

FUNDAMENTAL FAIRNESS

A Report on the Due Process Crisis
in New York City Immigration Courts



IMMIGRATION COURT OBSERVATION PROJECT
OF THE NATIONAL LAWYERS GUILD



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WHO WE ARE

THE NATIONAL LAWYERS GUILD (NLG) was founded in 1937 as the first racially integrated bar association. Over the past 70 years, it has defended targets of McCarthyism and represented thousands of civil rights and anti-war activists. The NLG continues to fight for social justice and equality in the law.



The Immigration Court Observation Project (ICOP) of NLG is a law-student initiative that organizes observers to attend immigration proceedings, document observations, and identify due process violations. ICOP, formerly known as the Detainee Working Group (DWG), was started in 2006 at New York University School of Law and originally focused exclusively on the detained docket in New York City Immigration Courts, principally at Varick Street. Since then, ICOP has expanded to observe hearings at 26 Federal Plaza, and today includes student organizers and observers from Brooklyn Law School, Cardozo School of Law, Columbia School of Law, and CUNY School of Law. Since 2006, hundreds of NYC law students have observed over one thousand hearings.

ICOP is premised on federal regulations that give the general public access to observe most immigration proceedings.¹ If ICOP's attendance is questioned, ICOP observers will respectfully state the right to observe, and always defer to a respondent who is concerned about an observer's presence. Therefore, ICOP does not release a respondent's name or additional identifying information gathered at a hearing.

ICOP's observations focus on the human impact that the frequent due process violations occurring in immigration proceedings have on New Yorkers and their communities. By documenting stories of individual respondents and the Immigration Court's frequent abuses of immigrants' due process rights, the Project underscores the urgent need to reform the Immigration Court system. ICOP advocates that this reform include enhanced protection of immigrants' procedural rights while in immigration proceedings, reform of immigration policy and enforcement, and the amelioration of the immigration consequences of criminal convictions. ICOP welcomes collaboration with advocates committed to reforming the Immigration Court system and immigration law in general.

ICOP can be found online at <http://nycICOP.wordpress.com>.

¹ 8 C.F.R. § 1003.27

ACKNOWLEDGEMENTS

MOST IMPORTANTLY, thank you to the respondents who permitted ICOP to document their stories and observe their hearings. Thank you to the dozens of NYC law students who observed during the last three semesters, and to those who continue to observe. The professors and practitioners who provided support for this report and for ICOP's ongoing work also deserve our gratitude.

Finally, thank you to the following individuals who helped put this report together:

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EXECUTIVE SUMMARY

THE FOLLOWING REPORT is a summary of 414 immigration hearings observed by New York City law students in New York City's Immigration Courts from October 2009 through November 2010.² Although numerous sources have documented inadequacies of the United States' immigration laws and Immigration Court system, this report provides a unique perspective on the difficulties experienced by the individuals and communities affected by the Immigration Court system in New York City. It concludes with recommendations to ameliorate the identified problems.

Chapter I shows the diversity of the immigrant population in New York City and the human impact that deportations have on immigrant families and immigrant communities. Many immigrants observed in removal proceedings have lived in the United States for decades, and were placed in proceedings notwithstanding their deep roots in, and familial connections to, this country.

Chapter II turns to three elements of the due process crisis faced by immigrants in removal proceedings: (A) detention, (B) problematic courtroom procedures, and (C) inadequate access to representation and, when represented, to competent counsel. Each issue is addressed with anecdotes demonstrating the harsh reality faced by immigrants in New York City's Immigration Courts. Harrowing stories of detained immigrants lacking adequate medical care and incompetent attorneys prolonging immigrants' detention or improperly expediting immigrants' removal, show the deep-seated faults in the system.

Chapter III outlines an emerging and pressing issue in Immigration Court: the lack of protection provided to individuals with mental disabilities. ICOP chose to highlight its observations of proceedings involving individuals with mental disabilities because they demonstrate the urgent need for additional procedural and substantive safeguards for all immigrants in removal proceedings.

The substance of the report concludes with **proposed recommendations** that address the due process issues documented through ICOP's observations. These include:

- A. Reforming the detention system by ensuring meaningful review of liberty deprivation, and minimizing the impact of detention on a respondent's immigration case.
- B. Addressing lapses in courtroom procedural fairness by ensuring language access and promoting transparency and professionalism in the courtroom.
- C. Firmly establishing a respondent's right to counsel, and promoting and enforcing adequate representation.

Finally, the **appendix** of the report includes direction on how to implement an observation project in your city and a glossary of pertinent terms.

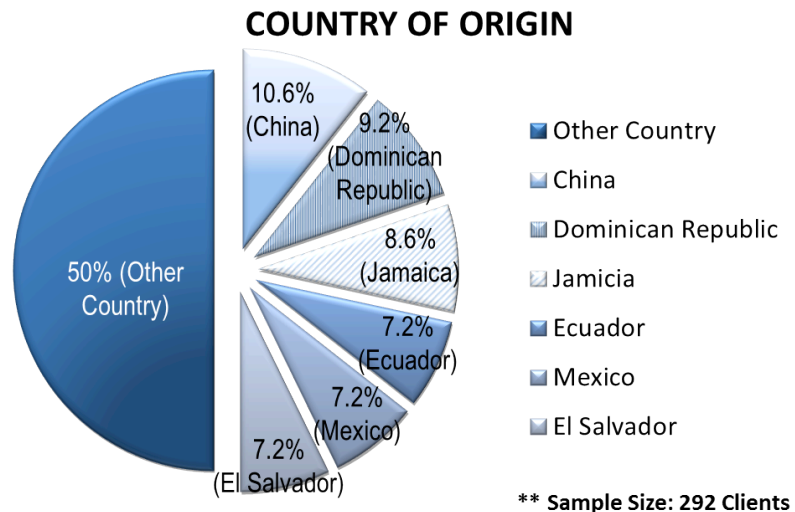
² The observation data cited throughout this report is derived from online data collection forms completed by students after observing hearings in New York City Immigration Court. ICOP has made efforts to ensure the accuracy and completeness of the data presented. Any discrepancies in the figures are attributable to human error alone and are the sole responsibility of ICOP.

I. NEW YORKERS IN IMMIGRATION COURT

A. PROFILE

1. Country of Origin

OF THE 414 immigration hearings ICOP documented from October 2009 through December 2010, observers were able to record the respondent's country of origin in 292 cases.³ These cases involved individuals from fifty-seven different countries. The six countries of origin observed most frequently were China, the Dominican Republic, Jamaica, Ecuador, Mexico, and El Salvador.



The Fifty-One “Other Countries”

Afghanistan	Cuba	Liberia	Tobago
Albania	Egypt	Malaysia	Trinidad
Argentina	Ghana	Mali	Tunisia
Armenia	Grenada	Myanmar	Turkey
Bangladesh	Guatemala	Nicaragua	Ukraine
Barbados	Guinea	Pakistan	United Kingdom
Belize	Guyana	Peru	Uzbekistan
Bolivia	Haiti	Poland	Venezuela
Bosnia	Honduras	Russian Federation	Yemen
Canada	Hungary	St. Vincent & Grenadines	
Chad	India	Senegal	
Colombia	Japan	Sierra Leone	
Cote d'Ivoire	Jordan	South Korea	
Croatia	Kenya	Spain	

³ ICOP data is based solely on statements and observations made in the courtroom and information posted publicly in Immigration Court. Thus, it is not always possible to identify the respondent's country of origin if it does not arise in proceedings.

2. Contact with the Criminal Justice System

Although evidence suggests that immigrants have significantly lower incarceration rates than those born in the United States, and that increased immigration is associated with lower crime rates,⁴ over 50% of the individuals observed by ICOP (213 of 414) had contact with the criminal justice system prior to their immigration proceedings. This trend is indicative of the expanding intersection between the criminal justice and immigration systems, including coordination between local police and U.S. Immigration and Customs Enforcement (ICE).⁵ Examples of crimes that ICOP documented as catalysts for removal proceedings include, *inter alia*, shoplifting, misdemeanor assault, fraud, and prostitution. ICOP witnessed one man ordered removed after living in the United States for thirty-six years because of drug possession convictions— notwithstanding the fact that his parents and child are all citizens, and that he was a lawful permanent resident. Another individual was detained and in proceedings for one count of prostitution that occurred over seven years prior to the proceedings. ICOP also observed an individual threatened with removal as a result of a conviction for providing his ID to someone else to pawn stolen property. It was revealed during this individual's hearing that the respondent received no profits from this endeavor. At the time of his observed hearing, the individual had spent more time in detention as a result of his removal proceedings (15 months) than he did in criminal detention for his conviction. In yet another hearing observed by ICOP, an individual faced removal for possession and sale of a small amount of marijuana.

ICOP is not the first to document the frequently severe consequences of the interconnection between the immigration and criminal justice systems for individuals and their communities.⁶ Human Rights Watch reported that between 1997 and 2007 nearly 900,000 immigrants were removed from the United States after serving criminal sentences—72% of those, for whom crime data was available, were for non-violent offenses.⁷ This enormous number of deportations is partially a consequence of the harsh Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, and the growing coordination of local police and ICE operations.⁸ IIRIRA, for example, eliminated certain forms of relief from removal and otherwise increased the already severe consequences a criminal conviction can have on an immigrant's ability to remain in the United States.

⁴ IMMIGRATION POLICY CENTER, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN* (2007), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20%28IPC%29.pdf>.

⁵ See *Activated Jurisdictions*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (last visited Mar. 29, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (documenting ICE's growing Secure Communities Strategy).

⁶ See THE DRUM MAJOR INSTITUTE FOR PUBLIC POLICY, *THE COST OF FAILURE: THE BURDEN OF IMMIGRATION ENFORCEMENT IN AMERICA'S CITIES* (2011), available at http://www.drummajorinstitute.org/pdfs/DMI_Cost_of_Failure.pdf.

