing the imbalance between EOIR resources and DHS enforcement activities requires DHS to engage in more focused and prioritized enforcement. The status quo is unsustainable, both from a fiscal perspective and a justice perspective. Record numbers of cases have been jammed into the immigration court system, leading to staggering backlogs. Immigration judges are dismissing an ever-larger number of removal cases brought by ICE.[1] These dismissals raise two concerns. First, ICE's constantly growing enforcement apparatus ensnares individuals who are not legally removable. Second, the immigration courts perform a critical check on the enforcement authority of the Department of Homeland Security and must be funded at a level that allows them to perform their oversight role.

Further, we remain gravely concerned about the low representation rates of respondents appearing before the immigration courts. According to the American Bar Association's comprehensive report on immigration courts in 2010, more than half of all respondents do not have an attorney. For respondents in detention, the percentage of those without a lawyer jumps to an astonishing 84%.

One successful program that should be expanded is the Legal Orientation Program (LOP). This program not only improves access to justice for detained, *pro se* respondents, it also reduces court processing times and increases efficiencies in immigration courts. In addition to

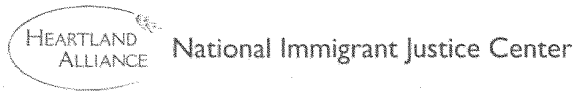
[1] Transactional Records Access Clearinghouse, "ICE Seeks to Deport the Wrong People," Nov. 9, 2010. http://trac.syr.edu/immigration/reports/243/

expanding the reach of LOP so that it covers all immigration detention facilities, further research is needed on its cost savings value.

We remain deeply troubled by inadequate safeguards in immigration court for identifying and accommodating respondents with mental health needs. As noted recently by the DHS Office of Inspector General[2], "A detainee's mental illnesses can hinder the government's ability to resolve an immigration case when the detainee cannot participate in proceedings because of his or her condition." We believe that it is entirely appropriate for the government to provide counsel to indigent persons—particularly for highly vulnerable populations such as the mentally ill, asylum seekers, and children.

[2] Dept. of Homeland Security, Office of Inspector General, "Management of Mental Health Cases in Immigration Detention", March 2011, OIG-11-62, at pg. 29.

SUBMISSION FOR THE RECORD




**Statement of**
**Mary Meg McCarthy, Executive Director**
**Heartland Alliance's National Immigrant Justice Center**
**Senate Judiciary Committee Hearing**
**"Improving Efficiency and Ensuring Justice in the Immigration Court System"**

**May 18, 2011**

## I. Introduction

Heartland Alliance's National Immigrant Justice Center (NIJC) commends Senator Leahy for holding a Congressional hearing regarding the administration of justice in the immigration court system. We appreciate the opportunity to submit a statement on this important issue.

NIJC is a non-governmental organization based in Chicago and dedicated to safeguarding the rights of noncitizens. NIJC advocates for immigrants, refugees, and asylum seekers through direct legal representation, policy reform, impact litigation, and public education. NIJC and its *pro bono* partners provide legal representation to approximately 10,000 individuals annually, including low-income immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. Since its founding more than 25 years ago, NIJC has developed the largest *pro bono* network in the United States, totaling more than 1,000 attorneys from the nation's leading law firms.

NIJC and its *pro bono* partners provide extensive legal assistance to asylum seekers. NIJC's asylum *pro bono* project was founded in 1985 and provides legal representation to low-income noncitizens seeking asylum in the United States. The project is now one of the leading asylum representation programs in the country, handling hundreds of affirmative and defensive asylum cases every year before the Chicago Asylum Office, the Chicago Immigration Court, the Circuit Courts of Appeals and the U.S. Supreme Court. NIJC's *pro bono* program relies almost entirely on volunteer attorneys, the great majority of whom have no previous experience in immigration or refugee law. NIJC assists its *pro bono* partners by providing training, materials, support services and consultations. Largely as a result of the efforts of its *pro bono* partners, NIJC has helped thousands of noncitizens from more than 100 nations begin new lives in the United States. NIJC provides further assistance to asylum seekers through the National Asylum Partnership on Sexual Orientation (NAPSM), which serves immigrants seeking asylum based on persecution related to their sexual orientation, gender identity, or HIV status.

Our statement will focus on the impact of immigration court backlogs on vulnerable individuals, including asylum seekers. The courts' inefficiencies and delays create barriers to effective adjudication of cases, delay and sometimes prevent family unity, and decrease the level of *pro bono* attorney involvement in immigration cases. Our statement will also provide recommendations to cure many of these issues.

## II. Significant—and Growing—Delays in the Immigration Court System

In December 2010, the immigration court docket included more than 250,000 cases — a record high.[1] Despite hiring new immigration judges, the administration projects that the backlog will continue to grow. The Office of Management and Budget estimates that the backlog will reach nearly 350,000 by the end of Fiscal Year 2012.[2] The backlog in the Chicago immigration courts has nearly doubled in just the past two years.[3] A number of recent reports have highlighted the overburdened court system.[4] However, the nexus between the administration's drive to increase enforcement and the court backlogs has not been explored.

Last year the United States deported a record number of individuals.[5] More than half were identified through collaborations with local law enforcement agencies.[6] The planned expansion of collaborations with local police -- particularly through the Secure Communities program -- will drastically increase civil immigration apprehensions. Although Secure Communities has proven quite controversial, the administration insists that the program is mandatory and that it will operate in every state by 2013.

## III. Justice Delayed is Justice Denied

Court delays have a grave and far-reaching impact. Under international law, the United States is prohibited from returning refugees to countries where their "life or freedom would be threatened."[7] Due to immigration court backlogs, however, asylum seekers are often unable to retain legal counsel to assist in their cases, are held in unnecessary and arbitrary detention, and are deterred from pursuing legitimate claims. These barriers prevent *bona fide* asylum seekers from winning their asylum cases, and the United States removes them to countries where their life or freedom is threatened, in violation of its international human rights obligations.

### A. Barriers to Representation

Legal representation is critical to the ability of noncitizens to obtain immigration relief. Immigration law and the immigration court system are complex and difficult to navigate without competent legal representation. This is particularly true with respect to asylum seekers, who are almost three times more likely to be granted asylum if they are

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[1] TRAC, http://trac.syr.edu/immigration/reports/246/, February 7, 2011.
[2] http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jus.pdf, p. 707.
[3] http://trac.syr.edu/phptools/immigration/court_backlog/.
[4] See, for example, Transactional Records Access Clearinghouse, Syracuse University, Immigration Courts: Still a Troubled Institution, June 2009, available on line at http://trac.syr.edu/immigration/reports/210.
[5] http://www.ice.gov/news/releases/1010/101006washingtondc2.htm.
[6] http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[7] "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"], art. 33-1, 189 UNTS 150. Although the United States did not sign the Convention, it did sign the Protocol, which includes by reference the rights and duties set forth in the Convention.

represented by counsel than if they appear *pro se* in immigration hearings.[8] As most asylum seekers are indigent, *pro bono* attorneys play a critical role in asylum hearings.

The immigration court hearing delays, however, have made it increasingly difficult for NIJC to secure *pro bono* representation for asylum seekers. Many *pro bono* attorneys are reluctant to accept an asylum case for representation when they know their client will not receive a merits hearing for several years. It is difficult for *pro bono* attorneys to gauge whether they will have the time and resources to represent the client when they know the merits hearing will not be scheduled for several years. Due to frequent postponements of hearings -- usually with little notice -- attorneys must prepare for the same hearing several times. Unexpected postponements also add to their firms' costs, as they must pay expert witnesses and interpreters. Law firms are also unwilling to commit resources to *pro bono* asylum cases that will not be resolved for years.

### B. One-Year Asylum Filing Deadline

Asylum seekers must file their asylum applications within one year of their entry into the United States or they are barred from asylum, except for a few, limited exceptions. The Executive Office for Immigration Review's (EOIR) Immigration Court Practice Manual requires asylum seekers in removal proceedings to file their asylum applications in open court during an immigration hearing. However, the immigration court delays have caused many asylum seekers to be scheduled for their first court hearing many months after their one-year filing deadline for asylum eligibility. As a result, *pro se* asylum seekers who are not aware of the one-year filing deadline may fail to file their application on time and be barred from asylum simply because of their delayed court hearing. Even *pro se* asylum seekers who know about the filing deadline may struggle to file their applications within one year because there are no clear procedures for filing an asylum application outside of an immigration court hearing.

### C. Prolonged Detention

Although EOIR created an expedited docket for detained individuals, the court backlog has also impacted the adjudication of these cases. Attorneys in NIJC's Detention Project report that immigrants in detention now commonly wait from six months to a year for a merits hearing. Numerous nongovernmental organizations, including NIJC, as well as the Inter-American Commission on Human Rights, have provided detailed reports of the harsh conditions in immigration detention.[9] Vulnerable populations, including asylum seekers and victims of crime, are often re-traumatized by conditions of detention. Some vulnerable individuals are held in solitary confinement, "for their own protection," for the duration of their detention. The following cases from NIJC's detention docket illustrate these issues:

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[8] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295, 340 (2007).

[9] http://www.immigrationforum.org/images/uploads/2010/DetentionReportSummaries.pdf.

