Questions for the Record from Senator Dick Durbin
"Strengthening and Reforming America's Immigration Court System"
Wednesday, April 18, 2018

Questions for Judge A. Ashley Tabaddor, President, National Association of Immigration Judges

You testified: "Individual judges have been tasked with responding to complaints voiced by DHS to EOIR management about how a particular pending case or cases are being handled, in disciplinary proceedings without the knowledge of the opposing party."

Please provide more details about this troubling practice by EOIR, including any specific examples.

The current Department of Justice "Immigration Judge Complaint" process does not conform to a judicial model of resolving complaints against judges but instead introduces a system that artificially inflates "complaints" against judges, encourages and condones ex parte communication with EOIR management on particular cases pending before Immigration Judges, and does not provide adequate due process to Immigration Judges. *See* https://www.justice.gov/eoir/immigration-judge-conduct-and-professionalism
As a result of this faulty process, DHS routinely contacts EOIR management with "complaints" about how judges are managing their docket or ruling on cases. Further compounding the issue, EOIR recently has been soliciting information from DHS during the Immigration Judge performance review process that can result in DHS complaining about rulings and management of pending specific cases before the Judge without involving the opposing party (the individuals in removal hearings or their lawyers).

The following are some examples of complaints being raised in problematic ways:

In February, 2017, a DHS prosecutor emailed an Assistant Chief Immigration Judge (ACIJ), a management official within the EOIR at the DOJ, regarding concerns that an Immigration Judge (IJ) did not terminate a case. The IJ had adjourned the case to allow Respondent to obtain new counsel. The Respondent who was *pro se* was not put on notice or advised of any of these conversations which dealt with the specifics of his case and the legal argument of termination of proceedings. So, there was impermissible *ex parte* communication, as well as circumvention of the appeal process.

In April, 2018, the same DHS prosecutor complained that the IJ engaged in a prolonged back and forth in a loud voice at a master calendar hearing regarding criminal convictions. All of this communication about the IJ and the substance of the case at bar went on without the Respondent's attorney's knowledge or participation. Another example of *ex parte* communication, as well as failure to appeal rather than complain.

Also in April, 2018, this same ACIJ solicited email from another DHS prosecutor regarding the same IJ's handing of a motion on another pending matter, without including the Respondent's counsel in the discussion. No justification exists for a supervisor or manager to impose himself or herself into a case, particularly without doing so in an even-handed manner.

In the spring of 2018, DHS complained about how an IJ had cancelled several cases "at the last minute." The ACIJ did not advise any of the Respondents or their attorneys about the complaint. Upon further inquiry, it was revealed that the IJ was required to cancel a week of cases because the IJ was reassigned to do detained cases by televideo at the last minute.

In the spring of 2017, DHS filed a complaint against another IJ for not ruling on a case because a motion to set aside a criminal conviction, upon which deportation was based, was pending. The attorney representing the Respondent was not notified. Why is DHS allowed to back channel such complaints rather than following transparent procedure to file a motion to issue a ruling, served on opposing counsel? Clearly the action taken here by DHS is inappropriate and should have been rebuffed by the ACIJ.

This condoned behavior fosters not only an unethical *ex parte* discussions about pending cases because by their nature they are occurring without the knowledge and participation of the adverse party which violates basic fairness and due process, but they also perpetuate a continuing appearance of impropriety that the EOIR courts are part of immigration enforcement and not an independent tribunal dedicated to due process and fair hearing.

You testified that the Justice Department has made changes to the qualification requirements for judges to prioritize litigation experience over other relevant immigration law experience.

What impact do you expect this change to have?

For years, the basic "qualification" for an Immigration Judge applicant was that he or she be a licensed attorney, in good standing, with at least seven years of experience See, e.g., https://www.justice.gov/legal-careers/job/immigration-judge-0 (sample IJ opening annoucement ending in August 2017); https://www.justice.gov/legal-careers/job/immigration-judge-dallas-0 (sample IJ opening announcement in 2016); https://www.justice.gov/legal-careers/job/immigration-judge-atlanta-0 (sample (IJ opening announcement in 2015.

However on or about the beginning of the fiscal year 2018, the Department changed the posted "qualifications" for an Immigration Judge position. In addition to the previous qualification requirements, the announcement required that an applicant must have experience in "*preparing for, participating in, and/or appealing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority. Qualifying administrative law experience involves cases in which a formal procedure was initiated by a governmental administrative body.*" See e.g., https://www.justice.gov/legal-careers/job/immigration-judge-3 (Announcement closing February 2018); see also, https://www.justice.gov/legal-careers/job/immigration-judge-4 (Announcement closing in March 2018); https://www.justice.gov/legal-careers/job/immigration-judge-5 (Announcement closing in May 2018)

This substantive change to the "qualifications" criteria appears to be used to disqualify otherwise qualified individuals whom the current administration may perceive as "too liberal." For example, immigration law professors, individuals who practice before the Asylum Office, and the Asylum Officers themselves are very knowledgeable and skilled candidates. Yet, their experience, since it is not in a non-adversarial setting, would not qualify them for this new prerequisite litigation experience for the position.

As a result of this change, NAIJ has heard from numerous sources that this new announcement has deterred otherwise qualified applicants from applying for the position.

Questions for the Record for Judge Ashley Tabaddor
National Association of Immigration Judges
From Senator Mazie K. Hirono

1. Fewer than half of all immigrants have attorneys when they appear in immigration court.

a. What is the impact of a lack of representation for so many in the system?