⁷ HUMAN RIGHTS WATCH, *FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 4–5* (2009), available at <http://www.hrw.org/node/82173>.

⁸ See *supra* note 5.

The Supreme Court recently acknowledged the heavy impact criminal convictions have on an individual's immigration status. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that criminal defense attorneys must advise their clients of the potential immigration consequences of their criminal convictions. The effect of this landmark decision is not yet thoroughly documented.

B. BROKEN FAMILIES, BROKEN COMMUNITIES:

THE HUMAN IMPACT OF DEPORTATION AND DEPORTATION PROCEEDINGS

UNDER THE CURRENT U.S. IMMIGRATION SYSTEM, immigrants living in the United States are routinely torn from their families and communities. Long-term detention and deportation have particularly severe consequences for immigrants who have lived in the United States for several decades. Many immigrants have strong ties to the United States, including citizen spouses and citizen children.⁹ Despite the fact that noncitizens may be the essential providers for their families, they may remain in detention for extended periods of time before being permanently removed to countries where they are cut off from their families in the United States. This frequently results in serious financial and psychological difficulties both for the individuals deported and for their families who are left behind.¹⁰ Many face deportation to countries that are little more than distant memories from their childhood—countries where they no longer have familial relations, job opportunities, and sometimes no longer speak the language. With limited exceptions, the equities of familial and community ties are not considered during deportation proceedings.

“During the course of [respondent’s] detention, his youngest son was born. [Nonetheless, after] the observed hearing, . . . he was forced to return to detention for three additional months.”

ICOP ascertained the year of arrival in the United States for 154 of the 414 observed cases.¹¹ Of these, approximately 31% had lived in the United States for twenty years or more prior to their removal proceedings. Nearly 90% entered the United States at least ten years before the initiation of their proceedings. In one instance, ICE detained and

⁹ Based on ICE data, as well as findings by the Pew Hispanic Center and the U.S. Census Bureau, Human Rights Watch estimated that at least one million spouses and children had faced separation from family members due to deportations between 1997 and 2007. HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 4–5 (2009), available at <http://www.hrw.org/node/82173>. See also BERKELEY INT’L HUMAN RIGHTS LAW CLINIC ET AL., IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 5 (2010), available at http://www.law.berkeley.edu/files/Human_Rights_report.pdf (focusing only on Lawful Permanent Residents (LPRs), and estimating that from 1997 to 2007, over 100,000 children under the age of 18 were impacted by deportation of an LPR parent).

¹⁰ See, e.g., AJAY CHAUDRY ET AL., URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT (2010) (reviewing literature on the impact on families of separation during the migration process and assessing the effects of immigration enforcement on family well-being, including psychological consequences for children).

¹¹ ICOP data is based solely on statements and observations made in the courtroom and information posted publicly in Immigration Court. Thus, it is not always possible to identify an individual’s year of arrival to the United States.

initiated deportation proceedings against a lawful permanent resident (LPR) after forty years of residence in the United States.

Observers witnessed the hardship of detention and deportation on families. In one case, an LPR entered deportation proceedings after a conviction for driving under the influence (DUI). The man's spouse and children, who were all United States citizens, watched in angst as their loved one stood on the verge of deportation to Argentina, a country he had not been for thirty-four years. ICOP also observed an LPR detainee who had been in the United States since he was five years old. His four American-born children and LPR spouse anxiously awaited the outcome of his case—which was not resolved at the hearing ICOP observed. One individual was arrested for driving without a license in 2009 and detained in New Jersey, although he and his family lived in New York City. During the course of his detention his youngest son was born. This father had not met his newborn son at the time of the observed hearing and because his unprepared representative did not bring the necessary documents, he was forced to return to detention for three additional months.

As documented in Chapter II, *infra*, immigrants often spend extended periods awaiting the resolution of their immigration cases in detention. While detention isolates immigrants from the community and imposes significant hardship on families in any case, this hardship is exacerbated when ICE transfers detainees from New York to states as far away as Arizona, Georgia, Louisiana, Pennsylvania, or Texas. The transfer makes it nearly impossible for families to visit their loved ones or assist them with their immigration cases.¹² ICOP observed this hardship on two occasions, in the proceedings of two noncitizen New Yorkers transferred to Texas. While in Texas, one individual was unable to communicate with family members for months at a time.

II. DUE PROCESS IN CRISIS

A. DETENTION

SEVENTY-ONE PERCENT OF THE HEARINGS observed by ICOP involved detained individuals.¹³ Across the country, immigration detention is widespread. In Fiscal Year (FY) 2009, ICE detained 383,524 individuals nationwide.¹⁴ According to the Executive Office for Immigration Review (EOIR), 44% of all completed Immigration Court proceedings in FY 2010 involved detained individuals, down slightly from 50% in FY

¹² See HEARTLAND ALLIANCE NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (2010) [hereinafter ISOLATED IN DETENTION], available at <http://www.immigrantjustice.org/download-document/793-isolated-in-detention-full-report.html>.

¹³ The high percentage of detained cases observed is the result of the fact that the majority of cases observed were of the detained docket at the Immigration Court located at 201 Varick Street, New York, NY.

¹⁴ *Changing Composition of ICE Detainees*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2010), <http://trac.syr.edu/immigration/reports/224/include/1.html>.

2009.¹⁵ Numbers for FY 2010 are expected to be comparable. On average, the cost of keeping an individual in immigration detention is approximately \$122 per person per day.¹⁶ Substitutes for incarceration, such as electronic monitoring and regular reporting, are significantly less expensive. ICE spent \$1.77 billion on custody operations in FY 2010 compared to a mere \$69.9 million on alternatives to detention.¹⁷

Many immigration hearings for individuals who have been or are currently in ICE custody, and whose immigration proceedings were initiated in New York City, take place at the Varick Street Immigration Court in Manhattan. Varick Street formerly doubled as an immigration detention facility, although the detention center closed in 2010.¹⁸ New York City immigration detainees who were previously held at Varick Street are now held in facilities in New Jersey, although they continue to be brought to Varick Street for their court hearings. Court hearings for detainees sent to distant facilities in other states are held in or near detention facilities in those locales.¹⁹

According to Detention Watch Network, the national average length of stay in immigration detention is 33.5 days, but there are numerous reports of individuals languishing in ICE custody for much longer.²⁰ ICOP's observations indicate that individuals may remain behind bars awaiting a resolution of their immigration cases for years. The duration of already accumulated ICE custody was obtained in forty-one of the 295 detained cases ICOP observed from October 2009 to December 2010. Among those cases, the recorded length of detention ranged from twelve days to five years; the average amount of time spent in detention was eleven months. These numbers represent only the period from initial detention to the date of the hearing observed by ICOP. The total detention time is likely to be higher since most of the hearings observed did not end with the respondent's release.

¹⁵ See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FISCAL YEAR 2010 STATISTICAL YEARBOOK at O1 fig.23.

¹⁶ DET. WATCH NETWORK & STANFORD LAW SCH. IMMIGRANTS' RIGHTS CLINIC, COMMUNITY BASED ALTERNATIVES TO IMMIGRATION DETENTION 9 (2010), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf.

¹⁷ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2010 ENACTED BUDGET FACT SHEET (Nov. 5, 2009); HEARTLAND ALLIANCE NAT'L IMMIGRANT JUSTICE CTR. ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS 3 (2010), available at <http://www.immigrantjustice.org/download-document/794-ice-year-one-report-card-october-2010.html>.

¹⁸ See Press Release, U.S. Immigration & Customs Enforcement, ICE to Suspend the Use of Varick Street to House Detainees (Jan. 14, 2010), available at <http://www.ice.gov/news/releases/1001/100114newyork1.htm>.

¹⁹ HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY (2009), available at <http://www.hrw.org/en/reports/2009/12/02/locked-far-away-0>.

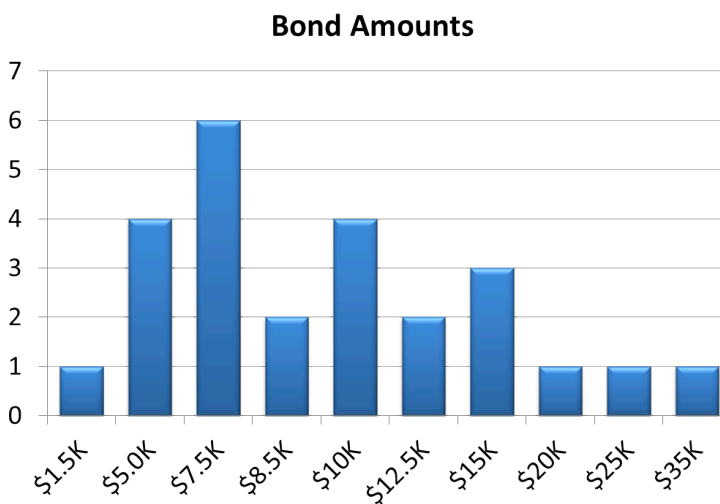
²⁰ Tracking ICE Enforcement, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2382> (last visited Mar. 29, 2011); see also AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 6 (2009) [hereinafter JAILED WITHOUT JUSTICE], available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

1. Bond Hearings

Similar to bail in the criminal setting, immigration bonds are set to ensure an individual's presence at all future hearings in Immigration Court. Traditionally, an Immigration Judge's determination to set bond, and the amount thereof, depends on a myriad of factors including, but not limited to, whether the respondent is a flight risk, the individual's family ties to the United States, employment history, criminal history, financial stability, membership in community organizations, and amount of time in the United States. The minimum bond an Immigration Judge can set is \$1,500.²¹ However, even with an impressive "resume" demonstrating positive equities in favor of the individual's release, many individuals will not be eligible for bond if they have a criminal conviction. This outcome is the consequence of the mandatory detention provision implemented as part of IIRIRA.²² These individuals may only challenge their detention by arguing that ICE improperly concluded that they are subject to mandatory detention.²³

Bond hearings occur off the record and usually occur prior to Master Calendar or Individual hearings. If a detainee is found eligible for bond, the government attorney and the detainee's representative will negotiate over the bond amount. From October 2009 to December 2010, ICOP observed fifty-seven bond hearings, with eleven respondents appearing *pro se* during their bond hearings. Bond amounts observed ranged from the minimum of \$1,500 to

\$35,000. In one case, ICOP observed one of the chief problems for detainees seeking bond — unprepared and altogether absent attorneys. After two bond hearings where the attorney failed to appear, the Immigration Judge set a bond of \$10,000. The detainee explained to the Immigration Judge that he could not afford a \$10,000 bond and requested a lower amount. However, because the *pro se* detainee did not have any paperwork or evidence to support his request, it was swiftly denied.



