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EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

OF THE

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EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

THURSDAY, JUNE 17, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:13 a.m., in room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (Chairwoman of the Subcommittee) presiding.

Present: Representatives Lofgren, Jackson Lee, Pierluisi, Chu, and King.

Staff present: (Majority) Hunter Hammill, USCIS Detailee; Traci Hong, Counsel; Andrés Jimenez, Staff Assistant; and George Fishman, Minority Counsel.

Ms. LOFGREN. This hearing of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law will come to order.

I would like to welcome our witnesses, Members of the Subcommittee and everyone who has joined us today to explore the Immigration Subcommittee's oversight of the Department of Justice's Executive Office for Immigration Review, otherwise known as EOIR.

The last time we had an oversight hearing on EOIR in September of 2008, we had just learned about the Department of Justice's Office of Professional Responsibility and Inspector General's joint report on politicized hiring of immigration judges and other DOJ personnel that occurred from 2003 to 2007. I am pleased to hear that many of the steps have been taken to retool the hiring process to protect it from the possibility of politicized hiring in the future. I look forward to continued reports from the Department of Justice to ensure that we do not repeat that serious mistake in the future.

Today I hope to hear more about efforts to address the continued lack of resources at EOIR, training and supervision of immigration judges, improvements already made to the Board of Immigration Appeals and any additional reforms that could further improve the immigration court system.

At a time when resources dedicated to the apprehension of illegal immigrants have rapidly increased, there has not been a corresponding increase in resources necessary for the immigration

courts to handle the influx of removal cases, and this has resulted in excessive backlogs and significant delays.

The appropriations levels for Immigration and Customs Enforcement increased from 3.5 billion in fiscal year 2004 to 5.4 billion in fiscal year 2010. The Customs and Border Protection went from 4.9 billion in fiscal 2004 to 10.1 billion in fiscal year 2010.

These massive budget increases for immigration enforcement agencies mean many more cases for immigration judges, yet at the same time the number of immigration judges has hardly kept pace with the increased enforcement. In 2004 there were 215 immigration judges, and today there are only 237. The backlog of cases has grown at an alarming rate from approximately 160,000 in 2004 to more than 240,000 cases as of March of this year.

Immigration judges do not even have the necessary and appropriate support staff to help deal with the increasing backlog. Unlike Federal court judges, who have two to three law clerks per judge, the average ratio of law clerks to immigration judges is one to four. On top of that, newly hired immigration judges are only provided 5 weeks of initial training, despite the fact that judges may be hired without any prior immigration law or administrative adjudication experience.

It is clear that resources, training, supervision and other systemic issues at EOIR have been overlooked for far too long. I very much commend recent efforts to raise the total number of immigration judges by the end of 2010 to 280. However, I note that despite these efforts, there were only five more immigration judges on the bench by March of this year than there were one full year ago.

I hope that with today's hearing we will be one big step closer to helping address some of these major issues in our immigration support system.

And I would now recognize our Ranking Member, Steve King, for his opening statement.

Mr. KING. Thank you, Madam Chair.

I want to thank all the witnesses for agreeing to testify today and coming before this panel.

Today's subject is the Executive Office for Immigration Review, which houses this country's immigration supports. I look forward to hearing today's testimony relating to the challenges that immigration judges face under our current system.

One of the most important functions carried out by immigration judges is to determine whether aliens receive asylum. This is obviously of great importance to the aliens involved, but it is also important to the American people. The United States provides refugee—excuse me—refuge to aliens who face persecution in their home countries, but we must ensure that our compassion is not taken advantage of by those who want to cheat our immigration system or to harm our Nation.

These individuals know about the rampant asylum fraud and terrorists who are free to plot and carry out their crimes after applying for asylum. I therefore urge USCIS to finally release the Office of Fraud Detection and National Security's asylum fraud report that this Administration has kept under wraps for so long.

Another issue crucial to the proper adjudication of asylum claims is the potential for political interference. The American Bar Asso-

ciation's Commission on Immigration recently issued a report that indicated that immigration judges have no statutory protection against removal without cause and that judges may be subject to removal or discipline based on politics or for improper reasons. I look forward to hearing the testimony relating to this report today.

Because of increasing political pressure being brought to bear on immigration judges, we should be troubled about an immigration judge's recent grant of asylum to President Obama's favorite relative, his aunt, Zeituni Onyango. This is a public perception that—there is a public perception that favoritism played a role. The Boston Globe reported that the asylum decision unleashed a firestorm of criticism from those who felt Onyango received preferential treatment because of her relationship with the President.

In order to better determine whether favoritism played a role, especially because Ms. Onyango was denied asylum in order to be deported in 2004 before her nephew became President—I believe he was actually a state senator at that time—this Subcommittee needs to hear from Ms. Onyango herself. The Subcommittee also needs to hear from Leonard Shapiro, the immigration judge who granted her asylum. In order to properly exercise our oversight authority, we should have access to Ms. Onyango's immigration file so we can learn the reasons why Judge Shapiro granted her asylum and reversed the earlier decision.

In an effort to pursue transparency and to put to rest any speculation of favoritism, I personally invited Ms. Onyango and her attorney, Margaret Wong, to come here today to testify. I also requested the Chair formally invite Ms. Onyango, Judge Shapiro and submit a request to the Department of Homeland Security for Ms. Onyango's immigration file. Ms. Onyango and her attorney declined my invitation, however graciously they did decline, and all three of my requests to the Chair were denied.

Madam Chair knows that she and the majority party have the authority to subpoena any of these potential witnesses and the Department of Homeland Security, who will only provide an information file at the request of the Committee majority. In other words there is no system in government that can provide oversight to this case if the majority is not willing to cooperate.

I am forced to conclude that Chair Lofgren doesn't want the Committee or the country to learn whether President Obama's aunt used her relationship to unjustly receive asylum or whether Judge Shapiro was pressured by the Administration to grant asylum or whether Judge Shapiro believed he was under such pressure.

There is a pattern of behavior in this Administration to influence and control such matters. For instance, there is a congressional testimony before the Subcommittee on Commercial and Administrative Law stating that the Obama administration laid out the exact terms and conditions of the Chrysler and General Motors bankruptcy. We also know that there are allegations of the Obama administration trying to influence the outcome of an election in Pennsylvania. And most recently, we have seen President Obama use his position to force BP into creating a new $20 billion escrow fund to pay claims against the company.

Now, before I yield back my time, I want to bring up one more matter. Ranking Member Smith recently sent a letter to Attorney General Holder, expressing his concern regarding the standards that the Department of Justice's Office of Professional Responsibility uses to launch disciplinary investigations against immigration judges. Currently, OPR initiates investigations of misconduct merely because Federal appellate courts have issued decisions critical of the conclusions reached by the immigration courts.

As Mr. Smith indicated in his letter, this practice makes no more sense than were Federal district court judges to be investigated for misconduct every time they were reversed on appeal by appellate courts or Federal appellate judges to be investigated every time they were reversed by the Supreme Court.

It is extremely damaging to the morale of immigration judges to be subjected—let me try to ask consent to conclude my statement in less than a minute.

Ms. LOFGREN. That is granted to complete your statement for 1 minute.

Mr. KING. Thank you, Madam Chair.

It is extremely damaging to the morale of immigration judges to be subject to investigation based on nothing more than having reached conclusions that are later challenged by Federal courts.

Even worse are the repercussions for the administration of justice in our immigration courts. Under its practice, OPR will usually investigate immigration judges only in cases where they deny relief that is later granted by Federal courts. The course of least resistance is therefore for immigration judges to grant relief in many cases despite their beliefs about the merits of the case.

This approach results in the approval of fraudulent or baseless asylum claims, applications for relief. More broadly, immigration judges may feel pressure to reach decisions to satisfy the most extreme Federal appellate panels that might be assigned to review cases.

So in conclusion, I look forward to hearing everyone's testimony and anticipate Associate Attorney General Osuna and all of the other witnesses to respond to the concerns I have laid out here.

I thank you all for being here today, and I yield back the balance of my time. Thank you, Madam Chair.

Ms. LOFGREN. The gentleman's time has expired.

Other Members are reminded that opening statements can be submitted for the record.

Before turning to our first witness, I would like to briefly comment on the process used for selecting witnesses, since the Ranking Member has raised it. I did receive a letter from the Ranking Member after 5 o'clock on Thursday after Congress had recessed for the week. Unfortunately, I was by then on my way to a interparliamentary meeting, a bipartisan meeting with the Mexican House and Senate on drug violence in Mexico.

Our process is that the minority is given great leeway in the selection of witnesses, if it is pertinent to the actual hearing. But the individual who the Ranking Member wished to invite declined to come, as did her lawyer. And I subsequently learned from media and a press release that you had written to the individual, and she had declined.

So I do want to mention also that Section 208.6 of the Alien and Nationality Code does prohibit disclosure to third parties of information. I will read this.

"Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to Section 208.30, and records pertaining to any reasonable fear determination conducted pursuant to 208.31 shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General," and that the only section that could apply to us would be any United States government investigation concerning any criminal or civil matter, none of which is present here.

So I did want to—we are guided by the rule of law, and including those laws that provide for confidentiality.

Mr. KING. Would the gentlelady yield?

Ms. LOFGREN. No, I think we will have plenty of time to discuss this in the course of the hearing.

Let us turn now to Mr. Osuna, who will be——

Mr. KING. There is a statute that exempts Congress.

Ms. LOFGREN. We will get into that later. You raised the issue. I needed to address it, because I think your statement seriously distorted the situation. I needed to correct the record.

Mr. KING. Misinformed the panel.

Ms. LOFGREN. We will now have a statement from Mr. Osuna.

Your full written statement will be made part of the record, and we would ask that your testimony consume about 5 minutes. And welcome.

Your microphone is not on, and actually, I would—before you do turn it on, I would like to tell the public I have known of you for many, many years, but not all of the audience may know that you are the Associate Deputy Attorney General at the U.S. Department of Justice, overseeing immigration policy, that from June 2009 to 2010 you have served as Deputy Assistant Attorney General, overseeing civil immigration related litigation in the Federal courts.

We knew you, and I first met you when you were chairman of the Board of Immigration Appeals, the highest administrative tribunal on immigration law in the United States. You were appointed to that position by Attorney General Mukasey in 2008, after serving as active chairman for 2 years. You were first appointed to the BIA by Attorney General Reno in 2000.

In addition to duties at the DOJ, you teach immigration policy at George Mason University School of Law. You hold your law degree from American University Washington College of Law and a master's degree in law and international affairs. You are a member of the Pennsylvania Bar Association, and you have had bipartisan support for your very professional work throughout your career.

We appreciate your presence here today and welcome your statement.

There is a problem with that microphone. Could the clerk help out here? Maybe one of the other microphones will work.

Let us start again.

TESTIMONY OF JUAN P. OSUNA, ASSOCIATE DEPUTY ATTORNEY GENERAL FOR IMMIGRATION POLICY, UNITED STATES DEPARTMENT OF JUSTICE

Mr. OSUNA. Thank you. I apologize.

Madam Chair, Congressman King, Members of the Subcommittee, thank you for the opportunity to appear before you today to speak about the progress that the Executive Office of Immigration Review has continued to make since its last appearance before you in 2008.

The EOIR administers the Nation's immigration court system, composed of 58 immigration courts around the country, as well as the Board of Immigration Appeals. The department has taken significant steps to maintain and further improve the operations of the immigration court system, and we are doing so at a time of great challenge for the courts, as you alluded to in your opening statement, where there are now more than 275,000 pending cases, the largest ever. Further, a large and growing proportion of that caseload is composed of aliens detained while they are waiting their hearings.

Despite these challenges, I would like to share with you today some initiatives that the department and the EOIR currently have under way that are all designed to ensure the prompt review of priority cases, while giving each individual case the review that it merits.

A well-functioning immigration court system starts with adequate resources. The department is fully committed to ensuring that the immigration courts have the appropriate number of immigration judges and support staff needed. An aggressive hiring initiative is currently under way which, by the time it is finished, will hire 47 immigration judges in calendar year 2010 alone. And we don't intend to stop there. If Congress approves the President's request for 2011, the hiring will have the effect of increasing the number of immigration judges to 301 by the end of 2011.

I am pleased to report that for the current round of immigration judge hiring, we had the luxury of a large pool of qualified applicants to choose from. For the 28 immigration judge positions that were advertised in December 2009, the department received well over 1,700 applications. And those applications are now being vetted through a robust and rigorous election process.

It is not enough to hire the most qualified individuals to serve as immigration judges. We must also make sure that they receive adequate training and get initial training and continuing training. Our chief immigration judge, who was appointed by the Attorney General last year, has made training a priority.

EOIR now provides immigration judges with 5 weeks of initial training, and they are assigned an experienced mentor immigration judge throughout their first year hearing cases. They are also required to take and pass a new immigration law exam before they can actually begin hearing cases.

In addition, the EOIR held a legal training conference in August 2009 and will do so again in July of this year. This weeklong conference covers many substantive legal issues that come before the immigration courts, as well as process issues such as handling immigrants with special needs and managing a courtroom.

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

This year EOIR has increased the transparency of its system for addressing complaints about immigration judges. For example, EOIR's Web site now includes additional information about the complaint process, along with a flow chart and instructions for filing a complaint against an immigration judge.

There have also been changes at the Board of Immigration Appeals. Over the past 2 years, the BIA has implemented the Attorney General's directives for change by enhancing the quality of its decisions while still keeping up with the appellate caseload.

One example is the BIA's reduction in the use of affirmances without opinion, which have been criticized because they do not set forth the BIA's resources for its decisions. In 2004 affirmances without opinion, or AWOs, comprised more than a third of the board's decisions. Today only 4 percent of the board's decisions are affirmances without opinion.

This has been part of an overall effort to improve the overall quality of the board's decisions, and based on the feedback that we have received from Federal judges, the private bar and government attorneys, this has been a welcome and much noticed change.

We believe that these changes at the BIA and in the immigration courts have been in part responsible for a welcome and declining caseload in the Federal courts of appeals for the past 2 years. While there may be a number of contributing factors for that decline, including probably changes in the courts themselves, we do believe that fewer AWOs and higher-quality decisions have played a significant role.

Madam Chair, Congressman King, Members of the Subcommittee, these are just some of the initiatives that we currently have under way. I also want to note that we 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 an enforcement action of the Department of Homeland Security. EOIR's caseload is therefore directly tied to DHS enforcement and detention initiatives.

The department and EOIR are in regular and continuing contact with DHS in order to anticipate and respond to caseload trends, and this coordination allows our two departments to explore additional efficiencies and ways of handling the removal of adjudications smarter and more effectively, while ensuring that we are focusing resources on the highest priority cases.

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

[The prepared statement of Mr. Osuna follows:]

Department of Justice

STATEMENT OF

JUAN P. OSUNA
ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

HEARING ENTITLED

"EXECUTIVE OFFICE FOR IMMIGRATION REVIEW"

PRESENTED

JUNE 17, 2010

Madam Chair, Congressman King, and other distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to speak about the progress that the Department of Justice's Executive Office for Immigration Review (EOIR) has continued to make since the agency's last appearance before the Subcommittee in 2008. The Department is taking significant steps to further improve the immigration adjudication system, while managing the more than 275,000 pending cases, the largest number the system has ever encountered.

As background, EOIR administers the immigration court system, composed of both trial and appellate tribunals. The trial level consists of 237 immigration judges in 58 immigration courts around the country. The immigration courts are overseen by a Chief Immigration Judge, assisted by a Deputy Chief Immigration Judge and a number of Assistant Chief Immigration Judges. Removal proceedings begin with the filing of a formal charging document against an alien by the Department of Homeland Security (DHS). EOIR's immigration judges must decide whether the alien is removable from the United States based on the DHS charges and whether the alien is eligible for and merits any relief from removal. The immigration courts are high-volume tribunals; in FY 2009 the courts received more than 390,000 matters, a number expected to rise in FY 2010. As discussed below, the Department is currently adding the resources required for the immigration court system 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 from the decisions of immigration judges. The BIA is composed of 15 Board members, supported by a staff of about 150 attorney advisers, and headed by a Chairman. Like the immigration courts, the BIA is a high-volume operation; in FY 2009 the Board issued more than 33,000 decisions. In addition, the BIA issues binding precedent decisions interpreting complex areas of immigration law and procedure. An appeal to the Board can be filed by either the alien or DHS. 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 immigration courts' caseloads are tied directly to DHS enforcement and detention initiatives. DHS determines both detention space allocations and the filing of charging documents, and thus EOIR is in regular and continuing contact with DHS in order to anticipate and respond to caseload trends. This close coordination is important to allow our two departments to explore additional efficiencies and ways of handling the removal adjudication process smarter and more effectively, while ensuring 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.

My testimony today will discuss several key areas where the Department of Justice and EOIR are focusing particular attention to ensure that the immigration court system functions effectively.

Hiring

A well functioning immigration court system begins with adequate resources. The Department is 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.

A major hiring initiative is underway this year which, by the time it is finished, will add 47 immigration judges and additional support staff in 2010 alone. The initiative involves the hiring of newly authorized immigration judges, which, when filled along with other vacancies, will bring the total immigration judge corps to 280 by the end of this year. This hiring initiative is one of the Department's high priority performance goals for FY 2010 and 2011. If Congress approves the Administration's request for 2011, this initiative will have the effect of increasing the size of the immigration judge corps to 301 by next year.

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. In December 2009, EOIR posted multiple immigration judge vacancies, resulting in the agency receiving about 1,750 applications. After vetting through human resources, four panels, each consisting of Assistant Chief Immigration Judges (ACIJs), screened and evaluated the applications. They were 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.

As a result of the screening and evaluation process, EOIR interviews the most highly rated candidates. 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.

Under this new process, the Department has hired 11 highly qualified immigration judges so far this fiscal year. Further, 43 immigration judge candidates are in the final stages of the hiring and selection process, and will be placed in more than 25 immigration courts nationwide. 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.

In addition, EOIR is focused on hiring judicial law clerks to assist the immigration judges. Law clerks are hired for two years. For 2009-10, the number of

judicial law clerks in place is 62. For 2010-2011 that number will rise to 90, and EOIR hopes to have further increases in future years. These law clerks are critical to helping the immigration judges manage their large and complex caseloads.

Training

It is not enough to hire the most qualified people to serve as immigration judges. The Department must also make sure that judges receive robust initial training and that continuing and appropriate training opportunities are provided. The Department recognizes the central role that training plays in maintaining a professional corps of judges, and has ramped up training initiatives at EOIR.

In December 2009, EOIR added a new ACIJ for training. This new 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 five 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 a new 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 August 2009 and will do so again in July of this year. The week-long training conference is mandatory for all immigration judges, members of the BIA, and BIA attorney advisors. The conference covers the 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 covers topics ranging from handling immigration proceedings involving unaccompanied alien children and respondents with mental competency issues to combating immigration fraud and managing a courtroom. EOIR also holds training conferences for judicial law clerks, court administrators, and staff interpreters.

In order to maintain flexibility and meet the agency's continuing education demands throughout the year, EOIR also offers other training, both mandatory and optional, via a computer-delivered system. For example, the ACIJ for training is currently developing two DVDs for the immigration judges on dealing with diverse populations and courtroom management issues. We expect both to be complete by the end of 2010 and EOIR will make this combined eight hours of immigration judge training mandatory. At the BIA, all Board members and attorney advisors are offered monthly training sessions on diverse legal and procedural topics that come before the BIA.

In addition to the formal training programs that EOIR offers its staff, the agency continues to improve the Immigration Judge Benchbook. In March, EOIR added a section on mental competency issues that has been well-received by many in the private sector. This new section provides guidance and templates for immigration judges in handling the special challenges posed by respondents with mental competency issues. The Immigration Court Practice Manual and BIA Practice Manual, both available on EOIR's website, are also valuable resources for immigration judges, the BIA, and the public.

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 May of this year, EOIR increased the transparency of its system for addressing complaints about immigration judges. 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 daily supervision of the courts by ACIJs in the field. EOIR's website now houses a link to a summary of the complaint process, along with a flow chart and instructions for filing a complaint. In the near future, the website will also include 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.

In recent years, disparities in the grant rates in asylum cases among immigration judges or courts have been studied and reported upon. The Department and EOIR take seriously any claims of unjustified and significant anomalies in immigration judge decision-making, and EOIR has taken a number of steps to evaluate the problem and seek possible solutions. For example, in November 2008 EOIR met with the Government Accountability Office (GAO) to explore GAO's multi-variate analysis methods demonstrating asylum grant rate disparities. With that information, and with its own internal analysis, EOIR identified judges with grant or denial rates significantly different from those of their peers and cross-referenced that data with other indicia of judicial performance. As appropriate, ACIJs assess the reasons for the disparity and address any underlying performance issues.

Board of Immigration Appeals

In 2006 the Attorney General ordered changes in the procedures governing the BIA, in order to make sure that appeals from immigration judge decisions receive adequate review while still ensuring that cases move quickly and do not linger at the BIA for years, as was a problem in the past.

Over the past two years, the BIA has implemented the Attorney General's directives by enhancing 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 now only four percent of the BIA's decisions are AWOs. At the same time the Board has improved the quality of its decisions by ensuring that they set forth the legal bases for the Board's conclusions, to ensure that parties appearing before the Board understand why the Board decided how it did.

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 removal 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.

The Department currently has under advisement draft regulations that would codify these changes, and it is considering whether other changes are worth making. Regardless, EOIR and the BIA have largely implemented the Attorney General's 2006 directives, even in the absence of regulations.

These changes at the BIA have been partially responsible for a welcome and declining caseload in the federal courts of appeals in the past two years. We can confirm the assessment provided in Chief Justice Roberts' 2009 year-end review on the judiciary, in which he reported that the workload in the regional courts of appeals declined in 2009, primarily as a result of fewer appeals from decisions of the BIA.

There are approximately 2,700 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. 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 11.2 percent in 2009.

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

In FY 2008, EOIR's Legal Orientation Program (LOP), which provides assistance to aliens in detention, was expanded from 13 sites to 25 sites. For FY 2010, the LOP was expanded to four additional sites 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, roughly 40 percent of all detained aliens in removal proceedings.