**Asylum Seeker: Detained Eight Months, Now Released**

**Myat**:[10] ICE detained Myat, a young Burmese man, for more than eight months due to court scheduling delays and to the court's inability to find a translator in his native language. Myat was finally granted asylum at his merits hearing and the Department of Homeland Security (DHS) waived appeal.

**Asylum Seekers: Detained for More than Six Months**

**Abdul:** ICE has detained Abdul, a Somali refugee, for three months. Abdul's merits hearing will not occur until September 2011 -- four months from now. Abdul has applied for adjustment of status, and he has a strong case for a 209(c) waiver, given the hardship suffered by Abdul and his family. In the alternative, Abdul has applied for asylum, withholding and protection under the Convention Against Torture; as he is from a minority clan and suffered past persecution, he has a high likelihood of success. At the time of his merits hearing, ICE will have detained him for more than seven months.

**Jasmine**: ICE currently detains Jasmine, who applied for asylum, withholding of removal and protection under the Convention Against Torture (CAT). Jasmine has been detained for more than three months and although she promptly filed her asylum application, the judge set her merits hearing more than two months after her last master calendar hearing due to court delays. Her hearing is scheduled in July 2011; if it is not delayed again, at the time of her merits hearing ICE will have detained her for more than six months.

**José**: ICE currently detains Jose, who applied for withholding and protection under CAT. He has been detained for 6 months. Although Jose timely submitted his asylum application, his merits hearing was set for over three months after his last master calendar hearing as that is the first available date the court had. By the date of his merits hearing, ICE will have detained him for eight months.

**Non-asylum Clients: Released After Being Detained for Five to Six Months**

**Juan**: ICE detained Juan for five months. Juan is a Mexican man who was eligible for non-LPR Cancellation of Removal based on hardship to his U.S. citizen wife, who suffers from mental illness, and his U.S. citizen son, who has severe developmental and physical delays. The immigration judge granted Cancellation of Removal; DHS waived appeal.

**Maria**: ICE detained Maria for six months, due to court delays. Maria is a lawful permanent resident. She is a single mother who is the sole provider for three young sons, two teenage children of her deceased sister, and her elderly mother. Maria's two-year-old son is deaf and suffers from severe developmental delays. Maria's mother suffers from

[10] Names have been changed to protect client confidentiality.

numerous medical issues and is frequently hospitalized. At her merits hearing, the immigration judge granted her LPR Cancellation of Removal; DHS waived appeal.

These cases demonstrate that the trauma of prolonged detention affects not only asylum seekers and vulnerable individuals, but also the families of individuals caught in the court backlog.

### D. Food and Housing Insecurity

Daily life is also difficult for asylum seekers who are not in detention. Statutory and regulatory language prohibits most asylum seekers from obtaining work authorization; they live under the poverty level. Most experience food insecurity and housing instability.

Finding a safe and stable place to live is a challenge for most asylum seekers, but the immigration court hearing delays exacerbate this already stressful situation. Many NIJC asylum seekers have to rely on shelters and charities for housing and other basic needs, but due to limited resources, many shelters limit their services to short-term assistance. As asylum seekers often have to wait three or four years to receive a decision from the immigration judge, they are forced to move from shelter to shelter, or in some cases live on the street.

Even asylum seekers fortunate enough to have family in the United States frequently encounter housing instability. Family members, often low-income immigrants themselves, who initially agree to support an asylum seeker, do not expect that they would have to provide food and housing assistance for several years while waiting for an asylum decision.

As hearing delays grow more extended, some asylum seekers have become so desperate for housing that they have chosen to move out-of-state to find stable housing, even if this move means that they will lose their *pro bono* representation.

### E. Separation from Family

For individuals forced to flee persecution in their home countries, court delays increase the time apart from their families. Separation from loved ones causes anxiety and stress, often exacerbating post-traumatic stress disorder caused by persecution and torture. Extended separation can be especially difficult for men from cultures where their identity as men is closely linked with their ability to protect and provide for their families.

**Chadian Husband Separated from His Wife for More than Four Years**
In late 2006, Joseph, a 28-year-old man from Chad, fled to the United States after the Chadian government severely tortured him. After obtaining *pro bono* representation through NIJC, Joseph and his attorney appeared before the immigration court and requested a merits hearing on his asylum case. The court scheduled the hearing for February 2009, more than one year later. At that hearing, the judge decided he needed additional testimony, and scheduled a second merits hearing for March 2010, more than one year later.

Shortly after the first merits hearing, Joseph discovered that his wife, who had remained in Chad, was ill and had been hospitalized. Desperate to see his wife, Joseph told his NIJC attorney that he wanted to return to Chad even if it meant abandoning his asylum case. Although he feared that the Chadian government would torture or kill him if he returned, Joseph told his attorney that if he died in Chad, at least he would have seen his wife again. Joseph's attorney convinced him to remain in the United States and promised to do everything he could to obtain an earlier hearing date. The attorney filed a motion to advance Joseph's hearing, but the immigration judge never responded. Then, in March 2010, on the date of the continued merits hearing, Joseph and his attorney learned that the judge was sick and had rescheduled his hearing for November 2010. Finally, in November 2010, over four years after he had entered the United States, the immigration judge granted Joseph asylum. Joseph is now petitioning for his wife to join him in the United States, but it may still be one or two years before Joseph can be reunited with his wife.

This case provides just one example of the thousands of asylum seekers each year whose separation from family members is exacerbated by immigration court delays.

### F. Abandonment of Bona Fide Cases

For some asylum seekers, the stress of extended delays in adjudicating the merits of their claim leads them to withdraw their applications for asylum and return to their home countries. These individuals provide the clearest example of the failure of the United States to comply with its international human rights obligations.

**Torture Survivor Abandons His Asylum Case**

In 2007, Andre fled the Central African Republic (CAR) after government soldiers killed his father and brutally tortured him. After entering the United States, Andre applied for asylum and NIJC obtained a *pro bono* attorney to represent him in his asylum case before the immigration court. Andre did not have employment authorization or any friends or family to help support him. He was extremely anxious to receive a decision on his case so that he could put the torture and pain he had suffered behind him. As a result, in April 2009, when Andre and his attorney attended an immigration court hearing, the attorney requested the earliest merits hearing date available; the judge scheduled the merits hearing in September 2009, four months later.

Due to that judge's imminent retirement, the court transferred Andre's case to a different judge, effectively canceling the September 2009 hearing date. When it became clear that Andre's merits hearing would now be delayed at least one year, his attorney requested an earlier date. The court denied his request.

After learning that his merits hearing would be substantially postponed, Andre became despondent. Extremely concerned about his family in the CAR, Andre decided to withdraw his asylum case so that he could return to the CAR, even though his attorney and therapist strongly advised against such action. In late 2009, Andre abandoned his asylum claim and returned to the CAR.

## IV. Recommendations

**Increase immigration court staff**

- The Department of Justice should create a feasible plan to drastically reduce the backlog. While EOIR has recently hired a number of judges, the backlog has not been impacted. At a minimum, DOJ should continue to hire immigration judges, and provide judges with law clerks in order to increase the integrity of the decision-making process.
- The Obama administration must take steps to ensure that the individuals apprehended through increased enforcement are provided with adequate due process in the adjudication system. They must ensure that EOIR is sufficiently resourced; if not, it cannot maintain the current historic levels of enforcement.

**Increase electronic efficiencies**

The immigration court should be provided with funding in order to adopt the e-filing standards and practices of the federal courts. This would reduce the workload of court clerks and promote prompt decision-making. Digital recording of immigration hearings would also make the process more efficient and ensure an accurate record of proceedings.

**Increase immigration judges' authority**

- To increase due process and judicial efficiency, immigration judges must be given control over their own docket and courtroom. Judges should have the discretion to defer cases that are not ripe for adjudication.
- As in federal court, immigration judges should also have and utilize authority over both parties appearing before the court. Currently, immigration judges have the authority to file complaints concerning "practitioners" who appear before them, but the definition of "practitioner" does not include attorneys who represent the Department of Homeland Security (DHS).
- Judges should have the authority to require that both parties (when represented by counsel) engage in a pre-hearing conference to determine if the matter can be settled without a hearing. If the DHS attorney fails to confer with the noncitizen's counsel prior to a hearing or fails to file motions or other documents in a timely manner, judges should also have the ability to find the DHS attorney in contempt.

**Access to counsel**

- Due to the critical need for representation in immigration court, the Department of Justice should increase funding for legal orientation programs and create a pilot project for appointed counsel.
- Immigration judges should also allow attorneys to enter a limited appearance for bond hearings to increase detained immigrants' ability to challenge their detention.

**Improve the Appellate System**

- Due to legislative restraints, many Board of Immigration Appeals (Board) decisions are unreviewable by the federal courts. It is therefore critical that the Board have adequate staffing and resources to carry out its role and ensure that noncitizens have access to due process at the appellate level.

- The Board should be required to provide the opportunity for oral argument when requested and should request amicus briefs before issuing precedential decisions.
- To enhance transparency and develop its case law, the Board should make non-precedential decisions publicly available.
- To increase professionalism in the system, the Board should have the authority to cite immigration judges and DHS attorneys who are abusive and should provide noncitizens with the right to move for reassignment to a different immigration judge on remand.

