

# **BROKEN JUSTICE**

**A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR  
IMMIGRATION DETAINEES IN NEW YORK CITY**



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Detainee Working Group  
Of the  
New York University Chapter of the National Lawyers Guild

Volume I: September 2006 – May 2007

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# WHO WE ARE

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The National Lawyers Guild was founded in 1937 as the first integrated bar association. Over the past 70 years it has defended targets of McCarthyism, represented thousands of civil rights activists, anti-war activists, and continues to fight for social justice. The Detainee Working Group at NYU was started in 2006; hundreds of law students have since attended immigration hearings. We hope to share what we observed and the stories we witnessed during the 2006-2007 school year.

# ACKNOWLEDGMENTS

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Many thanks to the dozens of NYU law students who observed during the 2006-2007 school year and to the many more who have continued to observe. We are also very appreciative of the work Angela Yen and Liv Herriot did editing and giving a fresh perspective to our work, and to Angela and Reena Arora for founding the Detainee Working Group at NYU.

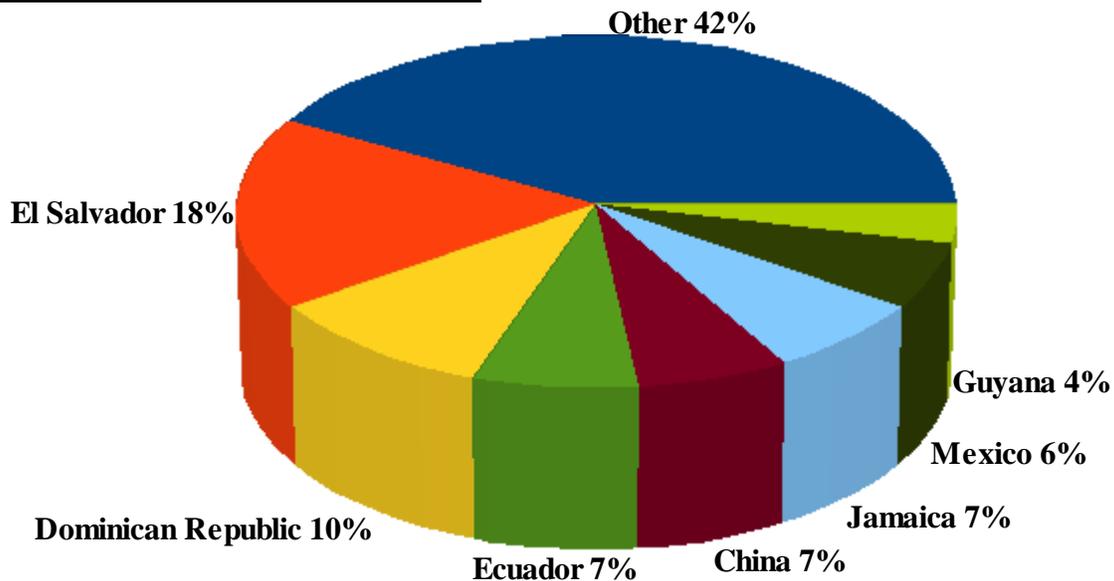
Tim Warden-Hertz  
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# WHO WE OBSERVED

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We observed close to 400 immigration hearings at the Varick Street Immigration Courthouse in New York City. The detainees whose cases we observed were 87% male, 13% female, and from over twenty different countries. Some had arrived in the country only recently, while others had been living in the United States for twenty or thirty years. Many had families and children. Some had criminal records and had served their time, some were only facing immigration charges, but all were detained.

## Country of Origin



### Other Countries (42%):

- |                |            |                   |
|----------------|------------|-------------------|
| Albania        | Ghana      | Pakistan          |
| Argentina      | Greece     | Panama            |
| Bangladesh     | Grenada    | Peru              |
| Barbados       | Guatemala  | Phillippines      |
| Belarus        | Guinea     | Poland            |
| Belize         | Haiti      | Puerto Rico       |
| Bolivia        | Honduras   | San Salvador      |
| Burkina Faso   | India      | South Africa      |
| Cayman Islands | Indonesia  | Syria             |
| Chile          | Jordan     | Trinidad & Tobago |
| Colombia       | Korea      | Turkey            |
| Cuba           | Liberia    | Ukraine           |
| Egypt          | Mauritania | Venezuela         |
| Gambia         | Nepal      | Vietnam           |

# GLOSSARY OF TERMS

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**Aggravated Felony** - A term of art in immigration law that includes a very broad range of felonies as well as some misdemeanors and other less serious crimes, such as some fraud crimes and theft offenses. The crimes included in the definition have been vastly expanded since 1996, but the law is applied retroactively. Aggravated felonies carry severe consequences, including ineligibility for most forms of relief, and mandatory detention while awaiting trial.

**Asylum** - A form of immigration relief that is discretionary and may be granted if the individual has a fear of persecution if forced to return to his or her home country.

**Bond Hearing** - A proceeding early in the removal process where the individual requests a bond to be set so that the individual does not have to remain in detention for the duration of the removal proceedings.

**Cancellation of Removal** - A form of relief from a finding of removability. If the noncitizen meets the eligibility requirements, an immigration judge has discretion to balance positive factors for allowing the individual to remain in the US--such as family, length of time in the US and hardship if removed--against negative ones, such as severity of the crime.

**Continuation** - When a hearing ends without a final decision being made and a date is given for the next hearing.

**Crime of Moral Turpitude** - A term of art in immigration law that includes a vast, but vague number of crimes, such as making a false statement on a student financial aid application, tax fraud or selling counterfeit goods.

**Derivative Citizenship** - Citizenship that is acquired by the naturalization of a child's parent(s). It is often difficult to ascertain and may not even be known by the citizen child.

**Individual (Merits) Hearing** - The final hearing, usually several hours long, where evidence is presented and the judge will typically reach a decision.

**Legal Permanent Resident (LPR)** - A person who is not an American citizen but who is authorized to live and work in the U.S. so long as they follow the relevant immigration laws and regulations. For example, many crimes, including aggravated felonies, will result in the loss of legal permanent residency. Also known as a "green card holder".

**Master Calendar Hearing** - A scheduling hearing where papers are often submitted, the immigration charges are accepted or denied and a date for another hearing, possibly an individual hearing, is set.

**Removal/Deportation** - The action of taking a person from the United States and sending the person to another country, generally the country he or she came from, based on violations of the immigration laws.

