Testimony of the American Immigration Council

Submitted to the Senate Committee on the Judiciary
Hearing on
"Improving Efficiency and Ensuring Justice in the Immigration Court System"

May 18, 2011

Introduction

Immigration courts have long suffered from crushing backlogs that can delay the scheduling of hearings for years at a time. Additionally, noncitizens who appear before these courts often suffer serious due process violations. With the dramatic and rapid escalation of immigration enforcement, too little attention has been paid to the many challenges facing our immigration court system.

The backlogs in our nation's immigration courts are bigger today than at any time in U.S. history. In many U.S. cities, noncitizens must wait eighteen months or longer for a hearing before an immigration judge. These backlogs not only delay the removal of noncitizens with no lawful claim to remain in the United States, but also impose hardships on individuals—such as asylum seekers—whose status and ability to work remain in limbo until their cases are resolved. The troubles that have long faced our immigration court system have been magnified and compounded by the Department of Homeland Security's increasing reliance on state and local law enforcement agencies. So long as the federal government continues to expand its enforcement efforts through programs like Secure Communities, while ignoring the need for court reform, our nation's immigration courts will continue to be flooded beyond capacity.

Moreover, noncitizens in removal proceedings historically have been denied many rights that Americans have come to expect from a fair system of justice. Unlike criminal defendants, noncitizens who cannot afford an attorney have no right to appointed counsel. Noncitizens can also be removed on the basis of hearsay and other evidence that would be excluded in federal courts. Vulnerable noncitizens, including those who lack mental competency, are often deported without inquiries into their ability to comprehend the proceedings against them.

And the immigration court system remains largely exempt from crucial checks and balances like judicial review. Federal court oversight is important not only because of the high stakes involved in immigration cases, but because of the potential for error that accompanies the growing volume of cases and limited resources. Moreover, because the majority of noncitizens do not have lawyers, federal court review adds an important layer of protection; courts can catch

inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws.

For far too long, immigration courts have failed to provide a fair, efficient and effective system of justice for noncitizens in this country. The American Immigration Council is grateful for this opportunity to highlight certain problematic aspects of the immigration court system that have long been a focus of our litigation and advocacy efforts.

Access to Counsel

Access to counsel lies at the very core of our legal system and is integral to ensuring that noncitizens facing removal receive fair process and a meaningful opportunity to be heard. Whether a person has legal representation is perhaps the most critical factor in obtaining a favorable result in immigration court.[1] Despite the importance of counsel, a staggering number of individuals in removal proceedings are forced to proceed without legal representation. In FY 2010, 57 percent of all noncitizens in proceedings did not have lawyers. In other words, 164,742 noncitizens faced the daunting and often insurmountable task of navigating a complicated maze of procedural rules, statutes, regulations, and court decisions on their own.

Not surprisingly, cost often is a barrier to representation, especially for detained noncitizens. However, cost is not the only impediment. Transfers from the place of arrest to a detention center in a different state make it more difficult to retain a lawyer, particularly in remote locations where there are few lawyers and even fewer pro bono resources. Transfers also may disrupt existing attorney-client relationships.

Given the gravity of removal—which can range from permanent separation from family in the United States to a threat of persecution in an asylum-seeker's country of origin—indigent noncitizens should be appointed counsel. Appointed counsel would not only help protect the rights of noncitizens and ensure more just outcomes in removal cases, but also would make removal proceedings more efficient. Because non-attorneys generally are unfamiliar with the complex laws and rules governing immigration court hearings, immigration judges must spend precious time getting them up to speed. In addition, unrepresented noncitizens with no available relief may unwittingly file frivolous appeals. Lawyers can help streamline the process.

[1] The Government Accountability Office found that asylum applicants who had lawyers were more than three times as likely to be granted asylum as those who did not. GAO, *Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* at 30 (2008), *available at* http://www.gao.gov/new.items/d08940.pdf. Similarly, a comprehensive study of asylum outcomes by academics concluded that whether an asylum seeker was represented in court was "the single most important factor" affecting the outcome of the case. Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007), *available at* http://www.acslaw.org/files/RefugeeRoulette.pdf.

Effective Assistance of Counsel

The courts and the Department of Justice long have recognized that the right to counsel must necessarily include a remedy for ineffective assistance of counsel. Over twenty years ago, the Executive Office for Immigration Review (EOIR) established a framework for evaluating ineffective assistance of counsel claims and providing remedies.[2] This framework, however, has proven to be severely flawed. It has elevated form over substance; resulted in protracted litigation and unnecessary expenditure of resources; pitted lawyers against one another; and most significantly, deprived noncitizens of their only opportunity to present their cases.

In November 2009, the American Immigration Council submitted to EOIR written suggestions for how to improve the framework for adjudicating ineffective assistance of counsel claims.[3] The American Immigration Council also suggested revisions that would reduce the number of motions to reopen for ineffective assistance and other reasons; reduce the amount and duration of litigation in the administrative and federal courts over procedural and clerical mistakes; and help ensure that all noncitizens in removal proceedings have their day in court.

Protections for Noncitizens Who Lack Mental Competency

Every year, untold numbers of noncitizens with mental disabilities are deported from the United States without access to counsel or any assessment of their cognitive capabilities. This issue has taken on greater urgency following extensive reports of the challenges such individuals face in removal proceedings, as well as alarming reports of the mistaken deportation of U.S. citizens.

The entry of removal orders in cases involving noncitizens who lack mental competency raises significant questions under both the Constitution and the Immigration and Nationality Act (INA). The Due Process Clause of the Fifth Amendment mandates that *all* noncitizens, including those present in violation of law, receive a full and fair hearing. The INA also calls for procedural safeguards to "protect the rights and privileges" of mentally incompetent noncitizens.[4] At a minimum, such safeguards should include appointed counsel for noncitizens who are not competent to proceed on their own. Additional safeguards, including the appointment of a guardian *ad litem*, may be required for noncitizens who are so severely incapacitated that they cannot understand and assist with their hearings even with the assistance of counsel.