**Eliminate the one-year deadline**

- The Asylum Office currently refers all cases filed after the one year deadline to immigration court. Repeal of the one-year asylum deadline would allow the Asylum Office to adjudicate these cases, thus removing one source of the court backlog.

The New York Times

May 3, 2011

# As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions

By SAM DOLNICK

More than two years ago, a federal judge in New York began a crusade to find lawyers for the many immigrants who are detained or deported because they lack representation. Powerful figures, including Attorney General Eric H. Holder Jr. and Mayor Michael R. Bloomberg, heard the call and helped draw attention to the issue.

But the problem persists in immigration court, where defendants have no right to a court-appointed lawyer, forcing many to go without and drastically raising their chances of being deported. Although Mr. Bloomberg promised $2 million to train lawyers in immigration issues, the city has not produced the money.

On Tuesday, about 200 leaders from legal, governmental and immigration circles gathered in Manhattan to discuss the barriers that deny many immigrants proper legal counsel. Robert A. Katzmann, the federal judge who started the effort and organized the symposium, called the problem a "substantial threat to the fair and effective administration of justice."

John Paul Stevens, the retired Supreme Court justice, who galvanized immigrant advocates with a decision last year that said lawyers must tell their clients about the deportation consequences of pleading guilty, delivered the keynote address.

"The need for legal representation for immigrants is really acute," Mr. Stevens said. He urged the audience to push for Congress to grant state and federal judges discretion in deportation cases because, he said, "the consequences are just so drastic."

Immigrants' fate in deportation cases often comes down to whether they can afford a lawyer. Immigrants with legal representation are at least five times as likely to win their cases as those without, yet in New York only 40 percent of detained immigrants have lawyers, according to research by Judge Katzmann's group that was released Tuesday.

More than a quarter of immigration defendants who have not been detained do not have lawyers either, the study showed.

"The fact that so many can face such dire results at the hands of our legal system without the benefits of competent counsel is one of the blatant injustices of our time," said Matthew Diller, dean of the Benjamin N. Cardozo School of Law at Yeshiva University, where the conference was held.

The problem only gets worse when immigrants are sent to distant detention centers in places like Texas or Louisiana, as happens to nearly two-thirds of those taken into immigration custody in New York. Nearly 80 percent of those immigrants are unrepresented, according to the study, which examined Justice Department data from 2005 to 2010.

"If they don't have a lawyer, it's because they don't have anything," said Lynn M. Kelly, executive director of the City Bar Justice Center. "People beg, borrow and pass the hat around the community to hire attorneys."

But simply hiring a lawyer is not necessarily a solution. Lazy and unprepared lawyers fill immigration courts, bungling cases at grave costs to their clients, experts say.

"The too-often-poor quality of representation continues to undermine the effective administration of justice," said Judge Katzmann, who sits on the Court of Appeals for the Second Circuit.

More than 50 New York lawyers who have been expelled or suspended by the Justice Department have cases pending before the immigration courts or the Board of Immigration Appeals, the new research says.

People posing as lawyers are another common problem for vulnerable immigrants, many of whom cannot speak English. "Across New York, fraudulent legal service providers are making huge profits by defrauding immigrant communities," said Janet Sabel, an official in the state attorney general's office.

It is highly unusual for a federal judge to embrace a public issue with such vigor, but Judge Katzmann said his background — he is the grandson of Russian immigrants and the son of a refugee from Nazi Germany — had granted him a special sympathy "for those who come to this country and want to make it great."

His study group, which draws more than 50 immigration experts, has made some progress since it began work in 2008.

The Legal Orientation Program, a Justice Department project that advises immigrants on their rights, opened a New York City branch last year. The ranks of pro bono lawyers working on

immigration cases have grown, and the authorities have stepped up efforts to crack down on fraudulent lawyers.

But with much work remaining, many advocates looked to Mr. Bloomberg to fulfill his 2009 campaign promise to spend $2 million to train lawyers. Fatima A. Shama, the city's immigrant affairs commissioner, said the mayor had not forgotten.

"We will do what we need to do, not only to maintain our commitment around a campaign promise, but around what's right," Ms. Shama told the crowd.

At the session Tuesday, many acknowledged that there were no quick fixes to the challenges of immigrant representation.

"These problems have been around for a long time," said Claudia Slovinsky, a veteran immigration lawyer. She said that only a sweeping solution ensuring representation to all immigrants would address the fundamental inequalities.

"Everything we're doing in the meantime is short-term improvements of a weak system," Ms. Slovinsky said.

[End]

SUBMISSION FOR THE RECORD


**STATEMENT FOR THE RECORD FROM PHYSICIANS FOR HUMAN RIGHTS**

U.S. Senate Committee on the Judiciary

Senator Patrick Leahy, Vermont, Chairman, Presiding

*"Improving Efficiency and Ensuring Justice in the Immigration Court System"*

May 18, 2010

Physicians for Human Rights (PHR) is alarmed that people seeking humanitarian protection are encountering significant delays at Immigration Courts. Waiting for long periods while their fates hang in the balance imperils survivors of human rights abuses' health and safety. PHR urges the Administration and Congress to address this problem by referring defensive asylum claims and those made in expedited removal proceedings to asylum officers rather than Immigration Courts. Additionally, PHR strongly encourages limiting expansive mandatory detention laws that have led to a sustained increase in detained immigrants. People in detention suffer from severely limited access to legal, forensic, and other assistance that they need to present their cases in a timely and coherent manner. Reducing the use of detention in favor of community release on safeguards will in turn help the Executive Office for Immigration Review (EOIR) reduce processing times by enabling more individuals to get professional help preparing their cases.

PHR is an independent, non-profit organization that uses medical and scientific expertise to investigate human rights violations and advocate for justice, accountability, and the health and dignity of all people. We are supported by the expertise and passion of health professionals and concerned citizens alike. Health professional members of PHR have evaluated the mental and physical health of detained and non-detained asylum seekers and torture survivors since 1992.

Delays at Court

Recent increases in backlogs and processing times at Immigration Courts are well documented. The number of cases pending has grown steadily from less than 125,000 in FY1999 to more than 250,000 in FY2010.[1] Overall, the average number of days it took to resolve all cases jumped from 233 days in FY2009 to 280 days in FY2010, a 20.2% increase in processing time.[2] Individuals who win their cases wait far longer on average for a decision than those who are eventually removed. The average time a deportee waited for a court decision in FY2010 was 140 days, compared to 424 days for people whose cases were terminated because the government had not proven their removability. Processing time for people who were granted relief, including asylees and recipients of other forms of protection (including withholding of removal, relief under the Convention Against Torture, and visas for victims of trafficking, domestic violence and other crimes), was 696 days on average – nearly two years.[3] Delays also

[1] Transactional Records Access Clearinghouse, *Growing Backlog of Pending Cases in Immigration Courts*, SYRACUSE UNIVERSITY (February 7, 2011), http://www.trac.syr.edu/immigration/reports/246/include/pendingG.html.
[2] Transactional Records Access Clearinghouse, *Immigration Courts Taking Longer to Reach Decisions*, SYRACUSE UNIVERSITY (November 11, 2010), http://www.trac.syr.edu/immigration/reports/244/.
[3] *Id.*

disproportionately affect people with mental disabilities, many of whom are eligible for humanitarian relief based on the inhumane treatment they are likely to receive in their home countries.[4] These individuals often face numerous continuances for purposes of finding representation, guardians or other close friends to appear on respondents' behalves and for seeking mental status evaluations. Some also land in extended legal limbo when their cases are administratively closed – suspended, rather than resolved – because they cannot communicate well enough to defend themselves.[5]

Consequences of Delayed Adjudication for People Seeking Humanitarian Protection

Survivors of human rights abuse are among those who wait the longest for case resolution, and the processing delays affect their lives in profoundly negative ways. Many are not authorized to work in the US during the pendency of their cases, nor are they eligible for other benefits that might help them to support themselves, such as student financial aid. As a result, survivors of persecution must rely on the charity of family members, friends, and even strangers, to meet their most basic needs for up to years at a time. Like others living in poverty, applicants for protection must forego seemingly fundamental goods and services, such as primary health care.

Most of those seeking protection fled their countries to escape persecution, and they fear for the safety of those family members left behind. Unfortunately, the lengthy process of obtaining visas for dependent family members cannot begin until the primary petition is approved, a policy that leaves those family members in peril for increasingly long periods.[6] Worries like these combine with pre-existing traumatic experiences to produce significant levels of stress for this population. Survivors of persecution exhibit markedly elevated rates of post-traumatic stress disorder (PTSD) and other mental and physical health challenges that are exacerbated by lengthy waits in limbo. Ninety-percent of detained asylum seekers interviewed by PHR for our report *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* had clinically significant symptoms of anxiety, depression, PTSD, or some combination thereof.[7] The severity of these symptoms worsened the longer people awaited resolution of their cases.[8] Studies from around the world have reached the same conclusion: the length of the wait for a final decision is correlated to greater and more acute incidence of psychological distress in survivors of abuse.[9]

Uncertainty creates a condition of constant and heightened anxiety about unknown and unknowable dangers and outcomes, provoking a state of deep stress and priming individuals for pain.[10] The insecurity resulting from long delays in adjudication deprives survivors of persecution of a basic sense of

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[4] HUMAN RIGHTS WATCH & ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 28 (July 2010).