**Removal Hearing** - The proceedings brought by the United States Government in an attempt to remove an individual from this country based on allegations that the person entered without inspection, does not have current immigration status or has committed an offense that makes him or her removable.

**Voluntary Departure** - A form of "relief" in removal proceedings by which a person avoids the issuance of a final order of removal (which would trigger certain negative consequences if the person wished to enter the country again in the future) but must nonetheless leave the country. The individual must purchase his or her own plane tickets and leave the country within a fixed time period, often within 1-2 months. At times, with the payment of an additional bond, an individual may be released from detention and allowed to gather his or her belongings, bid farewell to family and friends and take care of the many things involved in leaving a life behind.

**Withholding of Removal** - A form of relief similar to asylum in that it is based on a fear of persecution, but it is not a permanent status and may be revoked at any time if the US government deems the conditions in the home country to have changed.

# DETENTION: PROLONGED & FAR FROM HOME

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Time away from family, home and work severely impacts a person's emotional and economic well-being and damages his ability and willingness to mount a vigorous defense. Oftentimes detainees will waive the right to appeal, accept a removal order, or ask for voluntary departure simply to avoid having to spend more time behind bars. With detainees often detained for months or even years, families suffer extreme distress from the separation, stress, and lack of financial support. As a result, detainees give up their fight to remain in the country so that they can support their families from abroad and escape the abysmal conditions in immigration detention.

**“Recorded time in detention ranged from three days to almost four years, and the median time spent behind bars was 163 days.”**

In addition, immigrants from the New York City area are never detained here, because there are no detention centers in the city. Some are detained in New Jersey or upstate New York; many are transferred to remote detention centers in states such as Texas, Arizona, and Louisiana. This means limited access to their attorneys and hardship for family members who wish to visit. The practical result of harsh detention policies is that immigrants spend more time behind bars before having the opportunity to contest the government's charges and are frequently demoralized by their treatment even if they are fortunate enough to obtain counsel.

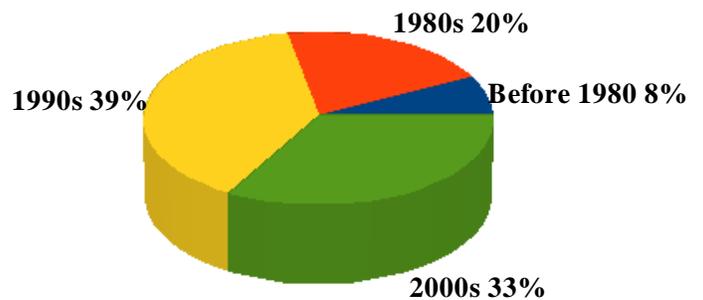
Out of all of the proceedings observed, on only 42 occasions were we able to ascertain the length of time the detainee had spent in detention prior to the hearing that was observed. In cases where the original date of detention was noted, we recorded the length of time detained between that point and the final date of observation. Recorded time in detention ranged from three days to almost four years, and the median time spent behind bars was 163 days. The median time in detention was higher (183 days) for detainees without an attorney present than for detainees represented by counsel (whose median time behind bars was 150 days). It is important to note that these numbers represent time spent behind bars *so far*: unless bond was granted *and* the detainee was able to post it, or unless a final order of removal was granted at the hearing DWG observed, the actual length of detention will be much longer than what is recorded here. Even if a final order is granted, a detainee may very likely spend additional time in detention pending removal.

The negative effect of lengthy detention stays cannot be overstated. In one case, an undocumented immigrant waived his right to appeal a deportation order because he could not spend any more time in prison and still support his family. He had come to the United States in 1988 at the age of 17 (he was 36 at the time of the removal order) and his wife and daughters were all U.S. citizens. The immigration judge advised against waiving the appeal because he knew that there would be no other legal recourse; immigrants are usually barred from returning to the country for at least 10 years, and sometimes permanently. The detainee was adamant, however. He felt that if he could return to Mexico and work, he could at least send money home to provide for his family. At the time of the order, the detainee had spent 585 days (one year and seven months) in detention.

# BREAKING ESTABLISHED TIES: TIME IN COUNTRY

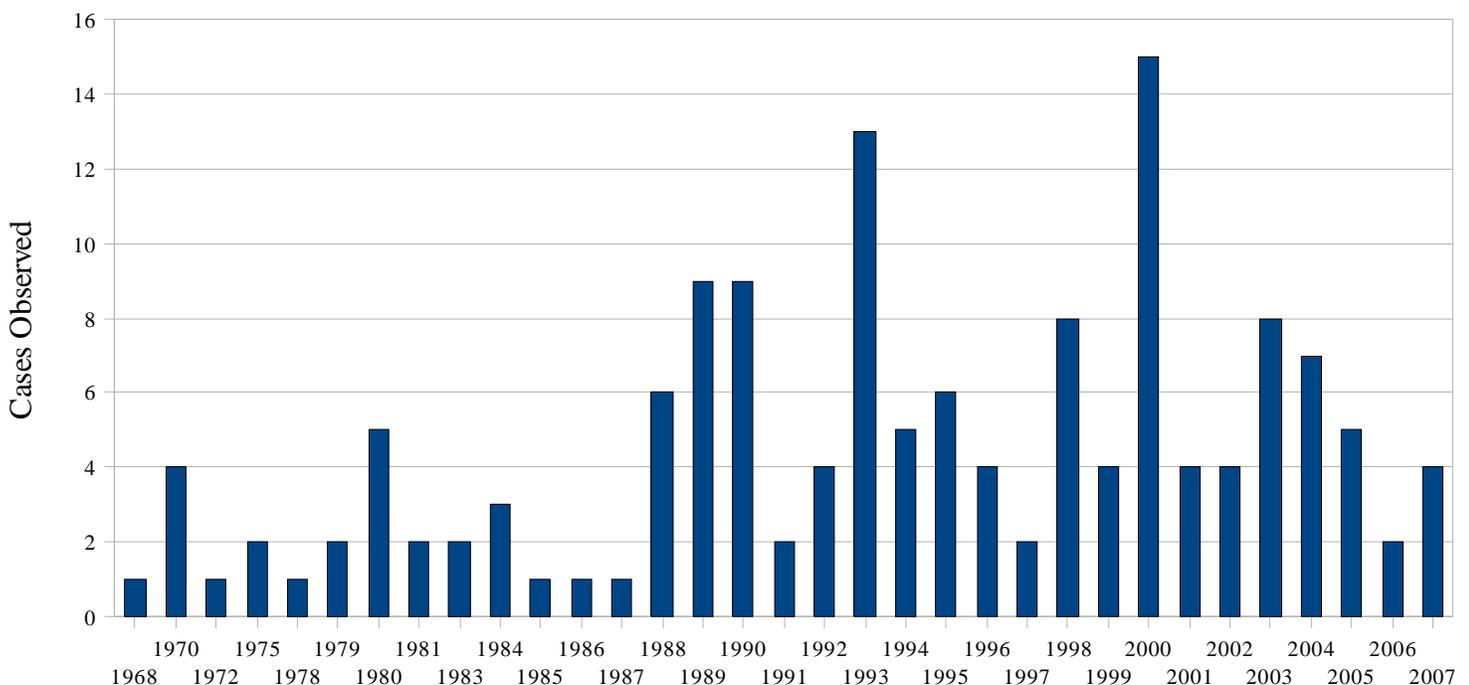
The immigration detention system affects not only recent immigrants, but also those who have lived in the United States for several decades. Many immigrants in detention have established lives with strong family ties and careers that contribute to the vitality of their communities. Despite their strong ties and contributions to this country, they face disproportionate punishments and deportation to countries that they may not have seen since they were small children due to what are often small crimes. The penalties that they face are drastically different than those that U.S. citizens would face for similar crimes.

