

**Written Follow Up Questions of Senator Leahy  
Hearing On “Improving Efficiency  
And Ensuring Justice In The Immigration Court System”  
May 18, 2011**

**Questions for Karen Grisez**

**1. Access to Counsel**

Judge Robert Katzmann of the Second Circuit Court of Appeals recently led a study on representation, called the New York Immigrant Representation Study, which found that access to counsel greatly improves an immigrant’s chance of winning his case. This does not mean the immigrant can game the system. An asylum seeker must still meet all the requirements of our law to win relief. But with such a complicated law, counsel is essential to presenting a complete case. You have represented immigrants in court as a *pro bono* attorney. In a practical sense, how do attorneys make the system function better? How could the appointment of counsel actually lead to cost savings for the immigration courts?

**MS. GRISEZ:** Representation has the potential to increase the efficiency of at least some adversarial immigration proceedings. *Pro sé* litigants are by definition unfamiliar with immigration laws and court procedures. Their lack of knowledge and understanding, particularly when combined with a language barrier, can create delays that impose a substantial financial cost on the government. As a number of immigration judges, practitioners, and government officials have observed, the presence of competent counsel on behalf of both parties helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Immigration Judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens thus would facilitate the more efficient processing of claims, lessen the burden on the immigration courts, and decrease appeal rates. This is particularly true in detained cases.

Approximately 85% of individuals in immigration detention do not have legal representation. In addition, because of the lack of easily accessible and understandable legal materials available (sometimes virtually non-existent due to shortcomings at some detention facilities), detainees often have no alternative for obtaining information about their removal proceeding or the substantive forms of relief that might be available to them. In these instances, immigration judges often must spend extensive time explaining the removal process or in some instances may grant multiple continuances to afford a detainee time to seek counsel. Appointed counsel in appropriate cases, particularly for those not competent to represent themselves such as children and the mentally ill, would help to significantly increase the efficiency of the immigration courts.

Most importantly, the presence of counsel makes it more likely that all meritorious claims for relief will be identified and all corroborating evidence obtained and presented. A just result, as well as a speedy one, must be the goal of a fair system.

## **2. The Effect of the Case Load on Asylum Seekers**

Immigration Judges have to manage an extraordinary case load. Each judge completes, on average, 1,500 cases per year. You have represented asylum seekers throughout your career. What is the effect of this case load, and of the resulting delays, on asylum seekers with valid claims? Do they ever give up because the wait is so long?

**MS. GRISEZ:** Detained cases are necessarily and properly given priority on the dockets of the immigration courts. Unfortunately, this means that in many courts, non-detained merits hearings are being scheduled eighteen months to two years into the future. The impact of these delays is serious, particularly for asylum seekers whose past experiences have already left them traumatized and feeling a lack of control over their lives. For those with family members at risk or in hiding in their home countries, such delays are not only stressful but very dangerous. In some cases, family members are in life or death situations. As a result, an asylum seeker who is otherwise eligible for release must sometimes make a strategic decision to remain in detention in order to ensure a merits hearing within a reasonable period of time. Others who are not detained are forced to live in shelters or squeeze into space donated by friends, relatives, or church groups during lengthy waits for hearing dates. Even if they find lodging, some must work without authorization to feed themselves or their families, thereby creating an adverse discretionary factor that may impact the outcome of their case. Even worse, as you suggest, there are some asylum seekers who, either facing lengthy detention or already having been detained for a significant period, decide to withdraw their claims because they simply cannot cope with prolonged detention.

## **3. Legal Orientation Programs**

How do Legal Orientation Programs help asylum seekers and other immigrants who may fear persecution or torture at home, but face deportation from the United States?

**MS. GRISEZ:** The Legal Orientation Program (LOP) provides individuals in removal proceedings with information regarding basic immigration law and procedure before immigration courts. Depending on the noncitizen's potential grounds for relief, the LOP also provides a referral to pro bono counsel, self-help legal materials, and a list of free legal service providers organized by state. If the basis for a detainee's fear does not appear to qualify him for asylum under U.S. law, the detainee may decide to abandon his case and accept removal.

