Statement of
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President
on behalf of the
AMERICAN BAR ASSOCIATION
for the record of the hearing on
COMPREHENSIVE IMMIGRATION REFORM
before the
Committee on the Judiciary
of the
U.S. SENATE

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Chairman Leahy, Ranking Member Grassley and Members of the Committee:

On behalf of the American Bar Association (ABA), I am pleased to submit this statement for the Committee’s February 13, 2013 hearing on “Comprehensive Immigration Reform.”

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 improvements 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.

The United States is a nation of immigrants, and immigration continues to shape and strengthen our country. Today, more than one in every five U.S. residents is either foreign-born or born to immigrant parents. Every day more immigrants seek to come to our country to reunite with close family members, fill jobs, and find protection from persecution in their homelands. The development, implementation and enforcement of our immigration laws should seek to balance this influx with the necessity of controlling our borders through a fair and effective system of immigration. However, even a cursory review of the immigration system today shows that it is plagued with problems at every level.

In the more than fifteen years since Congress last passed major immigration reform legislation, the impacts have been felt keenly throughout every aspect of our society: families too long separated; business’ unable to fill necessary jobs to bolster our economy; those suffering persecution lacking access to safe harbor in the land of the free; and a country in fiscal crisis spending an inordinate amount of scarce resources on border security and enforcement. Ultimately what is needed, and what the ABA supports, is comprehensive reform that fairly and realistically addresses the U.S. undocumented population, the need for immigrant labor, the value of family reunification, and the importance of an effective and humane immigration enforcement strategy.

Despite the fact that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic protections that we take for granted in our American system of justice. As 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 and those topics comprise the primary focus of our recommendations here.

ENSURING ACCESS TO LEGAL COUNSEL AND LEGAL INFORMATION

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Meaningful access to legal representation for persons in immigration proceedings is particularly important. The consequences of removal can be
severe, resulting in separation from family members and communities, or violence and even death for those fleeing persecution. Yet, immigrants have no right to appointed counsel and must either try to find lawyers, which is particularly difficult for those in detention, or represent themselves. Legal assistance is critical for a variety of reasons, including a lack of understanding of our complex immigration laws and procedures due to cultural, linguistic, or educational barriers. Statistics show that asylum seekers and others who have legal representation are significantly more likely to succeed in their immigration cases. Representation is therefore crucial – the outcome of an immigration case should not be determined by a person’s ability to secure counsel, but on the merits of his or her claim.

In addition, representation has the potential to increase the efficiency of at least some adversarial immigration proceedings. Pro se litigants may be unfamiliar with immigration laws and court procedures. Their lack of knowledge and understanding, particularly when combined with a language barrier, can create delays that 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 helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Immigration Judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. 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.

The federal Legal Orientation Program should be expanded nationwide and be provided to all detained persons in removal proceedings.

One of the ways that detained immigrants can be provided with relevant legal information is through Legal Orientation Programs (LOP). The federal LOP program is administered by the Department of Justice’s Executive Office for Immigration Review, which contracts with nonprofit organizations to provide LOP services at 25 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings to educate them on the law and to explain the removal process. Based on this orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the overwhelming majority – typically submit to removal.

According to the Department of Justice, LOPs improve the administration of justice and save the government money by expediting case completions and leading detainees to spend less time in detention. In fact, reports have shown that cases for persons participating in LOPs move an average of 12 days faster through the immigration court system. Since the inception of the program, the ABA has provided LOPs at the Port Isabel Detention Center in South Texas and can unequivocally attest to the benefits that these presentations bring to detainees, the facility, and the immigration court system. Legal orientation presentations facilitate noncitizens’ access to justice, improve immigration court efficiency, and save government
resources. To maximize these benefits, the Legal Orientation Program should be expanded nationwide to all detained persons in removal proceedings.