## Date of Arrival



DWG was able to document the date of arrival for 147 of the cases observed. Although a sample size of 147 is too small to be representative of all the detainees at Varick Street Immigration Court, there were a significant number of detainees who had been in the country for more than 27 years. The detainees who had resided in the U.S. for more than 20 years were mostly lawful permanent residents (LPRs) who had been arrested for charges of drug possession and/or petty larceny. The lawyers for the Department of Homeland Security often based their motions for deportation on the claim that these are crimes of moral turpitude. The judge must rule on this allegation, subjecting these individuals to consequences that would uproot them from the lives they have established over the course of decades, forcing separation from their families and a return to countries that they no longer consider to be their own.

## Year of Arrival



# FAMILIES TORN APART

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Those who came into the United States in the 1980s are now having their lives uprooted by the harsh consequences that the immigration system imposes on minor crimes. Many of the cases observed were those of men who entered in the 1980s and who had U.S. citizen children with women who were also U.S. citizens. One man's entire family was in the United States, he had 4 brothers and 3 sisters as well as a long-term relationship from which he had two children born in the United States, ages 2 and 4. He possessed a good history of civic engagement, holding a steady job in construction for the past 7 years and consistently filing taxes. He did not have an attorney at his hearing and appeared confused, expressing frustration over his detention. He asked for voluntary departure because he could no longer tolerate waiting in jail for developments in his case. This man's story is representative of the multiple problems observed in the immigration system: lack of legal counsel, excessive use of detention as a method of coercion, disproportionate punishment for minor crimes, and the rending apart of families.

These problems are very apparent in the cases of detainees who had been in the country for an extended period of time and had established lives and families here. Removal of the individual from the home placed significant burdens on the families of those detained. One man who entered the United States in the 1980s was married to an American citizen, with whom he had children who were also American citizens. He was detained on minor charges and was eligible for adjustment of his status, but this process was delayed because his wife had difficulties making it to court hearings. Her difficulties in attending court hearings were a result of the second job she had to take in order to make their mortgage payments.

**“Many cases involved fathers and mothers of dependent children who were American citizens and whose lives were being torn apart by their parents' deportation.”**

Detention is extraordinarily detrimental to the families affected, and often continues unnecessarily because of lack of appropriate counsel. One case observed was that of a mother of five citizen children (aged 3, 6, 8, 10, and 13). Her husband, the father of her children, was a lawful permanent resident. Her lawyer simply failed to show up to her final hearing. In her lawyer's absence she was ordered to be deported for drug charges and informed that she could only reenter the country with special permission and could never become a lawful permanent resident. The futures of her LPR husband and citizen children are unknown.

Many cases involved fathers and mothers of dependent children who were American citizens and whose lives were being torn apart by their parents' deportation. Some of these cases included parents whose children were enlisted in the Armed Forces. Other cases included parents of children with physical disabilities or developmental illnesses who required the care of their parents. The future of these minor dependent children is unknown.

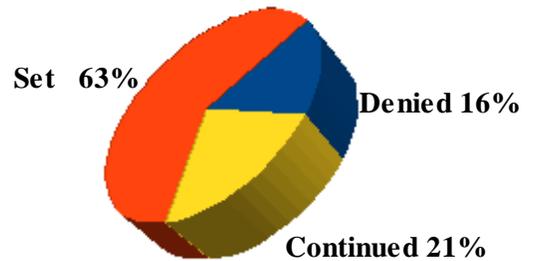
# BOND: BARRIERS TO FREEDOM

Bond eligibility is determined at the court's discretion and is influenced by a variety of factors. Detainees who have committed crimes involving moral turpitude or aggravated felonies are considered mandatory detainees and are ineligible for bonds. The court evaluates all other detainees in order to determine if bond should be granted and if so, the bond amount. The examination looks at whether they present a danger to the community if released or if they are a flight risk.

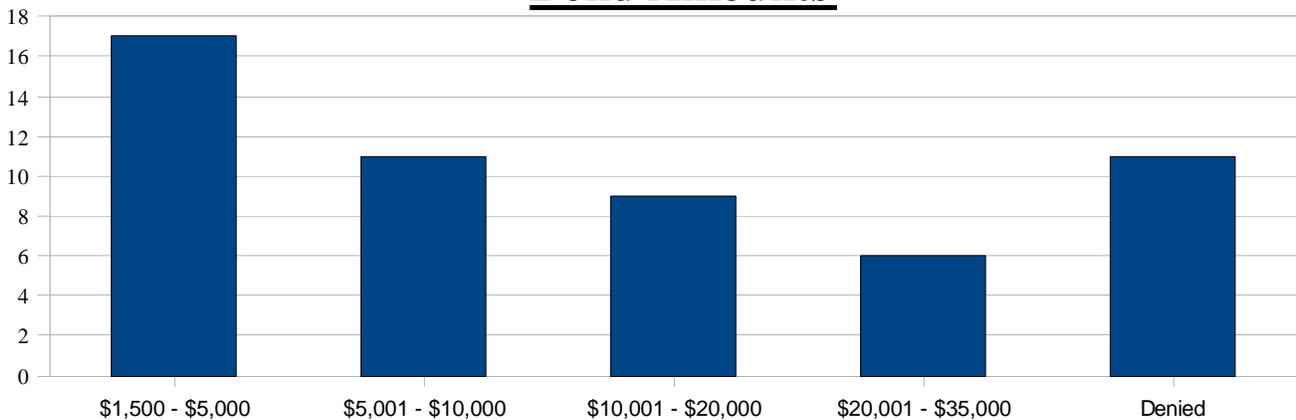
Detention is a burden on both the detainee's liberty and the community's funds. It is in the interest of both the community and the government that the Court allow those who do not actually fall into these categories to return home until their next hearing.