The general informality of bond proceedings raises additional concerns. For example, ICOP observed bond hearings that were not translated for the detainees who were of limited English proficiency. Given the discretionary nature of bond determinations, it is essential that the detainee be thoroughly informed, making effective interpretation all the

²¹ INA § 236(a)(2)(A), 8 U.S.C. 1226(a)(2)(A).

²² INA § 236(c), 8 U.S.C. § 1226(c).

²³ *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

more important.²⁴ As mentioned above, the Immigration Judge will examine several factors that require factual investigation of the detainee's personal life. Without meaningful communication with the detainee, these potentially compelling facts may be lost. As a result, the individual may remain in detention and deprived of his or her liberty.

ICOP observers also noted that attorneys representing detainees in bond hearings were often unprepared. Out of fifty-seven bond hearings ICOP observed, ICOP noted nine attorneys who were not prepared²⁵ or did not appear for the hearing. One of these cases resulted in the Immigration Judge granting a bond of \$25,000, the second highest bond set during an ICOP observation.

2. Impact of Detention on Deportation Proceedings

Detained individuals face a host of problems while behind bars—presenting basic human rights concerns that can affect their ability to contest their removal from the United States. Issues including access to counsel²⁶ and medical care were common. One detainee reported that he had not eaten in over two days because the detention center where he was held stopped providing kosher meals. On two separate occasions detainees referred to the harassment they suffered at the hands of other detainees due the fact that they were homosexuals. Although ICE adopted Performance Based National Detention Standards in 2008,²⁷ covering issues like access to medical care and religious dietary restrictions, compliance remains problematic, as these standards do not carry the force of law. Additionally, advocates point out that these standards apply only to detention facilities directly operated by ICE, not those run privately or by municipalities.²⁸

Other detainees complained of inadequate medical care. In hearings observed by ICOP, individuals reported cases of untreated diabetes, multiple sclerosis, and HIV, as well as instances of untreated substance abuse and withdrawal problems involving crack, heroin, and alcohol addictions. One detainee suffering from advanced HIV claimed that his medication was no longer effective and that his health was deteriorating while he remained in detention. He also claimed that medical officers in the detention center were not properly addressing a potentially cancerous mass in his lungs. At the time of the proceedings that ICOP observed, the detainee was asking the Immigration Judge to grant him release on bond so he could visit his own doctor.

In roughly 5% of the 295 detained hearings observed, respondents reported problems with access to outside communication. One of the most common obstacles cited by

²⁴ See Chapter II (B), *infra*, for a more detailed discussion of interpretation and language access issues.

²⁵ See Chapter II (C), *infra*, for further discussion and examples of the standard used to determine the efficacy of counsel.

²⁶ ICOP observed that only approximately 66% of detainees were represented by an attorney.

²⁷ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS pt. 4, *available at* <http://www.ice.gov/detention-standards/2008/>.

²⁸ CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS 16 (2009) [hereinafter CONSTITUTION PROJECT RECOMMENDATIONS], *available at* <http://www.constitutionproject.org/pdf/359.pdf>.

detainees was the inability to make phone calls from detention. Many do not have sufficient funds to purchase calling cards and, therefore, are unable to use the telephones in the detention centers. Consequently, they are unable to contact legal representation or family members for assistance. One detainee reported that, as a result of his inability to communicate with his lawyer during his detention, he was unexpectedly roused at 3:00 AM and told that he was to be in court for his hearing that same day, without having been allowed any time to prepare or consult with legal counsel.

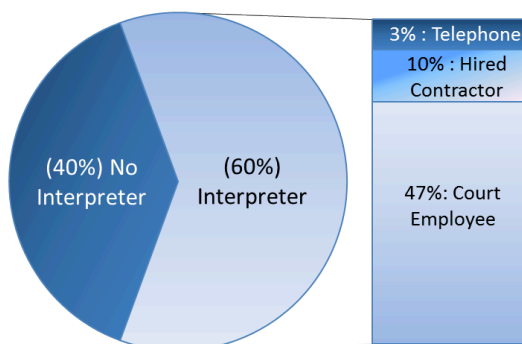
Prolonged detention prompts some detained individuals to abandon claims for relief, opting instead to leave the country in order to avoid further detention. In three hearings observed by ICOP, detainees asked the Immigration Judge to issue a final order of removal because they stated they could no longer bear additional time in ICE custody or because they feared their return to detention. Some of these detainees requested voluntary departure despite the potential that they could be granted permission to stay in the United States at the conclusion of their immigration cases.

B. COURT ROOM PROCEDURE

1. Language Access

INDIVIDUALS WITH limited English proficiency are entitled to interpreter services at government expense in all Immigration Court hearings.²⁹ In most jurisdictions, however, including New York, Immigration Court interpreters render *only* those statements made by and directed to respondents. Immigrant advocates unsuccessfully challenged this practice.³⁰ As a result, individuals may not fully understand what is happening in their proceedings.

Utilization of Interpreters in Total Hearings Observed



Interpreters for Immigration Court are not subject to the same minimum qualification standards required of federal court interpreters. Interpreters in more common languages, such as Spanish, are often employees of the court. Other interpreters are employed by a private vendor, which in 2010 won a six-year, \$100+ million contract with the Justice Department.³¹ That contractor's qualification standards remain undisclosed to the public.

²⁹ See NATIONAL LANGUAGE ACCESS ADVOCATES NETWORK (N-LAAN), LANGUAGE ACCESS PROBLEMS IN IMMIGRATION COURT 1 (2010), available at http://brennan.3cdn.net/5c3459d5d38a1553e3_e3m6bxf8z.pdf (explaining that the Department of Justice has required federal agencies to make their services accessible to non-English speakers, pursuant to Title VI of the Civil Rights Act of 1964 and Executive Order 13166).

³⁰ See e.g., *El Rescate Legal Services v. Exec. Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991).

³¹ See *Language Interpretation Services*, FEDBIZOPPS.GOV, https://www.fbo.gov/index?s=opportunity&mode=form&id=c00030d2f2d0b3f6113889b9c93c6f6b&tab=cor&_cview=1 (last visited Mar. 29, 2011).

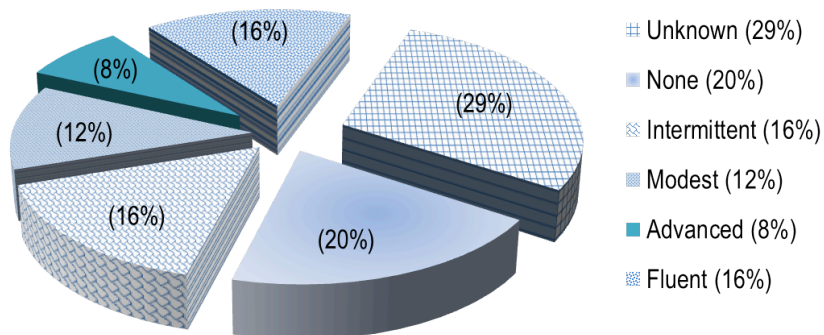
When individuals are provided interpretation, ICOP observed that the extent and quality of those services is often inadequate. ICOP observers noted numerous instances in which interpreters did not fully interpret the proceedings, provided incorrect translations, or acted unprofessionally. Additionally, observers noted six cases where the interpreter arrived late, left before the hearing was finished, or stepped out while the hearing was in progress.

In about 10% of cases using interpreter services, the court provided an interpreter who did not speak the respondent's primary language. For example, one respondent who spoke a dialect of Uzbek, but had learned Russian in grade school, was provided with a Russian-speaking interpreter. In another case, a respondent who spoke a Chinese dialect other than Mandarin was provided with a Mandarin-speaking interpreter. Although the interpreter appeared to do her best to facilitate communication, in the end all parties seemed frustrated and ended up continuing the hearing off the record, with the Immigration Judge and lawyers conferring without any input from the respondent. In another instance, the Court relied on the defense attorney to double as the interpreter for the respondent.

Even when the Court provided an interpreter who spoke the respondent's primary language, observers noted instances of inadequate interpretation. In at least three cases observers who spoke the same language as the respondent noticed flawed or erroneous translations. Sometimes it was a failure to recognize nuances in word choice. Other times, observers noted that the interpreter failed to translate whole parts of sentences and instead provided the Immigration Judge with short answers like “yes” or “no.” For example, ICOP observed a case where the Immigration Judge informed the respondent that he was eligible for voluntary departure and asked him whether he wanted this relief.

The respondent replied that he did not understand what voluntary departure was, so his answer was “no.” The interpreter, however, merely rendered this answer to the Immigration Judge as “no,” resulting in the respondent unknowingly waiving voluntary departure.

Respondent’s English Language Skills



Observers also reported unprofessional behavior by the interpreter in about one out of seven cases. These instances ranged from relatively minor—like checking a mobile device during the proceeding or becoming impatient with a respondent—to severe. In one case, the interpreter gratuitously offered her personal views on U.S. immigration policy during an off-the-record discussion that was not being translated for the respondent. She stated: "I don't mind when they break into my country, so long as they

don't do anything to cause trouble. [I]f you break into my house and sit in the corner, I'm willing to turn a blind eye. But if you come into my house and don't pay rent, and then rape my brother, then get . . . out I've been here for years and I'm tired of seeing these guys.” Such outbursts call into question an interpreter’s ability to render the respondent’s statements in an impartial manner.