**Legal representation, including appointed counsel where necessary, should be provided for unaccompanied children and mentally ill and disabled persons in all immigration processes.**

There are classes of vulnerable persons for whom it is particularly important to ensure appropriate legal representation for the duration of their cases: unaccompanied alien children and mentally ill and disabled persons. These persons may lack the capacity to make informed decisions on even the most basic matters impacting their cases and are not in a position to determine on their own whether they might qualify for relief. In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. However, the particular vulnerabilities of these persons also make it difficult to impossible for them to obtain counsel on their own.

Current law calls for the government to ensure that unaccompanied children have legal representation in immigration proceedings and other matters, but only “to the extent practicable.” Similarly, the law allows, but does not require the appointment of a guardian or advocate for vulnerable unaccompanied children. For those who are mentally ill or disabled, the law allows an attorney or other representative to appear on behalf of the respondent, but does not require that legal representation be provided. Fundamental principles of fairness and due process demand that these vulnerable persons receive legal representation and guardians to represent their interests throughout the immigration process. While pro bono representation should be encouraged and utilized to the maximum extent possible, it cannot meet the need in all cases, particularly for those who are detained in remote border areas. The ABA recommends that legal representation be provided for unaccompanied children and the mentally ill and disabled in all immigration proceedings, including by requiring government-appointed counsel where necessary.

**Indigent noncitizens with potential relief from removal, and who are unable to secure pro bono counsel, should be provided government-appointed counsel.**

About 50 percent of noncitizens in immigration proceedings lack legal counsel; the percentage rises to almost 80 percent for those in detention. The reasons vary, but for many the cost of retaining counsel presents an insurmountable obstacle, and free or low-cost legal services simply may not be available to them. For those in detention, remote facility locations and communication barriers may impede such access. Under U.S. law, noncitizens have a right to counsel in removal proceedings, but at “no expense to the government.” This provision does not necessarily preclude government-funded counsel; it merely provides that counsel need not be provided as a matter of right.

The ABA supports establishing a system to identify indigent persons with potential relief from removal and refer them to legal counsel. In such a system, all indigent noncitizens in removal proceedings would be screened by lawyers or other highly trained experts supervised by
lawyers. If a determination is made that there may be an availability of relief from removal, the person should be referred to legal counsel. While qualifying cases could be referred to charitable legal programs or pro bono attorneys if available, where such services are not, then government-paid counsel should be provided.

While establishing such a system would entail some additional cost to the government, the number of persons who are potentially eligible for relief from removal is limited. Roughly 10 percent of those who receive legal orientation presentations have viable claims for relief. Of this figure, many secure pro bono counsel and others can afford to retain counsel. A very small percentage of LOP recipients and others – those eligible for relief from removal who cannot otherwise obtain legal counsel – should be eligible for appointed counsel.

Beyond the obvious interest of affected noncitizens, legal representation also benefits the government and the administration of justice through improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings. It also deters frivolous claims. Above all, increased representation serves the government’s interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on an individual’s ability to secure and afford paid counsel.

**COST-EFFECTIVE AND HUMANE IMMIGRATION DETENTION**

The Department of Homeland Security’s Immigration and Customs Enforcement (ICE) is one of the nation’s largest law enforcement agencies. ICE annually detains over 400,000 foreign nationals in facilities throughout the United States at a cost of $2 billion per year. Of the more than 33,000 daily detention beds available to ICE, over half are rented from private prisons and state and local jails. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population.

**Noncitizens in removal proceedings should not be detained, except in extraordinary circumstances, such as when national security or public safety is threatened or when a noncitizen presents a substantial flight risk.**

Although immigration is a civil, not a criminal, matter, various provisions of the Immigration and Nationality Act provide for detention of foreign nationals. The primary reasons for permitting detention in the immigration context are to ensure that people appear for all scheduled immigration hearings and comply with the final order of the immigration judge. Unfortunately, even immigrants who may be eligible for release often remain detained because they cannot afford to post bond. These persons often are detained for months or even years while their immigration cases work their way through the courts.