[5] *Id.* at 71-76.

[6] *E.g.*, Chip Mitchell, Court Keeps Asylum Seekers in Limbo, Chicago Public Radio, March 25, 2010, http://www.wbez.org/story/news/immigration/court-keeps-asylum-seekers-limbo#.

[7] PHYSICIANS FOR HUMAN RIGHTS & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON 57 (June 2003).

[8] *Id.* at 63.

[9] *E.g.*, Kathrine Hvid Schwarz-Nielsen & Ask Elklit, An Evaluation of the Mental Status of Rejected Asylum Seekers in Two Danish Asylum Centers, 19 Torture 51, 52 (2009) (discussing various research on point); Danny Rose, Detention Harms Asylum Seekers: Research, Australian Associated Press/Sydney Morning Herald, January 19, 2010, http://news.smh.com.au/breaking-news-national/detention-harms-asylum-seekers-research-20100120-mjdk.html.

[10] *E.g.*, Lisa Johnson Wright, Niloofar Afari, Alex Zautra, The Illness Uncertainty Concept: A Review, 13 Current Pain and Headache Reports 133, 134 (2009).

control and agency, exacerbating their perception of threat.[11] "There is nothing quite as frightening as the unknown, especially where your freedom is concerned,"[12] according to experts, and routinely subjecting the most vulnerable immigrants to years of terrifying uncertainty through the immigration process is unconscionable.

Extended waits for Immigration Court decisions pose particular dangers for people with mental disabilities. The population is disproportionately subject to mandatory detention based on criminal record, because, as in the broader criminal justice and civil commitment system, many first enter custody when they commit minor crimes as a result of mental illness.[13] Detention, especially for long periods necessary to resolve Immigration Court cases, is "medically traumatic and dangerous"[14] for people with mental disabilities. Detainees with mental disabilities have been inadequately treated and then left alone even though they were at known risk of suicide, resulting in several successful attempts;[15] placed in solitary confinement in lieu of receiving intensive therapy or a transfer to a specialized facility;[16] and even accused of faking their symptoms.[17]

Solutions Include Routing Expedited and Defensive Cases to Asylum Officers and Reducing Use of Detention

Congress and the Administration can take immediate steps to reduce delays and backlogs in Immigration Courts, thereby minimizing their negative effects on vulnerable immigrants. Potentially thousands of asylum cases[18] could be diverted out of the Immigration Court system annually if the Asylum Officers who work for U.S. Citizenship and Immigration Services were given jurisdiction (by Department of Justice and Department of Homeland Security) over defensive asylum claims and claims of persons subject to expedited removal. Numerous organizations and experts, including the American Bar Association Commission on Immigration, endorse the suggestion to route these cases to USCIS Asylum Officers[19].

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[11] Nicholas Carleton, Donald Sharpe, Gordon Asmundson, Anxiety sensitivity and intolerance of uncertainty: Requisites of the fundamental fears?, 45 Behaviour Research and Therapy 2307, 2307 (2007).

[12] J. Levin, Intervention in detention: Psychological, ethical and professional aspects, 74 South Afr. Med. Journal 460, 460 (1988) (*citing* L.J. West, *Effects of Isolation on the Evidence of Detainees*, DETENTION AND SECURITY LEGISLATION IN SOUTH AFRICA: PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF NATAL SEPTEMBER 1982 69, 71 (A. Bell and R. Mackie, eds., 1985)).

[13] *E.g.*, TEXAS APPLESEED, JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION 17 (March 2010) (hereinafter "Texas Appleseed"); Council of State Governments Justice Center, *Fact Sheet: Council of State Governments Justice Center Releases Estimates on the Prevalence of Adults with Serious Mental Illnesses in Jails* (June 1, 2009), http://consensusproject.org/jc_publications/council-of-state-governments-justice-center-releases-estimates-on-the-prevalence-of-adults-with-serious-mental-illnesses-in-jails/MH_Prevalence_Study_brief_final.pdf.

[14] Texas Appleseed, *supra* n.13, at 20.

[15] AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 41 (March 25, 2009).

[16] Nina Bernstein, Immigrant Finds Path Out of Maze of Detention, NY Times, Sept. 10, 2009, at A20.

[17] Texas Appleseed, *supra* n.13, at 25; *Problems with Immigration Detainee Health Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary,* 110th Cong. (2008) (statement of Gloria Armendariz, wife of former detainee Isaias Vasquez) http://judiciary.house.gov/hearings/pdf/armendariz060408.pdf.

[18] The ABA, for example, estimates that just one year of referrals of asylum seekers subject to expedited removal, and of defensive asylum seekers, to Asylum Officers for first adjudication (prior to referral to Immigration Courts) would have likely resulted in 5,400 asylum seekers winning their cases before reaching the Courts. AMERICAN BAR ASSOCIATION, REFORMING THE IMMIGRATION SYSTEM ES-20 (February 2010) (hereinafter "ABA Immigration Reform Report").

[19] *Id.* at ES-14.

In addition, Congress can and should aid EOIR in reducing its backlog by minimizing use of immigration detention. The population of detained immigrants has grown exponentially due to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996's expansion of mandatory detention categories. The burden on Immigration Courts has grown in lockstep with this expansion. Detained immigrants suffer from impaired ability to defend themselves in every respect imaginable: they are largely unrepresented[20]; they are more often than not held in isolated locations that are difficult to reach for forensic evaluators, family, friends, and others who might assist with case preparation[21]; and they suffer from limited access to legal materials and communications equipment.[22] Inadequate mental health staffing, failures to share medical records, and other deficits[23] cause frequently deteriorating mental health during detention,[24] compromising the functioning of people with mental disabilities in proceedings.

Lack of representation and other resources for detained people makes their cases more time-consuming and costly for Immigration Courts to resolve. EOIR itself has acknowledged that, "Non-represented cases are more difficult to conduct. They require far more effort on the part of the judge."[25] The corollary is also true: provision of even minimal professional assistance through Legal Orientation Programs (LOPs) in detention centers has been found to cut case processing times for beneficiaries by 13 days on average.[26] Release from detention would go much further than LOPs in empowering people to assemble coherent case presentations that could be quickly and efficiently adjudicated by Immigration Courts.

By limiting and rationalizing mandatory detention policies so that they apply only to individuals who pose a flight risk or danger to the community, Congress would avoid both "inefficient expenditure of resources" on unnecessary detention[27], and a notable degree of the burden and expense incumbent upon Immigration Courts as they struggle with the cases of ill-prepared and unassisted immigrants. Applicants for humanitarian protection will reap particularly meaningful benefits from reform of mandatory detention laws, as they have historically suffered longer sojourns in detention than other immigrants.[28]

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[20] The ABA finds that 84% of detained immigrants are unrepresented. *Id.* at ES-7.

[21] NATIONAL IMMIGRANT JUSTICE CENTER, ISOLATED IN DETENTION 7 (September 2010).

[22] *id.* at 8-9; NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, AMERICAN FRIENDS SERVICE COMMITTEE & NEW JERSEY ADVOCATES FOR IMMIGRANT DETAINEES, LOCKED UP BUT NOT FORGOTTEN 23-25 (April 2010).

[23] *See generally* U.S. DEPT. OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, OIG-11-62, MANAGEMENT OF MENTAL HEALTH CASES IN IMMIGRATION DETENTION (March 2011).

[24] Texas Appleseed, *supra* n.13, at 19.

[25] CHARLES KUCK & U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES 8 (Dec. 2004).

[26] Luis Perez, Legal Orientation Program Provides For More Efficient Immigration Court System, The Treasure Coast Palm, November 19, 2008, http://www.tcpalm.com/news/2008/nov/19/legal-orientation-program-provides-more-efficient-/.

[27] ABA Immigration Reform Report, *supra* n.18, at ES-12, ES-25-26; *also* DR. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2-3, U.S. Dept. of Homeland Security, Immigration and Customs Enforcement (October 6, 2009).

[28] HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 6 (2009); Associated Press, Immigrants Face Long Detention, Few Rights, March 15, 2009, http://www.msnbc.msn.com/id/29706177/ns/us_news-security.

SUBMISSION FOR THE RECORD



GEORGETOWN LAW

Philip G. Schrag
Delaney Family Professor of Public Interest Law
Director, Center for Applied Legal Studies

Hon. Patrick Leahy
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We are the co-directors of the Center for Applied Legal Studies, Georgetown University Law Center's asylum law clinic, in which students represent asylum applicants in the immigration courts in Arlington, Virginia, and Baltimore, Maryland. We write in response to your call for information about delays in the immigration courts and their effect on asylum seekers. We note that substantial delays have these negative consequences:

a) bona fide applicants often have to live for more than a year in poverty because (as explained below) they are not allowed to work while their cases wend their way forward on the immigration courts' dockets;

b) some of them are subjected to severe exploitation in the United States because, unable to work, they are at the mercy of relatives or others who use them as unpaid laborers;

c) their immediate relatives abroad are often at risk of imprisonment or death because the docket delay postpones their ability to petition for those relatives to be allowed to join them in safety; and

d) applicants who do not merit asylum are permitted to remain in the United States, without final orders of removal, for longer than they would if the courts' dockets were less clogged.