Of the cases observed by the DWG, there were bond proceedings in 68 cases; 14 of the bond decisions were continued until a later date, while a bond decision was made in 54 cases and the case continued on the immigration decision. Of the decided cases, bond was denied in 11 and granted in 43. Of the cases where bond was decided, amounts ranged from \$1,500 to \$35,000.

## Bond Decisions



## Bond Amounts



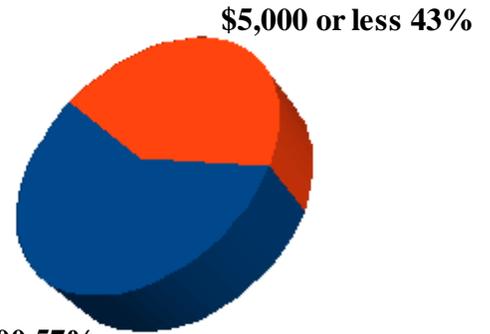
By rule, bond hearings always occur off the record and involve the detainee's attorney negotiating with either the Department of Homeland Security (DHS) lawyer or the judge to grant a bond and if so, to lower the bond so that the detainee can go home. If the detainee is ineligible for bond, or is unable to post the required amount, he will remain incarcerated throughout the multiple hearings that are usually required for the removal proceeding. The DWG found that discussions of bond were informal and were often insufficiently or not at all interpreted for the detainee. They amounted to negotiations between the DHS lawyer and the detainee's lawyer, often before the detainee had even entered the courtroom. The only thing entered on the record was the final determination of bond by the judge, after being informed of the results of the attorney's negotiations. When the detainees were present during the negotiations, they took no part in the proceedings that would determine their temporary freedom. The interpreters did not translate the negotiations or inform the detainee of the results until the judge's final determination on the record was translated.

# BOND: BARRIERS TO FREEDOM, II

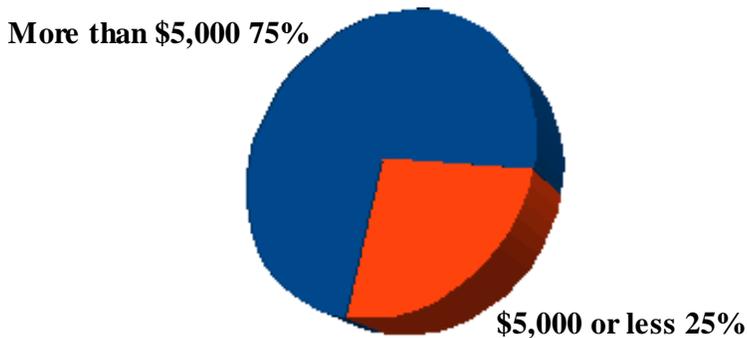
Only 12% of all the detainees observed by the DWG in this time period were granted bond. To better analyze the bond decisions, they can be split up into cases with \$5,000 bond or less ( $\geq$  \$5k) and cases with more than \$5000 bond ( $<$ \$5k). There were 17 low bond cases and 26 high bond cases. Where a detainee was not represented by an attorney, 75% of the cases had high bonds. Where a detainee was not represented by an attorney, 57% of the cases had high bonds.

The importance of having a legal representative was seen throughout the DWG observations. The presumption of bond is set high, and can then be negotiated by the detainee's attorney with the DHS lawyer depending on the detainee's circumstances. Several detainees with criminal charges (DWI, drug possession) were given lower bonds if they were represented by an attorney than detainees with no criminal charges appearing *pro se*.

## With Legal Representation



## Without Legal Representation



In addition, detainees appearing *pro se* are uninformed about what relief is available, whether permanent or temporary. One detainee had waived his right to appeal his \$30,000 bond because of a lack of legal counsel to advise him. His mother is a citizen, he has lived here since 1992, he has maintained a good employment record, and he had no known criminal charges. He had sent out letters to legal services but had not gotten any replies, and it did not appear that he would be able to secure counsel before his next hearing.

# DISREGARDING PROCEDURE: GOING OFF THE RECORD

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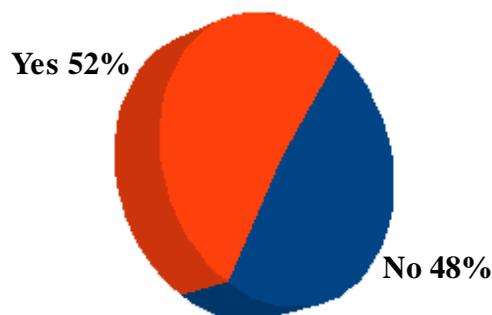
All immigration proceedings are recorded on tape, with, as previously mentioned, the exception of bond hearings. Bond hearings, however, only accounted for approximately 35% of the total off the record proceedings, and the remaining portion consisted of conversations held before or after the hearing or at the request of the parties. Having an accurate and comprehensive documentation of the court proceedings adds an element of accountability to the parties involved. It is not surprising, then, that DWG observers noted that non-bond hearing exchanges held off the record were plagued with examples of misconduct in the form of unprofessional behavior, discussing or negotiating the outcome, and excluding the detainee from his or her own removal proceedings.

Unprofessional conduct was common to many off the record conversations. Observers documented instances in which the judge, attorney, or prosecutor used the opportunity to go off the record to use disrespectful language, argue inappropriately, reprimand the detainee, or engage in frivolous conversation, all behavior generally unfitting to a court situation. One attorney, in discussing the case with the prosecutor, referred to his client as “stupid,” in a voice loud enough for the observer, who sat in the back of the courtroom, and certainly the judge, who sat next to the attorney, to hear.