2. Off the Record

Creating a record is essential for review and appeal of any court decision, and is thus an important part of any proceeding. As a result, federal regulations require that all deportation hearings be recorded verbatim except where statements are made off the record with the permission of an Immigration Judge.³² Following an off the record conversation, the Immigration Judge is to summarize the discussion on the record, ask the parties if the summary is true and complete, and offer parties the chance to add or amend the summary. Parties may request a summary from an Immigration Judge who does not offer one.³³ Despite these safeguards, significant portions of potentially outcome determinative aspects of immigration proceedings frequently take place off the record. Bond hearings for example, which play a significant role in one’s immigration proceeding,³⁴ are not recorded because they are legally considered separate from deportation hearings.³⁵

Of the non-bond hearings observed by ICOP, roughly 37% of observers noted significant conversations held off the record. These conversations frequently resulted in respondents being excluded from important elements of their Immigration Court proceedings, which were not translated and excluded from the record. Additionally, the conversations exposed many instances of unprofessionalism bordering on serious misconduct. Judges, respondents’ representatives, government attorneys, and interpreters took opportunities off the record to make jokes, sarcastic comments, and reprimand respondents.

i. Inappropriate Conversations

It is impermissible to conduct conversations that are not relevant to the proceedings inside the courtroom.³⁶ Nevertheless, ICOP observed instances of government attorneys making jokes in front of distressed respondents and their families. Discussions between

A court interpreter expressed her opinion about immigrants, saying that they should “get the f--- out.” The interpreter continued . . . “Get out, get out. That’s one less of you guys.”

attorneys and the Immigration Judge about their personal lives were also common. Sometimes off the record conversations took a more disturbing tone. In one case, a court interpreter expressed her opinion about immigrants, saying that they should “get the f--- out.” And when the respondent’s application for voluntary departure was approved and the respondent was getting ready to leave, the interpreter continued in a raised voice, “Get out, get

³² 8 C.F.R. § 1240.9.

³³ See Immigration Court Practice Manual at 4.10(a).

³⁴ See discussion *supra* in Chapter II (A)(1).

³⁵ 8 C.F.R. § 1003.19(d).

³⁶ See Immigration Court Practice Manual at 4.12(c)(i).

out. That’s one less of you guys.” During another case ICOP observed, an interpreter compared the respondent to her daughter, who was living in her basement, saying that she was paying for her daughter in the same way that we are paying for these “freeloaders.”

ii. Failure to Translate or Record Discussion of Relevant Topics

ICOP observed many topics that were pertinent to cases discussed off the record, and therefore not translated to respondents with limited English proficiency. For example, several discussions regarding family background were discussed off record. In one case, an Immigration Judge questioned a respondent’s wife off the record about whether the respondent had battered her. Judges and attorneys were also observed discussing documents that led to findings about criminal and familial backgrounds of respondents, as well as mental health issues. In one case, the government attorney spoke about the respondent’s crimes as crimes involving moral turpitude. In another instance, although after the hearing, the respondent’s counsel expressed that he felt that they were not getting the whole story from the respondent. The government attorney and the Immigration Judge agreed with him. ICOP also observed hearings that took place entirely off the record with the Immigration Judge summarizing it on record at the end. In one instance, the Immigration Judge forgot to go back on the record after turning off the recording; it was the end of the hearing before he realized that they were not recorded. He then resorted to summarizing the hearing on record.

iii. Unrecorded and Inadequate Representation

Lack of diligence by representatives³⁷ was revealed in several off the record conversations. While reviewing exhibits, ICOP observed ten Immigration Judges go off the record to admonish attorneys for not submitting documents on time or properly. In one case, the respondent’s representative did not file a claim for relief with the Court in advance of an individual hearing, despite the Immigration Judge expecting the attorney to present a case for asylum or otherwise challenge deportation. ICOP witnessed proceedings in which attorneys were absent at the time of the proceedings, and Immigration Judges called the attorneys while off the record to try to locate them. On a separate occasion, the respondent’s representative received off the record advice from the government attorney because the representative knew little about Immigration Court procedure.

C. ACCESS TO ADEQUATE COUNSEL

EFFECTIVE LEGAL COUNSEL can mean the difference between the freedom to continue a life in the United States and removal, particularly for those encountering language barriers or with mental competency issues. Though the Sixth Amendment guarantees legal representation to criminal defendants, the same guarantee is not extended to respondents in Immigration Court. Instead, individuals in immigration proceedings have the right to be represented “at no cost to the government.”³⁸ While persons can attempt

³⁷ For a more detailed discussion of the efficacy of counsel, see *infra* Chapter II (C).

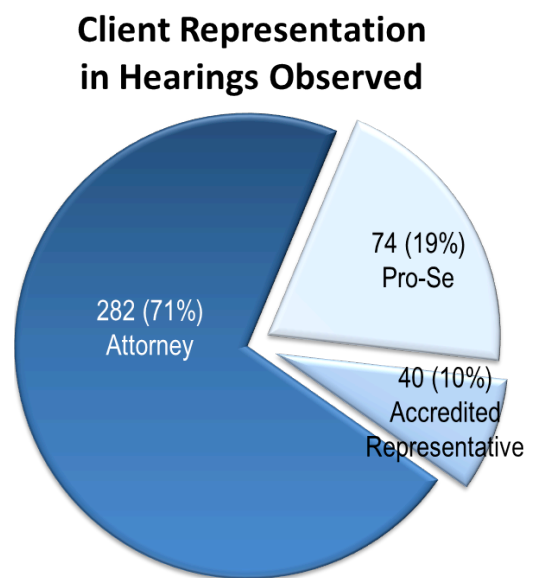
³⁸ INA § 292, 8 U.S.C. § 1362.

to invoke a right to counsel based on Fifth Amendment claims on a case-by-case basis if “fundamental fairness” is at issue, such attempts are rarely successful.³⁹

Recognizing the necessity of counsel, civil rights organizations such as the ACLU have been working on policy-changing litigation. The right to counsel for people with mental disabilities, discussed *infra* at Chapter III, is one significant example, as some government estimates suggest that up to 15% of detainees suffer from mental illness – approximately 57,000 people in 2008.⁴⁰

1. Access to Counsel

Of the total cases observed, ICOP was able to determine whether a respondent was represented in 396 of 414 hearings.⁴¹ Of those cases, 19% of respondents were unrepresented. Without court-appointed representation, persons with limited economic resources are often forced to represent themselves or put their families in dire financial straits to cover attorneys’ fees. While some individuals succeed in obtaining pro-bono counsel, others are not so fortunate. A few respondents obtained representation at the hearing, but this usually resulted in returning the individual back to detention until a later hearing date to give their new counsel a chance to review their case. For the remainder of the *pro se* respondents, there was no indication that they would acquire counsel in the future.



** Sample Size: 396 Clients

2. Adequacy of Counsel

While the majority of respondents observed had succeeded in obtaining legal counsel, the quality of this representation varied widely. ICOP observers monitored the adequacy of representation in 336 cases. Some problems with the lack of effective counsel were so grave, that while technically represented, respondents in those cases appeared to be no better off than those who appeared *pro se*.

³⁹ See AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010) [hereinafter ABA REFORMING IMMIGRATION SYSTEM] (noting the rejection of most “fundamental fairness” right to counsel claims in immigration proceedings, and calling for government-funded counsel in removal proceedings meeting certain criteria).

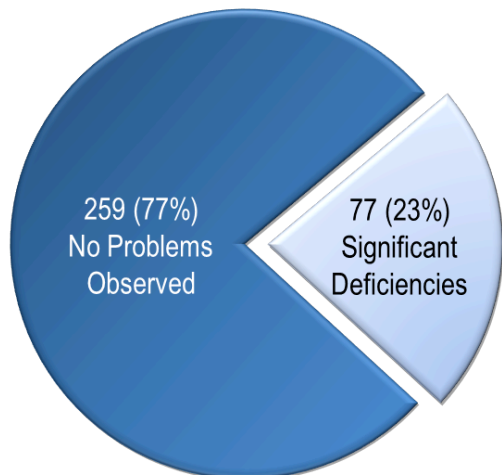
⁴⁰ ACLU & HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT; MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 17 (2010) [hereinafter DEPORTATION BY DEFAULT], available at <http://www.hrw.org/node/91725> (citing Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment*, WASH. POST, May 13, 2008 for statistic that 15% of the detained population on any given day in 2008 had a mental disability).

⁴¹ ICOP data is based solely on statements and observations made in the courtroom and information posted publicly in Immigration Court.

For example, ICOP observed twenty-four cases where respondent’s representative failed to appear in court for the scheduled hearing (although in one of these cases, the respondent was also absent). While several of these absences may have stemmed from

legitimate excuses such as short notice, scheduling conflicts, and confusion over whether an attorney was actually retained—most were completely unexplained, poorly explained, or seemingly rooted in fraud. In one case, both the government attorney and the Immigration Judge

ADEQUACY OF COUNSEL



**** Significant Deficiencies observed include:**

- Failure to file relevant documents
- Clear lack of familiarity with procedural requirements

**** Sample Size: 336 Clients**

expressed concern that the respondent was the victim of fraud after learning that the attorney, who the respondent already paid, claimed that he did not need to be at the first hearing, despite the fact that the respondent could have been ordered removed that very day. Another respondent reported that his attorney told him that the respondent needed to find out from the Immigration Judge what options for relief were available before the attorney would bother to appear in court. In another case, the Immigration Judge called the attorney, whose secretary claimed that the attorney mailed a withdrawal overnight, even though the Immigration Judge had not received it and the client paid the attorney as recently as the prior day. In most cases where the attorney was absent, the Immigration Judge decided to postpone the hearing until a later date, allowing the attorney another chance to appear or giving the respondent time to seek new counsel. However, in one case observed by ICOP, the respondent decided to proceed *pro se* after his counsel failed to appear. This respondent was deported. In another case, an Immigration Judge clearly frustrated with respondent’s counsel, told the respondent that he needed to fill out the I-589 (an application for Asylum and Withholding of Removal) form himself by the following Monday or face deportation. In one case, the Immigration Judge reprimanded respondent’s counsel for not meeting with their client prior to the hearing, despite having ample time to do so. Another lawyer was observed claiming that he was not even aware that he was allowed to meet with his client beforehand.