We can speak only to our own experience in with non-detained affirmative asylum cases that have been referred to the immigration courts in Arlington and Baltimore by the Asylum Office of the Department of Homeland Security (DHS).[1] Except as otherwise noted, this letter pertains only to those courts and that category of immigration court cases.

[1] These cases are known as "affirmative asylum cases" as opposed to "defensive" cases in which the applicant is first apprehended by DHS and seeks asylum for the first time in immigration court. A substantial majority of asylum cases are affirmative cases.



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An affirmative asylum case begins when an individual claims a well-founded fear of persecution by filing an application with DHS. Applications should be thoroughly documented; as the instructions from the Department put it, the applicant should

> Provide a detailed and specific account of the basis of your claim to asylum. . . . You must attach documents evidencing . . . the specific facts on which you are relying to support your claim.

Successful applications, particularly those filed by applicants who have lawyers, often include not only a detailed statement from the applicant but also dozens or sometimes hundreds of pages of supporting documentation, including not only published human rights reports but also family records and histories, party membership cards, arrest warrants, prison records, affidavits from friends and family who visited the persecuted applicant in jail, expert affidavits from anthropologists and political scientists, and medical and psychological records to prove the trauma that the applicant suffered.

Unfortunately, 56% of these applicants do not have lawyers or other legal representatives,[2] and of the 44% who do, many are represented by people who do only cursory jobs. The quality of many applications is therefore often poor; in particular, the unsuccessful applications tend to lack the necessary corroborating documentation.

After reading the supplied documentation, an asylum officer of the Department interviews the applicant and then decides whether or not to grant asylum. When the Department of Homeland Security does not grant asylum to an out-of-status applicant (at least 85% of the applicants are out of status at the time of the Department's decision),[3] it refers the case to immigration court for a removal hearing, at which the applicant may renew the asylum application, albeit in an adversarial hearing at which a DHS lawyer typically opposes a grant of asylum. The immigration courts play a crucial role in the asylum adjudication process. For applicants who get to explain how and why they were persecuted and fear future persecution, the immigration judges grant asylum to more than 50% of those applicants referred to them by the Department of Homeland Security.[4]

One reason why many asylum applicants who are turned down by DHS prevail in immigration court, despite the adversarial nature of the immigration court hearings, concerns representation. Many of those who were unrepresented at the DHS interviews and at the immigration court's calendar calls (at which judges usually urge them to secure representation) find lawyers for their hearings on the merits of their claims. And many of them overcome their failure to obtain sufficient corroboration in the first instance by collecting the necessary documentation in preparation for their merits hearings in

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[2] Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum, 52 William and Mary L. Rev. 651, 683 (2010)

[3] Id at 661 n. 23.

[4] U.S. Department of Justice, FY 2010 Statistical Yearbook, http://www.justice.gov/eoir/statspub/fy10syb.pdf at K2.

immigration court. (In addition, the government provides language interpretation, though not representation, at the immigration court stage). Almost all of the clients who have been represented by our clinic students were referred to immigration court by DHS,[5] yet they have won asylum at a rate of more than 90% in immigration court. Clinical law teachers around the country report similar success rates in their cases and agree that a principal reason is that the students collect extensive additional documentation that was not made available to DHS. In our experience, in virtually all of these cases, either our client was unrepresented when compiling evidence for DHS or was counseled or represented by a "notario" (a non-lawyer purporting to give legal advice) or by a lawyer who did not do a thorough investigation. In some cases, the applicant filed an application with an insufficient amount of corroborating evidence in order to meet the one-year deadline that Congress enacted in 1996.

Though represented asylum seekers who get a chance to explain their persecution claim in court and corroborate that history are often successful before immigration judges, they generally experience considerable delay.[6] While an application is pending, an applicant is not eligible for public social services and may not work in the United States. Some of them live with relatives who exploit them by requiring them to do unpaid household work under conditions of near-slavery, because the asylum-seekers are totally dependent on them for shelter. Others (including some of our clients) become homeless while waiting for their court hearings, go hungry, live in cars, or are unable to purchase prescribed medication (including medication for depression caused by the trauma that they experienced in their home countries). In addition, if an applicant's spouse or minor children are at risk abroad (and many are at more risk because a family member has fled the country), every day's delay increases the chance that they will be jailed, tortured or killed.[7]

In principle, there should not be long delays in the process. The government's goal is to adjudicate every asylum application within 180 days of its being filed. The asylum office of Homeland Security generally takes about 60 days to decide cases, leaving the immigration court with about four months to meet that goal. If the court takes more than 4 months *through no fault of the applicant*, the applicant receives permission to work while the case is pending.

In the typical case in which the applicant is summoned to immigration court, the judge will offer the applicant the "next available hearing date" to adjudicate the case. That date is often three or four weeks after the date on which the applicant first appears in immigration court. It usually takes more than three or four weeks to obtain a lawyer and to secure the necessary proof from the home country. In our clinic, once students start

[5] A very small percentage applied for asylum after being apprehended and therefore did not go through the DHS affirmative application process.

[6] Unfortunately, many indigent asylum seekers do not find counsel to represent them in these adversarial proceedings and never have a real opportunity to present their persecution claims. They are likely to be granted continuances to find counsel, but since many asylum seekers are indigent and only a limited number of pro bono attorneys are available, many don't succeed at this crucial task.

[7] After an applicant receives asylum, the U.S. government grants visas to these family members to join the asylee in safety.

working on a case, it usually takes two law students, working nearly full time, almost three months to obtain sufficient documentary evidence. Relatives and other witnesses abroad are often very hard to locate and contact, and then are usually very fearful for their own safety if they supply statements or documents for use in the immigration court proceeding. Once they agree to cooperate, the difficulties of translation and transmission often add at least a month to the time it takes to obtain their evidence.

Therefore, many applicants decline the judge's offer of the next available date. They need at least two or three months in order to obtain legal representation if they don't already have it, and to collect further corroborating evidence from their countries.[8] At that point, two things happen:

A) declining the offered date is recorded as a delay that is the applicant's fault, preventing the applicant from obtaining authorization to work in the United States after 180 days, even if the immigration court hearing is delayed much longer than 180 days.

B) the applicant goes to the back of the line on the court's hearing calendar. How long that line is depends on how congested the court is. In Baltimore, the calendar is not terribly congested, and applicants who decline the next available date can often obtain hearings within six months or so. But the Arlington immigration court has a much longer backlog. The length of the backlog depends on the particular judge, but Arlington asylum cases are often scheduled for hearing more than a year after the initial calendar call at which the applicant declines the "next available date," and at least one judge is currently (in May, 2011) scheduling cases into 2013. So applicants who live in Virginia or the District of Columbia may have to wait, without permission to work, and while their close relatives are at risk, for a year or two before being able to have their case heard in immigration court.[9]

A retired immigration judge has told us of a Department of Justice practice that exacerbates this problem. We understand that every month, a statistical office within that Department sends the assistant chief immigration judge for each region a list of how many cases each immigration judge has resolved within 180 days and how many have lingered beyond 180 days, and that the judges (who serve at the pleasure of the Attorney General) take these statistics very seriously because they affect their performance reviews. However, the statistical office does not distinguish between cases that are resolved just beyond the 180-day mark and those that go far beyond that limit. Furthermore, any case in which an asylum applicant has asked for a delay does not count as a "late" case for purposes of these statistics. Therefore, judges have incentive to encourage applicants to ask for delays. In addition, in such cases, and even in those cases

[8] For a detailed example of the efforts required to obtain corroborating affidavits and other documents, see David Ngaruri Kenney and Philip G. Schrag, Asylum Denied 95-147 (Berkeley: Univ. of Calif. Press 2008).

[9] We do not know first hand whether the backlog in the Arlington immigration court is typical, but the Transactional Records Access Clearinghouse reported in February, 2011, that "The average time these pending cases have been waiting in the Immigration Courts of the Executive Office for Immigration Review (EOIR) is now 467 days, compared with 456 days at the end of September last year." TRAC, Immigration Case Backlog Still Growing in FY 2011, http://trac.syr.edu/immigration/reports/246/

in which the applicant has not asked for a delay but the 180-day limit has been reached, they have no incentive to put the case on the hearing calendar promptly. In fact, they have the opposite incentive. There is no penalty for further delay, so newer cases, in which the limit has not been reached, as well as other cases (such as detained cases) fill the short-term docket, and older cases get even older. (The information in this paragraph is necessarily second-hand, as we do not have access to the internal procedures of the immigration courts, but perhaps your staff could make inquiries about the courts' efforts to schedule prompt hearings for asylum cases that have been on the docket for more than 180 days).

Several possible approaches to the problem of delay are worth considering. As a first step, if it is true that the statistical reports from the Department of Justice create incentives for judges to delay further the oldest cases, the statistical model should be modified to report how many asylum cases have lingered on a judge's calendar for more than 180, 270, and 360 days.