Detainees, due to the nature of the detention system and a general lack of resources, often do not have the luxury of conferring with their attorneys or cannot afford an attorney willing to prepare for the case in advance. Although there were many attorneys who did not have the opportunity until the hearing to meet their clients, only a handful of the off the record conversations involved discussions between attorney and detainee. These attorney-client conversations were observed to be overly informal and cursory in nature.

In some cases, conversations were held off the record in order to clarify logistical or procedural issues. These procedural questions reflected a lack of preparation on the part of detainee’s attorney. In many cases, time was taken out during the proceeding to discuss paperwork that the attorney failed to submit or to address a basic issue about immigration law the attorney needed explained. In one case, the immigration judge had to instruct counsel on how to conduct a simple internet search to prepare for his client’s case and what the attorney would need to look for, much to the judge’s annoyance.

## Off the Record?



# **DISREGARDING PROCEDURE: GOING OFF THE RECORD, II**

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In a significant portion of the off the record proceedings, the immigration judge, attorneys, and sometimes even the interpreter discussed issues pertinent to the hearing. Details about the detainee's medical history, criminal record, and family background, all of which could substantially affect the outcome of the case, were discussed at length. These conversations were often held before the detainee was brought in for trial, after he/she was removed from the courtroom, or during private conferences between the government and detainee attorney. Sometimes the prosecutor negotiated an outcome with the detainee's attorney, without the detainee's input and sometimes without the detainee even being present. A detainee could have his or her fate settled without being privy to the details or even being given the opportunity to provide a defense. In one case, a judge spoke with an attorney at length about his legal strategy and the detainee's mental health claims before the actual hearing and even before the detainee had arrived. The physical presence of the detainee did not change the course of the conversation, as they continued to discuss his status amongst themselves and how to proceed before finally turning the tape recorder on to officially state what they had decided. Unfortunately, this complete disregard for the detainee was common in off the record proceedings. Aside from preventing the detainee from contributing to the conversation regarding his or her status in the country, discussion and speculation about the details of a case has the potential to have a prejudicial effect on the official hearing. One observer noted a conversation between an immigration judge and an interpreter, both speculating about the detainee's character and the interpreter voicing support for anti-immigration policies.

# EXCESSIVE CONSEQUENCES FOR PAST CONVICTIONS

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The detention and deportation system is not only a threat to those present in the country without documentation but also to the 12 million legal permanent residents (“green card” holders or LPRs). LPRs can be detained and deported for a wide variety of crimes, both serious and minor. Immigrants typically face harsh immigration consequences after they have completed their criminal sentence.

Much has been written about the flaws in the plea-bargain focus of the criminal justice system, and the push to plead out, even for crimes that one did not commit. With many public defenders unaware or misinformed as to the immigration consequences of criminal convictions (including pleas), one crushing but common result is the deportation of long-time permanent residents due plea bargains made without any warning of their devastating immigration consequences.

One story in particular illustrates the drastic and often random difference in immigration consequences to crimes that an LPR faces relative to a citizen. One man we observed very nearly became a citizen when his mother naturalized, but he was just several months past the eighteen year old age cut off. He had come to the United States when he was twelve, been in the country for over thirteen years, and his primary language was English. Yet, because of the crime he committed, and the unlucky fact that his mother naturalized just months after he turned eighteen, he was banished from the country after serving his time in prison whereas a citizen would have been able to return to his or her life in this country.

The range of crimes that make people eligible for deportation is surprising and includes many crimes that do not have major criminal consequences, including where there is no jail time involved. One woman we observed had been in the US as an LPR since 1968, almost 40 years, yet she was in removal proceedings because of three petty larceny convictions.

## **Examples of Some Deportable Crimes:**

- Possession of any amount of illicit drugs \*
- Petty Larceny (x2)
- Firearm Possession
- Selling Counterfeit Handbags

Also, while direct appeals of criminal cases allow for a continuance of an immigration hearing until a later date, in many cases, respondents must try collateral attacks, or, after misinformed representation, late appeals. No continuance is provided for such cases, and thus many people, who may have legitimate issues challenging the underlying conviction, may be deported for that conviction before they can contest the conviction’s legitimacy. In one hearing we observed, an LPR who had his “green card” for over 11 years was ordered removed after pleading to a crime that his criminal attorney advised would not have any immigration consequences. He had filed a late appeal to the criminal plea, but the immigration judge would not continue his hearing until after the decision on the late appeal.

**“For most people, except a legal non-citizen immigrant, the consequences of a bad relationship, while it might mean jail time, does not entail being sent from a country you have lived in for many years, away from your family and loved ones.”**

– DWG observer

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\* Excluding 30g or less of marijuana

# MENTAL HEALTH: UNDIAGNOSED AND NEGLECTED

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While detention is always a hardship, immigrants struggling with mental illness face special challenges that are not being addressed by the system. Mental well-being interacts with the conditions and length of detention, and lack of access to family, counsel, and adequate mental health services and medication. Mental illness compounds the difficulties discussed throughout this report.

Generally, problems with mental illness fell in to one of two categories: diagnosis and medication. First, diagnosis and screening are usually only available to the extent that the detainee's family steps in or an attorney takes action. Detainees in need of treatment for mental illness will face greater hurdles in securing counsel, mounting a defense, and presenting a clear narrative to the immigration judge. Observers reported that some detainees clearly had difficulty that was unrelated to language barriers in understanding their removal proceedings or responding to the judge's or lawyer's questions.

Those who were diagnosed prior to detention and had been receiving treatment, however, were not necessarily better off. As a result of standard detention procedures, detainees are frequently denied their medication on the day of their hearing, when they most need to be lucid and competent. Detainees may be taken from their cells to the courthouse as early as 3AM on the day of a hearing—even if that hearing is scheduled for the afternoon. The result is that they miss scheduled medication distributions. On more than one occasion, detainees appeared dazed and lost during the hearing and told the judge that they had been forced to miss their morning medication because they were transported to the courthouse so early. It appears that this is the normal course of affairs.