Additional failures observed by ICOP include forty-four cases in which the defense attorney incorrectly filed documents, or neglected to file them at all. One attorney lost several important documents when moving into a new office. In another instance, an Immigration Judge remarked that the respondent seemed like a “good guy” and would have willingly set a bond for him except for the fact that the necessary paperwork had not been filed. Similarly, an Immigration Judge was on the verge of granting an individual asylum when the government attorney pointed out that the necessary documentation for a

background check was not filed. Additionally, observers watched as an Immigration Judge and government attorney discussed off the record how they both would have been willing to cancel a respondent's removal that day had it not been for his attorney's failure to file some necessary affidavits at the hearing. In most cases, Immigration Judges were willing to grant a continuance despite these mistakes. However, this still meant that many respondents had to spend more time in proceedings, some of whom were detained, and have the conclusion of their case unduly delayed. Occasionally, however, Immigration Judges were not willing to put off their decisions any longer and respondents suffered because of their attorney's ineptitude. For example, ICOP watched as one Immigration Judge indicated that he would have been willing to cancel a removal but the respondent's attorney failed to produce any documentation or witnesses to support such a decision.

Moreover, there were instances where it was unclear whether the respondent's interests were the foremost priority of the attorney. For example, in a significant number of cases, observers noted disrespect by attorneys toward their clients. One attorney smiled to the Immigration Judge and stated that his firm was not representing the respondent yet, and proceeded to ask the Immigration Judge about the fee he hoped to collect for appearing in court. In that case, the Immigration Judge nearly considered the asylum claim waived because the attorney failed to take any steps to pursue it, but reconsidered when the respondent strenuously objected. The attorney in another case asked to be removed from the case and then proceeded to berate his former client for incorrectly filing some documents. Another attorney stayed behind after his client, who was being held for failure to pay child support, left and told the Immigration Judge he believed that "something else was going on."

In addition to problems with respondents' current representatives, ICOP witnessed the adverse consequences that resulted from the practices of former attorneys. Many attorneys in the immigration proceedings took over a case from apparently incompetent predecessors. In one case, the new attorney had difficulties formulating a defense strategy because a previous attorney failed to raise one. In another case, a former attorney inaccurately told a client that he could not qualify for asylum, despite the fact that the Chinese government forced his wife to have an abortion.⁴² As a result of this misinformation, the individual missed the one-year window to file an asylum claim.

The attorney failure that ICOP observed was not always the sole source of inadequate representation for respondents. Rather, lackluster assistance was sometimes indicative of structural constraints inherent in an over-burdened system. Observers noted dozens of cases where the respondent's representative was not prepared, had poor knowledge of the facts of the case, and was unaware of the relevant legal issues of the case because the representative acquired the case with little to no time to prepare. For example, several cases were observed in which representation was attained at the Court itself, giving the newly acquired counsel mere minutes to try to learn the client's situation and determine the best course of action to pursue. In other cases, organizations that provide free or deeply discounted legal counsel appear to be over-whelmed with cases - this included a

⁴² ICOP recognizes that this fact alone is not dispositive of a successful asylum claim.

case where an incredibly unprepared attorney admitted to the Immigration Judge that the case had “slipped through the cracks.” In another instance, a detainee did not understand that the Legal Aid attorney assigned to him was there to represent him in his bond hearing only.

ICOP notes that some of the misgivings observed may correlate with the fact that detainees appearing in New York City Immigration Courts are no longer detained in New York City, and that many removal defense attorneys are simply over-burdened by large caseloads, thereby making it difficult for attorneys to adequately represent all of their clients. However, despite the challenges of representing a detained individual and working under the pressures of an overtaxed system, attorneys are still required to provide competent counsel to their clients.

III. IN FOCUS:

INDIVIDUALS WITH MENTAL DISABILITIES

SINCE PUBLICATION OF THE FIRST ICOP REPORT in 2007, issues of mental health in the immigration system have attracted increased attention from media, immigrant and disability rights groups, and government agencies. Following the deportation of a mentally ill U.S. citizen⁴³ and impact litigation on behalf of two immigrants with severe mental disorders, each detained for years in California facilities, the serious threat to mentally ill immigrants of “disappearing” in the U.S. immigration system sparked sharp criticism by human rights organizations at home and abroad.⁴⁴ Mental health issues are reportedly at the top of the agenda in the comprehensive review of immigration detention practices ordered by Department of Homeland Security Secretary Janet Napolitano.⁴⁵ A welcome development that has increased the scrutiny of the treatment of individuals with mental health issues in the immigration system and revealed deep injustices with constitutional due process implications.⁴⁶

In the New York City Immigration Courts, ICOP observers noted numerous instances in which an immigrant’s mental problems led to his or her apprehension by law enforcement agencies and ultimately to removal proceedings. In one case, a fifty-seven year-old respondent had suffered a stroke that left him confused, limited his capacity to communicate, and made employment impossible. He entered the criminal system on charges of trespassing after being found sleeping in an apartment he did not live in. In

⁴³ See Press Release, ACLU, ACLU Files Lawsuit After Government Wrongfully Deports U.S. Citizen with Mental Disabilities (Oct. 13, 2010), *available at* <http://www.aclu.org/immigrants-rights/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental-disabili>.

⁴⁴ Press Release, ACLU, Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years (Mar. 31, 2010), *available at* <http://www.aclu-sc.org/releases/view/103017>. See also Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES, May 3, 2009, at A17 *available at* http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html?_r=1&pagewanted=1.

⁴⁵ *Due Process for People with Mental Disabilities in Immigration Removal Proceedings*, 33 Mental & Physical Disability L. Rep. 882, 883 (Nov.-Dec. 2009) [hereinafter *Mental Disabilities in Immigration*].

⁴⁶ *Id.*

several other cases, observers noted that an Immigration Judge remarked on the connection between respondents' depression, drug or alcohol dependencies and their criminal rap sheets, often comprised of drug possession and petty larceny charges.

1. Detention

Immigrants with mental disabilities and disorders are less likely while detained to receive effective medical attention, compromising their performance in Immigration Court. In one case, ICOP observers witnessed a detained respondent on anti-psychotics, anti-depressants and mood stabilizers. At this hearing, the respondent was unable to provide sufficient testimony of his mental condition because he was unable to contact his doctor while detained. Moreover, the observer noted that this respondent's prescriptions continued to be filled without medical supervision, once again due to the individual's inability to communicate with his doctor.

2. Court Room Procedure

Inconsistent or otherwise inadequate medical care for mentally ill individuals in detention can exacerbate one's inability to effectively communicate during proceedings. ICOP observers witnessed a number of instances in which respondents appeared less than fully mentally present during the proceeding. For example, one observer noted the respondent seemed to be speaking to himself during the entire hearing. Another observer noted that during the hearing, a respondent became easily confused by simple questions, and gave contradictory answers without being aware that he was doing so. This same observer noted that the respondent appeared to be illiterate and only communicated in incomplete sentences.

Because of the added communication barrier, immigrants with mental disabilities "have reduced capacity to exercise [their] limited right to counsel and are especially likely to proceed *pro se*."⁴⁷ Without counsel, even U.S. citizens with mental disabilities are at risk for unlawful deportation because of the obstacles they facing in proving their citizenship.⁴⁸ Non-citizens with mental disabilities are all the more vulnerable, even though they may not have violated any immigration law or might be eligible for relief from deportation.

3. Access to Adequate Counsel

While the Immigration and Nationality Act mandates that the government attorney provide "safeguards" to protect the rights and privileges of individuals who cannot "be present" at their proceedings due to mental incompetency,⁴⁹ no statute or regulation defines either competency or safeguards. Without guidelines for dealing with mental illness and disability, Immigration Judges struggle to create *ad hoc* remedies during removal proceedings, leaving them frustrated and depriving respondents of consistency in hearing outcomes. In one case ICOP observed that the hearing could not proceed since

⁴⁷ *Mental Disabilities in Immigration*, *supra* note 45, at 884.

⁴⁸ See *supra* note 43.

⁴⁹ INA 240(b)(3), 8 U.S.C. 1229a(b)(3).

the lawyers and the Immigration Judge were not convinced that the respondent knew what was going on. In another case, all sides acknowledged that mental competency was an issue but respondent had not been evaluated and no one knew how severe it was. The Immigration Judge stressed that mental incompetency is not an excuse. In a third, the Immigration Judge made known his irritation with a detainee and was hostile (unbelieving) of detainee's disability.

Because estimates of individuals with mental illness represent only the number of individuals who disclose a mental illness or identify themselves as mentally ill, it remains unclear how many immigrants face removal while struggling with mental disease or disability. As cited above, Human Rights Watch calculates that such individuals account for at least 15% of immigrants in detention, or 57,000 people in 2008.⁵⁰ However, out of the 414 observations, ICOP observers witnessed only two in which the Immigration Judge ordered a mental competency evaluation. While a number of ICOP observations suggest that the respondent could have been suffering from mental disabilities, without reliable and consistent evaluations, and without adequate representation, these impressions cannot be verified—either for purposes of this report, nor moreover by an Immigration Judge or a reviewing court.

IV. CONCLUSION

THE OBSERVATIONS ABOVE provide snapshots of New Yorkers facing deportation, and the forum in which these individuals are permitted to defend their ability to remain in this country. ICOP's analysis of these observations paints a picture of a diverse group of immigrant New Yorkers frequently deprived of physical liberty and, ultimately, facing deportation from a country, the United States, in which 90% of those observed have lived for at least ten years.