In addition to serving detained aliens, the LOP is also being utilized for certain non-detained aliens who appear in immigration court. For example, EOIR is close to implementing a pilot program for the Miami Immigration Court which, if successful, could be expanded nationwide. The program will use 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.

Under the program, immigration judges at the Miami Immigration Court will be able to refer these individuals to the LOP contractor to receive individual legal orientation and referral to pro bono legal services. EOIR is planning to launch the pilot program this July. The agency will also expand the LOP for custodians of unaccompanied alien children in the Fall of this year.

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 continues to implement a Digital Audio Recording (DAR) system to replace 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. DAR has now been implemented in 281 courtrooms around the country. Full implementation, including the final installations in New York, Los Angeles, and Honolulu, should be complete by the end of FY 2010.

Fraud and Abuse

In 2007, EOIR established a Fraud and Abuse Program so that cases of immigration fraud and abuse can be properly referred to the appropriate investigative agencies for action. To assist immigration court and BIA staff in identifying suspected fraud in immigration proceedings, EOIR conducts a Fraud Program training during the annual legal training conference. The staff then refers identified cases to the Fraud Program, whose staff 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.

Interpreters

EOIR has developed an orientation, mentor, and continuing education program for interpreters. The performance review process was redesigned to centralize,

standardize, and enhance staff interpreter evaluations. Moreover, EOIR created a website link for the public to report complaints regarding interpreter services.

Sanction Authority/Frivolous Filings

A draft EOIR civil money penalties rule that relates to sanction authority is currently under review. Finalizing the rule for vetting and publication is a priority for the agency.

EOIR has, however, by way of a final rule effective January 20, 2009, increased 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, to fully implement DAR, and to continue pursuing other improvement measures that will benefit the immigration court system and the parties who appear before EOIR. During the last five budget cycles, the Department and the Office of Management and Budget have supported EOIR's requests for increased resources. For FY 2010, the President requested and Congress approved $298 million and 1,558 positions for EOIR, including a critically-needed increase of 172 positions (28 immigration judges; 28 judicial law clerks; 16 BIA attorneys; and requisite support staff positions). The appropriation also included $10.2 million to continue development of EOIR's priority information technology initiatives, including DAR, information sharing and electronic document management systems. For FY 2011, the President's budget includes $316 million and 1,683 positions for EOIR, representing an increase of 125 positions (21 immigration judges; 21 law clerks; 10 BIA attorneys; and requisite support staff). The resources the President requests are essential to our ongoing efforts to recruit, train, and equip top-quality immigration judges and court staff.

Conclusiou

Madam Chair, Congressman King, and distinguished Subcommittee Members, despite the continuing challenges that it faces, EOIR has made great progress in the past two years. Our EOIR staff – immigration judges, Board members, attorney advisors, and support staff – are dedicated professionals who work every day to ensure 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.

Ms. LOFGREN. Thank you very much, Mr. Osuna.

I will begin the questioning, if I may. First, let me thank you for your efforts to bring down the AWO rate to 4 percent. I think all of us who know appellate court judges know that they were just totally swamped with appeals after the changes made by Attorney General Ashcroft.

You know, it is amazing how unsatisfactory are the words "I told you so." You know, exactly what we said would happen happened, that if a case was incorrectly decided, it wasn't just going to go away. It would end up in the appellate courts, which in fact is exactly what happened, a more expensive place to decide. And so bringing that down and having the reasons are going to make a huge difference, and I do appreciate that.

I am looking at your written testimony, which raised some questions for me about the reversal rate, which has dropped, according to testimony on page 5, from 17.5 percent down to 11.2 percent in 2009, which is good. That speaks to the quality of the decision-making. Has that trend continued this year, the decrease that is? Do we know?

Mr. OSUNA. Yes, it has. My understanding is that the current reversal rate in the Federal courts is just about 10 percent and actually not that there is a wide variety in the reversal rates among the Federal courts. Many courts have reversal rates as low as, you know, 3 or 4 percent. Others have higher reversal rates than the—I think about 17 percent. But the nationwide average is just about 10 percent right now.

Ms. LOFGREN. Now, in terms of reversal rates, I think some of us have read some of the scathing decisions from appellate courts about individual immigration judges, who from the record apparently never read the file, read the law or anything else when they made a decision. When you get that kind of information from a published decision, what is done with it?

Obviously, you don't want to make a decision based on a difference of a legal opinion, but if it is clear that the judicial officer didn't read the file, didn't read the law, and didn't do his or her job, what process, rights do the immigration judges have in such a case?

Mr. OSUNA. I believe you are asking for what happens when the case is actually remanded back to the immigration——

Ms. LOFGREN. Correct.

Mr. OSUNA [continuing]. To the BIA——

Ms. LOFGREN. With a scathing little pithy remark from the appellate court.

Mr. OSUNA [continuing]. With some indication that it might not have been handled as well as it should have been.

A number of things happen. First, nobody wants this case to go back to the courts, and so if the case requires additional fact-finding on a legal—in a case, it will be sent back to the immigration judge, typically, for additional fact-finding. If it can be decided on a legal basis at the BIA, it will certainly be decided in that way. And depending on what the nature of the decision was by the Federal court, the BIA may make some reference to it in its decision.

In terms of what happens to the immigration judge himself or herself, the Office of the Chief Immigration Judge now has a train-

ing coordinator. In other words there is an assistant chief immigration judge, whose only portfolio is training, and training is defined somewhat broadly in that sense.

So there was a process for the BIA to send a copy of the decision back to the Office of the Chief Immigration Judge. Then that training assistant chief immigration judge would take a look at it and decide whether there is additional training that needs to be done for the immigration judge or additional feedback needs to be sent back to the immigration judge, and any other measures that may be appropriate like——

Ms. LOFGREN. So we would have an opportunity to provide, you know, the five—I think some of the older judges didn't get the 5 weeks immigration law training. We could put them through that, for example.

Mr. OSUNA. Yes, the 5 weeks of initial—that is when a newly appointed immigration judge——

Ms. LOFGREN. Right. But the holdover judges didn't get that, and so we could put them through that, if they look like they needed it.

Mr. OSUNA. Yes, ma'am. If there is additional retraining that needs to be done, training is done in a couple of ways at the Office of the Chief Immigration Judge. First, there is the annual conference. That is a weeklong conference that is happening in a few weeks again. And that is the single best opportunity for immigration judges to learn not just about the law, but also about how to write decisions, how to handle a court room, things like that.

There is also continuing training throughout the year that the Office of the Chief Judge is trying to put together, and is putting together, a lot of that being done by DVD to try to reach a large number of judges.

And again, there is that individualized training that, if necessary, given a particular—given an immigration judge's decision in particular cases, can be done either by the chief immigration judge, assistant chief immigration judge or by an experienced mentor judge that can step in and assist the other judge who was the subject of that decision.

Ms. LOFGREN. Let me just ask one question, and then we will turn this over to the Ranking Member.

There has been a suggestion that any place where there are a number of immigration judges, that there ought to be a chief judge appointed among them, somebody to kind of put some order to the calendar, do some additional supervision and the like. What do you think of that idea?

Mr. OSUNA. Well, I think that is an intriguing idea. There is a corps of assistant chief immigration judges, we call them, that have either regional portfolios or specific topical portfolios. Some of them are, for example, there is somebody who is assistant chief judge for training. There is another one who is assistant chief judge for professionalism and ethics reasons.

And then there are judges that are responsible for regional immigration courts—typically, the largest courts. So, for example, there is one for Los Angeles, San Francisco, New York and Miami, to name some examples there. I think that that was one of the Attor-

ney General's directives in 2006, the pilot experimenting with regional supervisors, and I think that has worked quite well.

And perhaps there is room for some more of that, but I think that taking them to the field has worked quite well in terms of the supervision of immigration judges.

Ms. LOFGREN. Thank you very much.

Mr. King, you are now recognized for 5 minutes.

Mr. KING. Thank you, Madam Chair.

Thank you, Mr. Osuna, for your testimony. I would ask if you are familiar with the 5 USC 522(a)(b)(9). And I know that that is a hard question with that whole stack of Federal statute, but it says this, the conditions for disclosure. And here are the exceptions for unless disclosure of the record would be, and it starts with two officers or employees of any agency.

Item number 9 says, "to either house of Congress or to the extent of matter within its jurisdiction, any Committee or Subcommittee thereof—Congress—any Joint Committee of Congress or Subcommittee of any such Joint Committee." Are you familiar with that statute?

Mr. OSUNA. I have not been familiar with that statute, but I am now.

Mr. KING. And would it be your judgment that the Federal code would trump the regs of DHS?

Mr. OSUNA. Well, I would have to take a look at what code and the regs actually say. I have not studied that particular section of the code, and I——

Mr. KING. Generally speaking, from a statutory construction.

Mr. OSUNA. Generally speaking, a statute does trump the regs.

Mr. KING. Thank you. And that is my argument for access to these records. However confidential they should remain under certain circumstances, not confidential—they can't remain confidential from Congress, if we are to do any kind of legitimate oversight.

So I would ask you how can the public and how can I be assured that there wasn't any pressure applied in the case of the asylum for President Obama's aunt that has been so well-publicized? Do you know of any means that I as a representative of the public could determine that there was a balanced decision there based on the facts, if there isn't going to be a, let me say, a cooperative effort on the part of the majority or the Administration?

Mr. OSUNA. Congressman, I can tell you that that particular case was handled just like any other case is handled in the immigration court system. The normal rules in asylum cases applied in that case, which is that the applicant has the burden of proof.

The immigration judge handled that case as he does the thousands of other cases that come before him every year. There is absolutely no indication that there was any kind of—anything unusual in that matter other than the facts of the case, which, you know, obviously put it as a different and a high-profile matter.

Mr. KING. But it was reported in the news that she was adjudicated for deportation and didn't respond to that order, stayed in the United States for at least 8 more years until her nephew became President, and then appealed it before the court and had the decision reversed. So is that usual to have a decision reversed?

Mr. OSUNA. Well, it is actually not—that was subject to a motion to reopen process, which the regulations allow for a motion to reopen in particular cases. In asylum cases it is not unusual for a case to be reopened or somebody to seek reopening in a case even a few years later. The fact that she was not removed by the Department of Homeland Security meant that she was still in the country and so was therefore eligible to file a motion to reopen.

Mr. KING. Would you agree, though, that this raises a lot of questions of doubt, given that this is most likely the highest profile asylum case in the country right now?

Mr. OSUNA. Well, I don't think that the granting of the motion necessarily raises unusual questions, because again that is not atypical. I mean, that does happen in a system where there are a large number of people, and not every removal order is enforced immediately.

Mr. KING. But we have a public out there that thinks otherwise, and they don't have any facts to deal with other than what has been printed in the press, which indicates the opposite of that. And however comfortable you might be, I would ask you have you reviewed the file?

Mr. OSUNA. I have not reviewed the file.

Mr. KING. And so you are speaking generally again, no, not probably specifically of this case.

Mr. OSUNA. Yes, sir. I mean, I have not reviewed the file, because we, you know, we don't review asylum files. I mean, asylum files are subject to confidentiality protections, and it would be unusual if somebody in the department had reviewed that particular asylum file.

Mr. KING. I understand.

Mr. OSUNA. We don't with other cases.

Mr. KING. Have you by any chance read Arizona immigration law?

Mr. OSUNA. I have.

Mr. KING. Good man. I congratulate you for that, as have I. I won't ask you any questions about it. I just wanted to ask that question.

And I will just conclude with this. Are you aware that the average asylum grant rate has increased from 38 percent in 2005 to 47 percent in 2009, or at least the general trend? And could you speak to what that might mean?

Mr. OSUNA. Yes, I am aware of that. The asylum rate has gone up in the immigration courts as well as at the Department of Homeland Security asylum offices. And there could be a number of reasons for that. I think one reason could be that there has generally an increase in the—or I should say an improvement in the advocacy provided in asylum cases in certain cases—in certain areas.

And immigration judges report that. Asylum officers report that. I saw it at the BIA. So I do think that the advocacy has improved its least in those types of cases, not in every case. And that could be one reason for the increase.

Mr. KING. Were the light not red, I would perhaps take the other side of that argument. But I will thank you for your testimony and yield back the balance of my time.

Ms. LOFGREN. The gentleman's time has expired.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. First, let me thank the Chairwoman and the Ranking Member for holding this hearing. And I am delighted to have been able to come in and to hear part of the questioning of the Chairwoman and, of course, the Ranking Member.

Mr. Osuna, let me just ask a basic question. We have been deliberating. We have almost gone to the goal line on comprehensive immigration reform over a number of years. And I have served on this Subcommittee for a number of years.

Beside the resource infusion that would help the executive or judicial part of immigration reform, would that be a valuable approach to get regular order in terms of who can stay and who cannot as it relates to your responsibilities in governing—let us say governing, regulating the immigration policies of America?

Mr. OSUNA. Congresswoman, yes. I think comprehensive immigration reform is something that the President has said is he is fully behind. The Attorney General fully supports it. The Administration supports a comprehensive approach to our immigration issues.

In terms of what it would mean for the Department of Justice and the immigration court system, it would be a game changer. It would be a significant development that would mean that a lot of this caseload goes away, frankly.

Depending on what happens with a path to citizenship, a path to legalization, whatever we would eventually call it, we could see a large number of these people that are currently pending hearings before immigration judges drop out of the system and get some sort of regular status. The exact parameters are unclear but, yes, it would be game changing.

Ms. JACKSON LEE. Before your comments become headlines—drop out of the system, go underground—what you mean is there would be an administrative process, regular order that would allow thousands of good intentioned, well-meaning, possibly workers who are in this country, families, children to access a process that would be government instructed that would allow them to legally make an application. At least, that is the present construct. Is that what you are saying?

Mr. OSUNA. That is exactly right.

Ms. JACKSON LEE. They wouldn't get lost. They wouldn't go to the street. They would have to get in a system. Otherwise, they would all then still fall in the eligibility of deportation if they were not somewhere trying to determine whether they could stay.

Mr. OSUNA. Yes, ma'am. And thank you for the clarification. Dropping out of the system than, you know, being taken out of the immigration court system and being given the opportunity to regularize their status.

Ms. JACKSON LEE. So high school students or students who are valedictorians in some of my schools in Texas, who now face the unfortunate posture of maybe not going to some of the prominent schools around the Nation even with their credentials because they are not of status, they would have the right opportunity to seek the American dream fairly.

Mr. OSUNA. That is correct.

Ms. JACKSON LEE. Let me just comment and make the fact that you have read this law. Let me just say this. I am glad you clarified the President's aunt, since thousands every day, which is one of the reasons that some of the court systems are clogged. I know the asylum system has its own track. But in any event, appeal—this goes on every day. Some are denied and some are not, but the idea is that you make your legitimate case. You have the opportunity to be heard.

The disappointment, of course, is that many people do not have resources, not a question of favoritism. So we lose those individuals, who ultimately, tragically, find themselves in deportation or other unfortunate circumstance, such as the Haitian teacher that I helped, who was pulled out of the classroom of a school system that she was loved by, because she missed by 5 minutes an appointment, because she was taking her baby to the doctor's office. Those are the kinds of human tragedies that we need to fix.

On the Arizona law, would you just comment on the inequity of a patchwork type of immigration policy—the Arizona law, the Chicago law, that Texas law, the Georgia law? Would you comment on how that affects having a real system of immigration reform?

Mr. OSUNA. Congresswoman, the Attorney General has stated his concerns about the Arizona law. He believes that there are potential civil rights and other problems with the law, including whether it diminishes the trust that police departments have with the communities that they serve.

Ms. JACKSON LEE. But a patchwork——

Mr. OSUNA. And the department is looking at the law, so it would be premature to get into a lot of the details on that. However, I do think that, as the President has indicated, we don't want a patchwork of laws. Immigration policy, immigration law is a national priority. It is a Federal priority, and it should remain that way. Not to say that there is not room for some involvement by states, but it is something we want to avoid.

Ms. JACKSON LEE. Thank you, Madam Chair. I think it is long overdue for comprehensive immigration reform, and the Arizona law is an abomination. I yield back.

Ms. LOFGREN. The gentlelady's time has expired.

The gentleman from Puerto Rico is recognized for 5 minutes.

Mr. PIERLUISI. Thank you. I will be brief.

One thing that bothers me is that I understand that a lot of immigration judges, when they are hired or when they were hired, they had no prior immigration law experience. This is a very particular field of the law, and it shocks my conscience that that hasn't been a requirement in the past and that it shouldn't be a requirement in the future. So I would like your comments on that, and then I will cover another point.

Mr. OSUNA. Yes, sir. There are a number of requirements that we look for for immigration judge positions. Certainly, knowledge of immigration law is an important one, and it is one that is desirable to have in anybody that is applying for one of these positions. However, I should note that it is not the only requirement that we look for or that we should look for.

One of the more important requirements that the department looks for in these candidates is an assessment and an ability to

demonstrate that they know how to act like a judge, that they have the judicial demeanor, that they can handle a courtroom, that they handle parties coming before them respectfully and appropriately, because you may have an immigration law expert, but they may not know how to handle themselves in a courtroom.

So while immigration law experience is certainly important and is at the top of the list in terms of what we look for, it is not the only requirement. And I would mention again this assessment of judicial demeanor is just as important.

Mr. PIERLUISI. I agree with you that their are other requirements, and particularly just having the judicial temperament and so on, but I urge the department to look for immigration experience. There must be a lot of competent lawyers out there, who would be interested in becoming immigration judges, who have not only the immigration experience, but other matters you would like them to have.

The second area I want to cover it is continuing legal education. You already mentioned the 5-week training program and the yearly meeting or conference you have for immigration judges. But I wonder, I mean, shouldn't you have a formal continuing legal education program with the minimum hours or credits that you require of immigration judges on a yearly basis, on a permanent basis?

Mr. OSUNA. I think that continuing education throughout the year is very important, and I agree with you on that. It is not just the annual conference and the initial training that is important, but continuing training opportunities is important.

That is one of the issues that the current Assistant Chief Immigration Judge for training with the training portfolio is looking at. And we started with making training available through these electronic means as a way of trying to reach the various immigration courts around the country, but the agency is looking at other training opportunities, other training mechanisms, that could make some sense and that are appropriate throughout the year.

Mr. PIERLUISI. And lastly, I see in the materials I have been reviewing that at least it is being reported that immigration judges face a higher level of stress and pressure than Article I judges and other Federal judges. And I wonder where does that come from? Does it come from the load that they have, the caseload? Does it come from actually the lack of training or experience in the area? Does it come from the nature of the cases themselves? Could you give me some additional light on that?

Mr. OSUNA. It is a combination of factors. I think that certainly the caseload is a significant factor in terms of the burdens placed on immigration judges, which is why hiring of new judges is such a priority for the department this year and next year.

I think it also does come from the nature of the cases. These are often life-and-death decisions, and immigration judges take their jobs very, very seriously. They know the stakes involved in this case not just for the immigrants that have come before them, but also for the government.

So I think the combination of a lot of cases with, you know, tough conditions and the nature of the case leads to these kinds of stressful situations.

Mr. PIERLUISI. Thank you.

Ms. LOFGREN. The gentleman yields back.

The gentlelady from California is recognized for 5 minutes.

Ms. SÁNCHEZ. Thank you, Madam Chair.

My questions are similar to that of the gentleman from Puerto Rico, and they are on the quality and the diversity of immigration judges. There was this exhaustive study that the Attorney General did on improving the immigration courts and the Board of Immigration Appeals. And you did this in 2006, and it resulted in 22 recommendations.

But recommendation number three called for all judges appointed after December 31st, 2006, to pass a written examination demonstrating familiarity with the key principles of immigration law. Have you implemented this?

Mr. OSUNA. Yes, ma'am. That has been implemented.

Ms. SÁNCHEZ. And what—have every immigration judge, then, appointed after December 31st actually taken this written exam and passed it?

Mr. OSUNA. I am trying to remember what the dateline was on that, but every immigration—I can't remember exactly the date as to when that directive was implemented, but as of today every immigration judge that has been appointed so far this year, and I believe most of last year, was required to take that immigration law exam and to pass that immigration law exam before she or she could start hearing cases.

Ms. SÁNCHEZ. Do you know what the initial pass rate was for appointed judges?

Mr. OSUNA. I am sorry. I have the information here. EOIR began testing new immigration judges in April 2009 and new BIA members in August 2008. I don't know the pass rates, but I believe that every immigration judge that was appointed, that has been appointed recently has passed the exam.

Ms. SÁNCHEZ. I guess the initial pass rate is interesting to us to hear about people who do not know about the immigration law before they become judges, and I would be very interested in knowing that.

You mentioned that there is training, this 5-week period, but do they have to go through 5-week period before they practice as an immigration judge?

Mr. OSUNA. Yes, ma'am. I am trying to recall what the training actually entails. The first week of training, I believe, is in the immigration judge's new home court, observing other immigration judges, trying to get a sense for the caseload. The second week, I think, is spent at EOIR headquarters on intensive sessions on the law and process that they will face. And the remaining 3 weeks are spent in a combination of other immigration courts and their home court, trying to get up on both the law and the caseload process that they will face.

They are all required to go through the 5-week training. Every immigration judge appointed is required to go through the 5-week training before they can actually start adjudicating cases.

Ms. SÁNCHEZ. Okay. Then I would like to talk about the diversity of the immigration judges. There has been some criticism about the way immigration judges are selected and that many to come from ICE or prosecutors of immigration cases, and fewer come from pri-

vate bar, nonprofit and nongovernmental organizations or from academic institutions.

And so if they did come from these areas, then you might have a more diverse population to select from and people who might be more familiar with the immigration experience. So let me ask what type of criteria you used to select immigration judges.

Mr. OSUNA. We have heard that criticism about the lack of diversity, and it is something that the department is taking quite seriously. I would only ask you to take a look at the judges that will be appointed this year. When they are finally appointed, there—again, there are 47 total hires that will happen this year, and most of them are in the final stages of selection right now.

I think that when you see that list and when you see where they come from, you will see that they come from quite diverse backgrounds, not just the government. And frankly, a lot of the government immigration judges—or judges that are appointed from the government have been some of the best judges that have been appointed. However, you will see that also quite a few will come from the private sector, from NGOs, from other administrative tribunals that deal with similar types of cases.