Second, where an applicant declines the "next available date" for a hearing and requests a postponement of the hearing for up to six months so that he or she can obtain representation and collect the necessary evidence, the period of time requested could also postpone the time when the applicant would receive work authorization, but any *additional* time that the applicant is forced to wait for a hearing, because the court's calendar is congested, should not be regarded as the "fault" of the applicant. For example, if an applicant asked for three months in which to collect evidence, the applicant might have to wait an additional three months before receiving work authorization, but if the judge postponed the hearing for a full year because of docket congestion, the applicant should not have to wait the entire year before being able to work.

Finally, as the American Bar Association has demonstrated in its exhaustive report on the immigration courts,[10] the full solution of the problem of court congestion must involve providing the immigration court with adequate numbers of judges, law clerks, and other staff support to enable them to judge cases fully and professionally without creating ever-greater backlogs on their dockets. Providing the immigration courts with sufficient resources will enable removal orders to be entered promptly in cases in which no relief is warranted and will offer genuine asylum applicants a timely day in court.

[10] ABA Commission on Immigration, Reforming the Immigration Courts (2010). The Executive Summary appears at http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf. The full report appears at http://www.americanbar.org/content/dam/aba/administrative/immigration/coi_complete_full_report.authcheckdam.pdf

In short, immigration court delays are detrimental to the lives of asylum seekers who are determined to be refugees and to the effectiveness of the system as a whole. We urge Congress and the Department of Justice to find ways, including those suggested above, to address this serious problem.

Sincerely,

Philip G. Schrag
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of Public Interest Law

Andrew I Schoenholtz
by PGS

Andrew I. Schoenholtz
Visiting Professor of Law

SUBMISSION FOR THE RECORD


*Protecting Immigrant Women and Girls Fleeing Violence*

**Written Statement for the Record**
**Testimony of Jeanne Smoot, JD, MALD**
**Director of Public Policy**
**Tahirih Justice Center**

**Hearing on:**
**"IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM"**

**Senate Committee on the Judiciary**
**May 18, 2011**

Chairman Leahy and Honorable Members of the Committee:

Thank you for convening this hearing on the immigration court system, and for providing the opportunity to share the perspectives of the Tahirih Justice Center ("Tahirih") on the impact that court delays have on women who have fled gender-based persecution and seek refuge in the United States. Tahirih deeply appreciates this Committee's attention to the need for swift access to justice for victims of persecution, and we look forward to further opportunities to assist the Committee as it considers proposals to reform the immigration court system.

Tahirih is a national legal advocacy organization with offices in Falls Church, VA, Houston, TX, and Baltimore, MD, that provides free legal representation to women and girls fleeing human rights abuses such as domestic violence, rape, human trafficking, female genital mutilation, torture, "honor" crimes, and forced marriage. Since 1997, through direct services and referrals, Tahirih has assisted over 12,000 women and children. Rooted in our direct services experiences, Tahirih's national advocacy initiatives seek systematic change to ensure the long-term protection of women and girls from violence.

Tahirih has a substantial stake in ensuring that immigration courts operate in an efficient and just manner. The women and girls we represent constitute a highly vulnerable population of asylum-seekers that can find themselves in especially precarious situations while they await a decision on their case. In some cases, long delays and court backlogs can even compromise the ability of women and girls fleeing gender-based violence to move forward with their legal claims.

In Tahirih's experience, when an asylum hearing is delayed for any reason, an asylum-seeker is typically unable to get a new hearing date until well over a year after the originally scheduled court date. For example, in February of 2010 a Tahirih client's asylum hearing was cancelled due to a record-breaking snowstorm in the Washington, DC area. Although this delay was caused by extraordinary circumstances beyond her control, her asylum hearing was not re-scheduled until June of 2011—*16 months* later.

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Such long waits for hearings in immigration court, coupled with other crippling constraints imposed on asylum-seekers during the pendency of their claims (a lack of access to work authorization[i] or public benefits), can be particularly devastating for women and girls fleeing gender-based persecution. Women and girls seeking asylum have often rejected cultural norms or practices (such as female genital mutilation or forced marriage) that make them unable to access help from their own families and communities, isolating them from the most common support systems available to other refugees or immigrants seeking protection in the United States.[ii] For example:

- One of Tahirih's clients, a woman who fears that both she and her daughter will be subjected to female genital mutilation if they are returned to her home country in West Africa, is *still waiting* for the immigration court in Houston, Texas, to reschedule a hearing that has already been postponed twice because the immigration judge assigned to her case is on extended leave. Disowned by her family and forced to take whatever help with housing she could find while her case languishes, the client and her two small children had to re-locate from Houston to Austin, Texas. The client's mental health is deteriorating, and she has lost the benefit of having a social worker from our Houston-based office provide case management services to ensure that she has access to medical care, counseling, and other desperately needed basic services.

- In the case of another Tahirih client, a woman from Liberia who faced persecution at the hands of Charles Taylor's brutal regime, long scheduling delays have forced her to wait almost *two and a half years* for a hearing on the merits of her claim—and, because of confusion over when to restart the "clock" that counts how long her claim has been pending and thus when she can access work authorization, she has still not received work authorization. She has no choice but to rely on others for her most basic daily needs (such as food and shelter) and has difficulty securing the ongoing mental health treatment she needs to recover from the years of torture she endured in her home country.

This prolonged uncertainty and debilitating dependence can be profoundly depressing and re-traumatizing for victims of persecution, whose lives may literally hang in the balance of the decisions that the immigration court will ultimately make. Although Tahirih's social workers diligently try to connect our clients with housing, counseling, and other help to meet their basic needs (through shelters, faith communities, etc.), there are few resources available to help asylum seekers survive while they prepare their application and await a decision on their case. In fact, one Tahirih client became so desperate that when she overheard a family speaking her native language at a bus stop, she went up to them and implored them to take her in. In some instances, this sort of random appeal does lead our clients to experience the wonderful kindness of strangers. In other instances, however, a client may find herself in renewed danger, trapped in an abusive or exploitative situation in the country where she hoped to find safety and protection.


The chronic and growing backlogs in the immigration court system can also adversely affect an asylum-seeker's ability to successfully present and pursue her asylum claim. Many asylum-seekers rely on non-profit or pro bono attorneys for legal representation, and significant delays in court proceedings can affect their ability to enlist and retain such counsel. The Tahirih client referenced above, who was forced to relocate from Houston to Austin, Texas, to find shelter for herself and her children, does not have access to transportation to return to Houston to work with her Houston-based pro bono attorneys, nor does she have anyone to drive her to appointments with her attorneys. She is now risks losing her pro bono representation and limiting her access to Tahirih's specialized expertise. The ultimate harsh consequence of court delays in this client's case, therefore—as in other gender-based asylum cases that often present complex legal issues—may be that her very ability to prepare her case and obtain protection is jeopardized.

Finally, the lack of binding guidance[iii] as to the legal standards that should govern gender-based asylum claims compounds the adverse impact that immigration court delays have on women asylum-seekers. The combination of all these factors uniquely places women and girls at increased risk of being subjected to long delays as their cases are shuttled through repeated cycles of appeals and remands in the immigration court system. While the scope of this hearing does not expressly extend to this pressing concern, we urge the Committee to take action to set clear national policy on gender-based asylum claims, and commend legislation introduced by Senator Leahy last March, the Refugee Protection Act of 2010 (S. 3113), for provisions he included to clarify the proper legal framework for evaluating gender-based claims.

We deeply appreciate this opportunity to share Tahirih's perspectives and experiences with the Committee. Please do not hesitate to contact us if we can provide additional information. Thank you.

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[i] Asylum seekers are statutorily unable to obtain work authorization until their claim has been pending for 180 days, and are ineligible for most forms of public assistance during that time. INA § 208(d)(2). In addition, immigration judges can start and stop the asylum "clock" (which counts how many days an asylum claim has been pending) for dozens of different clock-impacting events. See Office of the Chief Immigration Judge's Operating Policies and Procedures Memorandum (OPPM) 05-07: "Definitions and Use of Adjournment, Call-up and Case Identification Codes" (Jun. 16, 2005), available at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm (reviewing the 55 separate codes immigration judges must use to designate types of adjournments, 27 of which toll the clock until the next hearing). Current regulations toll the 180-day clock for any applicant-caused delay (8 C.F.R. § 208.7(a)(2)), even for reasonable requests related to the full and fair preparation of the case (such as requests to reschedule or continue a hearing to enable all evidence to be presented).

Given current court backlogs, therefore, asylum-seekers who ask for continuances in order to fully prepare their cases are perversely punished not only by enduring tortuously long waits to schedule that continued hearing, but also, by being prevented from obtaining employment authorization or having any other means of support for far longer than the prescribed 180-day waiting period.

[ii] Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (2009), at 35 (*available at* http://www.tahirih.org/2009/10/asylum-report/).

[iii] The Department of Justice issued draft regulations intended to govern gender-based claims in 2000; these draft regulations have never been updated or finalized.