**“On more than one occasion, detainees appeared dazed and lost during the hearing and told the judge that they had been forced to miss their morning medication because they were transported to the courthouse so early.”**

While the *effect* of detention on mental illness is outside the scope of this report, it should be noted that a large percentage of detainees are likely to be suffering some sort of emotional or mental distress as a result of their imprisonment. A 2005 study published in *Psychiatric Bulletin* examined the effect of indefinite detention on immigrants and asylum seekers, many of whom had previously suffered torture and detention. The study found high incidences of depression, anxiety, and post-traumatic stress disorder.<sup>1</sup> Similar results were evident in a survey of asylum-seekers by the NYU Medical School, which examined conditions in New York City area immigration detention centers.<sup>2</sup>

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1 Robbins et al. Psychiatric Problems of Detainees Under the Anti-Terrorism and Crime Act 2001, *Psychiatric Bulletin* (2005) 29 (11), 407-409. Available at <http://pb.rcpsych.org/>

2 Physicians for Human Rights, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers, June 2003, available at <http://physiciansforhumanrights.org/library/report-persprison.html>

# LACK OF ACCESS TO EFFECTIVE COUNSEL

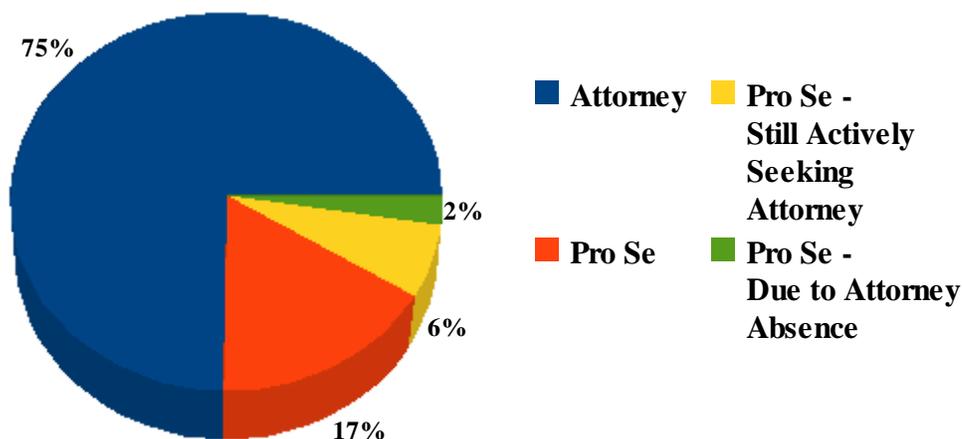
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In immigration court, detainees must somehow navigate the complex immigration system in the face of language barriers, a lack of resources, and a hostile court environment. In this increasingly complicated and technical legal system, having qualified representation is crucial in order for immigrants to have any chance of presenting a viable case. While the Sixth Amendment guarantees *criminal* defendants' the right to counsel, it does not similarly recognize the needs of detainees in immigration court.

Though an immigrant may defend himself or herself, having an attorney present is a more of a necessity than an alternative. Yet the nature of the detention process and the often limited resources of detainees can make finding any legal representation an impossible task. A detainee must pool whatever limited resources he or she may have in order to find an attorney while in the detention center or rely on family or friends for assistance, both of which may prove to be tremendously burdensome. In one of the cases observed, the detainee was strongly advised to obtain an attorney by the judge but nonetheless decided to appear *pro se* because he did not want to burden his family with the cost of an attorney. In effect, he chose to risk greater likelihood of continued detention and deportation rather than burdening his loved ones any further. Of the cases observed, nearly 25% of the detainees appeared *pro se*, meaning that one out of every four detainees was forced to navigate the very complicated immigration process alone.

In many cases, the immigration judge, as required by law, provided the detainee with a list of non-profit organizations that provide immigration services free of charge or at discounted rates. However, these organizations are extremely limited in capacity and already have overwhelming caseloads. Unfortunately, they do not have the means to represent many of those who need their services. At the time of their hearings, many of the *pro se* detainees were still actively seeking representation. An additional 8% had already obtained representation, but the attorney had abandoned them, dropped them due to a full caseload, or inexplicably failed to appear at the hearing. In some cases, the immigration judge scheduled a later hearing to allow time for the detainee to obtain an attorney, which meant more time in the detention center. In other cases, the judge decided to proceed with the hearing without the benefit of an attorney despite the detainees' objections.

## Attorney Type



# LACK OF ACCESS TO EFFECTIVE COUNSEL, II

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Actually obtaining an attorney by no means guarantees a detainee competent or even adequate legal representation. The DWG observed several recurring problems with the quality of legal representation which often had negative effects on how clients were treated. In some cases, the actual outcome of the trial was altered by poor legal representation.

The DWG observed many breaches in very basic but very important courtroom conduct. Several lawyers simply failed to show up at their scheduled hearing. In some cases the lawyers claimed to have family emergencies or scheduling mishaps, and in other cases, there was no indication that the attorney had any excuse or plans to return. In at least two cases, the detainee had hired and paid for an attorney who subsequently abandoned them, but not before accepting attorney's fees.

Due to the detention process and the poorly structured means of obtaining representation, some detainees were unable to even meet their attorneys until the day of the hearing. In some instances the attorneys inherited the cases from attorneys who were fired for incompetence, or who had simply abandoned the detainee. Not surprisingly, attorneys who had no previous contact with their clients made up a significant portion of the already high number of cases in which lack of preparation was a problem.

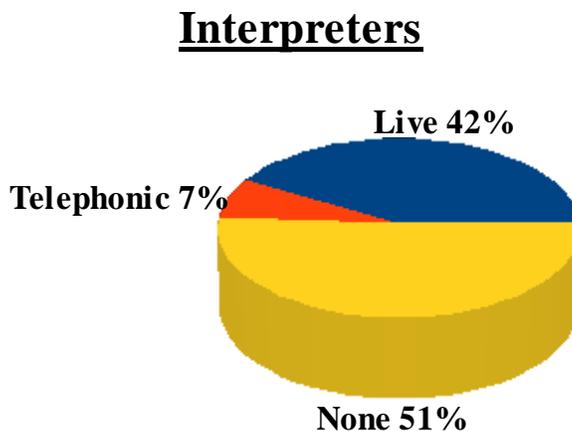
Detainees, desperate to find representation, are often at the mercy of attorneys who do not have the time or desire to invest effort in their clients. Or, even worse, detainees are taken advantage of by attorneys who are plainly unqualified to appear in immigration court but nonetheless take advantage of their client's desperate position. In many of these cases, attorneys were unprepared and handed in documents that were incomplete, riddled with typos, late, or sometimes forgot to hand them in altogether. In one case, the detainee was forced to step in for the attorney and fill out his relief application alone. At another hearing, the detainee had to repeatedly correct his attorney because the attorney had not reviewed his case carefully and made factual errors throughout the proceeding. One particularly egregious error was made by an attorney who failed to obtain documentation on a previous marijuana conviction, the details of which would have given the detainee a stronger case and more options. The detainee, who only spoke Spanish but was not granted an interpreter, was unaware of his attorney's damning omission.

