



# AMERICAN BAR ASSOCIATION

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**Statement of**

**KAREN T. GRISEZ**

**on behalf of the**

**AMERICAN BAR ASSOCIATION**

**to the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**for the hearing on**

**“Improving Efficiency and Ensuring Justice in the Immigration Court System”**

**May 18, 2011**

Chairman Leahy, Senator Grassley and Members of the Committee:

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

## **BACKGROUND**

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

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

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

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

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<sup>1</sup> The full report and executive summary are available at <http://www.americanbar.org/immigration>.

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

## **ADDRESSING THE NEED FOR ADEQUATE RESOURCES**

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

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

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

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

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<sup>2</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 T.36 (2010).

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

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

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

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

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

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

## **INCREASING ACCESS TO COUNSEL AND LEGAL INFORMATION**

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

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<sup>5</sup> 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>.

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

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

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

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

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

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

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

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

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

Aside from the argument that increasing representation makes the system more effective, there is strong evidence that representation also affects the *outcome* of immigration proceedings. In fact, a study has shown that whether a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.” For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when they proceeded pro se.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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

## **RECOGNIZING PRIORITIES AND IMPLEMENTING SMART PROCEDURES**

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

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<sup>7</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007).

<sup>8</sup> 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.

<sup>9</sup> *Id.*

<sup>10</sup> The New York Immigrant Representation Study, PRELIMINARY FINDINGS 1 (2011), available at <http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf>.

<sup>11</sup> *Id.*

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

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

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

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

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<sup>12</sup> Memoranda from John Morton, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens,” Immigration and Customs Enforcement, June 30, 2010, available at:

[www.ice.gov/doclib/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/civil_enforcement_priorities.pdf) and “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions,” Immigration and Customs Enforcement, August 20, 2010, available at: <http://www.ice.gov/doclib/dro/pdf/aliens-pending-applications.pdf>.

<sup>13</sup> Shoba Sivaprasad Wadhia, “Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion,” Immigration Policy Center-American Immigration Council, December 2010.

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

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

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

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

### **STREAMLINING THE ASYLUM PROCESS**

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

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

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

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

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

## **Eliminate the One-Year Filing Deadline**

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

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<sup>14</sup> See the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

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

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

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

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

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

## **CONCLUSION**

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

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

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

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