SUBMISSION FOR THE RECORD

May 16, 2011

Chairman Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Chuck Grassley
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Statement of the Constitution Project Submitted to the Senate Judiciary Committee in Connection with the May 18, 2011 Hearing, "Improving Efficiency and Ensuring Justice in the Immigration Court System"

Dear Chairman Leahy and Ranking Member Grassley:

The Constitution Project ("TCP") submits this letter to assist Congress as it considers the challenges faced by the immigration courts. We urge Congress to enact critical reforms to ensure that we adequately protect both our nation's borders as well as the rights of the individuals who seek asylum on our shores. We also urge Congress to use its oversight authority to encourage and facilitate reform efforts by the Department of Justice (DOJ) and the Department of Homeland Security (DHS). Recent years have seen a dramatic increase in the number of non-citizens detained by U.S. immigration officials. Moreover, non-citizens facing removal are subject to ever-lengthening detention periods while their cases are processed, frequently with very limited procedural and due process safeguards and often under circumstances and conditions that have been harshly criticized. In addition, non-citizens subject to removal proceedings frequently have little or no access to legal representation in these proceedings.

TCP's mission is to promote and defend constitutional safeguards. In 2009, TCP's bipartisan Liberty and Security Committee, comprised of an ideologically diverse group of prominent Americans, issued a report entitled *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*,[1] which highlighted its concerns about the increasing reliance on and length of immigration detention and the limited access to counsel afforded to non-citizens facing removal. In this report, the Committee makes a number of specific recommendations aimed at reforming the immigration detention system and at improving access to counsel for non-citizens in removal proceedings. Notably, many of these reforms would not only enhance the currently limited constitutional rights afforded to non-citizens subject to removal proceedings, but would also help ease the backlog faced by the immigration courts by making the process more efficient. Greater access to

[1] This report and list of signers is available at http://www.constitutionproject.org/pdf/359.pdf.

counsel will make the removal process more focused and streamlined, as attorneys present well-organized cases that clearly and concisely identify issues relevant to relief. This, in turn, will help increase the efficacy of the process and shrink the considerable delays that can lead to a backlog of cases and prolonged detention periods.

In particular, the Committee urges Congress to take the following actions to provide greater access to counsel:

- All indigent non-citizens in standard immigration removal proceedings should have access to government appointed and funded legal representation where *pro bono* services are not available. Legal representation is essential to ensuring that basic due process rights are actualized, particularly given the potential consequences of a removal order. Legal representation would also, as noted above, make removal proceedings more efficient, thereby speeding the process and ultimately lowering costs.
- Understanding that government appointed and funded counsel is, at the present time, unlikely to be undertaken, Congress should take the interim step of passing legislation to allow immigration judges the discretion to appoint counsel for indigent non-citizens in all standard immigration removal proceedings. In addition, immigration judges should be required to appoint counsel for indigent non-citizens in standard immigration removal proceedings where at least one of the following factors is present:
    - (i) Where the legal and/or factual issues involved are particularly complex.
    - (ii) Where non-citizen children are unaccompanied by an adult.
    - (iii) Where non-citizens are unable to represent themselves due to mental illness, extreme emotional distress, or other disability.
    - (iv) Where non-citizens seek relief under the Convention against Torture.
    - (v) Where removal would impose a greater than usual hardship due to the extent of the non-citizen's ties to the United States and/or the lack of ties to the person's country of origin.
- While we applaud Congress' partial expansion of the Federal Legal Orientation Program in 2006, the program should be expanded to *all* respondents in removal proceedings. The Department of Justice ("DOJ") has concluded that the program increases the likelihood of a just result and saves federal dollars by expediting processing times and decreasing detention terms.
- A federally-funded system should be established to refer indigent non-citizens in removal proceedings to *pro bono* attorneys.

In addition, Congress should use its oversight authority to encourage DHS and DOJ to take the following actions to improve access to counsel:

- The Board of Immigration Appeals' Pro Bono Project should be expanded to accommodate a larger percentage of the Board's caseload. Established in 2001, this effort helped match nearly 300 non-citizens with *pro bono* counsel by 2004.
- DOJ should provide guidance to immigration judges on how to encourage *pro bono* representation for non-citizens in removal proceedings. For example, where appropriate, immigration judges should grant adjournments that allow indigent non-citizens sufficient time to secure representation by law school clinics or other *pro bono* providers.

- The barriers to the attorney-client relationship in immigration proceedings should be minimized or removed. The Committee recommends that:
    - The Department of Homeland Security ("DHS") and DOJ adopt regulations requiring that, in determining whether to transfer a detainee, the agencies should consider whether such a transfer would adversely affect an existing attorney-client relationship, and if so, weigh this as an important factor against any such transfer.
    - DHS and DOJ adopt regulations requiring that in deciding the locations for construction and use of detention facilities, an important factor in choosing such locations should be whether the geographic areas provide sufficient access to interpreters and attorneys.
    - The 30-day time limit to file a Notice to Appeal with the Board of Immigration Appeals following receipt of the Immigration Court's decision should be extended to 60 days to allow sufficient time for a non-citizen to locate and retain counsel.
    - Information on petitioning for review in federal courts should be provided to non-citizens whose initial appeals to the Board of Immigration Appeals are rejected.

As noted above, the Committee also made a number of recommendations aimed at reforming the immigration detention system itself. Several of these would not only shorten the duration of detentions but would also help speed the processing of cases and significantly improve the constitutional safeguards afforded those subject to removal proceedings. Specifically, Congress should encourage DHS and DOJ to improve the detention system as follows:

- DHS should amend its regulations to require that "credible fear" interviews of non-citizens seeking relief from removal (e.g. asylum) take place no later than two weeks after apprehension. Although we support existing DHS practices that require a 48-hour "cooling off" period between a non-citizen's arrival and his or her credible fear interview, we are concerned that too many applicants are subject to long periods of detention while they await their interviews.
- In the case of non-citizens subject to standard removal proceedings, DOJ and DHS should implement regulations to establish a maximum time limit between the initiation of removal proceedings and the date of a merits hearing before an immigration judge. There is currently no such maximum time limit, and many non-citizens are consequently subject to detention for lengthy periods of time before they receive hearings on the merits of their cases. We propose that authorities establish a reasonable limit of 90 days.
- DHS should implement its own Inspector General's recommendations regarding the monitoring of the cases of non-citizens subject to final orders of removal. Under current regulations, non-citizens who are detained following a final order of removal receive hearings ninety days and six months after the date of the final order of removal to determine whether further detention is warranted. Improved tracking of these cases is critical to ensuring non-citizens receive their ninety-day and six-month hearings in a timely fashion. DHS should also ensure that detainees have ready access to information about the status of their hearings. Finally, DHS should prioritize the securing of travel documents for non-citizens who would present a danger to the public or a national security threat.

- DHS should implement an administrative complaint process for untimely six-month reviews in order to help ensure that the agency conducts these hearings in a timely manner.

The Constitution Project urges Congress to carefully consider the recommendations we have highlighted here and those detailed more fully in the Liberty and Security Committee's report.

Sincerely,

Mason C. Clutter

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SUBMISSION FOR THE RECORD

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Senator Patrick Leahy, Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

May 13, 2011

Dear Senator Leahy,

I write to share the impact of immigration court backlogs on asylum-seekers represented by the Immigration Law Clinic at the University of Arizona's James E. Rogers College of Law. I am co-director of the Immigration Law Clinic. In that capacity, I supervise law students in the representation of immigrants who are in deportation proceedings and are detained in Eloy Detention Center, which is located about one hour from Tucson. Many of our clients include asylum-seekers.

I would like to share specific information about the time trajectory of the cases of four asylum-seekers we have represented in recent years. I think this information demonstrates the severity of the problems related to court backlogs for detained asylum-seekers.

**CASE 1: Ms. T, detained 10 months (March 3, 2010 to January 11, 2011)**

Ms. T fled an African country after undergoing female genital mutilation, imprisonment, and torture in her home country related to her family's politics and tribal membership. She fled half way around the world on her own and then declared asylum at the U.S./Mexico border. She was immediately taken into immigration custody on March 3, 2010. Her individual hearing took place on November 23, 2010. We were unable to complete the hearing at that time due to a delay in processing her biometrics. Therefore, the Immigration Judge could not issue his decision until January 11, 2011.

During this entire ten month period, Ms. T was detained in Eloy Detention Center, where no one else spoke her language. When we came on the case, five months into her detention, she was so traumatized that we could not get through a single interview without extended periods of weeping. After several months of working closely with her law student representatives and a dedicated volunteer interpreter, we were able to piece together her story, which turned out to be a very strong basis for asylum. Even after her hearing, which addressed all the government's concerns about her claim, she was still detained for nearly two more months, including the Christmas holiday, because of government delays with her biometrics processing.

**CASE 2: Mr. S, detained over two years (May 12, 2009 to present)**

Mr. S was initially taken into immigration custody on May 12, 2009. His individual hearing on his asylum claim from Nepal took place on November 20, 2009. The hearing could not be completed in a single day, so it had to be continued, and the next available day was January 26, 2010. The Immigration Judge issued his decision on February 2, 2010. Thus, Mr. S was detained for 9 months until his initial asylum hearing was completed. Although it may be beyond the scope of the Judiciary Committee's review, it is worth noting that it took another six months for the BIA to issue a decision on his appeal, and the Ninth Circuit is still reviewing his final appeal. During these months in detention, Mr. S has suffered a variety of increasingly serious medical and mental health concerns, including depression, fatigue, discomfort, and pain due to untreated Hepatitis C.