Many of the law student observers were shocked to discover the range of individuals who are targeted for deportation and how few procedural protections are afforded individuals in proceedings with such high-stake outcomes. ICOP is not the first to identify or document these problems. Critiques of immigration policy, enforcement priorities, and conditions of detention are numerous and wide-ranging, and will not be fully surveyed here. The more narrow issue of the immigration adjudication process has also attracted considerable attention, from academic literature,⁵¹ judicial scrutiny,⁵² independent reports

⁵⁰ DEPORTATION BY DEFAULT, *supra* note 40.

⁵¹ See, e.g., Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006); Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489 (2011); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1721 (2010).

⁵² Perhaps most famously, Judge Posner declared that immigration adjudication “has fallen below the minimum standards of legal justice.” *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). Posner's critique has been echoed in other courts, see, e.g., *Gor v. Holder*, 607 F.3d 180, 198-99 (6th Cir. 2010).

by practitioners, and advocates.⁵³ ICOP's observations strongly support proposals to introduce increased accountability, transparency, and procedural protections.

In the recommendations that follow, ICOP highlights some recent proposals that would address the major issues identified by this report, including procedural implications of detention, fundamentals of courtroom procedure, and the absence of consistent access to effective counsel. The highlighted issue of individuals in proceedings with mental disabilities underscores the need for these increased procedural protections. We hope the observations published here, and our continued presence in the Immigration Courts can continue to provide support for the implementation of these reforms.

RECOMMENDATIONS

IN THE RECOMMENDATIONS THAT FOLLOW, ICOP draws on its observations to advance proposals that address the major issues identified by this report, including the procedural implications of detention, fundamentals of courtroom procedure, and absence of consistent access to effective counsel.

A. Detention⁵⁴

The majority of the cases observed by ICOP involved respondents who were detained in ICE custody, and the adverse consequences of detention featured prominently in the proceedings. In the fifty-seven bond hearings observed, ICOP found that the altogether denial of bond, or high price bonds set, contributed to the difficulties experienced by immigrants in proceedings. Detainees reported problematic conditions in detention facilities, including inadequate medical care and difficulties accessing counsel. Based on these observations, ICOP recommends that:

- **DHS should minimize detention both by exercising discretion in taking respondents into custody, and by employing alternatives to physical incarceration when monitoring is statutorily required:** Based on observations of individuals who either did not have bond set, or could not afford the amount that was set, ICOP urges DHS to exercise restraint in taking respondents into custody. In cases where monitoring is required, ICOP supports calls for increased reliance on Alternatives to Detention.⁵⁵

⁵³ See, e.g., APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS (2009) [hereinafter ASSEMBLY LINE INJUSTICE], available at http://www.chicagoappleseed.org/uploads/view/75/download:1/assembly_line_injustice_june09.pdf; ABA REFORMING IMMIGRATION SYSTEM, *supra* note 39; CONSTITUTION PROJECT RECOMMENDATIONS, *supra* note 28.

⁵⁴ The above observations speak to the urgent need for fundamental changes in detention policy, such as reforming immigration enforcement priorities. Here we highlight only recommendations directly related to ensuring due process in immigration proceedings. For a general summary of recent reports and recommendations on detention reform, see NAT'L IMMIGRATION FORUM, SUMMARIES OF RECENT REPORTS ON IMMIGRATION DETENTION (2010), available at <http://www.immigrationforum.org/images/uploads/2010/DetentionReportSummaries.pdf>.

⁵⁵ See, e.g., DET. WATCH NETWORK & STANFORD LAW SCH. IMMIGRANTS' RIGHTS CLINIC, *supra* note 16; MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES & CASE

- **Immigration Judges should set affordable bond for all eligible respondents:** Ensuring that bond is both available and affordable would enable more respondents to obtain release from ICE custody, reducing the cost and hardship of lengthy detentions and permitting them to secure counsel and gather evidence for their defense.
- **ICE should improve conditions of detention:** Based on ICOP observers' documentation of complaints about conditions of detention that were raised in Immigration Court, ICOP calls upon ICE to update and enforce standards for medical treatment and other conditions of detention that directly impact respondents' abilities to contest their deportability.⁵⁶
- **ICE should guarantee detainees access to counsel:** In light of observed detainees' complaints regarding the difficulty of retaining and communicating with counsel while in detention, ICOP recommends that ICE should not detain respondents in facilities that present a geographical barrier to obtaining counsel⁵⁷ and should require that all its detention facilities ensure respondents can communicate with attorneys.⁵⁸

B. Courtroom Procedure

ICOP observations indicate that immigration proceedings frequently fail to comport with the fundamental fairness required by the right to due process. Because of inadequate, incorrect or unclear interpretation and other deficiencies in language access, respondents who had limited English proficiency could not participate fully in their proceedings. Furthermore, frequent off-record conversations and unprofessional behavior on the part of attorneys, judges, and court staff, compounded procedural flaws. Based on these observations, ICOP recommends that:

- **EOIR regulations and individual Immigration Judges should ensure adequate language access in Immigration Court proceedings:** In light of every individual's right to due process in civil proceedings, particularly when those proceedings affect a liberty interest, it is essential that respondents are able to fully understand and participate in their Immigration Court hearings. For these reasons, ICOP strongly recommends increasing both the extent and the quality of interpretation services in Immigration Court. This includes mandating comprehensive interpretation and enforcing the prohibition against paraphrasing and opining. In order to further promote respondents' full comprehension of all parts of proceedings, interpreting equipment should be used whenever an interpreter and English-speaker are speaking

MANAGEMENT RESPONSIBILITIES? (2009), *available at* <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

⁵⁶ See, e.g., NAT'L IMMIGRATION LAW CTR. ET. AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (2009), *available at* <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; AMNESTY INT'L, JAILED WITHOUT JUSTICE, *supra* note 20.

⁵⁷ See, e.g., ISOLATED IN DETENTION, *supra* note 12; CONSTITUTION PROJECT RECOMMENDATIONS, *supra* note 28.

⁵⁸ See, e.g., *id.* See also NEW YORK UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC ET. AL., LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM (2010), *available at* <http://afsc.org/sites/afsc.civicactions.net/files/documents/LockedUpFINAL.pdf>.

simultaneously to the respondent, in order to allow for efficient and effective simultaneous translation. ICOP also calls on the Immigration Court to limit the use of telephone interpreting.⁵⁹

- **EOIR regulations and individual Immigration Judges should promote transparency and professionalism in Immigration Court proceedings:** In light of the disrespect and lack of professionalism recorded by observers, especially during off the record conversations, ICOP strongly recommends that EOIR improve its complaint system and promote review and accountability of judges and attorneys, alike.⁶⁰ This may require strengthening internal review procedures to examine judicial and prosecutorial practices. The pervasive informalities observed during off the record conversations and unrecorded proceedings, such as bond hearings, compromise respondents' access to independent, impartial review of their detention. ICOP recommends that bond hearings be conducted in a more transparent and formal manner, so as to better ensure consistency and fairness in the treatment of detainees.

C. Adequate and Effective Representation

ICOP routinely observed problems with the presence and effectiveness of counsel for respondents. Many respondents lacked representation altogether, and among those who acquired counsel, a significant number of their attorneys failed to appear in court, appeared unprepared, or otherwise seemed to provide ineffective representation to their clients. Given the complexities of immigration law and the high stakes of decisions concerning removal, individuals without adequate, effective representation face significant obstacles to obtaining favorable outcomes in Immigration Court. Based on these observations, ICOP recommends that:

- **Congress should establish the right to counsel in immigration proceedings:** Based on its documentation of both *pro se* and represented respondents, ICOP joins the persistent call for the establishment of a right to government-funded counsel in removal proceedings. While this call has taken many forms,⁶¹ ICOP supports a right to appointed counsel for all indigent individuals in removal proceedings. As the New York City Bar Committee on Immigration & Nationality Law has pronounced, “a right to appointed counsel is necessary so that the outcome of removal cases does not

⁵⁹ For more detailed recommendations, see NAT'L LANGUAGE ACCESS ADVOCATES NETWORK, LANGUAGE ACCESS PROBLEMS IN IMMIGRATION COURT, *available at* http://brennan.3cdn.net/5c3459d5d38a1553e3_e3m6bxf8z.pdf.

⁶⁰ Appleseed also stresses the importance of “Cultivating a Culture of Professionalism in the Immigration Courts.” See ASSEMBLY LINE INJUSTICE note 53, at 4.

⁶¹ See, e.g., ABA REFORMING IMMIGRATION SYSTEM, *supra* note 39, at ES-64, (calling for a “right to government-funded counsel in removal proceedings for indigent noncitizens who are potentially eligible for relief from removal and cannot otherwise obtain representation... and for unaccompanied minors and noncitizens with mental disabilities and illnesses, at all stages of the adjudication process”); Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 Stan. J. Civ. Rts. & Civ. Liberties 113 (2008) (arguing that due process requires appointment of counsel in proceedings of detained lawful permanent residents); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 345-46 (2008) (recommending right to counsel in removal proceedings for those admitted to United States as lawful permanent residents).

turn on a respondent's ability to afford counsel, but rather on the merits of his or her claim."⁶²

- **EOIR regulations should promote and enforce adequate representation:** Whether or not a right to government-funded counsel is recognized, in light of the deficiencies in the quality of representation documented above, ICOP strongly supports measures to strengthen and protect individuals' rights to adequate representation in immigration proceedings as an essential element of fundamental fairness.⁶³ ICOP strongly supports the enforcement of prohibitions against unauthorized practice, such as the enforcement of the established Fraud Program within EOIR, as a crucial minimum step.⁶⁴

This report is just a beginning. The limited access that ICOP has to information about immigration enforcement and adjudication and the fact that there are not more reports of this nature documenting what transpires in New York City Immigration Courts, reflect the lack of transparency that pervades the immigration system overall. Independent court-watching programs like ICOP have been recognized as a critical means of enhancing transparency,⁶⁵ and ICOP is working to promote and cooperate with similar programs outside of New York City. However, independent monitoring cannot replace consistent internal monitoring and public reporting on the operations and impacts of the Immigration Court system by the agency itself. ICOP applauds recent steps toward increased transparency, such as the Immigration Judge complaint process established in 2010, and the regular publication of statistics regarding these complaints.⁶⁶ ICOP further recommends that EOIR record and publish comprehensive statistics on the issues raised in this report, such as average bond amounts and denial rates, and complaints about conditions of detention. Such enhanced transparency will serve to promote accountability within the system, and will allow stakeholders to offer informed proposals for reform. Increasing transparency is essential to improving quality, ensuring due process, and protecting fundamental fairness for immigrants—not only in immigration courtrooms, but in the immigration system overall.