So the department has tried to broaden the diversity of this, of this corps. And again, what we try to look for are people that we are confident we can see in an immigration courtroom, handling cases appropriately with the complexity of the law the way it is.

While I don't have those numbers for you in terms of the actual breakdown, because it is a little premature for that, I would invite you to take a look at the corps that will be appointed this year. And I think that you will see that it is going to be quite a diverse corps.

Ms. SÁNCHEZ. And how about the ethnic diversity?

Mr. OSUNA. It will be diverse both in terms of background, work experience, as well as ethnicity.

Ms. SÁNCHEZ. Do you have any figures?

Mr. OSUNA. I am sorry. I don't. And the only reason for that is just because they are still in the final selection process, so it is a little premature to get into that, but I am happy to come back with you later in——

Ms. SÁNCHEZ. Thank you.

Ms. LOFGREN. The gentlelady's time has expired.

And all time has expired for questioning of you, Mr. Osuna. We do thank you for being here. Your testimony has been very helpful. And without objection, the Members of our Subcommittee will have 5 legislative days to submit additional questions to you, which we will forward. And if that occurs, we would ask that you answer as promptly as you can.

In terms of follow up from the questions, we know that you are going to send us the percentage who passed the test and, when the selections have been made, a picture of, you know, the nature of the new hires.

I would just like to say before we bring up our second panel that we do appreciate our immigration judges. It is a hard job, and the caseload is huge. It is much bigger than administrative law judges face and other parts of the Federal Government. The amount of

support staff—we need additional judges, but they don't have much support either.

And so we are hoping that with your leadership, we can get them the kind of support they need and the numbers they need to bring the caseload numbers down so they have time to judge and give dispassionate justice. That is all we can ask. And with your leadership, I am sure that we are moving in the right direction. So thank you very much.

And we will call up our second panel at this point.

Mr. OSUNA. Thank you, ma'am.

Ms. LOFGREN. If the second panel could step forward, we will introduce you now. As we transition and the new witnesses step forward, I will begin the introductions.

First, I am pleased to welcome Karen Grisez.

And you will correct my pronunciation of your name, if that is incorrect.

She is chair of the ABA Commission on Immigration and is special counsel for public service in the Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson. In that role she manages the intake and placement of all pro bono matters for the firm.

Her practice focuses on political asylum, deportation defense and other immigration matters. She is the former co-chair of the Immigration Litigation Committee of the ABA Section of Litigation and is a trustee of the American Immigration Council. She also serves on the board of directors of the Capital Area Immigrant Rights Coalition. She received her bachelor of arts summa cum laude from the University of Maryland, and her Juris Doctor degree from the Columbus School of Law at Catholic University.

Next, I am pleased to introduce Russell R. Wheeler. Mr. Wheeler is president of the Governance Institute, a think tank with a special interest in interbranch relations, and a visiting fellow in the Brookings Institution's government study program. From 1991 to 2005, he was deputy director of the Federal Judicial Center, the United States Federal court systems research and continuing education agency.

He is also an adjunct professor at American University's Washington College of Law and serves on the academic advisory committee of the American Bar Association's standing committee on Federal judicial improvement, the advisory board of the University of Denver's Institute for the Advancement of the American Legal System and the Supreme Court Fellows Commission.

He is the United States representative to and chairs the board of the Justice Studies Center of the Americas created by the Organization of American States 10 years ago to help the hemisphere's judicial system adapt to changing procedural norms. And he is a graduate of the University of Chicago and of Augustana College.

Next, I would like to introduce the Honorable Dana Leigh Marks. Judge Marks has served as an immigration judge in San Francisco since January 1987. She is currently serving her fourth 2-year term as president of the National Association of Immigration Judges, the recognized collective bargaining unit for the 237 member corps of immigration judges nationwide. Judge Marks is a member of the International Association of Refugee Law Judges and a member of the National Association of Women Judges.

Prior to taking the bench, Judge Marks worked for 10 years in private immigration law firms with broad business immigration, family visa work, and asylum caseloads. She was an active leader, who held several offices with the Northern California chapter of the American Immigration Lawyers Association while in private practice. She also served as lead counsel and orally argued the landmark case of INS versus Cardoza-Fonseca.

Judge Marks is a Phi Beta Kappa graduate of the University of California at Berkeley, where she majored in sociology. She received her Juris Doctor from Hastings College of Law and was admitted to the California bar in 1977.

And finally, I would like to introduce the Honorable Mark Metcalf. Mr. Metcalf is a former immigration judge on the court in Miami, Florida. He is a former state and Federal prosecutor and private practitioner. Mr. Metcalf worked at the Justice Department from 2002 to early 2008, serving as Special Counsel for Election Reform, Special Counsel of the Domestic Section of the Criminal Division, and as senior counsel to three Assistant Attorney Generals.

He is publishing a book, I understand—"The Broken Court," about America's immigration court. Mr. Metcalf received both his bachelors and his Juris Doctor from the University of Kentucky. And I was pleased to find out before we started that he also at one time worked for our colleague, Hal Rogers.

So give Hal our best.

And we will begin with the testimony. We ask that you summarize your written testimony. The full statement will be made part of the written record.

And we will begin with you, Ms. Grisez.

Could you move the microphone up a little bit closer? And we will have a better chance of hearing you. And I don't think it is on.

TESTIMONY OF KAREN T. GRISEZ, CHAIR, COMMISSION ON IMMIGRATION, AMERICAN BAR ASSOCIATION

Ms. GRISEZ. There. Now, is that better?

Ms. LOFGREN. Much better, thank you.

Chairwoman Lofgren, Ranking Member King and any other Members of the Subcommittee, who may rejoin us, my name is Karen Grisez, and I chair the American Bar Association Commission on Immigration. The ABA appreciates the opportunity to share our views on EOIR's efforts to improve the immigration courts and the Board of Immigration Appeals, as well as the challenges that EOIR faces as immigration enforcement continues to rise.

The ABA has a particular interest in the fair and efficient administration of the immigration adjudication system. The commission recently released a report that examines the removal adjudication system from start to finish and makes recommendations for several reforms.

Ultimately, the ABA supports fundamentally restructuring the system to create an independent body for adjudicating immigration cases such as an Article I court. However, we also recommend a number of incremental reforms that could be made within the existing structure to produce significant improvement. I would like to

take my few minutes this morning to highlight several of those important recommendations.

First, the immigration courts remain overburdened and under resourced, as has already been discussed this morning. Immigration judges in recent years have completed an average of more than 1,200 proceedings and issued 1,000 decisions per judge per year. This is far more than adjudicators and other administrative agents.

A lack of adequate staff support for the judges compounds the problem, and in particular the ratio on the average of only one law clerk per four immigration judges.

The immigration cases, particularly asylum claims, are very complex, and the time that is allowed for the judges to adjudicate them is grossly inadequate. We recognize DOJ's request for 21 additional judge teams for fiscal year 2011, but that seems to be from their request primarily directed to address expanding enforcement levels and new cases coming into the court system, resulting from initiatives like Secure Communities.

However, because the current staffing levels are already inadequate, even with the existing addition of 21 new teams, the caseload per judge may not improve and could indeed get worse. We would urge Congress at a minimum to improve the DOJ's request, but also consider increasing the number of requested immigration judges and also the proportion specifically of law clerks to judges.

In addition to increasing the resources available to the immigration courts, the caseload could also be reduced by being more strategic about which cases go into the removal proceedings to start with. Working with DHS to address this issue would help ensure faster processing in the cases of people we most want to remove, such as those who are a threat to public safety or national security.

I have three examples to highlight briefly. First, in cases where noncitizens with no criminal histories are out of status and appear prima facie eligible for an immigration benefit, we recommend that they should not be issued NTAs in the first instance, but should be allowed to pursue their application through administrative adjudications at CIS, complete with background checks, complete with all of those same safeguards that exist now, but not in the adversarial court system.

Similarly, we believe that prosecutorial discretion, widely used in the criminal justice context, should be increased in the immigration proceedings, particularly where it is apparent, due to serious health issues or other concerns, that the respondent actually will not ultimately be removed, and the case would result in a stay for a deffered action. These cases should not be going through the court system and should be addressed through the use of discretion.

Third, we have a recommendation on improving efficiency and asylum processing by moving the cases of newly arriving aliens, who seek asylum at the border or ports of entry and must have their claims adjudicated before an immigration judge in expedited removal proceedings after a credible fear interview, we ask that those cases be in the first instance actually evaluated by asylum officers and only referred to immigration court if they cannot be readily approved.

All three of these recommendations would decrease adversarial adjudications without sacrificing quality or security.

Our last point has to do with Legal Orientation Program. The vast majority of detained aliens are not receiving the Legal Orientation Program, even though the statistics are clear about the 13 days decreased time per case for those persons who have had access to LOP.

So our encouragement to the Congress is that more people should be having access to LOP, and particularly those detained persons, so that people with no good claims for relief will have sufficient information not to pursue those claims. Detention time and costs will be shortened with the increased availability of referrals to pro bono counsel for people with identified meritorious claims. Thank you.

[The prepared statement of Ms. Grisez follows:]

PREPARED STATEMENT OF KAREN T. GRISEZ

Statement of

KAREN T. GRISEZ

on behalf of the

AMERICAN BAR ASSOCIATION

to the

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

for the hearing on

"The Executive Office for Immigration Review"

June 17, 2010

Chairwoman Lofgren and Members of the Subcommittee:

I am Karen Grisez, Chair of the American Bar Association (ABA) Commission on Immigration. I am here at the request of ABA President Carolyn B. Lamm to present the views of the ABA on the Executive Office for Immigration Review's (EOIR) efforts to improve the Immigration Courts and the Board of Immigration Appeals (BIA), as well as challenges EOIR faces as immigration enforcement continues to rise. We appreciate this opportunity to share our views with the subcommittee.

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. Earlier this year, 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, from the decision to place an individual in removal proceedings through potential federal circuit court review. The findings of this report confirm 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 recommends a number of incremental reforms that could be made within the current system, either through policy revision, regulation or legislation, which would make significant improvements in the operation of the current system. While space constraints prevent us from outlining all of our recommendations, we would like to take this opportunity to highlight several important issues.

Many, even those in the legal profession, are unaware of the magnitude of the immigration court system. More than 10,000 appeals from BIA decisions were filed in 2008 with the federal circuit courts. Over the past 5 years, these cases have represented about 17% of all the cases handled by those courts. In the circuits with the largest immigration dockets — the Second and Ninth Circuits — appeals from BIA decisions have comprised 35% to 40% of the entire caseload.

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[1] The full report and executive summary are available at http://new.abanet.org/immigration/pages/default.aspx.

These numbers illustrate that the operation of the immigration courts and Board of Immigration Appeals has far-reaching ramifications for our justice system as a whole, and instigating the much needed improvements to this system should be given high priority.

IMMIGRATION JUDGES AND COURTS

The immigration courts in the United States sit in 57 locations in 28 states and hear several hundred thousand matters each year. The matters include, among others, removal proceedings, asylum petitions, bond redeterminations for noncitizens held in detention, reviews of credible fear determinations, and rescission hearings to determine whether a lawful permanent resident was wrongfully granted permanent resident status. The vast majority of the matters are removal proceedings. With a low rate of appeal from the decisions of immigration courts, most noncitizens' cases end in those courts.

In recent years, the immigration courts have faced harsh criticism — including by federal appellate judges — for inadequate decisions and reasoning, and for improper behavior by some immigration judges. In 2006, then Attorney General Alberto Gonzales announced 22 reform measures designed to improve the functioning of the immigration courts and the BIA. Some of these measures have been implemented, representing a promising start toward improving the performance and reputation of the immigration courts. However, over three years after the announcement, a number of reforms remain incomplete, and numerous problems with the immigration court system remain.

Large Caseloads and Inadequate Resources. The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible. In 2008, some 226 immigration judges completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions per judge. To keep pace with these numbers, each judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday, assuming no absences for vacation, illness, training, or conference participation, nor time devoted to calendaring hearings. 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 decided approximately 544 cases per judge.[2]

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.

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[2] BD. OF VETERANS' APPEALS, FISCAL YEAR 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.

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 280 authorized positions. However, even if all of those positions are filled and assuming the number of decisions made remains constant at the FY 2009 level, immigration judges would still be deciding about 830 cases per year. In order 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), we recommend hiring approximately 100 additional immigration judges as soon as possible. We also recommend hiring enough law clerks to provide one law clerk per judge.

Insufficient Training and Professional Development. Insufficient resources also contribute to inadequate opportunities for judicial training and professional development. Although training of newly hired and existing judges has increased and improved over the past few years, some of the existing training has been cut back due to a shortage of funds. Moreover, heavy caseloads result in a lack of administrative time during which immigration judges could participate in training and interact with other judges. Sufficient funding should be provided to permit all judges to participate in regular, in-person trainings on a wide range of topics in immigration law, and EOIR should designate an administrator to facilitate increased communication among immigration judges, including setting up formal and informal meetings among judges and providing opportunities for judges to observe other judges in their own courts or in other courts.

Selection and Qualification of Immigration Judges. The standards used to hire judges are incomplete and opaque, open positions often are not filled quickly, and there is a lack of public input into the hiring decisions. As a result, some judges are hired with inadequate experience, there is a general lack of diversity in the professional backgrounds of judges, and there are problems with inappropriate judicial temperament. EOIR has recently made significant improvements in the process of hiring immigration judges. We generally recommend allowing those reforms time to take effect, while suggesting a few additional improvements. We recommend adding questions to applications, interviews, and reference checks designed to evaluate a candidate's background and judicial temperament, including the ability to understand and consider the effect of cultural differences and treat all persons with respect. In addition, we urge EOIR to allow more public input in the hiring process by permitting organizations within the profession to participate in screening candidates who reach final levels of consideration.

Adequate Supervision and Discipline. Inadequate experience and problems with judicial temperament theoretically could be addressed with proper supervision and discipline, but we have found that inadequacies exist in those areas as well. For instance, many observers have noted that there are too few (nine) Assistant Chief Immigration Judges (ACIJs) supervising the more than 220 other immigration judges spread throughout the country. In addition, supervision of immigration judges suffers from a lack of appropriate feedback mechanisms such as performance reviews. In terms of discipline, the standards of ethics and conduct applicable to the judges are currently numerous and unclear, and the disciplinary system lacks transparency. The disciplinary system also lacks independence, since it rests within EOIR and therefore the Department of Justice (DOJ). The lack of independence and clarity raises a concern about the potential for improper political influence on judges' decisions.

We recommend significantly increasing the number of ACIJs to permit a more appropriate ratio of judges to supervisors, rather than the current 20 to one ratio, and expanding their deployment to the regional courts. This reform would allow ACIJs more time to give focused attention to each immigration judge while maintaining their own dockets and other administrative duties. In addition, we urge implementation of a judicial model for performance review based on the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance proposed by the Institute for Advancement of the American Legal System. We also recommend the adoption of a new single, consolidated code of conduct for immigration judges, based on the ABA Model Code of Judicial Conduct and tailored to the immigration adjudication system.

Removal of Immigration Judges. Immigration judges serve as career attorneys in DOJ with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. The immigration judges have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. This erodes judicial independence and provides a basis to undermine public opinion regarding the competence and impartiality of immigration judges. This lack of independence may also inhibit some highly qualified individuals from seeking an immigration judge position.

In order to protect against the possibility that judges may be subject to removal or discipline based on politics or for other improper reasons, and to help attract the most qualified candidates, we recommend that they be provided statutory protection against being removed or disciplined without good cause (as is provided for administrative law judges who adjudicate cases in other federal agencies). This will provide the appropriate balance between accountability and independence.

Problems with Immigration Court Proceedings. Problems affecting the immigration court proceedings include extensive use of oral decisions made without sufficient time to conduct legal research or thoroughly analyze the issues and evidence and problems with courtroom technological resources and support services for judges (including unreliable recording equipment and the lack of written pre-decision transcripts). We note that EOIR has previously indicated it anticipates completing the rollout of digital audio recording systems to all immigration courts by the end of this year, and hope that that timeline will remain on track.

With additional resources and more time for judges to decide each case, judges should be required to provide more formal, reasoned written decisions, particularly in proceedings, such as asylum cases, where the complexity of the cases requires more thoughtful consideration than can be given during the hearing itself. Immigration judges should at a minimum produce written decisions that are clear enough to allow noncitizens and their counsel to understand the basis of the decision and to permit meaningful BIA and appellate review. If and when the parties in an immigration proceeding decide to proceed with an appeal, this record will also allow more efficient consideration of the cases by the BIA and federal circuit courts.

BOARD OF IMMIGRATION APPEALS

The Board of Immigration Appeals (BIA or Board) has a unique role and mission. The purposes of the Board's administrative review are to provide guidance to immigration judges below through the interpretation of the law, to achieve uniformity and consistency of decisions rendered by the immigration judge corps, and to ensure fair and correct results in individual cases. In an overwhelming majority of appeals, the Board is the court of last resort. In this context, the quality of the administrative appeal is crucial.

In the last decade, the standards governing the Board and the review process have changed significantly as a result of "streamlining" measures implemented in 1999 and 2002. Those measures were designed to reduce delays in the review process, focus the Board's resources on cases presenting the most significant legal issues, and eliminate a mounting backlog that had reached more than 60,000 cases by 2000. The 2002 streamlining regulations expanded the category of cases in which affirmances without opinion (AWO) and single-member review were treated as appropriate; eliminated the Board's authority to conduct de novo fact finding; imposed time limits for rendering decisions; and reduced the size of the Board from 23 to 11 Members.

The 1999 and 2002 streamlining reforms were successful in reducing backlogs and delays in adjudication by the Board. By the end of FY2009, the number of pending cases had been reduced to 27,969 cases. But this increase in Board efficiency came at a substantial cost, including the reduced likelihood of finding immigration judge error, the lack of precedent guidance coming from the Board, significant burdens imposed on Board Members, and increased burdens on the federal appellate courts as more BIA decisions are appealed. Furthermore, studies have suggested that single-member review and AWOs result in decisions that unduly favor the government at the expense of the noncitizen.[3]

Review of immigration court decisions by the BIA has the potential to reconcile disparities and correct errors in immigration judge decision-making before such cases are appealed, if at all, to the federal circuit courts. In the last several years, the Board has instituted several improvements in its processes — such as issuing fewer affirmances without opinions — that help it come closer to achieving this goal than its past practice allowed for after the two streamlining reforms. In addition, the size of the Board has been increased to 15 members. Nevertheless, the Board's current review process does not appear to have significantly altered the appeal rate to the circuit courts, or significantly reduced the result of adjudication disparities among the decisions of immigration judges. Therefore, to help the Board achieve its purpose of crafting uniformity in immigration law, exercising oversight, and correcting the errors of immigration judges, a number of additional reforms must be put in place.

Single-Member Review. Most BIA cases are now decided by a single Board Member. Single-member review precludes the issuance of precedent, makes it less likely that the Board will catch

[3] U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANTVARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 49 & fig. 6 (2008), *available at* http://www.gao.gov/new.items/d08940.pdf.

errors made by immigration judges, and precludes dissent and the interplay of diverse legal minds. Moreover, the shift to single-member decisions may have affected the outcome of appeals, as single-member review appears to generate fewer decisions that favor asylum seekers. Two academic studies found a sudden reduction in the rate at which the Board issued decisions favorable to asylum applicants after the 1999 and 2002 reforms were adopted.[4]. Similarly, a 2008 GAO Report found that only 7% of single-member decisions favored the alien in asylum appeals, compared to 52% of panel decisions.[5] Absent some rational explanation for this discrepancy, these findings support making changes to ensure that the method of review does not impact the outcome of an appeal. We recommend: 1) amending the Board's regulations to make review by three-member panels the default form of adjudication and to allow single-member review only in very limited circumstances; 2) requiring panel review for all non-frivolous merits cases that lack obvious controlling precedent; and 3) allowing single-member review for purely procedural motions and motions unopposed by the Department of Homeland Security (DHS). For these reforms to be implemented, additional staff attorneys and Board Members will be needed.

Lack of Detailed Decisions. Following adoption of the 2002 streamlining reforms, the Board relied heavily on AWOs. This practice has declined more recently, with AWOs constituting only about 5% of Board decisions for the first six months of fiscal year 2009, compared to 36% in fiscal year 2003. However, short opinions by single members are now the dominant form of decision-making. Since the Board is not required to issue decisions responding to all arguments by the parties, they can be as short as two or three sentences, even when the issues would appear to merit a longer discussion. This shift from AWOs to short opinions is insufficient as a quality improvement for decisions issued by the Board. The lack of detailed, reasoned decisions denies both the noncitizen and a reviewing court a sufficient explanation of the Board's decision.

We recommend detailed written decisions that address all non-frivolous arguments raised by the parties, thus providing sufficient information to facilitate review by federal appeals courts, to allow participants to understand the Board's decision, and to promote their confidence in the fairness of the decision.

Standard of Review. The stricter "clearly erroneous" standard of review in effect at the BIA since 2002 inhibits the Board's ability to correct factual mistakes made by immigration judges, which are increasingly difficult to avoid given the enormous caseload and time pressures imposed on these judges. This standard also inhibits the Board's ability to serve as a check against unwarranted disparities among immigration judges in factually similar cases. The current limitation has impeded the Board's oversight role and increased the chances that an applicant could be harmed by erroneous decision-making. We recommend restoring the Board's ability to conduct a de novo review of factual findings and credibility determinations by immigration judges.

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[4] David Martin, Major Developments in Asylum Law over the Past Year, 83 INTERPRETER RELEASES 1889 (2006); John R.B. Palmer, et al., Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. L.J. 1 (2005).
[5] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3

Lack of Precedent. The combination of single-member review and lack of detailed decisions has given rise to a dearth of Board precedent and guidance for the courts. Since only decisions issued by a three-member panel or the Board en banc may be designated as precedential, the vast majority of the Board's decisions are now unpublished and, although binding on the parties, do not serve as precedent. The number of precedent decisions has recently increased, due in part to a recognition of the need for such decisions, but it still falls short of the percentage of published opinions (over 15%) issued by federal appellate courts. A greater body of precedent is needed to provide an orderly body of law, to facilitate efforts to reduce disparity among immigration judges, to decrease the number of appeals and rates of reversals, and to decrease the frustration and cost of prosecuting and defending noncitizens in the removal adjudication process.