Earlier this month, the Board of Immigration Appeals issued a precedent decision adopting a test for Immigration Judges to assess a noncitizen's capacity to participate in a removal hearing in cases where there are "indicia of incompetency."[5] The decisive factors are whether the noncitizen understands the nature and object of the proceedings, can consult with an attorney or representative (if there is one), and has a reasonable opportunity to examine adverse evidence,

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[2] The framework is set out in the Board of Immigration Appeals' decision *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

[3] These suggestions are available at http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf.

[4] 8 U.S.C. §1229a(b)(3); INA § 240(b)(3).

[5] *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

present favorable evidence and cross-examine government witnesses. If there is good cause to believe that a noncitizen lacks sufficient competency to proceed, the Immigration Judge must evaluate and implement appropriate procedural safeguards to ensure a fair hearing.

While the Board's decision was a welcome first step, many concerns remain. For example, while the Board properly held that the Department of Homeland Security must disclose evidence in its possession relating to a noncitizen's mental competency, significant doubt remains that the government can provide a neutral competency assessment in the first place. The decision also fails to acknowledge that legal representation is indispensable to help noncitizens who lack mental competency navigate the complex maze of immigration law. Finally, the decision provides only a cursory discussion of how to proceed in cases involving noncitizens whose mental disabilities are so severe that no procedural safeguards would ensure a fair hearing. More comprehensive guidance will be necessary to protect the due process rights of noncitizens who lack mental competency.

Employment Authorization Asylum Clock

The INA requires asylum applicants to wait 150 days after filing an application to apply for a work permit. However, due to problems with the Employment Authorization Document (EAD) asylum clock—which measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization—asylum applicants often wait much longer than the legally permitted timeframe to receive a work permit. During this time, applicants must generally rely on others for financial assistance. Some eventually are forced to work without authorization at serious risk of exploitation while they wait for decisions on their asylum cases.

Many of these problems result from inconsistent and overly broad interpretations by immigration judges (IJs) of what constitutes "delay requested or caused by the applicant," which, pursuant to regulation, causes the clock to stop.[6] Attorneys report that IJs fail to properly implement the clock and, in some cases, appear predisposed toward preventing asylum applicants from accumulating time toward eligibility for employment authorization. The backlogs at the immigration courts can magnify these problems. When a respondent requests a continuance to seek counsel or prepare for a hearing, IJs often stop the clock until the next hearing date, which may be many months later and long after the reason for the delay has been addressed.

Many EAD clock problems, and suggested solutions, are addressed in a comprehensive report issued by the American Immigration Council and Penn State Law School's Center for Immigrants' Rights, "Up Against the Clock: Fixing the Broken Employment Authorization Clock."[7] The report offers recommendations that would help ensure asylum applicants become eligible for employment authorization without unnecessary delays and closer to the timeframe outlined in the INA.

[6] 8 C.F.R. §§ 208.7(a)(2) and 1208.7(a)(2).

[7] http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf.

Departure Bar to Motions to Reopen

EOIR bars noncitizens from pursuing motions to reopen or reconsider a final order of removal after they have left the United States. Over the past several years, the so-called "departure bar," codified at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), has been the subject of protracted litigation in numerous courts of appeals. To date, five appellate circuits have found that the bar to motions to reopen from outside the United States is unlawful.[8] Challenges to the bar are pending in at least two circuits.[9] The departure bar is inconsistent with Congress's intent when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). One of Congress's goals in enacting IIRIRA was to encourage prompt removal and departure from the United States upon the completion of immigration proceedings. Yet the departure bar has created an incentive for noncitizens with removal orders to ignore such orders and remain in the United States—because complying with the order would mean foreclosing an opportunity to exercise their statutory right to file a motion to reconsider or reopen, a right that is especially compelling if factual or legal circumstances change. Thus, contrary to congressional intent, the departure bar actually undermines the goal of encouraging compliance with removal orders.

Moreover, when Congress enacted IIRIRA, it took the significant step of codifying the right to file motions to reopen and reconsider. As the Supreme Court has said, the motion to reopen is "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings."[10] Not only does the departure bar preclude reopening when there is new evidence or arguments that may affect the outcome of removal proceedings, but it also deprives EOIR of authority to adjudicate motions to remedy deportations wrongfully executed, whether intentionally or inadvertently, by DHS. At present, immigration judges and the Board of Immigration Appeals are powerless to adjudicate motions to correct wrongful deportations, even under the most egregious circumstances. The simplest solution to this problem is for EOIR to remove the departure bar from the regulations. In August 2010, we filed a petition for rulemaking asking the agency to do just that; to date, however, EOIR has not acted on our petition.

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The American Immigration Council is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy and the value of immigration to U.S. society. The Legal Action Center (LAC) is the litigation and legal resources arm of the American Immigration Council. The mission of the LAC is to protect the legal and constitutional rights of noncitizens, and to ensure that immigration law is interpreted and

[8] *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Martinez Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). *But see Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

[9] *Prestol Espinol v. Attorney General*, No. 10-1473 (3d Cir. *argued* April 27, 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500 (10th Cir. petition for rehearing en banc *filed* March 8, 2011).

[10] *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010) (internal quotations, citations omitted).

implemented in a manner that is sensible and humane. The LAC has established itself as a leader in litigation, information-sharing, and collaboration among immigration litigators across the country. The LAC is also one of the leading providers of legal resources for immigration advocates, including in-depth practice advisories, trainings and litigation meetings.