**CASE 3: Mr. M, detained 8 months (March 14, 2009 to November 16, 2009)**

Mr. M. survived forced conscription in Afghanistan as a teenager and witnessed the beheadings of his father and brother by the Taliban as a young man. He then lived in California for years as a lawful permanent resident with his mother and sisters. Despite the fact that he had a very strong asylum claim, he struggled for months without a lawyer and his hearing was repeatedly continued. Finally, in August 2009, the Immigration Law Clinic assumed his representation and successfully represented him in a hearing on November 16. He suffers from PTSD and many of its effects were exacerbated by the 8 months he spent in detention, thousands of miles away from his family.

**CASE 4: Mr. U, detained 18 months (from February 1, 2008 to August 17, 2009)**

Mr. U was initially issued a Notice to Appear on February 1, 2008. He had the first day of his individual hearing on January 12, 2009, nearly one year later. This time elapsed due to his struggles to find representation in his complex claim for asylum based on sexual orientation. The Immigration Clinic assumed representation for Mr. U in February 2009 and prepared for the second day of the hearing, on May 6, 2009. Although all the evidence was submitted at that time and neither the government nor our client had anything further to add, the IJ then took three more months to write his final decision, which was issued on August 17, 2009.

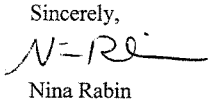
Mr. U suffers from bipolar disorder, which was exacerbated by his extended stay in detention. His grandmother also passed away while he was detained, and he lost his opportunity to be with her in her final hours because his requests for a brief parole from detention were denied.

I hope these cases give you a glimpse of the human toll of the extended waiting periods at each stage of the asylum process. Clearly, the lengthy delays have a particularly devastating impact on asylum-seekers who are detained. As a result of detention, they are both prejudiced in their ability to successfully bring their claims and

deeply emotionally and physically compromised by their extended stays in the detention facility.

Thank you very much for the opportunity to submit this letter and for your consideration of these important issues. If I can supply you with any further information, please do not hesitate to contact me.

Sincerely,



Nina Rabin
Co-Director, Immigration Law Clinic
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SUBMISSION FOR THE RECORD

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VERA INSTITUTE OF JUSTICE

**STATEMENT OF THE VERA INSTITUTE OF JUSTICE**

**SUBMITTED TO THE SENATE JUDICIARY COMMITTEE**

**FOR THE HEARING "IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM," MAY 18, 2011**

The Vera Institute of Justice (Vera) has managed the Legal Orientation Program (LOP) for the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice since 2005. The LOP seeks to educate detained persons in removal proceedings—84 percent of whom receive no legal representation—about their rights and the immigration process so they can make better-informed decisions, thus increasing efficiencies in the immigration court and detention processes.

Analysis of program data shows that LOP participants move through immigration court faster. Detained LOP participants have case processing times that are **13 days shorter** on average than detained persons who did not participate in the program. With the average detention cost to Immigration and Customs Enforcement (ICE) being $122 a day, the LOP may represent important resource-savings for the government. Moreover, the LOP benefits ICE, detention facility staff, immigration judges, and detained persons.

- **ICE** can remove more people without increasing the number of detention beds because shorter case processing times can lead to fewer days in detention and more available bed space. Alternatively, ICE can remove the same number of people using fewer detention beds.
- **Detention facility staff** describe reductions in behavior problems when detainees have access to legal information.
- **Immigration judges** report that the LOP increases court efficiency by preparing respondents for the court process and educating them about their eligibility or ineligibility for relief.
- **Detained persons facing removal** who are eligible for relief are more likely to obtain it, while those who are ineligible for relief are more likely to agree to depart the country without delay.

LOP services were provided to nearly **63,000 detained persons in FY 2010** in 27 sites nationwide at a cost of **$4.6 million.** Vera has been asked to estimate how much it would cost to expand the LOP to all immigration facilities in the nation. Our estimate, based on models derived from operating the existing program, is around $18 million. With this, LOP could serve approximately 160,000 people, which includes all detained individuals in EOIR removal proceedings (125,580 people) plus detained individuals who are not in EOIR removal proceedings but access LOP.

We note that in calculating costs we did not have access to all the ICE data that would have been desirable. Our models also do not adjust for any changes to the detention system that ICE may undertake in the coming years. Finally, our cost estimate does not include two desirable enhancements to the current level of LOP services—enhanced *pro bono* attorney and social service coordination—which would bring our estimate up to around $22 million.

**National expansion of the LOP could lead to potential cost savings of $177 million.** This figure is based on applying the 13 days court case processing time savings to a nationwide program serving the 125,580 people who go through EOIR removal proceedings each year. In estimating net savings to the government, the cost of the LOP (with the above enhancements) has been deducted from the detention cost savings.

*For additional information, contact Stacey Strongarone, Director of the Legal Orientation Program at the Vera Institute, at (212) 376-3074 or sstrongarone@vera.org.*

SUBMISSION FOR THE RECORD

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May 16, 2011

VIA E-MAIL

Senator Patrick Leahy
Washington Office
437 Russell Senate Bldg
United States Senate
Washington, DC 20510

Re: Statement in Connection with Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System"

Dear Senator Leahy:

Please let me express my thanks to you and the members of the Senate Judiciary Committee for holding a hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System." Thank you also for the opportunity to submit a statement in connection with the administration of justice for immigrants in removal proceedings.

I am a partner at Foley & Lardner LLP, a law firm with twenty-one offices located throughout the United States and across the globe. Attorneys in all of Foley's U.S. offices have provided *pro bono* legal assistance to asylum seekers and refugees. In our Midwestern offices alone, our attorneys provided more than $1 million worth of legal services to asylum seekers and refugees in the last year in conjunction with the National Immigrant Justice Center's *pro bono* program.

Despite our very strong commitment to providing *pro bono* assistance in these cases, it is becoming increasingly difficult to do so. From our experience, it is clear that the immigration court system is not being given resources sufficient to engage in a thorough, accurate, and timely adjudication of our clients' cases. In particular, the lack of a sufficient number of judges and law clerks leads to extended delays in immigration court hearings, as well as an epidemic of rescheduled hearings.

For example, we represented a mother from Venezuela seeking asylum for herself and her children after numerous incidents in which she was beaten and harassed by supporters of President Chavez. Her case was set for a merits hearing in January 2008 and our attorneys spent hundreds of hours preparing for the hearing, including preparing prehearing submissions and spending three days preparing our clients and witnesses for testimony. When we arrived at the hearing, the immigration judge informed us that he needed to pick up his sister from a doctor's appointment and would need to reschedule the hearing. The immigration judge retired the following month and the merits hearing was not rescheduled until December 2010, when our client and her family were finally granted asylum.

We also currently represent an individual from Eritrea who escaped from a prison camp, where he experienced unspeakable torture, and fled to this country. We filed his asylum application in December 2008 and, despite multiple motions, have yet to receive even a date for a merits hearing. Given our experience in other cases, we do not expect the hearing to be held any earlier than 2013 – more than four years after our client filed his application. In the meantime, our client continues to be separated from his wife and young son – who is now growing up without his father.

In another case involving an individual from Eritrea, in what was supposed to be an expedited proceeding, our attorneys appeared at the merits hearing only to learn that the immigration judge had, without any notice, unilaterally rescheduled the merits hearing for a date almost two years in the future.

These types of delays and cancellations not only cause undue suffering to our clients, but they significantly impact our ability to continue providing *pro bono* representation in immigration cases. At the most basic level, these immigration court inefficiencies require us to spend substantially more time per case than would otherwise be required. For example, in the course of our representation of the family from Venezuela discussed above, we had to prepare for the hearing twice – including updating our pretrial submissions, securing an updated expert report, and spending several days preparing our witnesses for a second time. To make matters worse, the attorney with primary responsibility left Foley for a new position after the hearing was rescheduled and we had to find a new attorney to handle the matter.

Indeed, in the last two years, we have had to find substitute attorneys on at least a dozen matters as attorneys have left the firm in the intervening years that it now takes to get to a hearing. In short, increasing a case's adjudication time from two to five years exponentially increases the likelihood that an entirely new team of attorneys will handle the case before completion; which, again, substantially increases the amount of time which we must devote to the case.

The fact that asylum cases are now taking such an enormously long time also means that we can take on fewer cases. Attorneys are naturally reluctant to take on a new *pro bono* matter when they still have one pending. Moreover, asylum cases have historically been attractive to young attorneys in our firm looking to obtain trial experience and, frankly, these cases become less attractive when the hearing will not take place for at least three years, if not more.

Increasing the number of immigration judges, while desperately needed, is not enough. In our experience, it appears that immigration courts also lack basic court infrastructure, such as dedicated judicial law clerks, electronic case filing systems, and modern docketing systems. Moreover, many cases could be more easily and quickly resolved by alternate mechanisms (such as a referral of a case to the Asylum Office), mechanisms which would likely produce resource savings for the government as well as more accurate results for our clients. Improving the system would

undoubtedly require additional resources, but even more, it requires the political will to take steps to force the system to change.

These barriers to representation cannot be allowed to persist. The necessary resources and attention must be given to these cases by the Department of Justice, to ensure that the system respects the rights of all concerned.

Sincerely,

Ellen M. Wheeler