The Board should issue more precedential decisions, expanding the body of law to guide immigration courts and practitioners. Regulations should continue to require that the full Board authorize the designation of an opinion as precedential. In addition, we support making non-precedential opinions available to noncitizens and their attorneys. Currently, the Board maintains an internal database of such opinions. Making this database publicly available would provide additional guidance to those appearing before immigration adjudicators.

Lack of Independence. The Board's status as a body created by regulation (not by statute) and subject to the Attorney General's power has led to frequent criticism regarding its lack of political and executive independence. Board Members are appointed by the Attorney General and serve at his or her discretion. Decisions of the Board are reviewable de novo by the Attorney General, who may vacate decisions and substitute his or her own decisions. This structure has generated concern that Board adjudication can be politicized either directly through the firing of members whose decisions the Attorney General disagrees with or indirectly through the threat of reversal of opinions that do not comport with the implied policy direction of the Attorney General. The downsizing of the Board in 2002 reinforced such criticism. Whether the threat of removal may have the potential to affect the decision-making of Board Members or not, even the perception that Board Members are subject to political influence harms morale, impugns the Board's reputation with both noncitizens and practitioners, and undermines the legitimacy of the Board's decisions.

REPRESENTATION

Any examination of the operations of the immigration courts would be incomplete without considering the impact of legal representation, or lack thereof, for noncitizens in the removal adjudication process. EOIR has put in place some measures to provide noncitizens with assistance in obtaining representation. These include a Legal Orientation Program (LOP) for some detainees in removal proceedings; a Model Hearing Program, which provides immigration law training to attorneys and law students who agree to provide a certain amount of pro bono representation annually; an Unaccompanied Alien Children Initiative; and the issuance of a new policy for pro bono activities in immigration courts, designed to facilitate the functions of pro bono counsel.

Despite EOIR's efforts, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2008, approximately 57% of these noncitizens

were unrepresented. For those in detention, the figure is even higher — about 84% are unrepresented. Barriers impeding access to representation include the unavailability of the LOP to persons who are not detained, as well as many detainees; the inability of many persons to afford private counsel; and a number of systemic impediments, including remote detention facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another location without notice and with DHS routinely seeking changes of venue.

There is strong evidence that representation 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.[6] 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.[7] 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.[8]

Representation also 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 understand 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 lessen the burden on immigration courts and facilitate the more efficient processing of claims. This is particularly true in detained cases.

One means of increasing access to representation and legal information is to expand the Legal Orientation Program (LOP). EOIR established the LOP in 2003 and the program 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 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

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[6] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. Rev. 295, 340-41 (2007).

[7] 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.

[8] *Id.*

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 LOP facilitates immigrants' access to justice, improves immigration court efficiency, and saves government resources.

However, the LOP currently does not reach the majority of noncitizens who may need assistance. First, it operates at only 25 of the approximately 350 detention facilities currently under contract with DHS. Second, it does not reach *non*-detained persons and those who might have special need for legal representation, such as persons with mental disabilities and illnesses. Finally, the LOP may not be able to reach those noncitizens who are placed into expedited removal. EOIR should be provided with sufficient resources to expand the Legal Orientation Program nationwide and make it available to all detained and non-detained noncitizens in removal proceedings.

IMPACT OF INCREASING ENFORCEMENT ON IMMIGRATION COURTS: The Need for Change in Department of Homeland Security Policies and Procedures

To a certain extent, EOIR is at the mercy 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 358,886 in FY 2008 – a more than 400% increase.[9] The number of Notices to Appear (NTA) issued by DHS grew by 36% in just two years, from 213,887 in FY 2006 to 291,217 in FY 2008. 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 and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases.

While this imbalance between judges and cases is in part a function of insufficient funding and staffing for the immigration courts, DHS policies and procedures, along with some substantive provisions of immigration law, significantly contribute to the burden. In order to alleviate this burden, we recommend actions not only to increase the resources available but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the system. This will enable the enforcement and adjudication functions to work together 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 Removal Proceedings and Litigation. Immigration and Customs Enforcement (ICE) officers' decisions are guided by operation manuals, guidance from supervisors, and training. A 2007 GAO report concluded that ICE lacked comprehensive guidance for the exercise of officer discretion, particularly in determining whether to detain noncitizens with humanitarian circumstances or those who are not

[9] U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 T.36 (Aug. 2009).

primary targets of ICE investigations.[10] In addition, ICE did not have an effective mechanism to ensure that officers are informed of legal developments that may affect decision-making.[11]

The decision to serve an NTA on a noncitizen is an exercise of prosecutorial discretion.[12] If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. Therefore we recommend: 1) communicating to all DHS personnel the view of the DHS Secretary and other senior officials that the appropriate exercise of prosecutorial discretion is not only authorized by law but encouraged; 2) updating existing policies, guidelines and procedures to assist DHS officers and other personnel in appropriate exercises of prosecutorial discretion and; 3) mandating periodic training for DHS officers and other personnel, including senior officials.

To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys.
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 removal cases assigned to him or her, give the attorney a sense of ownership over those cases, and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

Cease Issuing NTAs to Noncitizens Who Are Prima Facie Eligible to Adjust to Lawful Permanent Resident Status. On July 11, 2006, Michael L. Aytes, Associate Director for Domestic Operations of the United States Citizenship and Immigration Services (USCIS), issued a memorandum informing USCIS offices that on and after October 1, 2006, upon the completion of the denial of an application or petition, an NTA should "normally" be prepared as part of the denial if the applicant is removable and there are no means of relief available.[13] The memorandum notes that "[d]eciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition." This represents a shift in prior USCIS policy established in September 2003 under which the issuance of NTAs by USCIS Service Centers focused on: cases in which a noncitizen's violation of the Immigration

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[10] U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE NONCITIZEN REMOVAL DECISION MAKING 20-22 (2007).

[11] *Id.* at 17.

[12] U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet "Type of Immigration Court Proceedings and Removal Hearing Process" (July 28, 2004). The decision to initiate removal proceedings is not subject to judicial review by any court. *See* INA § 242(g), 8 U.S.C. § 1252(g); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). Prosecutorial discretion is the authority of a law enforcement agency to decide whether to enforce, or not to enforce, the law against an individual.

[13] Michael L. Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Policy Memorandum No. 110: Disposition of Cases involving Removable Noncitizens 7 (July 11, 2006).

and Nationality Act (INA) or other law constituted a threat to public safety or national security; instances where fraud schemes had been detected; and certain applications for temporary protected status where the basis for the denial or withdrawal constituted a ground of deportability or excludability.

While this policy shift did not eliminate the exercise of prosecutorial discretion,[14] practitioners have reported instances in which USCIS has served NTAs on noncitizens that are out of status but eligible to adjust to LPR status pursuant to INA Section 245. For example, in January and February of 2009, the USCIS Texas Service Center reportedly issued NTAs to out-of-status noncitizen beneficiaries following the approval of employment-based immigrant visa petitions (Form I-140) filed for their benefit. The new policy also can reach noncitizens eligible to adjust to LPR status pursuant to INA section 245(i) who have not yet filed to adjust their status or who were unable to adjust their status because of backlogs associated with the relevant employment-based immigrant visa preference category.

Permitting the issuance of NTAs under such circumstances is an inefficient use of adjudicatory resources. Accordingly, we recommend that DHS implement a policy of not issuing NTAs to noncitizens who may be out of status but are prima facie eligible to adjust to LPR status.

CONCLUSION

Ensuring a fair and effective system for adjudicating immigration cases is in the interest of both the government and individuals within the system. While EOIR has made progress in a number of areas, there is ample evidence that significant problems remain. For example, notwithstanding a recent hiring effort, a recent report noted that the backlog of pending cases in the immigration courts is at an all-time high. 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. The American Bar Association looks forward to offering its assistance as a part of this effort.

Thank you again for this opportunity to share our views.

[14] USCIS has noted that it maintained and had the authority to exercise prosecutorial discretion and that "[t]here will be a number of cases where USCIS will decide not to issue an NTA upon a finding that to do so would be against the public interest or contrary to humanitarian concerns." USCIS Response to Recommendation #22 (Apr. 27, 2006) http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_22_Notice_to_Appear_USCIS_Response-04-27-06.pdf. In addition, USCIS has said there may be situations in which it would be logistically inappropriate to issue an NTA, such as where an application to adjust to LPR status was denied because it was filed prior to the effective date of the preference category priority. *Id.*

Ms. LOFGREN. Thank you. Very helpful.
Mr. Wheeler?

TESTIMONY OF RUSSELL R. WHEELER, PRESIDENT, THE GOVERNANCE INSTITUTE, VISITING FELLOW, THE BROOKINGS INSTITUTION

Mr. WHEELER. Chairwoman Lofgren, Ranking—can you hear me?

Ms. LOFGREN. We are having problems with these microphones today. Maybe the clerk can help you on that.

Mr. WHEELER. I have a green light.

Ms. LOFGREN. Oh, there you——

Mr. WHEELER. That better?

Chairwoman Lofgren, Ranking Member King and other Members of the Subcommittee who may appear. In all the attention to immigration courts, which is where the road stops for most people in removal proceedings, there has been little effort to try to apply to those courts lessons that have been learned from other Federal courts and state courts, judicial branch courts, as it were, courts in the third branch.

Now, those courts and executive branch courts, like the immigration courts, derive their authority from different sources, but I have to tell you, looking at the immigration court, in many ways it looks to me very much like a mid to large size state court—state trial court—or perhaps the U.S. bankruptcy courts more than the adjudicatory agencies in the executive branch.

And on that basis, my suggestion has to do with the characteristics of excellent courts that legal and judicial organizations have developed over the years, and scholars as well. By excellent courts I mean courts whose judges manage and decide cases impartially and efficiently and courts that are accountable for the effective use of the resources allocated to them.

It is worth considering whether adopting some of these characteristics might improve the operation of the immigration courts, although obviously that is not going to solve the entire problem, especially the problem of resources. Now, I am not the first to suggest this idea of importing standards from third branch courts to immigration courts.

To become an excellent court—I am quoting here from the International Consortium on Court Excellence—"proactive management and leadership are required at all levels, not just at the top, and performance targets have to be determined and detained. Well-informed decision-making about achieving high performance requires sound measurement of key performance areas and reliable data."

Now, that statement points first to a point that you made, Chairwoman Lofgren, about the crucial role of a chief trial court judge in forging consensus, monitoring performance and encouraging innovation. Now, there is a chief district judge, chief judge in every district court, and every bankruptcy court and almost every multijudge state trial court. And at the best, these local chief judges, in the words of the ABA's Committee on Standards of Judicial Administration, "set an example in the performance of judicial administrative functions, emphasizing the importance of tact, the ability to listen, attention to the interests of others, and persuasiveness."

At the Federal Judicial Center, we found as long ago as 1977 that the best-performing district courts were characterized by chief judges who had exceptional personal skills and the ability to forge compromises.

Now, the Executive Office, as Mr. Osuna said, assigns eight assistant chief immigration judges to from four to 11 of the over 50 immigration courts. Six are resident in the courts. That means that most of the courts do not have a resident chief judge.

I have no doubt that these assistant chief judges are committed to the effective administration of the immigration courts, and no doubt they possess the characteristics that I described for other chief judges. But without knowing more, I just have to ask whether or not it might benefit the immigration courts to establish a system of chief judges in every court similar to that that prevails in the third branch courts.

And also I'm just a little concerned about the orientation of the assistant chief judges. They are listed on the EOIR Web site right above instructions for filing complaints about judges. I don't dismiss the stories about rude and worse immigration judges, but too much emphasis on supervision and discipline inevitably fosters the view of immigration judges as bureaucrats who need to be supervised and disciplined rather than professionals, most of whom will perform well in an environment of consensus leadership.

Now, a second lesson that comes from the third branch court improvement efforts is the importance of performance measurement, which has a bad rap in the immigration courts partly because of the well-taken view of the immigration judges that they, like administrative law judges, should not be subject to performance measurement by the agency in which they work, and perhaps a little too much emphasis on productivity to the exclusion of other judicial virtues.

But a flaw in design and implementation is not a flaw in the basic concept. And my statement and those of Judge Marks is they both can include examples of well-designed performance measures court-wide and individual judge-wide, which encourage excellence and transparency.

Now, these suggestions I have made our unrefined, but I appreciate the chance to express them today, and I will try to answer any questions you may have.

[The prepared statement of Mr. Wheeler follows:]

PREPARED STATEMENT OF RUSSELL R. WHEELER

Prepared Statement of

Russell R. Wheeler
President, The Governance Institute
Visiting Fellow, The Brookings Institution

on the Executive Office for Immigration Review

Before the
Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law

Committee on the Judiciary, House of Representatives

June 17, 2010

Prepared Statement of Russell R. Wheeler*

Chairwoman Lofgren, Ranking Member King, and members of the Subcommittee: Thank you for this opportunity to testify at these oversight hearings on the operation of the Executive Office for Immigration Review and its components.

Since 2005, I have been the president of the Governance Institute—a small, non-partisan organization that since 1986 has analyzed various aspects of interbranch relations, with special attention to the judicial branch and the administrative state—and a Visiting Fellow in the Brookings Institution's Governance Studies Program. Before assuming these positions I was for 28 years with the Federal Judicial Center, the federal courts' agency for research and education, serving since 1991 as its Deputy Director.

My focus today will be on the immigration courts, because it is there that the litigation journey ends for the great majority of those in removal proceedings.[1] My interest in immigration courts is relatively recent. While I do not bring years of study of or experience in them, I have spent a good deal of time working with federal and state courts, and observing their operations and efforts to improve their operations.

Evaluating immigration court performance implicates three questions:

- Are they adequately resourced? No, but appropriations at the level needed are unlikely, especially in these difficult economic times.
- Should they be housed in the Department of Justice? Probably not, but the prospects for major structural change are quite unlikely.
- Given these two answers, are there other ways to enhance immigration court performance? Probably, and the bulk of my testimony will expand on this answer.

There is general agreement that the immigration courts need substantially more resources in order to do their inherently difficult job. Current resources provide too few immigration judges (IJs) and thus impose case processing demands on them that greatly exceed demands on other adjudicators whose decisions can have momentous impact. IJs in 2009 averaged 1,251 completed proceedings per judge, with considerable variation among the courts—from 506 per judge in one court to 3,504 in another.[2] By contrast, federal district judges in 2009 terminated on average 528 civil cases and criminal defendants per judgeship,[3] and few argue that federal district judges are underworked. IJs have an especially difficult job because of their working conditions, the kind of evidence before them, and because their decisions, some literally involving life or death, are largely dichotomous—removal or not rather than, for example, the range of criminal sentences a judge could impose—and their decisions are final, as opposed, for example, to state criminal sentences that a parole board can reconsider.[4]

There is less agreement about structural change. The National Association of Immigration Law Judges,[5] the American Bar Association Commission on Immigration,[6]

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* This statement is drawn in part from Wheeler, "Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky," 59 DUKE L. J. 1847 (2010). My work on immigration courts is supported by a grant from the Leon Levy Foundation to the Governance Institute.

to name two, have recommended some type of free standing agency or so-called Article I court, inside the executive branch but outside the Department of Justice, to do the work currently assigned to the immigration courts and the Board of Immigration Appeals.

I do not dwell on structural change because it is not the subject of these hearings and, as a practical matter, is quite unlikely to be enacted for the foreseeable future. It is not impractical, however, to identify the goals that such an independent agency might serve and whether it is possible to promote some of these goals under the current structure. The key goals are impartial and effective case management and decision-making, on the one hand, and accountability for the effective use of resources. Those values are important in any adjudicatory system but especially in one whose decisions are of such great consequence to aliens ordered removed and their families, and, just as important, to citizens who want immigration laws enforced. The immigration courts should provide litigants and interested publics assurance that executive branch removal orders are consistent with the criteria Congress has provided.

Of course, few argue that IJs' case management and decision making should not be impartial. The Department, although referring to IJs as the delegates of the attorney general, nevertheless tells them to "exercise their independent judgment and discretion" and to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."[7]

The current arrangement, however, defuses accountability, because IJs are ultimately accountable to the Justice Department, which is in turn accountable to Congress for how they do their jobs. There is, moreover, an inevitable conflict when the Department, with its wide-ranging portfolio and its inherent and necessary prosecutorial orientation—even if it does not prosecute in the immigration courts—is expected to administer a judicial system with as delicate and vital a mission as that of those courts. Judge Marks can testify better than I about problems created by those conflicting missions. In some ways, the situation seems analogous to the Justice Department's 69-year administration of the federal district and circuit courts. That situation prevailed from the department's creation in 1870 until 1939, when Congress created the Administrative Office of the U.S. Courts and told it to function under the supervision of what is now the Judicial Conference of the United States. One impetus for change were complaints that the chief prosecutorial agency should not be administering the courts in which it brought its prosecutions. Moreover, though, as Peter Graham Fish put it, "[a]t the root of many executive-judiciary stresses was the relatively insignificant place of the courts in the department's total administrative realm, and the nature of the court system's problems."[8] Attorney General Homer Cummings expressed the consensus that emerged within the courts and the Justice Department. "Let the judges run the judiciary," he told a legislative committee in 1938. "That is the burden of my song."[9] When Congress did let the judges run the judiciary, the judges became accountable to Congress for the responsible exercise of their duties and effective use of the resources provided them.

A DIFFERENT APPROACH TO IMPROVING THE IMMIGRATION COURTS

Given barriers to major structural change, perhaps the best hope for improving immigration court adjudication lies in Justice Department reassessment of some aspects of immigration court management. While whatever changes the department implements

may last only until the next attorney general takes over, trying new approaches is better than trying nothing. And new approaches to immigration court management would also benefit any independent adjudication agency that Congress might establish.

A. Using third branch analytic methods and findings to assess and improve executive branch courts

As developed below, I suggest that the Justice Department and the immigration courts look to successful efforts to improve the performance of third branch courts—defining "performance" broadly to include not only expeditious case disposition, but also judges' being attentive to the needs of court users and operating with transparency and accountability. Immigration courts—for all the ink devoted to them in recent years—have been subjected to rather narrow analyses of how they function as courts and little effort to learn how lessons gleaned about the ingredients for effective courts might be applied to immigration courts. The foray I describe here to use some third branch approaches to enhance the performance of immigration courts is tentative, limited, and exploratory, and I welcome comments and challenges to it. I realize too that the current caseload per IJ may make a pipedream of the analyses suggested by this approach, including application of the diagnostics necessary to implement them.

"Immigration Court," one immigration scholar has observed, "basically looks, feels, and operates like most other courts [even though] some of its characteristics strike even experienced litigators as foreign."[10] Beyond their look and feel, though, are other factors that make immigration courts less like many executive branch courts and more like large state court systems or the U.S. bankruptcy courts. First, the over 200 judges in over 50 immigration courts operate throughout the country, while most executive branch courts are based in the Washington, D.C. area. Second, the immigration court system is much larger than almost all executive branch adjudication agencies that employ Administrative Law Judges. Most of those agencies employ from one to 19 such judges (with the Social Security Administration the obvious exception).[11] And (again with a few exceptions[12]) the caseloads of other executive branch adjudication agencies appear to be small although often complex. (It is harder to get a handle on the number and configuration of non-APA judges—other than immigration judges—although a 2002 canvass identified 3,370.)[13]

B. Standards for Assessing Courts

Developing standards by which to assess courts has been one of the most pervasive types of efforts to improve their performance. I refer, first, to judicial administration standards, second to performance standards, and third to cultural standards (or types). I describe these three sets of standards briefly below. Various lessons from them might well be applied to immigration courts. In this statement, I discuss two: strong leadership by local trial court chief judges and comprehensive performance measures.

1. Judicial administration standards It seems likely that how courts are organized—e.g., who has management responsibility—may have some influence on their ability to deliver justice effectively, expeditiously, and economically. On that belief, the American Bar Association developed "minimum standards of judicial administration" in 1938 and approved revisions of them in 1974[14] and 1990.[15] It added standards for trial courts in 1992.[16] The standards, developed by committees of state judges and court administrators, embrace the "unified court" approach, in which all courts in a state are under the

administrative and rule-making authority of the highest state court and its chief justice. The highest court of the state may be roughly analogous to the Chief Immigration Judge within the Executive Office for Immigration Review (or perhaps the Board of Immigration Appeals in its capacity as, in effect, the system's appellate court). The revised standards recognize as well the need for strong and collegial local leadership by trial court chief judges. The ABA has promulgated additional organizational standards in various relevant areas, which some have recommended be applied to IJs' selection[17] and performance reviews.[18]

2. Court performance standards In 1990, the National Center for State Courts published its TRIAL COURT PERFORMANCE STANDARDS.[19] These performance standards reflect the view that even though the judicial administration standards state a well-informed conventional wisdom about how to organize and manage courts, in the final analysis, what is important is how courts perform. The standards, grouped in five "performance areas," are aspirational statements of how those who run and use the court, and taxpayers, expect courts to perform. Some examples:

Performance Area	Sample standard
1. Access to Justice	1.4 Courtesy, Responsiveness, and Respect—Judges and other trial court personnel are courteous and responsive to the public, and accord respect to all with whom they come into contact.
2. Expedition and Timeliness	2.1 Case Processing—The trial court establishes and complies with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload.
3. Equality, Fairness, and Integrity	3.4 Clarity—The trial court renders decisions that unambiguously address the issues presented to it and clearly indicate how compliance will be achieved.
4. Independence and Accountability	4.2 Responses to Change—The trial court responsibly seeks, uses, and accounts for its public resources.
5. Public Trust and Confidence (noting that courts have several constituencies) *	5.3 Judicial Independence and Accountability—The public perceives the trial court as independent, not unduly influenced by other components of government, and accountable.

* They include "the vast majority of citizens and taxpayers who seldom experience the courts directly; "opinion leaders;" "citizens [sic] who appear before the court;" and judges, court staff, and lawyers "who may have an 'inside' perspective on how well the court is performing."

The standards were released with an intimidating set of instruments for measuring performance. The National Center published in 2005 a simplified set of "CourTools"[20]—ten "core measures" that judges and administers can use to monitor their courts' performance. Eight measures are applicable to immigration courts: "Access and Fairness," "Clearance Rates," "Time to Disposition," "Age of Active Pending Caseload," "Trial Date Certainty," "Reliability and Integrity of Case Files," "Court Employee Satisfaction," and "Cost per Case."