Problems are not limited to the detainee's representation. Observers noted several instances of misconduct by the government prosecutor as well. In one case, the government attorney showed varying levels of disrespect within the courtroom, yawning throughout the proceedings and speaking sarcastically to and about the detainee. One observer noted that at one of the hearings, after a detainee recounted her suffering at the hands of FARC soldiers, the government attorney commented to the interpreter that the detainee needed "to get her lies straight." While the government attorney made this remark during recess, those comments were highly prejudicial and were made to the party who would be speaking on behalf of the detainee for the remainder of the hearing.

# **INTERPRETATION: INADEQUATE AND UNPROFESSIONAL**

Understanding the proceedings of court is something that we take for granted in America. It underpins our belief in justice and due process. While the laws and regulations regarding immigration court recognize parts of this norm, important pieces are left out and the reality of the implementation often differs dramatically from the regulations.

The Varick Street courtrooms are small spaces and the interpreter is seated next to the detainee, between the detainee and the judge. Four major problems with the interpretation offered at the Varick Street Immigration Court were identified by the data and stories that we have collected. First, there were times when interpreters were not provided to the detainees who clearly needed one. Second, the use of telephonic interpreters degraded the level of understanding of the detainee dramatically. Third, when the detainee had a lawyer, the interpretation was incomplete in that only the direct questions of the judge to the Respondent were translated. Lastly, the live interpreter was often unprofessional and disrespectful to the detainees.



Not having an interpreter present is an egregious denial of process if the hearing proceeds, but it is also detrimental to the detainee even if the hearing is postponed. More time in detention for a bureaucratic mistake is unacceptable and further pressures the detainee to accept an unjust outcome. (See Detention Section).

Several times, often for smaller dialects, but including widely used dialects such as Mandarin, an interpreter could not be obtained even by phone and therefore none was provided. These detainees were ordered to return at a date in the future and were sent back to detention.

In our observations of immigration hearings at Varick Street, we found close to half of the hearings were conducted with an interpreter and, of those, 14% were conducted telephonically. Telephonic interpretation is often used for non-Spanish cases.

# INTERPRETATION: INADEQUATE AND UNPROFESSIONAL, II

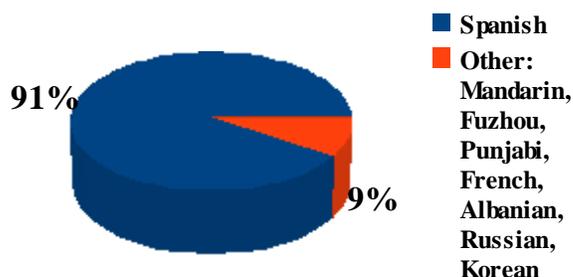
One observer witnessed the case of a man who spoke Mooré, a dialect from Burkina Faso. The immigration judge attempted to call a Mooré interpreter, but was unable to work the phone system to contact one. Instead, the immigration judge called a French interpreter. The detainee barely spoke French, and the difficulty of communication over the phone only exacerbated the misunderstanding and inability to effectively convey questions and answers. In another case a Mam-speaking detainee was provided with only a Spanish interpreter and was therefore unable to comprehend basic questions. The case was continued and the detainee was returned to detention until the later date.

Incomplete translation when a lawyer is present is not an exception but the rule. Though having an attorney is certainly an important step to receiving a fair hearing (See Attorney Section), the quality of the attorneys observed often did not contribute to a fair hearing. Thus, failing to translate the hearing in its entirety for the detainee can have devastating consequences if the attorney misrepresents the detainee or acts contrary to the detainee's interests.

The attorney of one man from El Salvador almost accepted an order for removal rather than the voluntary departure, which has much less dire consequences, because none of the exchanges between the lawyer and the judge were translated. In several cases, the judge would issue a lengthy oral decision from the bench, only the last sentence of which would be translated for the detainee.

Despite the life-changing consequences of the proceedings and the critical role that interpretation plays in ensuring due process, unprofessional behavior by the interpreter was frequent and wide-ranging. The inappropriate behavior included: audible private cell phone conversations while court was in session; tardiness by over an hour; flipping through magazines *while* interpreting; and, inappropriate comments about cases and detainees after detainees were taken from the courtroom.

## Languages in Interpreted Hearings



# FINAL DECISIONS: THE NEED FOR COUNSEL

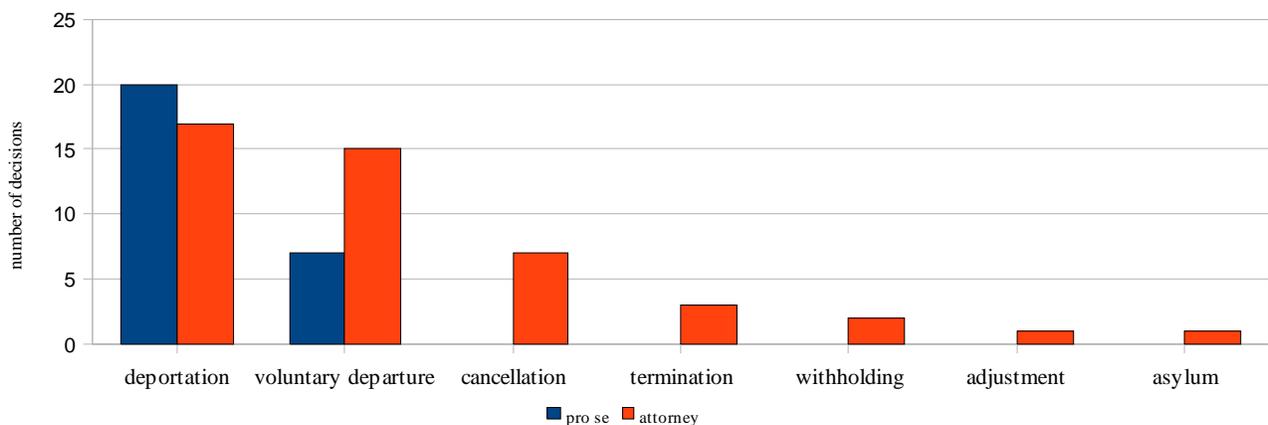
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At the simplest level, the final determination of a removal proceeding is a decision on whether or not the detainee may remain in the country. Within that rubric, there are several different kinds of relief (meaning a detainee gets to remain in the country) that may be awarded, and two different forms of removal. There are two stages to every detainee's case: a bond hearing and a removal proceeding. Frequently, the two will occur on the same date. In those cases, the bond hearing takes place first, and then the immigration judge moves on to the substantive matters of removal.