⁶² NEW YORK CITY BAR COMMITTEE ON IMMIGRATION & NATIONALITY LAW, REPORT ON THE RIGHT TO COUNSEL OF DETAINED INDIVIDUALS IN REMOVAL PROCEEDINGS (2009), at 2, *available at* <http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf>.

⁶³ For a summary of the current state of the law (including circuit splits on the constitutionality of this right), see Walter S. Gindin, *(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have A Due-Process Right to Effective Assistance of Counsel*, 96 Iowa L. Rev. 669 (2011).

⁶⁴ See ABA REFORMING IMMIGRATION SYSTEM, *supra* note 39, at 5-17.

⁶⁵ See ASSEMBLY LINE INJUSTICE, *supra* note 53, at 13, elaborating that the “time is ripe to create a comprehensive court-watching program in Immigration Courts around the country.”

⁶⁶ *Immigration Judge Conduct and Professionalism*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/sibpages/IJConduct/IJConduct.htm> (last visited Apr. 19, 2011).

APPENDIX

A. HOW TO GET INVOLVED

ICOP SEEKS TO ADD ACCOUNTABILITY AND TRANSPARENCY to Immigration Court proceedings. By observing hundreds of hearings each year and documenting the stories of individual respondents, we underscore the urgent need to reform the Immigration Court system in order to better protect respondents' procedural rights, address problematic areas of immigration policy and enforcement, and inject fairness into the immigration consequences of criminal proceedings.

Unfortunately, our geographic reach is limited. We urge communities around the country to join our effort by sending observers to their local Immigration Courts. There are currently 59 Immigration Courts in the United States:

<http://www.justice.gov/eoir/sibpages/ICadr.htm>

How to Join an Immigration Court Observing Project

Communities in some large cities are already sending observers to Immigration Courts. If you live in or near one of these cities, you may wish learn more about the following projects:

- Atlanta, GA:** Atlantans Building Leadership for Empowerment (ABLE),
<http://able.gamaliel.org/ABLECourtWatch.htm>.
Contact: tblagec@aol.com.
- Chicago, IL:** Chicago New Sanctuary Coalition (CNSC), Immigration Court Watch Program, <http://chicagocourtwatch.wordpress.com/about/>.
Contact: maryandbob.n@sbcglobal.net.
- New York, NY:** NYC Immigration Court Observation Project (ICOP), a law-student led initiative, <http://nycicop.wordpress.com/>.
Contact: nlg.detainee@gmail.com.
- San Francisco, CA** NLG-SF Immigration Court Watch Project,
<http://www.nlgsf.org/committees/immigration.php>.
- Seattle, WA:** Seattle University School of Law, Immigrant Detainee Justice Project,
http://www.law.seattleu.edu/Centers_and_Institutes/Access_to_Justice_Institute/Immigrant_Detainee_Justice_Project.xml.
Contact: tanj@seattleu.edu

How to Start Your Own Immigration Court Observing Project

If you want to start an observing project or just observe on your own, the following considerations may be useful:

- **What do you hope to achieve?** Whether you are a law student monitoring procedural rights, an immigrant trying to familiarize yourself with court proceedings, or a community member wanting to bear witness to an individual's story, it helps to think in advance about your goals and reasons for observing. You may wish to bring paper and a pen to court to record your impressions. If you want to document some of the issues discussed in this report, please contact nlg.detainee@gmail.com for a questionnaire with suggested items to document.
- **When do hearings take place?** Immigration courts are typically in session every weekday except federal holidays and weather emergencies. For a more detailed schedule, contact your local Immigration Court: <http://www.justice.gov/eoir/sibpages/ICadr.htm>.
- **Are Immigration Court hearings open to the public?** Generally, yes. However, an Immigration Judge may close a hearing for one or more of the following reasons: (i) to protect witnesses, parties, or the public interest; (ii) the parties filed a motion to close the hearing; or (iii) the case involves an abused spouse or child, information that is protected by a protective order, or an application for asylum, withholding of removal, or Convention Against Torture protections.

If a judge or court employee prohibits you from observing a hearing, it is perfectly acceptable for you to ask why the hearing has been closed. You may also call the court in advance to ask whether that day's scheduled hearings are open to the public. For more information, see <http://www.justice.gov/eoir/press/2010/ObservingImmigrationHearings09092010.htm>.

- **Do you have to inform the court beforehand that you will be observing?** Generally, no. However, if the Immigration Court is housed in a detention facility, you should contact the facility to find out about any clearances you need to enter the building. For more information, see <http://www.justice.gov/eoir/press/2010/ObservingImmigrationHearings09092010.htm>. If you are organizing a large project with many participants, it may be helpful to contact the local Court Administrator when you are getting started.
- **How can you file a complaint about an Immigration Judge?** Complaints against Judges should be filed with the Office of Professional Responsibility (OPR) in the Department of Justice. Instructions for doing so are available here: <http://www.justice.gov/opr/process.htm>.

EOIR also has its own process for filing complaints, but there are open questions as to how aggressively these complaints are being investigated internally by

EOIR. See <http://www.thenation.com/article/155497/lawless-courts>. Accordingly, we recommend that complaints be filed with OPR.

- **How can you file a complaint about an Immigration Court interpreter?** See <http://www.justice.gov/eoir/sibpages/InterpComplaint.htm>.
- **How can you file a complaint about an immigration attorney?** See <http://www.justice.gov/eoir/press/09/AttorneyDisciplineFactSheet.pdf>. The complaint form is also available in Spanish here: http://www.justice.gov/eoir/eoirforms/eoir44_spanish.pdf
- **Where can you learn more about specific Immigration Court procedures?** It's a slog, but try looking through the Immigration Court Practice Manual, available here: http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

B. GLOSSARY

Admissibility

Refers to an individual's eligibility for admission to the United States. The statutes governing immigration law specify numerous categories of persons who are barred from being admitted into the U.S. because of prior misconduct or other characteristics that Congress considers undesirable. The reasons for barring admission to immigration are called "grounds of inadmissibility." A person to whom no grounds of inadmissibility apply is admissible. Some, but not all, grounds of inadmissibility can be overcome if an individual obtains a waiver.

Aggravated Felony

A federal immigration category that includes more than 50 classes of offenses, some of which are neither "aggravated" nor a "felony" (for example, misdemeanor shoplifting with a one-year sentence, even if suspended). This term was first created by the 1988 Anti-Drug Abuse Act to include murder, rape, drug trafficking, and trafficking in firearms or destructive devices. Congress expanded this term numerous times over the years, and most extensively in 1996. This is one of the government's most powerful tools for deportation. An immigrant – including a lawful permanent resident – who is convicted of an offense categorized as an "aggravated felony" is subject to mandatory detention (no bond) and virtually mandatory deportation (no possibility of applying for cancellation of removal or any other pardons).

Alien

A term used in immigration law referring to a person who is not a U.S. citizen or a U.S. national.

"A" Number

The unique file number assigned by the Department of Homeland Security to every immigrant who is admitted to the United States or who otherwise comes into contact with DHS. This number begins with the letter "A," followed by eight or nine digits.

Asylum

A status allowing immigrants to remain in the United States because they either have been persecuted or have a well-founded fear that they would be persecuted (on account of race, nationality, religion, political opinion, or membership in a particular social group) in their home country. Technically, an applicant for asylum in the United States must meet the same legal standard as a refugee. The difference is that an asylum applicant applies for this status while in the U.S., whereas a refugee is granted refugee status before arriving in the country. A person who has been granted asylum is an asylee.

Board of Immigration Appeals (BIA)

The appellate body within the Executive Office for Immigration Review that reviews appeals of decisions made by Immigration Judges and of certain decisions made by officials of the Department of Homeland Security.

Cancellation of Removal

A defense to deportation available to certain immigrants. There are three basic and separate provisions under which relief is available: (1) cancellation for Lawful Permanent Residents (LPRs) who have resided for at least seven years in the U.S. following a lawful admission to the United States, and who have had LPR status for at least five years; (2) cancellation for non-LPRs who have resided in the U.S. continuously for at least ten years and whose removal would cause “exceptional and extremely unusual hardship” to a U.S. citizen or LPR parent, spouse, or child; and (3) cancellation for spouses and/or children (or the child or parent of such an individual) who have been battered or subjected to extreme cruelty by a U.S. citizen or LPR family member, if they have resided in the U.S. for at least three years and their deportation would cause extreme hardship.

Citizenship and Immigration Services (CIS)

The Department of Homeland Security agency that is responsible for the administration of immigration and naturalization adjudication functions.

Code of Federal Regulations (CFR)

Contains the regulations written by the federal departments and agencies that are charged with interpreting and implementing statutes passed by Congress and signed by the president. 8 CFR is the section of the regulations related to immigration.

Convention Against Torture (CAT)

An international treaty that the United States has ratified that prohibits the involuntary return of any individual to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The Department of Homeland Security and Executive Office for Immigration Review implement the CAT by granting eligible individuals either Withholding of Removal, or, if an individual is not eligible for that status because of criminal convictions or other disqualifying circumstances, deferral of removal.