3. Court Cultures Performance standards help judges and court managers identify how courts should perform, and how to measure whether they are performing as they should, but they offer little guidance in how to manage courts to achieve high performance. That

realization led to the third effort to improve state courts—analysis of their organizational cultures and a search for links between culture and performance, and how to change current cultures to those associated with high performance.

The 2007 path breaking work in this area, TRIAL COURTS AS ORGANIZATIONS,[21] adapted analytical tools for assessing corporate culture and put them to use in 12 criminal felony trial courts in three states. Ostrom et al said "[a] court's management culture is reflected in what is valued, the norms and expectations, the leadership style, the communication patterns, the procedures and routines, and the definition of success that makes the court unique. More simply: 'the way things get done around here.'"[22]

Ostrom and his colleagues identified four court "cultural archetypes"[23]—communal (prizing collegial decision-making), networked (emphasizing creativity and innovation), autonomous (eschewing administrative controls), and hierarchical (where "the chain of command is clear,")—emphasizing that "court culture is a matter of emphasis and degree rather than perfect alignment."[24]

They assessed the "performance consequences"[25] of the trial court's primary culture in several TRIAL COURT PERFORMANCE STANDARDS areas. In terms of time to disposition, they expected and found that hierarchical courts are more likely than others to meet the ABA's 1987 Time Standards for criminal felony clearance rates.[26] When they asked trial judges and administrators which cultures they preferred—i.e., how they might want their courts to do business differently—they expected and found, as to managing cases and dealing with change, that judges and administrators generally preferred the aspects of hierarchical culture—doing business "on the basis of clear and orderly rules, expertise, and modern management techniques."[27] As to judge-staff relations and internal organizations, they found a preference for networked cultures, in which business is done "on the basis of inclusiveness ... [b]ecause judges and court administrators have ongoing relationships and must consult each other to discuss ways to implement policies, allocate resources, and configure court staff" and avoid :personnel conflicts."[28] For court leadership, they found that judges and administrators favored a communal culture—doing court business on a "collegial basis, where trust and mutual respect reign automatically."[29] Finally, they found little interest in an autonomous court culture.

B. Applying Standards, Assessing Cultures, in Immigration Courts

From TRIAL COURTS AS ORGANIZATIONS and similar assessments emerge several observations about the trial court culture-performance link that may have applicability to immigration courts. I hope to develop a broader framework for analysis and a research method to determine whether lessons learned about the organization and performance of third branch courts might be used beneficially in and by immigration courts. Below, I identify, as examples, two essential needs that emerge from the analysis of third branch courts—strong local leadership and comprehensive performance measurement. The INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE, developed by a consortium including members of the National Center for State Courts, several international and foreign court organizations, and the Federal Judicial Center, seeks to promote high performance in seven performance areas: court management and leadership; court policies; human, material and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence.[30]

The consortium's basic conclusion: "To become an excellent court, proactive management and leadership are required at all levels, not only at the top, and performance targets have to be determined and attained. Well-informed decision-making [about achieving high performance] requires sound measurement of key performance areas and reliable data."[31]

1. Trial court chief judges One element of high-performance trial courts is the role of the chief trial court judge in enhancing the court's performance by establishing policies through collegial decision-making, monitoring performance, building and sustaining morale, and searching for alternative ways of doing things.

In all federal district and bankruptcy courts and all but one state general jurisdiction trial court, one of the judges serves as the chief judge. Selection methods and terms vary. Chief federal district judges take office through a statutory formula that combines age and seniority; they may serve for up to seven years.[32] Chief bankruptcy judges are appointed by the respective district court.[33] The dominant selection method for state trial court chief judges is election by peers, followed closely by appointment by the state chief justice. In over half the states, the term is from one to three years, usually renewable.[34]

Rather than this chief-judge-in-every-trial-court arrangement, the immigration courts currently have eight Assistant Chief Immigration Judges (ACIJs) who are each responsible for from four to eleven immigration courts, usually on a rough geographic basis. One has responsibility, for example, for the three courts in or near New York City and the court in Ulster. Another has responsibility for nine courts in Arizona, California, Nevada, and Maryland. Six of the ACIJs are resident in one of the several courts under their purview, but that leaves 38 of the 45 multi-judge courts without a chief judge as a member of the court.[35] The jobs of these ACIJs must be highly taxing, and the ABA's 2010 report recommends a significant increase in their numbers[36]

Instead of more ACIJs, though, the Department, the EOIR, and the immigration courts might consider the conventional third branch approach of a chief judge for every multi-judge court, or at least for immigration courts of three or more judges. As of May 2010, 30 of the 52 courts for which EOIR showed at least one assigned judge had three or more judges, and those courts accounted for 76 % of the receipts in 2009.[37]

As much as their small numbers and geographic remoteness may limit the ACIJs' effectiveness (and I have no knowledge of their effectiveness), there may also be limitations within what appears to be the job description. On the EOIR website, immediately below the link to the ACIJs and their areas of responsibility, are links to directions for filing complaints about immigration judge conduct.[38] Similarly, the ABA Commission report discusses the need for more ACIJs in a section headed "Inadequate Supervision and Discipline,"[39] and a recent TRAC report on implementation of the attorney general's 2006 changes reflects the same orientation.[40] The emphasis on ACIJs as supervisors and discipliners no doubt reflects concern over some IJs' well-publicized abusive and intemperate behavior.

But dealing with "bad apples" is not the only thing that chief judges in well-performing trial courts do. ABA judicial administration standards and TRIAL COURTS AS ORGANIZATIONS emphasize, not supervising a group of bureaucrats, but rather leading a group of professionals. The ABA standards recognize the state chief justice as the central

authority of the court system but say that each trial court should have its own administration "so that it can manage its business."[41] In this scheme, the chief judge of each court assumes a key role, not only as "the locus of responsibility for internal management, coordination between units, and conduct of external relations,"[42] but also to "[s]et an example in performance of judicial and administrative functions," emphasizing the importance of "tact, the ability to listen, attention to the interests of others, and persuasiveness."[43]

Likewise, Ostrom and his colleagues see the job as "fostering agreement among members and staff of the court in a collegial manner" and "encourag[ing] other judges and staff to embrace one set of cultural orientations in case management style and change management and another set in judge-staff relations and internal organization. Clearly this role calls for the [chief] judge to be deft in building agreement and not asserting authority unilaterally or collaborating with a particular coalition on the court."[44] These are not novel observations. Flanders's 1977 study of federal district courts attributed the characteristics observed in high performing courts largely to their chief judges' "exceptional personal skills," and the ability to forge compromises, deal effectively with procedural issues, and work hard.[45]

I have no evidence whether the current ACIJs do or do not function in a similar manner in some or all of the courts under their purview. At least one immigration judge (in the New York court), writing specifically about the problem of unrepresented aliens, praises her ACIJ for encouraging the judges of the court to seek ways to improve legal representation of aliens, pro bono and otherwise.[46] But it is unlikely that the current arrangement fosters—or, given the numbers—even permits the kind of chief judge stewardship envisioned for third branch courts.

2. *Performance measures* Another important principle for high-performance trial courts is measuring performance, which has been highly controversial within the immigration courts. The ABA Commission[47] rightly ask whether current performance evaluations of IJs overmeasure productivity to the exclusion of other judicial virtues, and the National Association of Immigration Judges refers to "a well-recognized and long-established principle that administrative law judges must be exempt from the provisions of agency administered performance evaluations . . . precisely to ensure their independence in decision-making."[48] But any skewed emphasis in the EOIR instruments and in their administration by executive branch supervisors are not indictments of judicial performance evaluations but rather of their implementation within the EOIR, as the ABA Commission and National Association recognize.

"Excellent courts," says the International Consortium, "systematically measure the quality as well as the efficiency and effectiveness of the services they deliver,"[49] and those services extend well beyond disposing of cases quickly. They include, for example, the first of the CourTools "core measures," viz., "Access and Fairness." Ostrom et al as well emphasize systematic rather than casual and anecdotal measurement and follow up by the chief judge when other judges fail to comply with agreed upon reporting protocols.[50]

Performance measurement can be both court-based (e.g., CourTools) and individual judge-based (typically, "judicial performance evaluation" or JPE) and can serve various

purposes. CourTools serve internal management goals, but in the interests of transparency, some courts and entire state court systems have placed the resulting scores on their public websites,[51] partly in response to a 2005 Conference of State Court Administrators call for state courts to implement performance measures.[52]

Individual judicial performance evaluation, which first appeared in the 1970s[53] and were the subject of 1985 ABA standards,[54] are in use, typically by statute or court rule, in at least 19 states, the District of Columbia, and Puerto Rico. Evaluations serve various purposes: for assessing judicial education needs; to provide judges objective information about their strong and weak points; and, in some states, to assist voters or others who decide whether to retain judges in office. Performance evaluation supporters insist that judicial discipline is not a purpose of judicial performance evaluation and warn against disseminating information developed about a judge to judicial discipline bodies.[55] As tracked by the University of Denver's Institute for the Advancement of the American Legal System (on whose advisory board I serve), independent commissions use surveys and interviews of those who interact with the judge, case management data, and the judge's work product to evaluate judges on a regular schedule as to the performance areas of legal knowledge, integrity and impartiality, communication skills, judicial temperament, and administrative skills.[56]

3. Importing Third Branch Court Tools into Immigration Courts It will no doubt be challenging for the Justice Department to bring to immigration courts the staples of well performing third branch courts, such as chief judges in each multi-judge court and well-executed court and individual judge performance measures (and of course other aspects of well-performing courts that have gotten more attention than the two I discuss in this testimony, such as judicial selection and education[57] and litigant representation[58]). The key considerations, though, are heavy involvement by the judges themselves, and by independent knowledgeable observers, while maintaining management oversight that provides accountability to Congress. And although the stunningly high per judge caseloads may make impractical any effort to right the ship as opposed to simply constantly bailing it out, there may be room for trying new approaches.

¶ ¶ ¶

Thank you for the opportunity to testify this morning. I will do my best to answer any questions you may have.

[1] See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEARBOOK, at Y-1 2010 [hereinafter YEARBOOK] *available at http://www.justice.gov/eoir/statspub/fy09syb.pdf*

[2] These calculations are based on the 232 judges listed on the EOIR website under "Immigration Courts Nationwide" as of May 2010 *available at* http://www.justice.gov/eoir/sibpages/ICadr.htm and completions data reported in YEARBOOK supra note 1 at B-4.

[3] Based on Tables C-4 and D-4 in Administrative Office of the U.S. Courts, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2010)

[4] Baum, "Judicial Specialization and the Adjudication of Immigration Cases," 59 DUKE L.J. 1501, 1511 (2010).

[5] Marks, "An Urgent Priority: Why Congress Should Establish an Article I Immigration Court," 13 BENDER'S IMMIG. BULL. 3, 10 (2008)

[6] ABA Commission on Immigration, REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE THE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES [hereinafter ABA REPORT (prepared by the Arnold and Porter law firm) at Part 6 (2010)

[7] 8 C.F.R. §§ 1301.1 (a) (1) and (d)(ii).

[8] P. Fish, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 101 (1973).

[9] *Hearings before the Committee on the Judiciary, United States Senate, on S. 3212, A Bill to Establish the Administrative Office of the United States Courts, and for other Purposes*, 75th Cong., 3d Sess. at 31 (1938).

[10] Caplow, "Renorming Immigration Court," 13 NEXUS J. OP. 85 (2007-08) ("Renorming" in the sense of using different norms than used traditionally to assess immigration)

[11] "The Federal Administrative Law Judges Conference" at http://005754d.netsolhost.com/faljcl.html (viewed June 14, 2010).

[12] Veterans Law judges averaged 729 cases per judge; Social Security Administration Administrative Law Judges averaged 544 cases per judge. ABA REPORT, supra note 6 at 2-37.

[13] M. Asimov, "The Spreading Umbrella: Extending the APA's Adjudication Provisions to all Evidentiary Hearings Required by Statute," 56 ADMIN. L. REV..1003, 1008 (2004)

[14] American Bar Association Commission on Standards of Judicial Administration, STANDARDS RELATING TO COURT ORGANIZATION (1974).

[15] American Bar Association Judicial Administration Division, I STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION [hereinafter 1990 COURT ORGANIZATION STANDARDS] (1990).

[16] American Bar Association, Judicial Administration Division, II STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO TRIAL COURTS [hereinafter 1992 TRIAL COURT STANDARDS](1992)

[17] Caplow, *supra note* 10 text at note 54 and note 54

[18] ABA REPORT, supra note 6 at 2-33.

[19] Available at http://www.ncsconline.org/D_Research/TCPS/Contents.htm

[20] Available on the National Center for State Courts website at http://www.ncsconline.org/D_Research/CourTools/temp_courttools.htm

[21] Brian Ostrom, Charles W. Ostrom, Roger Hanson, and Matthew Kleiman, TRIAL COURTS AS ORGANIZATIONS (2007) [hereinafter Ostrom].

[22] Id at 4-5

[23] Id at 69, 74ff, 79ff, and 84ff

[24] Id at 42

[25] Id at 91

[26] Id at 94

[27] Id at 112

[28] Id at 112-13

[29] Id at 113

[30] International Consortium for Court Excellence, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE at http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf

[31] Id at 11
[32] 28 U.S.C. § 136
[33] 28 U.S.C. §154
[34] Based on state-by-state information presented by the American Judicature Society at "Methods of Judicial Selection" at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (viewed June 14, 2010).
[35] Drawn from "Immigration Courts Nationwide," supra note 2.
[36] ABA REPORT supra note 6 at 2-21.
[37] Drawn from "Immigration Courts Nationwide," supra note 2 and YEARBOOK supra note 1 at B-4
[38] "Immigration Courts Nationwide," supra note 2
[39] ABA REPORT, supra note 6 at 2-21.
[40] Transactional Records Access Clearinghouse, *Immigration Courts: Still a Troubled Institution* "9) Pilot Program to Deploy Supervisors to Regional Offices" (2009) available at http://trac.syr.edu/immigration/reports/210/.
[41] 1990 COURT ORGANIZATION STANDARDS supra note 15 at 29.
[42] Id at 17
[43] 1992 TRIAL COURT STANDARDS supra note 16 at 44-45
[44] Ostrom supra note 21 at 127
[45] Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURT 78 (Federal Judicial Center, 1977)
[46] Noel Brennan, "A View from the Immigration Bench," 78 FORDHAM L. REV. 623, 627 (2009). Judge Brennan is an immigration judge at the main immigration court in New York City.
[47] ABA REPORT, supra note 6 at 2-21
[48] Marks, surpra note 5 at 14
[49] International Consortium for Court Excellence, supra note 30
[50] Ostrom supra note 21 at 145
[51] See the site links for "State/County Specific" at the National Center for State Courts' "Performance Measurement Resource Guide at http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=CtPerS#639, and, for example, the "Utah Court Performance Measures" at http://www.utcourts.gov/courtools/
[52] R. Schauffler, "Judicial Accountability in the US state courts, Measuring Court Performance," 3 UTRECHT L. REV. 112, 1219 (2007) at www.utrechtlawrev.org
[53] R. Kourlis and J. Singer, "A Performance Evaluation Program for the Federal Judiciary," 86 DENVER U. L. REV. 7, 10 (2008)
[54] American Bar Association Special Committee on Evaluation of Judicial Performance, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985), reaffirmed in 2005 and available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf (as cited in Kourlis and Singer, supra note 51 at n. 14
[55] ABA Special Committee supra note 54, Guideline 2.3
[56] Kourlis and Singer, supra note 53
[57] See, e.g., ABA REPORT supra note 6 at 2-18ff.
[58] See, e.g., R. Katzmann, "The Marden Lecture, The Legal Profession and the Unmet Needs of the Immigrant Poor," 3 GEO. J. LEGAL ETHICS 3 (2008) and Katzmann, "Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor," 78 FORDHAM L.REV. 453 and, in the same number of the REVIEW, the reports of three task forces that Judge Katzmann has assembled to enhance pro bono representation of aliens in immigration adjudication in New York City. Other pro bono representation projects are active in, for example, Houston (see South Texas Pro Bono Asylum Representation Project (ProBAR) at http://www.abanet.org/publicserv/immigration/probar.shtml; Immigration Justice Project of San Diego at http://new.abanet.org/Immigration/Pages/ImmigrationJusticeProject.aspx; and Florida ("Legal Representation Critical for Children in Immigration Removal Proceedings", ABA Now at http://www.abanow.org/2010/02/legal-representation-critical-for-children-in-immigration-removal-proceedings/).

Ms. LOFGREN. Thank you very much.

Judge Marks?

TESTIMONY OF THE HONORABLE DANA LEIGH MARKS, PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Judge MARKS. Do I pass the microphone test?

Ms. LOFGREN. Yes, you did, but I didn't.

Judge MARKS. Thank you.

Good morning, Chairwoman Lofgren, Representative King and distinguished Members of the Committee, who may come and go. Thank you for the opportunity to testify before you today.

I am the elected president of the National Association of Immigration Judges, which is the certified representative and collective bargaining unit for approximately 237 immigration judges presiding in the 50 states and U.S. territories. The NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO.

In my capacity as president, the opinions offered represent the consensus of our members, but do not represent the official position of the United States Department of Justice.

The NAIJ has long been on record explaining why far-reaching structural reform and reorganization of the immigration court system is needed, and we would welcome the opportunity to discuss this important issue in depth at the appropriate time. However, in light of the focus of this hearing, I will limit my comments to actions which can be taken immediately that would greatly improve the efficiency of our courts in their current structure.

Because of your oversight responsibility, you are already aware that the proceedings before the immigration courts rival the complexity of tax law cases, with consequences that can implicate all that makes life worth living and even threaten life itself. Despite the stakes of these proceedings, we operate with scarce resources at a pace that would make a traffic court judge's head spin.

While the average Federal district court judge carries a docket of 400 cases, the average immigration judge completed over 1,500 cases last year. Eighty-five percent of the respondents in detained settings appear without attorneys to represent them, and a high percentage of the cases that we hear do involve detained respondents. Fairness and efficiency are crucial to our mission.

I would like to make four short-term recommendations. First, the immediate hiring of more immigration judges is essential to alleviate the backlogs and stress caused by overwork, which lead to many problems that undermine the optimal functioning of our system. One obvious solution to this problem is now under way—hire more permanent full-time judges. And we commend EOIR for its rededication to this task and the promising effort it is currently making in this regard.

However, we also strongly advocate an additional approach to address this long-standing problem—the institution of senior status. In the past EOIR has never re-hired retired immigration judges on a part-time or contractual basis, and the time is ripe to do so.

In the National Defense Authorization Act for fiscal year 2010, Congress facilitated part-time reemployment of Federal employees on a limited basis, with receipt of both annuity and salary. The cre-

ation of a senior status for immigration judges, perhaps using reemployment under these provisions, would provide an immediately available pool of highly trained and experienced judges, who could promptly address pressing caseload needs in a cost efficient manner.

The benefits 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 could provide the immigration court with trained judges, who could comprise a rapid response team available to address unexpected caseload fluctuations or to assist in the training and mentoring of new judges. We firmly believe this would be an extremely effective way to keep the immigration judge workforce nimble and responsive to the agency's changing needs.

Our second short-term recommendation is the development of a principled methodology for budget requests and resource allocation. This can be achieved in two ways. Previously, Congress recognized the lack of a defensible fiscal linkage between the Department of Justice and the Department of Homeland Security and the fact that this has caused a chronic disconnect between enforcement activity and the lack of proportional increases in the resources for the immigration courts to use to respond. Such a linkage is imperative.

In addition to this critical tool, the NAIJ endorses implementation of the case weighting system modeled after the one employed by Federal district courts. This approach would provide insight into how to maximize the resources which are allocated to EOIR and help it plan effectively and proactively in the face of changing caseload dynamic. This type of analytical approach would be an invaluable tool to identify the level of resources needed by local immigration court as well as to clarify the needs of our system as a whole.

We also advocate incorporation of a study of other factors, which have been found by the Federal judiciary to influence their workload, such as the economies which can be achieved through automation, technology, flexible work schedules and program improvement.

Third, increased support services and resources are necessary, particularly an improved ratio of law clerks to immigration judges. I will briefly sum up.

Ms. LOFGREN. Actually, I am going to ask you to submit for the record, because we are going to have votes in a few minutes. I hope to get all the questions in before we do. And ordinarily, I would say go ahead, but we are going to call on Judge Metcalf at this point so that we can go to our questions.

Judge MARKS. I understand caseload pressures.

[The prepared statement of Judge Marks follows:]

PREPARED STATEMENT OF THE HONORABLE DANA LEIGH MARKS

Written Statement of the Hon. Dana Leigh Marks

President, National Association of Immigration Judges

Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary

United States House of Representatives

June 17, 2010

Madame Chairwoman, Mr. Ranking Member, and distinguished members of the Subcommittee, thank you for the opportunity to testify before you on the occasion of Congressional oversight of efforts by the Executive Office for Immigration Review ("EOIR") to improve the Immigration Courts.

My name is Dana Leigh Marks. I am appearing today on behalf of the National Association of Immigration Judges ("NAIJ") to provide our perspective on current challenges facing the Immigration Courts. While we have long been on record explaining why far-reaching structural reform and reorganization of the court system is needed,[1] in light of the focus of the current hearing, I will limit my comments to actions that can be taken immediately which would greatly improve the efficiency of the Courts while in their current structure.

I am the elected President of NAIJ, which is the certified representative and recognized collective bargaining unit representing the approximately 237 Immigration Judges presiding in the 50 states and U.S. territories. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO. In my capacity as President, the opinions offered represent the consensus of our members. The views expressed herein are not those of EOIR or the Department of Justice ("DOJ").