The loss of liberty has punitive effects and works to undercut rights on many levels, including the right to counsel. Furthermore, the impact of detention is particularly negative for certain vulnerable groups, such as families enduring indefinite separation, asylum-seekers and victims
of crime suffering from trauma and fearful of government authority, and those with physical or mental conditions that may be exacerbated by the lack of adequate medical care.

Detention also imposes a significant financial burden on the public; the federal government spent about $5 million per day on immigration detention in 2012. Efficient and effective use of scarce public resources should be directed toward detaining only those who pose a threat to public safety or national security, or present a substantial flight risk. Persons who do not meet those criteria should be released under appropriate conditions to ensure compliance with their immigration proceedings.

**The use of alternatives to detention should be enhanced and implemented appropriately.**

Among the more than 400,000 persons ICE detains annually are long-time permanent residents, sole care providers of U.S. citizen children, survivors of torture and abuse, and people with serious medical conditions who need specialized care. Humanitarian concerns and limited detention capacity have sparked national efforts over the past several years to integrate into ICE’s general practices the use of various alternatives to detention. Detention alternatives used by ICE include release on orders of recognizance, release on bond, supervised release, and electronic monitoring.

Alternatives to detention offer the prospect of a considerable cost savings. The cost of detention is approximately $164 per day per person, while alternative programs can cost less than $8 per day. Experience has shown that alternatives programs, designed and implemented appropriately, can be extremely effective. A pilot alternatives program coordinated by the Vera Institute of Justice between 1997 and 2000 resulted in a 93 percent appearance rate for asylum seekers in the program, at about half the cost of detention. ICE’s existing alternatives program report compliance rates of 85 to 99.7 percent. Aside from the issue of the cost-effectiveness, utilizing alternatives in appropriate cases also serves to increase access to legal representation and may allow noncitizens to fulfill their family, work, or community responsibilities while awaiting determination of their case.

Congress should provide increased funding for alternatives to detention and direct ICE to implement true alternatives to detention that apply to only those who would otherwise be detained and that use the least restrictive options necessary to ensure that an immigrant appears in court.

**Transitioning to a model of civil detention and ensuring humane conditions for those in immigration custody.**

The U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement (ICE) agency primarily detains persons who are in removal (deportation) proceedings. Persons in ICE custody are not facing criminal trials or serving prison sentences. Under the law, removal proceedings are civil in nature and the detention of immigrants serves to ensure their appearance at court and to effectuate their removal, not to punish them. Despite ICE’s civil
legal authority, the U.S. immigration detention system has traditionally held detainees in jails and in jail-like facilities that are administered according to American Correctional Association (ACA)–based standards for persons awaiting criminal trials.

The ABA has worked for many years to ensure that foreign nationals in the U.S. detention system are treated humanely. The ABA worked closely with the Department of Justice over the course of several years to craft the first meaningful set of standards to govern treatment of persons in immigration detention, focusing on four legal access standards: visitation, telephone access, group presentations on legal rights, and access to legal materials. The DHS/ICE detention standards, which have undergone several revisions, have not been codified in a statute or regulation and immigration detainees continue to struggle with lack of access to representation and legal materials, inadequate medical care, and other issues.

While DHS/ICE has initiated a process to reform its detention system, it has not adopted or crafted detention standards that reflect its civil immigration authority. In 2012, the ABA developed and adopted Civil Immigration Detention Standards (Civil Standards)\(^1\) in order to promote access to justice and fair and humane treatment of persons in the immigration detention system. The Civil Standards have a set of guiding principles that reflect the conviction that civil detention facilities and programs should approximate normal living conditions to the extent possible, while ensuring that residents appear at court hearings, can be removed (if so ordered) from the country, and do not present a danger to themselves or to others. The principles provide: 1) that any conditions placed on noncitizens to ensure court appearances or to effect removal should be the least restrictive necessary to further these goals; 2) describe a system that would offer a continuum of strategies, programs and alternatives to meet these goals, up to and including detention; 3) provide that residents should not be held in jails or jail-like settings; 4) highlight the importance of access to legal counsel, materials and courts; and 5) emphasize the need for rigorous oversight by DHS/ICE to ensure compliance with the standards.

