



June 3, 2009

Ms. Mary Ellen Callahan
Chief Privacy Officer
Privacy Office, Department of Homeland Security
Washington, DC 20528

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Re: Comments to Proposed Action Titled "Notice of amended
Privacy Act system of records," Department of Homeland Security,
docket number DHS-2009-0031, Federal Register: May 5, 2009
(Volume 74, Number 85)

Dear Ms. Callahan:

The American Civil Liberties Union ("ACLU") submits the following
comments to the Department of Homeland Security ("DHS") Privacy Office
in support of proposed action DHS-2009-0031, published in the Federal
Register on May 5, 2009.

The ACLU is a nationwide, non-partisan organization of more than 500,000
members dedicated to enforcing the fundamental rights of the Constitution
and United States laws. For almost 90 years, the ACLU has sought to
preserve and strengthen individual freedoms in all aspects of American life.
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, including the
right to due process.

**The ACLU supports changes to the Removable Alien Records System
that allow for effective Legal Orientation Program and Know Your
Rights programs.**

The proposed changes to the Removable Alien Records System ("RARS")
maintained by DHS Immigration Customs Enforcement ("ICE") will permit
the sharing of immigration detainee information with the DOJ Executive
Office for Immigration Review ("EOIR") or its contractors so that EOIR can
arrange for the provision of educational services to detainees under its Legal

Orientation Program (“LOP”). The proposed amendment would also allow the sharing of the same information with non-governmental attorneys and legal representatives for the purpose of facilitating “Know Your Rights” (KYR) presentations to immigration detainees.

The ACLU supports the proposed use of RARS to permit ICE to share information about immigration detainees with entities that provide LOP and KYR programs. Access to these programs will provide critical education to detainees facing permanent removal from the U.S., and inform them of their rights to immigration counsel, to appear before an immigration judge, to present evidence and testify in their cases, to appeal a removal order to the Board of Immigration Appeals, and other core due process protections.

The typical detainee in removal proceedings does not understand the charges leveled against him or her or the forms of immigration relief available. Eligibility for relief depends on many factors including the charges lodged, the detainee’s country of origin, birthplace, date of entry to and exit out of the U.S., family background, employment history, any criminal background, and the individual’s health status. Enabling immigration legal advocates to access all available information about a detainee is a crucial first step before screening the detainee for viable claims to relief from removal and connecting him or her with an available individual lawyer.

DHS should support the institution of government-appointed counsel for detained immigrants.

The ACLU welcomes the proposed amendment to encourage access to LOP and KYR programs as a first step toward ensuring access to immigration counsel. However, LOP by itself does not go far enough to provide the 442,000 (FY 2009) immigration detainees with meaningful legal representation. Equipping a detainee to defend him or herself pro se is an inadequate substitute for ensuring that the detainee receives competent legal representation in an individual removal case. Guaranteeing court-appointed counsel to an immigration detainee in a removal proceeding is necessary to ensure that the immigration removal process comports with due process.¹

All people placed in removal or deportation proceedings have a statutory right to immigration counsel. See 8 U.S.C. sec. 1229a(b)(4)(A), 8 U.S.C. sec. 1362. However, there is no right to government-appointed immigration counsel, and as such, the vast majority of immigration detainees in removal proceedings do not have immigration counsel.

¹See generally Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (adopted case-by-case approach, holding that the “test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness the touchstone of due process.’”)

Unlike nearly all other civil proceedings, in immigration removal proceedings an individual's liberty is at stake.² Permanent removal from the U.S. poses a severe threat to an individual's freedom, threatens permanent separation of families including those with U.S. citizen children, and potentially subjects the deportee to persecution, torture, and even death in the country of origin. Lack of access to counsel both undermines the fairness of removal proceedings and violates the fundamental principle of our legal system that people cannot be deprived of liberty without due process of law.

An indigent detainee in a removal proceeding needs government-appointed counsel in compliance with the Fifth Amendment right to counsel.³ Many immigrants in detention have viable claims to relief based on fear of persecution, likelihood of torture, long-term permanent residency and family and community ties in the U.S. The law governing such cases can be extraordinarily complex,⁴ and few immigrants have the knowledge or resources to research, develop, and present complicated legal arguments on their own behalf. Similarly, immigration court proceedings are usually equally complex, and many immigrants face serious challenges – including language and cultural barriers – in understanding proceedings.

Unlike other civil administrative proceedings, immigration proceedings are always adversarial, with government trial attorneys prosecuting each removal case; in many cases immigration proceedings mirror criminal trials. An adversarial process requires counsel on both sides, and the lack of counsel undermines the legitimacy of the entire removal process. It is an overwhelmingly and nearly impossible task for an immigrant, pro se, to challenge and argue against an ICE trial attorney.

LOP and KYR programs, while serving an important purpose, cannot extend far enough to ensure that each immigrant is accorded due process and that the entire immigration removal process comports with fundamental fairness and due process. For the reasons stated above, we urge DHS to support the institution of government-appointed counsel for immigration detainees in removal proceedings.

If you have any questions, regarding these comments please contact Joanne Lin, ACLU Legislative Counsel, at 202/675-2317 or jlin@dcacclu.org.

² See *INS v. St. Cyr*, 433 U.S. 289, 300, 308 (immigrants may challenge their deportation in a habeas corpus petition because their liberty is at stake); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (deportation “is a penalty” that deprives an immigrant of his liberty and “[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness”) (emphasis added); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir.1999) (aliens have a right to effective assistance of counsel under the Due Process Clause because deportation proceedings implicate an alien's liberty interest)

³ See generally *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) (“the right to be represented by counsel of their choice granted to aliens in deportation proceedings by statute and regulations is too important and fundamental a right to be circumscribed by a harmless error rule.”)

⁴ See *Zhang v. United States*, 506 F.3d 162, 169 (2d Cir. 2007) (“Immigration law is a notoriously complex and constantly shifting area of law.”).

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Fredrickson', with a stylized, cursive script.

Caroline Fredrickson
Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read 'Joanne Lin', with a cursive script.

Joanne Lin
Legislative Counsel