Who We Are

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 United States Supreme Court. Some of us 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 ("AILA"), the field's most prestigious legal organization, as well as several former local chapter officers. Many immigration judges continue to serve as adjunct professors at well-respected law schools throughout the United States. Some Immigration Judges have previously served as Administrative Law Judges ("ALJs"), whose qualifications have been compared with Federal district judges, or as state court judges.[2]

What We Do

The proceedings over which we preside rival the complexity of tax law proceedings, with consequences which 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. But immigration court determinations are far more intricate than most people, even lawyers, imagine. Those appearing before our courts also include lawful permanent residents who have lived virtually their entire lives in the United States, vulnerable unaccompanied minors, and sometimes even individuals who are actually United States citizens but 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 a 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. Federal circuit courts of appeals 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 testimonies 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 that 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. Immigration judges cannot refer to a transcript when rendering their decisions, as written transcripts of the proceedings are only created after their decision is appealed. 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 are generally scheduled to be on the bench 36 hours a week, receiving four hours less administrative time each week now than they did 20 years ago, when caseloads were smaller and the law far less complicated. This administrative time is woefully inadequate to keep up with motions adjudication, case preparation, and the general tasks of staying current with legal developments and changing country conditions.

The system is struggling to accommodate the evolving demands and criteria set forth in Federal circuit court holdings, which require more in-depth rationales, at a time when 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. Moreover, it is not just the number of cases in the system as a whole that cause this adjudicative crisis but also the pressures to continue to adjudicate historically high numbers of complex cases on a daily basis so as to forestall and reduce backlogs.[4] To put this in context, while the average Federal district judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2009, immigration judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges. Under these circumstances, it is not surprising that a

recent study found 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 with the increased DOJ focus on enforcement of criminal laws relating to immigration violations. As ICE's budget rises and provides better-prepared prosecutions in Immigration Courts, both the private bar and applicants respond 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 require a significant amount of additional judicial time for hearings and case evaluations. Simply put, immigration judges have found themselves behind the curve due to struggles with chronically inadequate resources.

Steps to Take Now to Improve the Immigration Courts

1. Senior Status Judges

The immediate hiring of more immigration judges is essential to address backlogs and to alleviate the stress caused by overwork, which leads to many problems that undermine the optimal functioning of the immigration court system. Former Attorney General Alberto Gonzales acknowledged this problem in 2006, following a comprehensive review by the DOJ of the Immigration Courts, but nevertheless contributed to its perpetuation. Since the lack of judicial staffing was identified and despite a recommendation that 40 more judges be added to the existing corps, the Courts have not had meaningful additions to the immigration judge corps. Figures show that there were 230 Immigration Judges in August of 2006, including several with full time administrative duties. It was not until April of 2009, when ten new Immigration Judges were brought on board, that the number of Judges finally exceeded that level, reaching the present total of 237 -- hardly a significant increase and not close to the 40 additional judge positions suggested by Attorney General Gonzales. Moreover, the DOJ has repeatedly failed to keep pace with an annual 5% attrition rate for immigration judges. Meanwhile, case backlogs have grown by 23% in the last eighteen months and a staggering 82% over the last ten years.[6] The docket strain on judges is overwhelming: in FY 2009, it is estimated that about 229 Immigration Judges were responsible for completing over 350,000 matters during the fiscal year, which, as stated above, averages more than 1500 completions per judge per year.[7]

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. We commend EOIR for its rededication to this task and the promising effort it is currently making in this regard. We are also grateful to Congress for increased fiscal resources and to this Subcommittee for its support in this regard.

We strongly advocate 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 for FY 2010, Public Law 111-

84, Congress facilitated part-time reemployment of Federal employees retired under the Civil Service Retirement System and the Federal Employees Retirement System 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 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 DOJ's changing needs. It would also borrow from a time-tested and successful system utilized in the Federal courts.

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 Courts. Long-term planning for the growth of Immigration Courts 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 ("DHS"). This is a crucial project which must be pursued.

NAIJ also strongly endorses implementation of a closely related tool: a case weighting system, modeled after the one employed by the Judicial Conference for the Federal district courts. Such an approach would provide insight into how to maximize the resources that are allocated to 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 30 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 to 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 their caseload burdens as well as clarifying the needs of our court system as a whole. We also advocate the study of other factors that 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, education, flexible workplace options, and program improvements.

3. Increased Resources

The persistent lack of resources to help judges perform their jobs adequately in light of changing expectations by the Federal 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 that 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 the performance of the Immigration Courts is the only realistic way to earn and retain public confidence in this system. 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 six principal areas where resources need to be augmented. First, 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.

Second, the problem with inadequate hearing transcripts is so pervasive that court reporters should be used instead of recorders. The long-awaited digital recording equipment has serious technical reliability and computer interface issues which persist and has not been shown to have produced the high-quality transcripts needed. Although digital audio recording is superior to tape recordings, voice recognition software is unsuitable for use with diverse speakers, particularly those with accents, and the varied foreign language terms that are frequently encountered in the Immigration Court setting continue to militate strongly in favor of the use of court reporters.

Third, 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 off the bench, to issue written decisions in any case where they deem it appropriate. This 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.

Fourth, immigration judge schedules need to be modified to provide adequate time off the bench for meaningful, ongoing training for judges, with sufficient follow-up time to assimilate the knowledge gained, to implement the lessons learned, and to research and study legal issues. Movement towards written decisions and provisions of more administrative time would allow the hiring of additional immigration judges without the constraints of a "brick and mortar" workplace. Although the current practice is to build one extra courtroom or chambers when acquiring new space, many physical sites are obsolete soon after they are built. If judges are writing more decisions and are allotted more work time off the bench, the same number of courtrooms could in fact serve twice as many judges. The current ALJ corps has a flexible workplace environment. There is no reason that this model cannot be used for the Immigration Courts as well. This improvement would emphasize quality as well as efficiency in adjudication.

Fifth, the current system of "case completions goals" and "aged case" prioritization should be eliminated because it is fundamentally flawed. To the extent that case completion goals were "aspirational," in an overloaded system they serve only as an additional source of stress and burnout to immigration judges and staff alike. These case completions goals have not been tied to resource allocation, which is their only legitimate function. Cases should be decided in accordance with due process principles. If case processing is taking too long, then 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 also undermines judicial corps stability.

Finally, a transparent complaint process for parties and the public which does not cut off or supplant the legitimate appeals process needs to be developed. While it is undisputed that the rare instances of problems with intemperance or unethical behavior must be addressed, the proper mechanism to do so should be modeled after proven judicial solutions. NAIJ believes that immigration judges should be held to the high standards set forth by the Model Code of Judicial Conduct of the American Bar Association ("ABA"). Performance reviews for immigration judges should be based on ABA and Institute for the Advancement of the American Legal System guidelines. The judicial discipline and disability mechanism enacted by Congress -- under the leadership of the House and Senate Judiciary Committees -- for the Federal judiciary could also serve as a model. *See* 28 U.S.C. §§ 351-364. The Department's efforts to establish an "employee-based" (versus judicial-based) complaint process has only served to highlight the inherent problems with this approach. For example, potential problems with *ex parte* communication have arisen, and privacy concerns preclude any public transparency. Judicial accountability, with transparent standards and consistent procedures, promotes judicial independence and is the only true solution to restoring public confidence in the system.

4. Legislative Action Needed

Although beyond the scope of today's hearing, 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 for judges.

Both the ABA and AILA advocate the removal of the 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. Such conflicts can be resolved by an Independent Agency Immigration Court or by creating 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 ("INA") §101(b)(4), should be amended to guarantee decisional independence and insulation from retaliation or unfair sanctions for judicial decision making. NAIJ recommends the following statutory definition (or something close to it), in lieu of the extant definition:

> The term "immigration judge" means an attorney appointed under this Act or an incumbent serving upon the date of enactment as an administrative judge qualified to conduct specified classes of proceedings, including a hearing under section 240 [of the INA]. An immigration judge shall be subject to supervision of and shall perform such duties as prescribed by the Chief Immigration Judge, provided that, in light of the adjudicative function of the position and the need to assure actual and perceived decisional independence, an immigration judge shall not be subject to performance evaluations. Immigration judges shall be held to the ethical standards established by the American Bar Association Model Code of Judicial Ethics. No immigration judge shall be removed or otherwise subject to disciplinary or adverse action for judicial exercise of independent judgment and discretion in adjudicating cases.

Conclusion

Madame Chairwoman, thank you for the opportunity to convey NAIJ's views. We deeply appreciate the work of the Subcommittee and stand ready to assist in any way we can to improve the Immigration Courts.

NAIJ, as a collective bargaining unit, represents all immigration judges. We are all public servants with an important mission -- to apply the statutory provisions of INA in an expeditious, consistent, and cost-effective manner, guaranteeing fairness and due process to all

whom we serve. Ours is often the first face of America seen by newcomers from around the world. Our mission is rendered more difficult, as is that of the DOJ and DHS, because we operate in an environment where the globe appears to be shrinking and border security is more difficult. We feel that we are an important part of the U.S. judicial system, and, in that context, we depend on Congress to give the Immigration Courts the necessary resources to achieve our statutory mission. Thank you for your leadership on those issues, which affect not only our professional livelihoods but the nation as well.

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[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., 2nd Sess. 15 (2002).

[2] "The caliber of administrative law judges … is certainly as high as those of federal district judges…" Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

[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] To understand better 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 Immigration Law Journal 57 (Fall 2008 CQ ed.) <https://articleworks.cadmus.com/geolaw/zs900109.html>.

[5] *Id.*

[6] Transactional Records Access Clearinghouse, *Criminal Immigration Prosecutions are Down but Trends Differ by Offense* (3-17-10) <http://trac.syr.edu/immigration/reports/227/>.

[7] Transactional Records Access Clearinghouse, *Backlog in Immigration Cases Continues to Climb* (3-12-10) <http://trac.syr.edu/immigration/reports/225/>.

[8] *See Executive Office for Immigration Review, U.S. Department of Justice, FY 2009 Statistical Year Book*, at B2 fig.1, B3, tbl.1 (2009), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

Ms. LOFGREN. Thank you very much. Very helpful to justice.

TESTIMONY OF THE HONORABLE MARK H. METCALF, FORMER IMMIGRATION JUDGE

Judge METCALF. Thank you, Madam Chair.

Madam Chair, Ranking Member Mr. King and distinguished Members, thank you for this opportunity to testify today. As a

youth I served in this, the finest deliberative chamber in the world. I briefed bills and attended hearings for my boss and your colleague, Harold Rogers of Kentucky. I am a grateful son of this great House.

Under President Bush I served in several challenging and rewarding positions at the Justice Department, among them special counsel at the Domestic Security Section and as a judge on the immigration court in Miami. In these two positions, I learned the risks posed by porous borders, lax enforcement of our immigration laws, and the institutionalized ineffectiveness of our immigration courts. In the next few minutes I will summarize for you.

America's immigration courts big reform, Madam Chair. From 1996 through 2008, the U.S. allowed 1.8 million aliens—some here legally, some not—to remain free up on their promise to appear in court; 736,000—41 percent of the total—never showed. From 1999 through 2008, 42 percent of aliens free pending court—put differently, 582,000 of them—did the same.

In the shadow of 9/11, court evasion exploded. From 2002 through 2006, 50.3 percent of all aliens summoned to court disappeared. Dodging court produced deportation orders numbering in the hundreds of thousands. In 2002 602,000 orders lay backlogged. By end of 2008, 558,000 still remained unenforced. Millions may in fact lie fallow and unreported.

The present court system, one without authority, one diminished by abuse, is broken. An about-face is needed. Rule of law is the answer. The Constitution directs that Congress shall establish a uniform rule of naturalization. Numerous proposals embrace different means to bring order to a sometimes orderless system.

A specialty court, an Article I court under the Constitution, is in my opinion the surest means to protect those fleeing persecution, while balancing this Nation's fundamental interest in sovereign borders and authentic legal processes.

The reason is simple, ma'am. Disorder prevails. Immigration courts cannot enforce their own orders. Forty-eight different classes of homeland security officials may order alien offenders arrested and removed. Immigration judges, the system's sole judicial officers, cannot.

Absent judicial authority is the common thread that finds expression in every aspect of the court's work. Absent authority equals enfeebled courts, no-show litigants, unenforced orders, listless caseloads, tardy relief, and annual reports that mislead Congress and the public.

An example is revealing, ma'am. Cases that routinely take less than 3 hours to try offered require more than 5 years to complete through final appeal. Empowered courts solve these problems.

Absent authority does more than inhibit rule of law. It obscures the work of highly effective jurists. In 2006, the court's busiest year on record, 233 judges completed 407,000 matters. All work of DOJ's trial and appellate lawyers combined equaled only 289,000. By comparison, Federal district and circuit courts with 1,271 judges, ma'am, completed 414,000 matters.

The ability of America's immigration judges is unmatched by authority equal to the challenges in their courtrooms. As cases are completed, judges lose control of their judgment, especially those

authorizing deportation. Instead, Immigration Customs Enforcement, what we know as ICE, takes over these orders and leaves them unenforced.

Meanwhile, few aliens choose to appeal.

Ms. LOFGREN. We can hear you over the bell. We are used to it.

Judge METCALF. Thank you, ma'am.

Not more than 9 percent in 2008 appealed. And instead, they walked from court and they disappeared. ICE's August 2009 announcement that it would not remove aliens who skipped court or disobeyed orders to leave the U.S. assures that others will do the same. But while many will disappear, many others will be summoned to court and risk removal years after convictions for minor offenses. Courts able to extend second chances to the deserving are needed.

Most troubling, though, is lack of accountability. The court's annual reports are a pretense of candid audit. Reports consistently understate the dynamics of those who evade court and in doing so fail to sound the needed alarm. Reports misrepresent failures to appear by merging dissimilar populations, adding detained aliens with non-detained aliens, and in turn drive down this important statistic.

In 2005 and 2006, for example, court numbers stated 39 percent of aliens summoned to court never showed. Actually, 59 percent of aliens, all who were outside custody, vanished. The real number——

Ms. LOFGREN. Judge Metcalf, we are going to ask, because they do have a vote, but your full statement is made part of the record. And I am going now to Mr. King, if I can, for questions. And we appreciate very much your testimony.

Judge METCALF. Thank you, Madam Chair.

[The prepared statement of Judge Metcalf follows:]

PREPARED STATEMENT OF MARK H. METCALF

Testimony of Mark H. Metcalf
June 17, 2010
Before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law:

Madame Chair, Ranking Member Mr. King and distinguished Members:

Thank you for this opportunity to testify today. As a youth, I served in this, the finest deliberative chamber the world has ever known. I briefed bills and attended hearings for my boss and your colleague, Harold Rogers of Kentucky. I am a grateful son of this great Nation and this great House.

Under President Bush I served in several challenging and rewarding positions at the Justice Department, among them Special Counsel at the Domestic Security Section and as a judge on the immigration court in Miami, Florida. In these two positions I learned the risks posed by porous borders, lax enforcement of our immigration laws and the institutionalized ineffectiveness of our immigration courts. In the next few minutes, I will summarize for you.

America's immigration courts beg reform. From 1996 through 2008, the U.S. allowed 1.8 million aliens to remain free upon their promise to appear in court. 736,000—41% of the total—never showed. From 1999 through 2008, 42% of aliens free pending court —put differently 582,000—did the same. In the shadow of 9/11, court evasion exploded. From 2002 through 2006, 50.3% of all aliens free pending court disappeared. Dodging court produced deportation orders numbering in the hundreds of thousands. In 2002, 602,000 orders lay backlogged. By end of 2008, 558,000 still remained unenforced. Millions may, in fact, lie fallow—and unreported. The present court system—one without authority, one diminished by abuse—is broken. An about face is needed. Rule of law is the answer.

The Constitution directs that Congress "shall establish a uniform Rule of Naturalization." Numerous proposals—all possessing merit—embrace different means to bring order to a sometimes orderless system. A specialty court—an Article I court under the Constitution is—in my opinion—the surest means to protect those fleeing persecution, while balancing this nation's fundamental interest in sovereign borders and authentic legal processes. The reason is simple.

Disorder prevails. Immigration courts cannot enforce their own orders. Forty-eight different classes of Homeland Security (DHS) officials may order alien offenders arrested and removed. Immigration judges—the system's sole judicial officers—cannot. Absent judicial authority is the common thread that finds expression in every aspect of the courts' work. Absent authority equals enfeebled courts, no-show litigants, unenforced orders, listless caseloads, tardy relief and annual reports that mislead Congress and the public. An example is revealing. Cases that routinely take less than three hours to try often require more than five years to complete. Empowered courts solve these problems.

Absent authority does more than inhibit rule of law. It obscures the work of highly effective jurists. In 2006—the courts' busiest year on record— 233 judges completed 407,000 matters. All work of DoJ's trial and appellate lawyers combined equaled only 289,000. By comparison, federal district and circuit courts, with 1271 judges, completed 414,000 matters. The ability of America's immigration judges is unmatched, however, by authority equal to the challenges in their courtrooms.

As cases are completed, judges lose control of their judgments—especially those authorizing deportation. Instead, ICE takes over these orders—and leaves them unenforced. Meanwhile, few aliens choose to appeal—not more than 9% in 2008—and, instead, walk from court and disappear. ICE's August 2009 announcement that it would not remove aliens who skipped court or disobeyed orders to leave the U.S. assures others will do the same. And while many will disappear, many others will be summoned to court—and risk removal—years after convictions for minor offenses. Courts able to extend second chances to the deserving are needed.

Most troubling, though, is lack of accountability. The courts' annual reports are a pretense of candid audit. Reports consistently understate the dynamics of those who evade court and, in doing so, fail to sound the needed alarm. In 2005 and 2006, for example, court numbers stated 39% of aliens summoned to court never showed. Actually, 59% of aliens —all who were outside custody—vanished. The same defects continue today. For 2009, EOIR declared 11% of aliens failed to make court. The real number—a scandal in any other court system—was 34%. An independent court—a court independent of DoJ—safeguards truthful reporting. Trial courts are not alone, however. The BIA too has its problems.

Contrary to ABA guidelines, the BIA fails to complete 95% of its appellate caseload from year to year—yet this is an improvement. In 2002, nearly 58,000 cases had been pending up to five years. In 2008—and despite Attorney General Ashcroft's streamlining measures—more than 29,000 cases awaited judgment. Streamlining, however, accomplished very real improvements. When put in place, the BIA had 23 seats with 19 judges then serving. Despite years of growing backlogs and increasing numbers of judges, progress was absent. Streamlining—among other changes—reduced backlogs by reducing the number of judges needed to consider and rule on cases. Congestion—like errant reporting—is corrosive. Streamlining brought a needed fix to a still unresolved problem. In the balance rests more than unmet deadlines and unenforced orders. In the balance are lives entrusted to a U.S. court. Completing this balance is an American public that expects its courts to perform with the same precision and candor they must bring to their own businesses. Immigration courts, in critical respects, do neither.

The overburden of DoJ has other consequences. Filing fees and court costs have not paced taxpayer commitment to the courts. Fees have not increased since 1990. Since then court

budgets have swollen 827%—with taxpayers footing the entire bill. Worse still, fees do not support the courts. DHS keeps them. Adding to public expense, tax dollars pay aliens' court costs—even the costs of those who have committed crimes in the U.S. Dollars that could support the courts—and reduce taxpayer expense—underwrite private litigation. Revised fees and costs are justified. They summon from alien litigants expenses largely met by citizens whose ranks they wish to join. They are a down payment on the broad processes of justice in which we are all stakeholders. Simply making fees on non-asylum cases the same as those imposed by federal district courts would raise $71 million using 2008 caseload numbers. That figure is 27% of the courts' 2009 budget.

Heated debates leave untold stories that affirm America's singular past—and a vast, optimistic future. Nearly one in ten of those who have died in Iraq and Afghanistan were immigrants. Indeed, the first serviceman to die in Iraq was not one of America's native sons, but one she adopted. Marine Lance Cpl. Jose Gutierrez, an orphan raised in Guatemala's slums, died in freedom's cause at Umm Kasr on March 21, 2003. His sacrifice echoes history. Nearly one-quarter of the Union army was foreign-born. So are 20% of those holding the Medal of Honor

American commitment to compassion, pluralism and rule of law is as large and generous as the continent we occupy. The *Immigration and Nationality Act* is among the most powerful expressions of that commitment. It redeems the persecuted. It welcomes the skilled. It confirms the exceptionalism of America. To continue this legacy, the INA and the institutions that interpret and enforce it must change. A court of law equal to this legacy is essential for reform. A rule of law nation should seek no less.

Ms. LOFGREN. Mr. King is recognized for 5 minutes.

Mr. KING. Thank you, Madam Chair.

First, I ask unanimous consent to introduce reporting of a study on the U.S. asylum system GAO report.

Ms. LOFGREN. Without objection.

[The information referred to follows:]

United States Government Accountability Office

GAO

Statement for the Record
To the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
Thursday, June 17, 2010

U.S. ASYLUM SYSTEM

Executive Office for Immigration Review Can Help Ensure Quality in the Asylum Adjudication Process

Statement for the Record by Richard M. Stana
Director, Homeland Security and Justice Issues

GAO
Accountability * Integrity * Reliability

GAO-10-863T

Chairwoman Lofgren, Mr. King, Members of the Subcommittee:

We appreciate the opportunity to provide this statement for the record on some of the challenges that the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) and others face in adjudicating asylum claims in the United States. Federal adjudicators, including immigration judges in EOIR and asylum officers in the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS), may grant noncitizens who are in this country—regardless of whether they entered legally or illegally—humanitarian protection in the form of asylum if they demonstrate that they cannot return to their home country because they have a well-founded fear of persecution. These adjudicators have the challenging task of assessing whether asylum applicants' claims are legitimate and meet the eligibility criteria for asylum.[1]

The accuracy of an asylum decision is critical because of the decision's potential impact on the safety of the asylum seeker and the security of our nation. An incorrect denial may result in an applicant being returned to a country where he or she had been persecuted or where future persecution might occur. At the other extreme, an incorrect approval of an asylum application could pose a threat to our national security or public safety. The 1993 bombing of the World Trade Center, the 1993 killings of Central Intelligence Agency employees, and a plot to bomb New York landmarks were all undertaken by individuals who had applied for asylum. Although none of these individuals was granted asylum, the attacks of September 11, 2001, have heightened fears that terrorists might enter the United States with false documents, file fraudulent asylum claims, and become embedded in the U.S. population.