The LOP is particularly critical for those who may be fleeing persecution. Like others in the immigration system, these individuals often have a lack of understanding of our laws and procedures due to cultural, language or educational barriers. Asylum seekers also may suffer from physical and emotional trauma, and have an inherent mistrust of uniformed officials. Although funded through the Executive Office for Immigration Review, LOP

services are provided to detainees by staff or volunteers from non-governmental organizations in detention facilities around the country. Asylum seekers and others receiving these services are more likely to share their stories and to trust the information they receive through these independent third parties. They receive critical information about the corroborative evidence required pursuant to the Real ID Act, and about their obligation to obtain written translation of foreign documents. Most importantly, because of the remote location of most immigration detention facilities, they are far more likely to be matched with pro bono counsel than they would be absent the LOP.

#### **4. Prehearing conferences**

How could wider use of pre-trial conferences enhance the quality of justice for asylum seekers? Is it your view that immigration judges need to participate in all pre-trial conferences, or can most be held between the parties without requiring a judge to preside?

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

Based on my experience, a pre-trial conference without a judge's participation could resolve procedural issues such as non-completion of background checks or a missing government file. However, most cases presenting legal issues or requiring rulings on admissibility of documents or witness testimony could be handled better with the judge's involvement.

#### **5. Increase in the Immigration Court's Caseload**

What does the American Bar Association recommend with regard to the spike in the case backlog? Are there steps that the courts can take to reduce the pressure on the system? Are there some cases that do not need to be referred to deportation proceedings?

**MS. GRISEZ:** While immigration enforcement activities and funding have increased exponentially in the last decade, this has not been matched by a commensurate increase in resources for the adjudication of immigration cases. Ultimately, to bring the caseload to a manageable level, Congress must provide funding to increase the number of immigration judges, law clerks and support staff.

However, the caseload could be partially alleviated by revising certain DHS policies and procedures to decrease the number of cases being put into the court system. For example, prosecutorial discretion, while used widely in the criminal justice context, has been

underutilized in the immigration context. DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are *prima facie* eligible for relief from removal, to concede eligibility for relief from removal after receipt of a clearly meritorious application, to stop litigating a case after key facts develop that make removal unlikely, or to waive appeal in certain appropriate types of cases. This would allow for more strategic decision-making, ensuring that the U.S. prioritizes the cases of people we most want to remove, such as those who pose a true threat to public safety or national security.

We would also recommend giving DHS attorneys greater control over the initiation of removal proceedings and, to the extent possible, assigning one DHS trial attorney to each removal proceeding. These measures would increase efficiency by eliminating the need for multiple attorneys to become familiar with the same case, and facilitate the exercise of prosecutorial discretion where appropriate.

In addition, there are a number of changes to the process for adjudicating asylum cases specifically that could improve immigration court efficiency overall. First, the one-year filing deadline for asylum applications could be eliminated. Asylum officers and immigration judges spend a substantial amount of time in these cases examining whether the filing deadline was met or if the individual may be eligible for one of the exceptions to the deadline. Eliminating the one-year deadline would preserve limited resources available for evaluating asylum cases on the merits. Second, asylum officers could be allowed to adjudicate, in the first instance, asylum claims raised as a defense in expedited removal proceedings, as is already done for minors in removal proceedings. The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court as part of removal proceedings, just as it happens currently if an affirmative asylum application is not granted. This reform could have a substantial impact on the immigration courts by diverting thousands of cases each year into a system that is less expensive, non-adversarial, and where the adjudicators are trained exclusively for asylum adjudication.

## **6. The Effect of Delays on Attracting *Pro Bono* Attorneys**

I received a number of letters from attorneys in private practice who manage *pro bono* representation for their firms. They explained that one negative result of long delays in scheduling hearings is the difficulty in finding attorneys to take the cases *pro bono*, especially when a case is delayed for two years or more, making it virtually impossible to plan against other potential future assignments. Have you seen this in your practice? Are attorneys declining to take asylum cases?

**MS. GRISEZ:** It is certainly true that associates considering taking on *pro bono* cases in the current economic climate need to consider whether they can provide zealous representation in their *pro bono* matters while still meeting their firms' billable hour expectations. Recently, I have noticed associates asking more specific questions about the time commitment involved in potential *pro bono* matters as well as the likely scheduling of

events such as discovery deadlines, briefing due dates, and court appearances. They want a manageable time commitment and matters that they can readily fit into their other workload. Young associates can find it difficult to commit to a case that will likely be scheduled for a merits hearing a year or 18 months in the future, because they have no idea what other matters they may be assigned to by that time. This problem is not limited to asylum cases, but the lengthy case processing times, especially in non-detained cases, have made individual asylum cases more difficult to place.