We are encouraged that ICE opened a facility in March 2012 in Karnes County, Texas that it says will provide less restrictive detention environments. However, this facility will be able to hold only a fraction of the annual number of detainees, and may be used for those who are well suited for appropriate alternatives to detention. We urge additional measures to transition the immigration detention system to a truly civil system and, in the meantime, to provide full implementation and enforcement of the current ICE Detention Standards at all facilities that currently hold immigration detainees.

A FAIR AND EFFICIENT IMMIGRATION REMOVAL ADJUDICATION SYSTEM

Several changes in recent years have undermined the quality of due process received by noncitizens in the immigration adjudication system. In 2010, the ABA released a report entitled

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\(^1\) Available at [http://www.americanbar.org/groups/public_services/immigration/civilimmdetstandards.html](http://www.americanbar.org/groups/public_services/immigration/civilimmdetstandards.html).
Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. The report examined 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 also recommend a number of incremental reforms that could be made within the current structure that could result in enhancing efficiency in the system if implemented, and we discuss several below. 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.

Addressing the Need for Adequate Resources

There have been vast increases in the resources devoted to immigration enforcement efforts that have resulted in an ever-burgeoning caseload in the immigration courts — immigration court receipts increased by 28% between FY 2007 (335,923) and FY 2011 (430,574). Yet there has not been a commensurate increase in resources available to the courts. As a result, the case backlog has grown and case processing times are significantly delayed. As of December 2012, the immigration court backlog was at 322,818 cases, with pending cases waiting an average of 545 days, or nearly one and a half years.

The immigration courts simply have too few immigration judges for the workload for which they are responsible. For FY 2011, some 266 immigration judges completed an average of 1,140 proceedings per judge, not including bond hearings and motions, and issued an average of 827 decisions per judge. To produce these numbers, each judge must have issued an average of at least 16 decisions each week, or approximately three decisions per weekday, in addition to conducting their calendaring hearings, even while assuming no absences for vacation, illness, training, or conference participation. A lack of adequate staff support for the immigration judges compounds the problem. On average, there is only one law clerk for every three 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 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.

Available at http://www.americanbar.org/groups/public_services/immigration/publications.html.
Strategic Decision-Making and Procedural Change to Reduce Unnecessary Litigation

In addition to increasing resources available, the caseload could also be partially alleviated by revising certain Department of Homeland Security (DHS) policies and procedures, consistent with enforcement priorities, to decrease the number of cases being put into the court system. This will enable the enforcement and adjudication functions to work together more strategically and effectively to ensure those the government is most interested in removing are prioritized in the process. For example, prosecutorial discretion, while used widely in the criminal justice context, has been underutilized in the immigration context. In certain cases it is clear that the government will not remove an individual in proceedings – for example because of health issues or eligibility for a hardship waiver. Some individuals are eligible for lawful status but are awaiting the determination of a benefits application from U.S. Citizenship and Immigration Services. Expending significant time and costs in proceedings in these cases does not make sense. These are cases that could be excluded from the court system in the first instance, by increasing the use of prosecutorial discretion and providing DHS attorney review of Notices to Appear before they are filed with the court.

There also is room for improving efficiency in the process for handling asylum claims. Affirmative asylum claims are currently handled by DHS officers, but asylum claims raised in expedited removal proceedings are adjudicated by an immigration judge. These defensive asylum claims also could be reviewed by asylum officers in the first instance, with referral for full adjudication only in appropriate cases. This could prevent thousands of cases from reaching the immigration courts each year, while maintaining the integrity of the asylum process. In addition, another procedural obstacle is the requirement that asylum seekers 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 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. In fact, both asylum officers and 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. Many other recommendations on improving the immigration adjudication system can be found in our 2010 report, which we would be happy to share with the Committee. Implementing these and other needed changes will help to improve the effectiveness of our immigration adjudication system and ensure due process for those caught within it.

Thank you for the opportunity to share the views of the American Bar Association on this critical issue.

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