Those who seek to apply for asylum generally go through an affirmative or a defensive asylum process. Affirmative applications are voluntarily initiated by the applicants themselves, and their cases are reviewed by asylum officers from USCIS. Affirmative applicants generally receive either a grant of asylum, a notice of intent to deny, or, if they do not have lawful immigration status, a referral to immigration court for removal proceedings and a second review of the claim. Defensive applications are

[1] Asylum provides refuge for certain individuals who have been persecuted in the past or fear persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.

filed by applicants against whom removal proceedings have been initiated, and each case is presented to an immigration judge from EOIR.

The very nature of the asylum system puts adjudicators in the position of trying to make quality decisions with imperfect information. Asylum law states that testimonial information alone can be sufficient for asylum applicants to meet the burden of proof for establishing asylum eligibility, in part because applicants may not be able to present documents if they fled their countries of persecution without them, came from countries where documentary evidence was not available, or fled with fraudulent documents to hide their true identities. As such, adjudicators must make decisions at times without documentation to support or refute applicants' claims. Furthermore, economic incentives for a better life in the United States can make it attractive for aliens to fraudulently apply for asylum status and, according to some academic journals and policy reports, fraudulent asylum claims are easy to make and difficult to detect.[2] Together, these factors create a challenging environment in which adjudicators must attempt to reach the best decisions they can.

At the request of this subcommittee, we issued a report on the asylum adjudication process in September 2008.[3] In this statement, I will discuss key factors that affected the ability of adjudicators, both immigration judges and asylum officers, to decide asylum cases. I will also discuss findings from a companion report on asylum outcomes requested by members of the Senate Committee on Homeland Security and Governmental Affairs and the Senate Committee on the Judiciary, that we also issued in September 2008.[4] This statement provides information on the following issues from that report: (1) factors that affected variability in asylum outcomes in EOIR's immigration courts and (2) actions that EOIR

[2] USCIS initiated a benefit fraud and compliance assessment in 2006 to determine the incidence of fraud in asylum applications, but as of June 2010, the report based on this assessment was not yet available.

[3] GAO, *U.S. Asylum System: Agencies Have Taken Actions to Help Ensure Quality in the Asylum Adjudication Process, but Challenges Remain*, GAO-08-935 (Washington, D.C.: Sept. 25, 2008).

[4] GAO, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, GAO-08-940 (Washington, D.C.: Sept. 25, 2008).

took to assist immigration judges in rendering asylum decisions and how they could be improved.[5]

For our September 2008 report on the asylum process, our work included a Web-based survey of all 207 immigration judges who were on board as of September 30, 2006. We obtained a 77 percent response rate to our survey.[6] We also surveyed all 256 asylum officers and all 56 supervisory officers and obtained 74 percent and 77 percent response rates, respectively. We visited three USCIS asylum offices, interviewed U.S. Immigration and Customs Enforcement trial attorneys who represent DHS in immigration courts in three cities, and interviewed representatives of the National Association of Immigration Judges.

For our September 2008 report on asylum outcomes, our work included analyzing over 12 years of data from EOIR on nearly 200,000 asylum decisions rendered by immigration judges. We assessed the reliability of the data used in our analyses through electronic testing, analyzing related database documentation, and working with agency officials to reconcile discrepancies between the data and documentation that we received. We found the data to be sufficiently reliable for the purposes of the report. We also visited five immigration courts in three cities and reviewed agency guidance on processing and preparing decisions on asylum cases, training materials for immigration judges, and the legal examination administered to new immigration judges. As part of both studies, we interviewed EOIR headquarters officials, observed asylum proceedings in immigration courts, reviewed the Attorney General's 2006 reforms directed to the immigration courts, and reviewed information from EOIR regarding its implementation of the reforms. More detailed information on our scope and methodology appears in both of our prior reports.[7] We conducted this work in accordance with generally accepted government auditing standards. We contacted EOIR and USCIS in June 2010 to obtain updated information on the status of open recommendations from our two asylum reports.

[5] Our full report also provides information on actions that EOIR took to assist applicants in obtaining representation and changes in asylum backlogs and outcomes that occurred following the streamlining of appeals procedures at the Board of Immigration Appeals.

[6] Of the 160 immigration judges who responded to the survey, 159 said that they had heard at least some asylum cases over the past year.

[7] See GAO-08-935 and GAO-08-940.

In summary, immigration judges who responded to our survey reported several challenges to adjudicating asylum cases, including assessing applicants' credibility; identifying attorney fraud, identity fraud, preparer fraud, document fraud, and fraud in the claim; time pressures; and managing their workload. Immigration judges also reported they needed more training in several areas, including identifying fraud. USCIS asylum officers who responded to our survey reported challenges similar to those of immigration judges. EOIR and USCIS had designed mechanisms to help adjudicators address challenges, and we made recommendations to USCIS help improve the integrity of the asylum adjudication process. The agency has taken steps or planned to take steps to address the recommendations. With respect to asylum decisions, our analyses of nearly 200,000 cases heard over a 12-year period found significant variation in outcomes across immigration courts and judges. The likelihood of being granted asylum was significantly greater in some courts than others, and significantly greater when the case appeared before some judges than others within the same court. EOIR was taking steps to identify immigration judges in need of greater supervision and improving training for all immigration judges. In addition, EOIR said it planned to take action on our recommendations to examine cost effective options for obtaining statistical information on immigration judges' asylum decisions to help it identify those with training and supervision needs, and assess resources and guidance needed to supervise immigration judges.

Key Factors Affecting Adjudicators' Ability to Decide Asylum Cases

Immigration Judges Reported Challenges in Identifying Fraud and Assessing Credibility

We reported in September 2008 that challenges related to identifying fraud and assessing applicants' credibility were key factors that affected immigration judges' asylum adjudications. Of immigration judges who responded to our survey, 88 percent cited verifying fraud as a moderately or very challenging aspect of adjudicating asylum cases. In assessing an applicant's eligibility for asylum, immigration judges consider adverse factors, including the use of fraud to gain admittance to the United States and inconsistent statements made by the asylum applicant. As an immigration judge respondent explained, "it is very easy to suspect fraud, but as in all civil cases, fraud is one of the most difficult things to actually prove. Unless the DHS . . . can prove fraud by a preponderance of the

evidence, or a respondent admits facts constituting fraud, the suspicion of fraud will remain just that."

We also reported that cases that appeared before an immigration judge could be subject to different kinds of fraud. The majority of immigration judges who responded to our survey reported that the following types of fraud about which the survey inquired were moderately or very difficult to identify: attorney fraud (66 percent), identity fraud (66 percent), preparer fraud (57 percent), document fraud (56 percent), and fraud in the claim (54 percent). Most immigration judges we surveyed also reported that these types of fraud presented a challenge in at least some of the cases they adjudicated during the previous year. Over 90 percent of immigration judges reported that fraud in the claim and in the documents presented by the applicant had presented a challenge in at least some of their cases. In September 2007, we reported that the ease with which individuals can obtain genuine identity documents for an assumed identity creates a vulnerability that terrorists can exploit to enter the United States with legal status.[8]

With respect to assessing credibility, 81 percent of immigration judges we surveyed reported that assessing credibility was a moderately or very challenging aspect of adjudicating asylum cases and an area in which they needed additional training. The majority of immigration judges reported the following impediments to assessing credibility in at least half of the cases they had adjudicated over the previous year: lack of documentary evidence (70 percent), lack of other overseas information on applicants (61 percent), and lack of document verification from overseas (56 percent).

In response to reforms directed by the Attorney General in 2006, EOIR designed a fraud and abuse program that established a formal procedure for immigration judges, among others, to report suspected instances of immigration fraud or abuse. The goals of the program included protecting the integrity of EOIR proceedings and providing immigration judges with source materials to aid in screening for fraudulent activity. In July 2008, the program was still relatively new, and EOIR officials indicated that the agency had not yet received enough referrals of suspected asylum and

[8] GAO, *Border Security: Fraud Risks Complicate State's Ability to Manage Diversity Visa Program*, GAO-07-1174 (Washington, D.C.: Sept. 21, 2007).

document fraud to assess patterns in order to alert EOIR staff and other entities to fraud schemes.

Immigration Judges Reported Time Constraints and Training Needs, Which EOIR Was Striving to Address

Most immigration judges who responded to our survey reported time constraints as a challenge in adjudicating asylum cases, and EOIR had taken some steps to mitigate these challenges. Over 75 percent of immigration judges reported that time limitations and managing their caseloads were moderately or very challenging in adjudicating asylum cases.

Nearly all immigration judge survey respondents also reported needing more than the 4 hours off the bench that they are provided to handle administrative matters. The majority reported that they did not use their administrative time as intended about half the time; instead, they used that time to hear cases.

In 2007, EOIR said that it had taken steps to help immigration courts address the time pressures caused by growing caseloads by, among other things, detailing immigration judges, using videoconference technology, advising immigration judges to issue oral decisions immediately after hearing cases, and establishing new courts. Over 75 percent of immigration judges who responded to our survey reported that having additional law clerks, additional immigration judges, and additional administrative court staff would moderately or greatly improve their ability to carry out their responsibilities.

The majority of immigration judges who responded to our survey reported that EOIR's training and professional development opportunities enhanced their ability to adjudicate asylum cases, but the majority also believed that they needed more training in several areas, including identifying fraud. In response to Attorney General reforms, EOIR expanded its training program in 2006 to provide additional training, primarily for new immigration judges to, among other things, increase the time immigration judges spend observing veteran immigration judges from 1 week to 4 weeks. In addition, EOIR solicited input from immigration judges on their training needs on an annual basis.

Challenges Faced By USCIS Asylum Officers Were Similar to Those of Immigration Judges

Similar to immigration judges, asylum officers we surveyed reported challenges in identifying fraud and assessing applicants' credibility, as well as time constraints, as key factors affecting their adjudications. Seventy-three percent of asylum officers who responded to our survey reported that it was moderately or very difficult to identify document fraud, and 53 percent reported that it was moderately or very difficult to identify

attorney fraud. The majority of asylum officers also reported that they experienced significant challenges with assessing credibility in about half or more of the cases they adjudicated in the previous year, including insufficient time to prepare and conduct research prior to the interview (73 percent), insufficient time to conduct the interview (63 percent), the lack of information regarding document validity (61 percent), the lack of overseas information on applicants (59 percent), and the lack of documents provided by applicants (54 percent). With respect to time constraints, 65 percent of asylum officers and 73 percent of their supervisors reported that asylum officers had insufficient time to thoroughly adjudicate cases—that is, in a manner consistent with procedures and training—while management's views were mixed. On average, asylum officers had about 4 hours to complete these tasks for each case. The Asylum Division had set a productivity standard equating to 4 hours per case in 1999, but it did not have empirical data on the time it took to thoroughly adjudicate a case. As a result, the Asylum Division was not best positioned to know if its productivity standard reflected the time asylum officers needed for thorough adjudications.

Asylum officers reported facing these challenges despite mechanisms USCIS designed to help them, such as identity and security requirements, fraud prevention teams with anti-fraud responsibilities, monitoring of applicants' interpreters during asylum interviews, and tracking of preparers suspected of fraud. Most asylum officers and their supervisors also reported that although they received both centralized training and training in local asylum offices, they needed better and more training in areas related to fraud, identity and security checks, interviewing, and assessing credibility, among other things. In effect, we found that the mechanisms USCIS designed to promote quality and integrity in decision making could be better utilized to decrease the risk of incorrect asylum decisions. We noted that insufficient time for asylum officers to adjudicate cases could undermine the efficacy of the tools they did have, as well as USCIS's goals to ensure quality and combat fraud.

We made several recommendations to improve the integrity of the asylum adjudication process, including recommending that USCIS empirically determine how much time is needed to adjudicate a case in a manner consistent with procedures and training. USCIS reported that it began an asylum processing study in April 2010 and anticipated having a final report for agency review in October 2010. Our other recommendations included that USCIS develop a framework for soliciting information from asylum officers on their training needs and develop a plan to implement local quality reviews in all asylum offices. DHS and USCIS agreed with our

recommendations and had taken action or planned to take action to address them.

Variation across Immigration Courts and Judges in Asylum Outcomes, and EOIR's Efforts to Improve Immigration Judge Capabilities

Significant Variation Existed In Asylum Outcomes across Immigration Courts and Judges

In addition to our report on asylum adjudications, we issued another report in September 2008 that found sizable differences in outcomes among 198,000 asylum cases heard over a 12-year period in the 19 immigration courts that handled almost 90 percent of the cases. Using sophisticated data analytic techniques, we reported that nine factors significantly affected the likelihood that applicants would be granted asylum, and that disparities across immigration courts and judges persisted even after we statistically controlled for these factors.[9] For example, in San Francisco, the likelihood of being granted asylum was 12 times greater than in Atlanta among affirmative applicants—that is, individuals who originally filed their asylum applications with DHS at their own initiative. Appearing before an immigration judge who was statistically more versus less likely to grant asylum also significantly affected asylum outcomes. For example, in the New York City immigration court—which handles the largest number of asylum cases in the country—the likelihood of an affirmative applicant being granted asylum was 420 times greater if the applicant's case was decided by the immigration judge who had the highest likelihood of granting asylum than if the applicant's

[9] The nine factors were (1) filed affirmatively (originally with DHS at his/her own initiative) or defensively (with DOJ, if in removal proceedings); (2) applicant's nationality; (3) time period of the asylum decision; (4) representation; (5) applied within 1 year of entry to the United States; (6) claimed dependents on the application; (7) had ever been detained (defensive cases only); (8) gender of the immigration judge and (9) length of experience as an immigration judge.

case was decided by the immigration judge who had the lowest likelihood in that immigration court. In 14 out of 19 immigration courts, affirmative applicants were at least 4 times as likely to be granted asylum if their cases were decided by the immigration judge with the highest versus the lowest likelihood of granting asylum in that immigration court.

We also reported that the likelihood of being granted asylum increased significantly for applicants who had representation, applied for asylum since fiscal year 2001, filed the application within 1 year of entry, and claimed dependents on the asylum application. In contrast, immigration judge characteristics such as age, race/ethnicity, veteran status, prior government immigration experience, prior experience doing immigration work for a nonprofit organization, caseload size, and the presidential administration under which a judge was appointed were not statistically significantly associated with the likelihood of an applicant being granted asylum. Because data were not available on the facts, evidence, and testimony presented in each asylum case or on immigration judges' rationale for deciding whether to grant or deny a case, our work could not measure the effect of case merits on case outcomes. However, the size of the disparities in asylum grant rates creates a perception of unfairness in the asylum adjudication process within the immigration court system.

EOIR Reported Taking Steps to Improve Immigration Judges' Capabilities

EOIR said that it was using information from two studies it had conducted on which immigration judges had unusually high or low asylum grant rates, in conjunction with other indicators of performance, such as high reversal rate for legal error, to identify immigration judges in need of greater training and supervision. In this context, as well as in the context of immigration judge survey respondents indicating a need for more training, EOIR said it was improving training for all immigration judges. EOIR also said it was developing a directory listing immigration judges' areas of expertise so judges could share best practices. EOIR said that it relied on immigration judges' supervisors to identify immigration judges who could benefit from mentoring, training, and observing their peers adjudicating cases. However, at the time of our report, EOIR had a limited number of supervisors for numerous immigration judges in numerous locations. It had not determined how many supervisors it needed to effectively supervise immigration judges and had not provided explicit guidance to supervisors on how they should carry out their responsibilities.

We recommended that EOIR use our findings and, because it did not have the expertise to conduct sophisticated statistical analyses of its asylum outcome data, examine cost-effective options for obtaining statistical

information on immigration judges' asylum decisions to help it identify those with training and supervision needs. We also recommended that EOIR assess resources and guidance needed to supervise immigration judges. DOJ and EOIR agreed with our recommendations and indicated that they planned to take actions to address them.

This concludes my prepared testimony. I would be pleased to respond to any questions that members of the subcommittee may have.

Contacts and Acknowledgments

For further information regarding this statement, please contact Richard M. Stana at (202) 512-8777 or stanar@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this testimony are Evi Rezmovic, Assistant Director; and Christine Hanson, Tom Jessor, and Lori Weiss.

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Mr. KING. Thank you, Madam Chair.

And again, I thank the witnesses for your testimony here. And I am really interested in things that all of you—each of you said.

I believe, though, given the time constraints that we are under, I would like to turn to the Honorable Judge Metcalf and ask you when in your statement when you say "immigration judges," there are 48 different classes Of Homeland Security officials that may order alien offenders arrested and removed, but immigration judges, the system's sole judicial officers, cannot.

Now, that speaks to their lack of authority to get a response from the ICE authorities and follow-through on the deportation orders, for example. So what kind of authority specifically would you grant the judges in order to get some response to their orders?

Judge METCALF. Jurisdiction over ICE.

Mr. KING. Could you expand on that a little bit?

Judge METCALF. Yes, sir. An Article I court is a statutory court that has judicial imperative, and you can award this same authority by regulation. But what happens is this. As a judge——

Ms. LOFGREN. Your microphone isn't on. Could you turn it so we can hear?

Judge METCALF. Yes, ma'am.

Ms. LOFGREN. Very good. Thank you very much.

Judge METCALF. Thank you, Ms. Lofgren, Madam Chair.

As a judge, I would order relief to men and women who deserve relief. And USCIS would see that the order was enforced. Now, sometimes it was tardy, and sometimes relief was delayed, but relief eventually found its place in their lives.

However, many aliens, when ordered removed, would say, "Judge, I am going to appeal." Or they would say that through their attorney. They would walk from the courtroom and disappear. They never appealed. And even if they did appeal, orders of the court to remove themselves from the United States were never enforced by ICE.

Mr. KING. Would you think that possible or likely in the case of President Obama's aunt?

Judge METCALF. Sir, I really—all I can say about that situation is this. An order was issued, denying her relief. ICE never enforced it, for whatever reason. But her case is not different from millions of other orders that have been issued by the court that have never been enforced or honored by ICE. Her case is really no different.

Mr. KING. Let me submit that since we don't have access to her case, we don't know there aren't other circumstances involved. But generally speaking, I do understand your point. And you have 1.8 million cumulative effect of those who have ignored orders. And presumably, most of them are still in the United States?

Judge METCALF. That is correct, sir.

Mr. KING. And I want to add broadness a little bit, that I do go down to the border, and I meet with our enforcement officers down there. I am watching a rotation effect where they pick up unique individuals, take them into the station and print them, take photographs of them, take them back to the port of entry. Instead of catch and release, it is catch and return.

We have records that show that as high as 27 different encounters of voluntary return of an individual, unique individual. And I am hearing law enforcement officers tell me that they have open and shut cases sometimes of multiple hundreds of pounds of marijuana, for example, but they can't get prosecuted, because we don't have the ability to do so. Do you have some familiarity that and you would like to address that subject?

Judge METCALF. Yes, sir, in several respects—first of all, as a special counsel of domestic security; also as a legal advisor to the joint support operations in the Kentucky Army National Guard. That is rear enforcement of our drug policies and our—then you

are talking about forward enforcement of our drug policies and our illegal immigration rules.

In both cases we simply do not have enough resources. In the case of courts, their feet and their resources are meager. In the cases of the agents you speak about, two things stand out. Number one, in observing when I was on the bench in Los Angeles, California, at the Lancaster detention facility, one of the judges observed to me while I was there that the immigration courts have become play courts. In other words they issued rules that were never enforced. The result of this——

Mr. KING. Just a minute. The clock is ticking.

Judge METCALF. Excuse me.

Mr. KING. Sorry to interrupt, but I just want to conclude this with this so that the panels——

Judge METCALF. Pardon me.

Mr. KING. When I see the resources down there and people doing their job with a badge and a gun and not seeing the follow-through on the judicial side of this from a prosecution and a court system that can follow through on those orders, we are putting people's lives at risk without the deterrent effect of that comes from enforcing the law.

I will support all the tools we need to enforce the law, and I thank you all for your testimony. And I regret that this is such a short time to ask you all questions to do honor to what you have done here today.

Madam Speaker—Madam Chair—excuse me.

Ms. LOFGREN. The gentleman's time has expired.

Mr. KING. I didn't mean to do that to you, but I do yield back.

Ms. LOFGREN. The gentleman's time has expired.

I will just quickly go through a couple of questions, if I can, before we rush to the floor to vote.

I was very interested, Ms. Grisez, on your suggestion that additional discretion needs to be used to ease the burden. And I was thinking back to a hearing that we had on military and immigration law and a young woman, who was active duty Navy. And she married a U.S. citizen, and she was also applied to naturalize within a year, as she could under our new provisions.

She was told by the lawyer, the Navy lawyer, don't file to remove the condition on your marriage, because you have already filed to naturalize, and you don't need to, which is what she did. She got a notice to appear, which she didn't receive, because she had been deployed to Kuwait.

And when I think about that case, it took forever. And the resources that were expended by, you know, the courts and by ICE, and for an active duty member of the American Armed Forces, and what we could have done with those judicial resources in terms of actually removing people who needed to be removed—is that the sort of thing you are thinking about?

Ms. GRISEZ. Yes, Madam Chair. There are a number of examples, and that is one of them. We aren't talking specifically about the military context, but cases where persons who don't timely seek removal of the conditions and then end up being put in removal proceedings are a good example of the types of cases that we are talking about, because when you play that out, what happens if a no-

tice to appear is issued is that the person then comes into immigration court, and they can seek review of the decision.

This is in cases where it has been denied. They can seek review of the denial of the removal of condition. But in the case where people never filed, and they are put into proceedings specifically because of that, and their permanent residence is deemed to have ended, so they are in the United States with no status, the procedure is then that if they still have the existing marital relationship, then they have to adjust status in the immigration court before an immigration judge.

And that is a good example of the type of cases where if you can see on the face that there is a bona fide marital relationship, particularly if there are children or joint tax returns, those kinds of cases where there may be a late filing, maybe even not a good excuse for filing late, it still seems not a good use of judicial resources to do that in a contested adversarial proceeding.

Let me ask you, Judge Marks—and thank you so much for your testimony. And if you could, express our appreciation to the immigration judges for the very hard work that they do. It is a very tough job.

Judge MARKS. Your comments would be very much appreciated.

Ms. LOFGREN. And we know that. And we are trying to get more resources for you.

But here is a question—well, two questions. One, we are hiring more judges. I agree that we actually need to hire more than are currently on the plate. And the Attorney General, I think, has been pretty supportive of that.