Conviction (for immigration purposes)

Immigration courts define “conviction” broadly to include dispositions where: (1) a formal judgment of guilt was entered by a court, or (2) (a) a judge or jury has found the defendant guilty, the defendant has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt and (b) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. This broad definition has been held to even include some dispositions not considered a conviction by the criminal court, such as low-level violations and convictions that are vacated after successful completion of rehabilitation programs.

Crime Involving Moral Turpitude (CIMT)

Conviction or sometimes admission of one or more crimes involving moral turpitude may trigger deportation for some immigrants. Congress has not defined this immigration law term. It has been interpreted by courts to include offenses which are “inherently” evil, immoral, vile, or base. Some examples are crimes that require an intent to steal or defraud

(such as theft and forgery offenses); crimes in which bodily harm is caused by an intentional act or serious bodily harm is caused by a reckless act (such as murder and certain manslaughter and assault offenses); and most sex offenses.

Criminal Alien

A term used by the Department of Homeland Security (DHS) to refer to any noncitizen apprehended by ICE through the criminal justice system, regardless of how minor or how long ago the alleged offense occurred or whether the noncitizen was ever convicted of a crime. This may be someone who is undocumented, someone who is applying for a green card, or a green card holder (LPR). So-called “criminal aliens” are aggressively targeted for deportation after they have served their sentence. Deportation is not part of any criminal sentence, and oftentimes immigrant defendants do not realize that a guilty plea may result in deportation.

Customs and Border Protection (CBP)

An agency with the Department of Homeland Security, Customs and Border Protection is responsible for immigration enforcement at the ports of entry into the U.S.

Department of Homeland Security (DHS)

The federal Cabinet department charged with “protecting” the United States. Through the Department of Homeland Security Act, DHS absorbed most of the former Immigration and Naturalization Service and took on its duties in 2003. DHS split immigration-related duties between three separate agencies under its control: services (Citizenship and Immigration Services), enforcement (Immigration and Customs Enforcement), and border patrol (Customs and Border Protection).

Detention

Basically – jail. People may be detained at every step of the immigration “process:” (1) awaiting adjudication of asylum or adjustment applications; (2) picked up and jailed without charges; (3) pending immigration proceedings; (4) after being ordered deported, while ICE is actively trying to remove them; and (5) sometimes indefinitely, where ICE knows it may not be able to deport someone with an order of deportation.

Mandatory detention (incarceration without the chance to apply for bond) applies to most people with past criminal convictions, asylum seekers, and all noncitizens considered “inadmissible” (people physically in the US, but never admitted legally at a port of entry). Detainees are housed in over 250 county jails, private prisons, and federal facilities nationwide, and are often held with the general criminal population. Immigration detention is supposed to conform to Detention Standards but they are not binding. Detention transfers occur often from one part of the country to another, without regard for access to family and counsel.

Entry Without Inspection (EWI)

The act of coming into the United States without inspection by a U.S. customs officer.

Executive Office for Immigration Review (EOIR)

A branch of the U.S. Department of Justice, and that operates independently of the Department of Homeland Security. The EOIR includes the Office of the Chief

Immigration Judge, the Board of Immigration Appeals, and the Office of the Chief Administrative Hearing Officer. The chief Immigration Judge supervises the Immigration Judges who hear deportation cases in Immigration Courts. The BIA hears appeals of decisions made by Immigration Judges, as well as appeals of some decisions made by INS officers.

Green Card

A term commonly used when referring to a permanent resident card, despite the fact that it has been years since the Department of Homeland Security issued green versions of this card.

Immigrant

A person who leaves his or her country to settle in another country. In the context of United States immigration law, the term refers to any noncitizen in the U.S. except any individual who was admitted to the United States as a ‘nonimmigrant’ and continues to maintain that status.

Immigrant Visa

An official authorization appended to a passport that permits the bearer to enter and settle permanently within the United States. A noncitizen who has been granted an immigrant visa and admitted to the United States is a Lawful Permanent Resident and may work, may travel within the U.S. without restriction, and is eligible to apply for U.S. citizenship after a requisite period of residence.

Immigration and Customs Enforcement (ICE)

A Department of Homeland Security agency, Immigration and Customs Enforcement handles enforcement matters within the U.S. borders, including detention, deportation, and worksite raids.

Immigration and Nationality Act (INA)

The basic law governing the immigration and nationality policy of the United States. Rather than writing a completely new law each time it changes immigration policy, since 1952 Congress generally has enacted amendments to the INA.

Immigration Court

An administrative tribunal presided over by an Immigration Judge, who is charged with hearing cases involving questions of immigration law, such as whether or not a noncitizen is admissible or removable, or whether he or she may be granted relief, such as asylum or a waiver of inadmissibility or deportability.

Immigration Judge (IJ)

An EOIR official who hears and decides cases brought before Immigration Court.

Lawful Permanent Resident (LPR)

A noncitizen who has been lawfully admitted to the United States to live and work permanently, but still subject to deportation upon violation of the immigration laws. A “green card” is the identification card for lawful permanent residents, but this status is not

lost just because the physical card expires or gets misplaced.

Noncitizen

An individual who was born outside of the US unless the person acquired or derived US citizenship or naturalized. Noncitizens include LPRs, refugees, asylees, temporary visitors, and the undocumented. Acquisition of US citizenship occurs when a person is born outside of the US but has a US parent(s) at birth and thus automatically acquires citizenship. Derivation of US citizenship occurs when a person is born outside of the US to noncitizen parent(s) but automatically becomes a citizen when the person's parent(s) became US citizen(s) while the person is still a minor. Naturalization occurs when a person is born outside of the US but lawfully immigrated to the US and later goes through the process of applying for citizenship, passing a civics test, and being sworn in.

Nonimmigrant

A noncitizen who has been granted a nonimmigrant status that allows him or her to remain in the United States temporarily for a specific purpose. There are more than two - dozen nonimmigrant categories, each of which has specific requirements concerning the purpose of the individual's stay in the U.S. Most nonimmigrant categories require as a condition of the status that the individual have the intent of returning to a residence abroad. Nonimmigrants who overstay or violate a condition of their status become undocumented immigrants ("overstays").

Refugee

A noncitizen given permission to come to the United States because he or she was persecuted, or has a well-founded fear of being persecuted (on account of race, nationality, religion, political opinion, or membership in a particular social group), in his or her home country. Refugees are given this status before coming to the U.S., usually when they are temporarily located in a third country. A refugee is granted the right to live and work in the U.S. and, after a one-year period, may apply to become a Lawful Permanent Resident (LPR).

Removal

The expulsion of a noncitizen from the United States. The administrative proceedings held to determine whether an individual should be removed are known as removal proceedings. Generally, removal proceedings include a removal hearing, which is held before an Immigration Judge. At the hearing, the Immigration Judge may determine whether a noncitizen who has not been admitted to the United States is admissible; whether a noncitizen who was previously admitted is deportable; and whether the individual qualifies for any relief from removal, such as Adjustment of Status, Cancellation of Removal, Asylum, or Withholding of Removal. Once removed, a noncitizen faces legal bars that prevent his or her return; sometimes they are permanently barred.

Special Immigrant Juvenile

An individual who may apply for Lawful Permanent Resident status because he or she has been declared dependent on a juvenile court or a state, and has been determined eligible for long-term foster care due to abuse, neglect, or abandonment. There must also

have been an administrative or judicial finding that it would not be in the juvenile's best interest to be returned to his or her country of nationality or last residence.

Stay of Removal

An order issued by the Department of Homeland Security, Immigration Court, the Board of Immigration Appeals, or a federal court temporarily halting the execution of a removal order. A stay of removal is most commonly issued in conjunction with an appeal or a motion to reopen a case.

Temporary Protected Status (TPS)

A temporary grant of permission to remain in the United States and to work that is granted to nationals of particular countries when the Attorney General determines that unstable or dangerous conditions in the country warrant such relief. Once a TPS designation has been made for a country, its eligible nationals who are in the U.S. may apply for TPS status and employment authorization. The attorney general has most commonly designated TPS for a country for either one year or eighteen-month periods, but it is common for TPS designations to be extended if unstable conditions persist in the country.

Undocumented

A term used to describe noncitizens who have no government authorization to be in the US. Undocumented people include people who crossed the border without permission, people who came on valid visas but then remained past their authorized period of stay, and former green card holders who were ordered deported. An "undocumented" person might have received work authorization (for example, upon filing an application for asylum or other status), but that does not necessarily mean s/he is considered "documented" for immigration purposes.

Voluntary Departure (VD)

A form of relief that the Department of Homeland Security offers to some deportable noncitizens prior to the commencement of removal proceedings, and also a form of relief available to eligible individuals in those proceedings. An individual granted voluntary departure agrees to leave the United States by a designated date. Individuals who comply with this agreement and depart the country prior to the designated date avoid having an order of deportation or removal entered against them. If the person fails to depart, s/he will be subject to fines and a 10-year period of ineligibility for other forms of relief. Immigrants with aggravated felonies are ineligible for voluntary departure.

Waiver

A discretionary determination to excuse a ground of inadmissibility that would otherwise apply to a noncitizen. A waiver may be granted by the Department of Homeland Security or an Immigration Judge, but only where the waiver is authorized by the INA.

Withholding of Removal

Status available in removal proceedings that prohibits the Department of Homeland Security from returning an individual to a country where his or her life or freedom would be endangered. This status is similar to, but separate from, asylum. To obtain

withholding, individuals must meet a higher evidentiary standard than applies in asylum, but if they meet this standard they must be granted withholding— unlike asylum, the status is not discretionary. Persons granted withholding may be deported to a third country if one will accept them, but they cannot be returned to their home country.

Unlike the status of refugee or asylee, withholding does *not* provide a basis on which individuals may subsequently obtain LPR status. However, persons who are granted withholding may apply for employment authorization.