Written Statement of the
American Civil Liberties Union

Laura W. Murphy
Director, Washington Legislative Office

Joanne Lin
Legislative Counsel
jlin@dcaclu.org

Before the Senate Judiciary Committee

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

Wednesday, May 18, 2011

Introduction

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

[12] *Id.* at 82.

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

[14] "Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years" (Mar. 31, 2010) *available at* http://www.aclu-sc.org/releases/view/103017.

[15] For the class action complaint, *see* http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf.

Representative for Plaintiffs . . . would be both ineffective and inadequate in providing them with meaningful access to participate in their immigration proceedings."[16] Universal legal orientation and an appointment of counsel mechanism for unrepresented immigrants are necessary minimum measures without which routinely full and fair hearings in the immigration courts – and the added beneficial savings of time and money for the government – will not be possible to achieve.

II. EOIR must become an active participant in furthering Immigration and Customs Enforcement's (ICE's) detention reforms.

Lack of representation for immigrants results from a variety of causes beyond the absence of legal orientation and appointed counsel programs. Some of these contributing factors could be ameliorated by improving immigration detention policies and practices that make it more difficult for immigrants to access counsel and communicate with existing counsel. A prime example is the counter-productive transfer of individuals in immigration detention away from family, community, and legal resources. Advocacy groups have reported on and decried "how transfers can result in unfair treatment of detainees facing immigration proceedings."[17] Due process and immigration court efficiency are both ill-served by removing litigants from their relatives, counsel, and witnesses.

More broadly, EOIR and ICE need to cooperate on achieving with dispatch the "major reforms" to the civil immigration detention system promised almost two years ago.[18] Significant delays in court proceedings mean that immigration detainees may spend years in detention waiting for their cases to be heard. Because detention correlates with negative effects such as mental health problems, detainees may become unable to present their cases in court as a result of their confinement. In this and other respects, Immigration adjudication and detention are inextricably linked, with failings in one arena having major repercussions for immigrants' due process rights in the other. EOIR must be an active and full participant when ICE discusses and plans civil detention reforms. Stakeholders deserve regular and thorough consultation with both agencies in order to communicate their concerns and ideas.

The paramount goal of detention reform is to detain only those who absolutely must be detained. Compliance with mandatory detention requirements does not require the incarceration of individuals who finished serving their criminal sentences years ago and have since been leading productive lives.[19] Many of these individuals pose no danger or flight risk. While detention may be warranted in individual cases, these immigrants are entitled to bond hearings to determine if their detention is necessary. Moreover individuals are subjected to mandatory

---

[16] Amended Order re: Plaintiffs' Motion for a Preliminary Injunction, *Franco-Gonzales v. Holder*, No. CV-10-02211 (C.D. Cal. Dec. 27, 2010) 42-43.

[17] Letter from Human Rights Watch to Secretary of Homeland Security Janet Napolitano re: ICE review of detainee transfer policy (Feb. 25, 2011) *available at* http://www.hrw.org/en/news/2011/02/25/us-reform-unfair-immigration-detainee-transfer-policy; Human Rights Watch, *Locked Up Far Away* (Dec. 2009) *available at* http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0.

[18] "ICE Announces Major Reforms to Immigration Detention System" (Aug. 6, 2009) *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm.

[19] *See, e.g.*, *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004) (holding that detention of lawful permanent resident three and a half years after his release was unauthorized and noting that "petitioner has had no further criminal conduct").

detention for prolonged periods far in excess of the 45-day to five-month period contemplated by the Supreme Court when it upheld mandatory detention, notwithstanding the increasing number of federal court decisions concluding that such practices are impermissible.[20] EOIR and ICE should adopt detention policies that demonstrate a commitment to ending overincarceration in order to avoid the serious constitutional problems that current policies are creating.

The prospect of continued detention coerces many detainees to abandon meritorious claims to stay in the U.S. EOIR and ICE should act cooperatively to reduce the government's use of detention and achieve enormous cost savings by expanding community-based alternatives to detention (ATD), which are far less costly than detention in prison-like settings – $8.88 per person per day for ATD as compared to $122.[21] All bond and custody decisions should be reviewed by an immigration judge and ICE should bear the burden of showing why detention is necessary, i.e., why conditions of supervision, including electronic monitoring, would not be sufficient. EOIR should also undertake a close examination of the legal doctrine and procedural requirements for immigration judges' bond decisions, which exhibit a lack of consistency and are not required to be transcribed, thereby hampering appellate review and wrongly keeping immigrants in detention as a first resort.[22]

III. EOIR should undertake a comprehensive review of language access services and ensure the required sharing of evidence by the government in immigration courts.

One of the most pervasive problems in immigration proceedings is the failure to guarantee translation of an immigrant's proceedings. The 2010 ACLU/HRW report observed "bond hearings that were not translated for the detainees who were of limited English proficiency."[23] Impartial observers are shocked to discover that "[i]n most jurisdictions . . . Immigration Court interpreters render only those statements made by and directed to respondents."[24] EOIR is an agency that serves a population with acute language access needs, yet many of its proceedings fail the most elementary test of intelligibility for immigrants whose lives, families, and futures are at stake. The ACLU urges EOIR to make language access a top priority, including the translation of immigration forms and the provision of interpretation services in detention facilities, and to draw lessons and shared resources from the experience of criminal and civil institutions with tested comprehensive interpretation services.

A second defect that affects an enormous number of immigration cases is the government's failure to produce information necessary to the immigrant's case. Discovery

---

[20] *See, e.g.*, *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (construing 236(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid serious constitutional problem), *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (construing 236(c) as only authorizing mandatory detention for period of time reasonably needed to conclude proceedings promptly); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).

[21] Statement of John Morton, "The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement" U.S. House of Representatives Committee on Appropriations, Subcommittee on Homeland Security (Mar. 18, 2010); ICE, "Protecting the Homeland: ATD Nationwide Program Implementation Report" at 9 (Feb. 1, 2010).

[22] All immigration court hearings should be transcribed as a basic tenet of fundamental fairness.

[23] *Fundamental Fairness*, *supra*, at 9.

[24] *Id.* at 11.

deadlines are frequently flouted by government attorneys without imposition of sanctions. In addition, despite the plain language of the Immigration and Nationality Act and the clear holding of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011), the ACLU has received reports that DHS is refusing to provide immigration files without a Freedom of Information Act request.

Lack of language access and government disrespect for its procedural responsibilities are recurring issues faced by immigration court practitioners. To achieve the fair legal playing field required by the Constitution, these flaws must be remedied.

Conclusion

The ACLU applauds the Senate Judiciary Committee's discussion of "Improving Efficiency and Ensuring Justice in the Immigration Court System." Our statement aims to demonstrate that improvement in efficiency and the assurance of justice are mutually reinforcing objectives. Improvements in legal representation, detention, and court procedures would benefit every participant in the immigration courts and cost savings frequently flow from improved process. Indeed, true systemic reform will result only when policymakers are genuinely committed both to enacting best practices and to realizing the fair immigration hearings our Constitution requires.