We could do a lot, it seems to me, with additional clerkship—I mean, the idea that the judges are there with so little clerk support. How much bang for our buck, if you will, would we get by augmenting the ranks of the clerkship?

Judge MARKS. It would be a tremendous improvement. Immigration judges spend on average 36 hours a week on the bench. That leaves us 4 hours a week to read the materials submitted to us in cases, to read new legal developments, to read he parties' briefs, as well as changes in country conditions. If we had sufficient judicial law clerks to be able to help summarize, organize, draft proposed decisions, help us wade through some of the complexities of the law—is this crime an activated——

Ms. LOFGREN. Right.

Judge MARKS [continuing]. Felony, some of the technical issues that take very close scrutiny of competing state statutes, comparing them with Federal statutes—it would be absolutely——

Ms. LOFGREN. Well, I was recently at the law school graduation at my alma mater. And I looked out at those hundreds of young people, thinking, "Where are these people going to get jobs?" And I think a lot of them would maybe be interested in a year working for the immigration courts. It would be good for them——

Judge MARKS. We do our best to use——

Ms. LOFGREN [continuing]. And it would be good for us.

A final question. I was very interested—I don't want to misquote him, but it seemed to me that the Ranking Member was responding to Judge Metcalf's suggestion that we have full Article I judges,

that we elevate the immigration court. What would the reaction be among the immigration judges to changing the status?

Judge MARKS. Well, thank you. The fourth point that I didn't get to was the fact that we believe there are structural reforms that need to be made. There are some modest legislative reforms that could be made without going to Article I, but the consensus of the immigration judges is that independence from the Department of Justice is a more appropriate structural position for the court to be in at this time.

We have grown beyond the traditional administrative agency——

Ms. LOFGREN. Right.

Judge MARKS [continuing]. Academic rationale that put us in the Department of Justice in the first place.

Ms. LOFGREN. Well, my time has expired. And I have a minute and 20 seconds to get to the floor. So I will thank you.

Judge MARKS. Thank you.

Ms. LOFGREN. And perhaps Mr. King and I don't always agree on these issues, but this may be something we could work on on a bipartisan basis.

As noted with Mr. Osuna, the written testimony will be part of the record. Members of the Subcommittee will have an opportunity to submit additional questions within 5 legislative days. And if that occurs, we will forward them to you. We ask if that occurs, for you to promptly respond.

And I would like to thank you again for coming here. It has been very, very helpful, really very helpful to see the full picture. And not everyone realizes witnesses are volunteers for their country to help us understand the law and the administration of the law better. And you have helped us in that regard today. So thank you very much. And this hearing is adjourned.Thank you.

[Whereupon, at 11:41 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

Questions for the Record
Chairwoman Zoe Lofgren
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law
Oversight Hearing on the Executive Office of Immigration Review
June 16, 2010

The Honorable Mark H. Metcalf

The following statistics appear in your written testimony. Please provide the Subcommittee with citations for the source(s) of these statistics.

- On page 1 of your written testimony, you cite the following statistics pertaining to the number of immigrants who have failed to appear in immigration court:
  - Paragraph 3: "From 1996 through 2008, the U.S. allowed 1.8 million aliens to remain free upon their promise to appear in court. 736,000—41% of the total—never showed. From 1999 through 2008, 42% of aliens free pending court —put differently 582,000—did the same. From 2002 through 2006, 50.3% of all aliens free pending court disappeared."
  - "Dodging court produced deportation orders numbering in the hundreds of thousands. In 2002, 602,000 orders lay backlogged. By end of 2008, 558,000 still remained unenforced."

- On page 2 of your written testimony, you state that the "actual number" of failures to appear differs from EOIR's published statistics. Please explain the discrepancies between the different numbers, with cites to the sources used.
  - Paragraph 3: "In 2005 and 2006, for example, court numbers stated 39% of aliens summoned to court never showed. Actually, 59% of aliens —all who were outside custody—vanished."
  - "For 2009, EOIR declared 11% of aliens failed to make court. The real number—a scandal in any other court system—was 34%."

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE MARK H. METCALF, FORMER IMMIGRATION JUDGE

July 12, 2010

Honorable Zoe Lofgren, MC
c/o Ms. Sara Cullinane
517 Cannon House Office Bldg.
Washington, DC 20515

Re: answers to questions from testimony of June 17, 2010

Dear Madame Chair:

Thank you for your letter and the attachments received by me through email on July 9, 2010. Thank you also for your gracious invitation to testify before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law on June 17, 2010.

Enclosed are answers to your questions included in the attachments. These answers come from open government sources and cite the web addresses for the documents referenced. I have arranged the answers with highlighted statements, supplemented by text and supporting footnotes.

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ANSWERS

In 2002, Justice Department figures placed unenforced removal orders at 602,000.[1] Unexecuted removal orders, according to ICE, now number 557,762.[2]

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[1] U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal Five, p. 118 www.usdoj.gov/ag/annualreports/ar2002/sg5finalacctpartone.html. "As of September 30, 2002, there was a 406,000 case backlog of removable unexecuted final orders and a 196,000 case backlog of not readily removable unexecuted final orders of removal, for a total of 602,000 unexecuted orders. Aliens "not readily removable" include those who are incarcerated, officially designated as in a Temporary Protected Status (TPS), and those who are nationals of Laos, Vietnam or Cuba (countries with whom the US does not have repatriation agreements)."

[2] U.S. Immigration and Customs Enforcement, *ICE Annual Report*, Fugitive Operations. www.ice.gov/pi/reports/annual_report/2008/ar_2008_page7.htm. In FY08 as ICE arrested 34,155 fugitives [from removal orders], an increase of more than 12% over the previous year. This has led to a 6% reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end of FY08, there were 557,762 such cases remaining.

Between 2002 and 2006, 50.3% of all aliens the U.S. permitted to remain free pending their court dates vanished. In raw numbers, 360,146 alien litigants out of 714,822 disappeared before trial.[3] From 1996 through 2000, 251,309 non-detained aliens never showed for court. Said another way, only 35% of aliens outside detention evaded court prior to 9/11.[4]

EOIR's annual reports significantly understate failures to appear.[5] Over the past 14 years, EOIR has never provided Congress with candid statistics regarding litigants who evade court. From 1996 through 2009—fourteen fiscal years—769, 815 aliens out of 1,887,746 aliens free pending trial failed to appear in court. All were people the U.S. permitted to remain free prior to their hearings. In other words, 41% of aliens summoned to court who were outside detention chose to evade court.[6] At no time did EOIR or the Justice Department alert Congress to this dynamic.

From 1999 through 2009—the last eleven fiscal years—1,457,701 alien litigants were allowed to remain free prior to their appearances in court.[7] 615,352 of them—42% of the

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[3]Between 2002 and 2006, 360,146 non-detained aliens failed to keep their court dates. Non-detained litigants who came to court over the same period equaled 354,676. During this 5 year period, trial courts decided or administratively closed 714,822 cases involving non-detained litigants. 50.3% of those litigants permitted by the U.S. to remain free pending trial evaded court. (360,146÷714,822=50.3%) *See* EOIR 2006 Yearbook, Pages H1-H4, Figures 10-12 and Page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy06syb.

[4]From Fiscal Years 1996 through 2000, 251,309 of 726,164 or 35% of non-custodial litigants failed to appear in court. This equation excludes custodial litigants. *See* EOIR 2000 Yearbook, Pages L1-L2 , Figures 15-17 and Page T1, Figure 23. www.usdoj.gov/eoir/statspub/fy00syb.

[5] From 1996 through 2009, 769,815 non-detained aliens failed to appear in court. EOIR calculates what it calls the "overall failure to appear" rate by merging the detained (those aliens in detention pending court) with non-detained populations (those alien litigants not in detention pending court). By mixing these dissimilar populations, the detained population, which always appears in court, with the non-detained population that frequently fails to appear in court, EOIR lowers the "overall failure to appear rate." Court evasion by non-detained aliens drives failure to appear rates, not those in custody. *See* EOIR 2000 Yearbook, Pages L1-L2, Figures 15-17 and Page T1, Figure 23. www.usdoj.gov/eoir/statspub/fy00syb. EOIR 2004 Yearbook, Pages H1-H4, Figures 10-12 and Page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy04syb. EOIR 2008 Yearbook, Pages H1- H4, Figures 10-12, and Page O1, Figure 23. www.usdoj.gov/eoir/statspub/fy08syb. EOIR 2009 Yearbook, Pages H1- H4, Figures 10-12, and Page O1, Figure 23. www.usdoj.gov/eoir/statspub/fy09syb.

[6]769,815÷1,887,746=40.7%. This equation contains non-detained litigants only. Composites for 5 year periods may be found in each yearbook. EOIR 2000 Yearbook, Pages L1-L2 , Figures 15-17 and Page T1, Figure 23. www.usdoj.gov/eoir/statspub/fy00syb. EOIR 2004 Yearbook, Page H1-H4 , Figures 10-12 and Page O1, Figure 20.www.usdoj.gov/eoir/statspub/fy04syb. EOIR 2008 Yearbook, Pages H1- H4, Figures 10-12, and Page O1, Figure 23. www.usdoj.gov/coir/statspub/fy08syb.EOIR 2009 Yearbook, Pages H1- H4, Figures 10-12, and Page O1, Figure 23. www.usdoj.gov/eoir/statspub/fy09syb.

[7]Composites for 5 year periods may be found in each yearbook. EOIR 2000 Yearbook, Pages L1-L2 , Figures 15-17 and Page T1, Figure 23.www.usdoj.gov/eoir/statspub/fy00syb. EOIR 2002 Yearbook, Pages H1-H4 , Figures 10-12 and Page O1, Figure 20.www.usdoj.gov/eoir/statspub/fy02syb. EOIR 2007 Yearbook, Pages H1- H4, Figures 10-12, and Page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy07syb. EOIR 2008 Yearbook, Pages H1-

total—never showed.[8]

Failures of alien litigants to appear in court are the single greatest source of unexecuted removal orders. DHS states there are presently 557,762 unexecuted removal orders.[9] Over the last fourteen years, 769,815 aliens failed to make their court dates and were ordered removed.[10]

In 2006, EOIR reported 39% of litigants, as a function of court decisions and administrative closures, failed to appear in court.[11] 59% were, in fact, no-shows.[12] In 2005,

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H4, Figures 10-12 and Page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy07syb.

[8] 615,352÷1,457,701=42.2%. From 1999 through 2009, 615,352 alien litigants not in custody disappeared during proceedings. EOIR 2000 Yearbook, L1-L2 , Figures 15-17 and T1, Figure 23. www.usdoj.gov/eoir/statspub/fy00syb and EOIR 2002 Yearbook, H1-H4 , Figures 10-12 and page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy02syb. EOIR 2007 Yearbook, Figures 10-12, H1- H4 and.O1, Figure 20. www.usdoj.gov/eoir/statspub/fy07syb. EOIR 2008 Yearbook, Figures 10-12, H1- H4 and O1, Figure 20. www.usdoj.gov/eoir/statspub/fy08syb. EOIR 2009 Yearbook, Figures 10-12, H1- H4 and O1, Figure 20. www.usdoj.gov/eoir/statspub/fy09syb.

[9] U.S. Immigration and Customs Enforcement, *ICE Annual Report*, Fugitive Operations. www.ice.gov/pi/reports/annual_report/2008/ar_2008_page7.htm. In FY08 as ICE arrested 34,155 fugitives [from removal orders], an increase of more than 12 percent over the previous year. This has led to a six percent reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end of FY08, there were 557,762 such cases remaining.

[10] *See* EOIR 2000 Yearbook, L1-L2 , Figures 15-17 and T1, Figure 23. www.usdoj.gov/eoir/statspub/fy00syb. EOIR 2004 Yearbook, H1-H4 , Figures 10-12 and page O1, Figure 20.www.usdoj.gov/eoir/statspub/fy04syb. EOIR 2008 Yearbook, H1- H4, Figures 10-12, and page O1, Figure 23. www.usdoj.gov/eoir/statspub/fy08syb.EOIR 2009 Yearbook, H1- H4, Figures 10-12, and page O1, Figure 23. www.usdoj.gov/eoir/statspub/fy09syb.

[11] EOIR 2006 Yearbook, pages H1-H4, Figures 10-12 and page O1. FY 2006 109,713÷280,494=39%, including custodial litigants. www.usdoj.gov/eoir/statspub/fy06syb.pdf

[12] EOIR 2006 Yearbook, 109,713÷185,398=59.2%, excluding custodial litigants. *See* EOIR 2006 Yearbook, pages H1-H4 , Figures 10-12 and Page O1.www.usdoj.gov/eoir/statspub/fy06syb.pdf. Measuring like populations of litigants—those free pending court—provides an accurate account of failures to appear. To determine the total number of non-detained aliens, simply subtract the number of aliens whose cases were decided in detention—for 2006 it was 95,096, as found on Page O1—from the total of immigration judge decisions and administrative closures—for 2006 it was 280,494, as found on Page H2. The remainder is 185,398—this is the total number of aliens who were outside detention during court proceedings. Divide the number who failed to appear—in 2006 it was 109,713, as found on Page H2—by the total number of aliens free pending court—in 2006 it was 185,398. The product of this division (109,713÷185,398=59.2%) yields a failure to appear rate of 59.2%. This same method is used to establish accurate failure to appear rates for 2005 and 2006 and to support EOIR's having understated this dynamic for the last 14 years.

EOIR again reported the same number— 39%— failed to make court.[13] The real number again was 59%.[14]

For 2009, 35% of alien litigants free pending court disappeared.[15] EOIR, however, told Congress only 11% failed their court dates[16] and that failures to appear in court dropped to historically low levels.[17] EOIR reported a figure[18] more than three times lower than the actual number.[19] The numbers—when clearly stated—tell a far different story. Put simply, EOIR's

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[13]EOIR 2005 Yearbook, pages H1-H4 , Figures 10-12 and page O1. FY 2005 106,832÷270,561=39%, including custodial litigants. www.usdoj.gov/eoir/statspub/fy05syb.pdf.

[14]FY 2005, 106,832÷179,616=59.47%, excluding custodial litigants. *See* EOIR 2005 Yearbook, pp. H1-H4 , Figures 10-12 and page O1.www.usdoj.gov/eoir/statspub/fy05syb.

[15]EOIR 2009 Yearbook, Pages H1-H4, Figures 10-12 and Page O1. www.usdoj.gov/eoir/statspub/fy09syb.pdf. 33,341÷95,606=35%, including administrative closures and excluding detained litigants.

[16]EOIR 2009 Yearbook, Pages H1-H4, Figures 10-12 and Page O1, Figure 20.www.usdoj.gov/eoir/statspub/fy08syb.pdf. The figure of 35% is obtained in this manner. EOIR reported 25,330 litigants free pending trial evaded court in 2009. EOIR excluded from its calculations cases administratively closed in 2009, essentially saying administrative closures—after 14 years—were no longer relevant. Because EOIR's exclusion appears overly broad, administrative closures are included by taking an average of cases from 2007 and 2008 and including this averaged figure. Here the average number of administrative closures from 2007 and 2008 is 8,157. [Noteworthy is the fact that administrative closures increased year over year from 2006 through 2008. Though not specifically identified, administrative closures are probably accounted for in the broad category "other completions"—found on Page D1—which also embraces venue changes, abandonments and withdrawals.] Determining that failures to appear in 2009 equaled 33,482 (25,330+8,157=33,482), the next step is to determine how many litigants were actually free pending trial. EOIR does not disclose this number. This number is obtained, however, by taking the number of detained aliens whose cases were concluded in 2009 (see Page O1) and subtracting this number—144,763—from the total number of court decisions and administrative closures in 2009 (see Page H1). In this case, court decisions and administrative closings equaled 240,369 (232,212+8,157=240,369). Subtracting 144,763 from 240,369 reveals that a total of 95,606 people were permitted to remain free pending their court dates and that 35% of aliens free pending trial evaded court or had cases closed directly or indirectly related to their failures to appear (33,487÷95,606=35%). The actual failure to appear rate is not 11% as stated by EOIR, but is more than three times higher at 35%. Failures to appear in 2009 did not decrease substantially as EOIR asserts. They remained consistent with failure to appear rates in 2007 and 2008—38% and 37% respectively.

[17]EOIR 2009 Yearbook, Pages H1-H4, Figure 10.www.usdoj.gov/eoir/statspub/fy09syb.pdf. Stated EOIR: FY 2009 has the lowest failure to appear rate of the five years that are represented (2005-2009).

[18]In its annual yearbook EOIR features a highlights page—page A1—with each report to Congress. With regard to failures to appear, the 2009 yearbook states: The failure to appear rate decreased to 11% in FY 2009. *See* Pages H1-H4, Figure 10. www.usdoj.gov/eoir/statspub/fy09syb.pdf.

[19]Thirty-five percent (35%) is based on an average of 2007 and 2008's administrative closures. Administrative closures numbered 7,943 in 2007 and 8,372 in 2008. Taking their average of 8,157 (16,315÷2=8,157) and adding it to 2009's failures to appear which came from *in absentia* orders (25,330) reveals that 33,482 alien litigants failed to appear in court. Dividing the total of those litigants free pending court who failed to appear (33,645) by the total of court decisions involving those litigants free during court proceedings (95,606)

accounting misleads.[20] Not only did EOIR merge two unlike groups—those outside detention with those inside detention—to lower the accurate number, it also dropped a whole category of aliens whose failures to appear had been included in the past thirteen years' calculations. Dropping this category—aliens whose court misses resulted in their cases being closed[21]—caused 2009 failures to seemingly decline. Had they been included, failures to appear in court would not have decreased. They would have remained where they were prior to 9/11—with between 30% to 38% of those aliens free pending trial not showing for court.[22] They would also have remained consistent with failure to appear rates in 2007 and 2008—38% and 37%, respectively (*see* footnote 14). Only by removing this category from calculations did EOIR show a significant decline in failures to appear.

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reveals that 35% of aliens free pending trial evaded court. For verification *see* EOIR 2008 Yearbook, Pages H1-H4, Figures 10-12, Page O1, Figure 20..www.usdoj.gov/eoir/statspub/fy08syb.pdf and EOIR 2009 Yearbook, Pages H1-H4, Figures 10-12, Page O1, Figure 20. www.usdoj.gov/eoir/statspub/fy09syb.pdf.

[20]For each annual report (from 1996 through 2008) EOIR combined dissimilar litigant populations in order to calculate the "overall failure to appear rate." Specifically, EOIR merged decisions and administrative closings involving both non-detained litigant population (those aliens outside detention) and detained litigant population (those inside detention), as found on Page H2. It then divided the number of those litigants who failed to appear—determined by the sum of *in absentia* orders and administrative closings, as found on Page H2—by the total number of decisions and administrative closings involving both detained and non-detained litigants. This method drove down failure to appear rates because detained populations rarely missed court, except for jail transportation problems or illness. As a result, failure to appear rates seemed much lower than they actually were. EOIR refers to the product of this division as the "overall failure to appear rate." At no point in its accounting were non-detained populations alone measured. Had they been, evasion rates might have alerted lawmakers to the gravity of the problem before failure rates climbed to 60% in 2005 and 2006. The source of failures to appear is the non-detained population. Measuring this population alone provides an accurate reading of court evasion or "failure to appear rates." For verification *see* EOIR 2008 Yearbook, Pages H1-H4, Figures 10-12 and Page O1. www.usdoj.gov/eoir/statspub/fy08syb.pdf. States EOIR: Failures to appear for detained cases occur infrequently, generally only because of illness or transportation problems, and are not broken out in the following figures.

[21]EOIR defines administrative closures in a glossary attached to its annual report. EOIR states: Administrative closure of a case is used to temporarily remove the case from an immigration judge's calendar or from the Board of Immigration Appeals' docket. Administrative closure of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations. A case may not be administratively closed if opposed by either of the parties. *See* EOIR 2009 Yearbook, *Appendix A - Glossary of Terms*, p.2. www.usdoj.gov/eoir/statspub/fy09syb.pdf.

[22]*See* EOIR 2000 Yearbook, Pages L1-L2 , Figures 15-17 and T1, Figure 23. EOIR 2004 Yearbook, Pages H1-H4 , Figures 10-12 and Page O1, Figure 20.www.usdoj.gov/eoir/statspub/fy04syb www.usdoj.gov/eoir/statspub/fy00syb. In 2001, the year of the 9/11 attacks, EOIR reported 20% of litigants failed to make their appearances in court. The accurate number was 30%. The agency reported 21% failed to make court in 2000. Instead, 31% did not appear. For 1999, Congress heard 24% failed to appear in court. In fact, 34% were absent. EOIR stated 25% missed their court dates in 1998. 34%, in fact, failed to answer when their case was called. EOIR recorded 21% failed to appear in 1997. Rather, 35% did not show for court. In 1996, EOIR declared 21% evaded court. The real number was 38%.

Equally troubling here is that EOIR explicitly admitted that a portion of these administrative closures directly related to aliens absent from court.[23] Rather than break out these figures and include the relevant cases in its reports while excluding the irrelevant ones, EOIR excluded both.[24] This overbroad exclusion sacrifices precision that would otherwise lead to more exact totals of failures to appear and, in turn, reforms that will fix court evasion. As a result of this exclusion, failures to appear predictably declined and the problem of court evasion was once again muted.

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Thank you again for this opportunity to be of assistance to the House Judiciary Committee and the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law. It was a pleasure and honor to appear before your Subcommittee.

Sincerely,

MARK H. METCALF

MHM/pp

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[23] *See* EOIR 2009 Yearbook, Page H1-H4, Figure 10.www.usdoj.gov/eoir/statspub/fy09syb.pdf. In a note to Figure 10 on page H1, EOIR states: **In previous years, administrative closures were included to calculate the failure to appear rate. However, due to a larger percentage of administrative closures not relating directly to failure to appear, the failure to appear rate is calculated using immigration judge decisions and in absentia orders only.*

[24] *See* EOIR 2009 Yearbook, Page H1, Figure 10.www.usdoj.gov/eoir/statspub/fy09syb.pdf. In a note to Figure 10 on page H1, EOIR states: **In previous years, administrative closures were included to calculate the failure to appear rate. However, due to a larger percentage of administrative closures not relating directly to failure to appear, the failure to appear rate is calculated using immigration judge decisions and in absentia orders only.*

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