Out of the 73 final immigration determinations that DWG observers witnessed, over 80 percent of the detainees were ordered removed from the country (14 grants of relief and 59 removals). The most common form of relief was cancellation of removal, which may be awarded to immigrants who have been in the country for a certain length of time and have no criminal record. In each of the 14 cases of relief, the detainee was represented by an attorney. No pro se detainee was granted relief.

Removal can be either through deportation or voluntary departure. In deportation the detainee will be transported out of the country directly from detention, with no opportunity to take care of their affairs or provide for any family members who remain. The detainee has no control over the date of departure. When voluntary departure is granted, a date is set (no longer than 120 days from the decision) by which the detainee must leave the country. He may make his own plans to leave, make arrangements in the country to which he is being deported, and provide for any family members who will remain behind. In addition, a grant of voluntary departure leaves open the possibility of obtaining a visa and reentering the country legally in the future, an option not available to deported individuals. Voluntary departure is available under certain conditions and at the immigration judge's discretion. Our data show that detainees with attorneys have a much better chance of receiving voluntary departure than do detainees who are appearing pro se.

In some cases, detainees who are exhausted by their time spent behind bars simply request the easiest way to resolve the case, not having the energy or wherewithal to fight the government. When the government threatens appeal of a voluntary departure order, the detainee faces a lengthened prison stay with the prospect of deportation at the end of it. One detainee in that position opted to simply take a deportation in order to get out of prison sooner. Another, from Honduras but with two U.S. citizen children, opted to take a deportation order instead of applying for asylum even though he feared returning to his country. He, too, just wanted to get out of prison.



# CONCLUSIONS

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Over the course of a year, the Detainee Working Group observed the struggles of a diverse group of men and women united in their struggle for the right to remain in the United States. Observers encountered several recurring problems that were the result of the poorly constructed immigration court system, which often precluded detainees from even receiving a proper trial, much less a positive outcome.

Due to its nature and the volume of cases, the immigration process is long and individual cases can extend for many months, if not years. Extended periods of time in detention severely impact the imprisoned person's well-being as well as his or her ability to obtain counsel or mount a defense. The practice of detaining immigrants and requiring a bond for their pre-hearing release only exacerbates the difficulties of mounting a defense and discourages immigrants from pursuing what legal rights they do have. Detaining and assigning high bonds to those with minor or no criminal records burdens the legal system and prohibits the individual from contributing to society in their normal capacity while awaiting proceedings. Detainees who are not granted bond, or who are ineligible, end up subject to de facto mandatory detention.

Bond hearings, which serve as the gateway for those in the immigration system seeking freedom from detention, were found to be informal, off the record, and not interpreted for non-English speaking detainees. The bond discussions took place in informal negotiations between the DHS lawyer and the detainee's lawyer, often before the detainee had even entered the courtroom. The only thing entered on the record was the final determination of bond by the judge, after being informed of the results of the attorney's negotiations. When the detainees were present during the negotiations, they were still excluded from the proceedings that would determine their temporary freedom. These hearings are inherently complex, involving intricate procedures and the extensive use of legal jargon. The interpreters, however, did not translate the negotiations or inform the detainee of the results until the judge's final determination on the record was translated. Comprehension of the proceedings is too important a right and should not be plagued with such deficiencies.

The problems present in bond hearings were also present in other off the record conversations that took place between judges, attorneys, and interpreters during non-bond hearings. Off the record conversations for removal proceedings have potentially more serious consequences than for bond hearings. Rather than deciding one's temporary freedom, removal proceedings determine the permanent course of one's life. In addition to the problems seen in bond hearings, attorneys and judges would discuss substantive issues of the case, either fully negotiating the outcome or sharing potentially prejudicial information before the hearing and without the input of the detainee. Off the record conversations were problematic overall because of the lack accountability, enforced through accurate record-keeping and formal hearing procedures. Many of these problems can be improved by the presence of effective legal counsel. However, detainees do not have access to a court-appointed attorney and are consequently left scrambling to find an attorney on their own or to risk appearing *pro se*. It is clear that detainees without a lawyer faced significantly worse outcomes than detainees who had obtained counsel. None were granted any form of relief, and voluntary departure was less likely to be granted. The combination of lack of counsel and detention seriously disadvantages immigrants who are trying to find a legal way to remain in the country.

These structural problems must be addressed in order to do provide fair hearings for the thousands of individuals who pass through the immigration court system. Based on our observations, the Detainee Working Group makes the following recommendations, in the hopes of providing those who seek to remain in the United States with a just means of doing so.

# **RECOMMENDATIONS**

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## **Bond Hearings**

- Bond discussions should be formal, on the record, and translated so that the detainee is aware of how his status is being decided and can therefore contribute or clarify any information that is being used against him.

## **Criminal Charges:**

- People who have served their time for their actions should not be doubly punished by being banished after spending time in prison. Short of that, a much better job needs to be made on the criminal defense side, mandating an examination into the immigration consequences of any plea.
- If any criminal acts were to result in deportation, they should be limited to only the most egregious crimes, not nebulous euphemisms such as “crimes involving moral turpitude” and “aggravated felonies.” Continuances of hearing where the respondent has lodged a collateral attack or untimely appeal of a conviction should be granted so as to allow justice to be served before the respondent is deported.
- Mandatory removal and detention, without any discretion for a judge to weigh family and community ties to the US and the harm of banishment, goes against American ideas of justice and rehabilitation.

## **Attorney Representation**

- Detainees should have access to court appointed attorneys, and all attorneys should be held to proper standards of professional conduct.

## **Interpreter**

- Live interpreters should be provided for all hearings.
- Interpreters should be from an objective, 3rd party agency.
- Interpreters should be held to strict professional standards.