The lack of representation in Immigration Court proceedings results in delays and increases the potential for errors. Immigration Law is one of the most complicated area of the law, and has been compared to tax and bankruptcy law in level of difficulty to comprehend. Immigration Court proceedings are considered "civil" in nature, and thus, indigent individuals are not entitled to appointed counsel. In addition, the majority of the individuals who appear before the Court (over 85%) do not speak English as their primary language, have not had any training in immigration law, and often lack the resources to secure competent counsel. Moreover, while they have a right to due process and must be afforded an opportunity to present their case, they are expected to abide by the procedural and evidentiary standards expected of represented litigants. Therefore, it is not surprising to find that lack of competent representation has profound impact on an individual who is in removal proceedings.

The impact of lack of representation is amplified when the individual is in detention. Detention facilities are often in remote areas where access to counsel, either paid or pro bono, is severely limited. This reduces the likelihood of an individual being able to secure competent counsel. Once detained, close to 80% of individuals complete their cases without counsel. [1] In cases where the respondent may be eligible for relief, lack of competent counsel often results in delays as the Court must continue the hearings so that the respondent can be provided due process in preparing and presenting his or her case before the Court.

b. Does it affect the efficiency of the courts?

Lack of representation decreases efficiency in the courts. It leads to multiple levels of delay in the system.

If an individual appears for their initial hearing, without counsel, it is incumbent upon the judge to explain the nature of the proceedings, the rights and responsibilities of the respondent in the proceedings, and continue the case for the respondent to secure counsel. This requires both additional time during the hearing, as well as, one or more continuances to secure counsel.

Low cost or free legal services are scarce and individuals face tremendous delay in meeting with the pro bono service providers who are in high demand and overwhelmed with cases and lack of sufficient resources to represent all indigent individuals.

[1] Justice Dept. to halt legal-advice program for immigrants in detention, The Washington Post, Maria Sacchetti, April 10, 2018.

If the individual is unable to secure counsel, it is then incumbent upon the judge to conduct what is tantamount to an "intake questionnaire" to determine if the respondent is eligible for relief before the Court. It is not unusual for the questioning to require 20 to 40 minutes of the Court's time, per each individual. Moreover, should the Court find that the respondent is eligible for relief, then the Court must provide a copy of the application to the respondent with a continuance for the respondent to have the opportunity to complete the application.

Additionally, to ensure due process and fundamental fairness in proceedings for *pro se* litigants, multiple continuances are required to allow litigants to obtain evidence and information in support of their applications for relief from their home countries, to provide the *pro se* litigants sufficient time to ensure that the applications for relief have been filed pursuant to regulation, and that DHS has been served with supporting documents pursuant to practice guidelines and regulations. All applications for relief must be completed in the English language, and copies of any supporting documents translated into English with a proper certificate of translation; another high hurdle for an unrepresented respondent to fulfill. Had the respondent been represented, counsel would have been expected to appear in court having already conducted the intake questionnaire, completed the application for relief, complied with the DHS biometrics requirements and otherwise be ready to set the case for trial. Representation by counsel allows an Immigration Judge to quickly assure that a respondent has been advised of his rights and potential relief, rather than having to start at the very beginning.

In addition, there are many things that an Attorney can do for an individual that the individual may have difficulty doing alone. Some examples include: investigating claims to U.S. citizenship, pursuing visa petitions or other forms of relief outside of Immigration Court, obtaining documents in support of the case, obtaining affidavits from witnesses unable to be present in court, and obtaining expert testimony in support of a case. Neither the Judge nor the Department of Homeland Security can adequately assist the respondents in this process.

If the individual remains unrepresented for the trial date, then the judge must ensure that the record is sufficiently developed through questioning and inquiry of the respondent and government counsel. Had the individual been represented by counsel, the Court could have saved times by allowing both counsel to engage in a pre-trial conference to narrow the issues in advance of the hearing rather than having to spend time during the hearing to determine what issues remain to be resolved. Lack of representation at the merits hearing stage often greatly lengthens the time spent in Court as it is far more difficult for the Immigration Judge to determine if information proffered is relevant, tangential or salient to the claim. As it is the duty of the Immigration Judge to create a full record for potential review, this burden on the Court when a respondent is unrepresented is significant.

It is our experience, when noncitizens are represented by competent counsel, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly. A higher percentage of competent attorney representation, through vigorous pro bono or other programs would increase court efficiency and ultimately result in cost savings.

c. Does it affect the fairness of the process or the outcome?

Multiple organizations have provided data and statistics to show that unrepresented *pro se* respondents are at a disadvantage in immigration proceedings when not represented. While in some instances lack of counsel may reflect the respondent's ineligibility for relief, in other cases, it creates an insurmountable obstacle in securing relief.

As noted above, an attorney may be able to investigate and develop claims for relief that an individual could not do on his or her own, such as claims to U.S. citizenship and visa petitions. For example, a private attorney can assist a victim of a crime in navigating the U visa process, especially in procuring certification of cooperation from a law enforcement official. Also, it is difficult to imagine a minor child being able to negotiate the process of obtaining a special immigrant juvenile visa without the assistance of counsel. Thus, generally, immigrants with competent attorneys can better present their case at every stage of the court process.

2. The Department of Justice has decided to suspend the Legal Orientation Program, which helps so many unrepresented immigrants have even a basic understanding of the process.

What do you think the impact of that suspension will be on immigration judges and immigration courts?

We are happy that the Attorney General has announced that for the time being the Legal Orientation Program (LOP) will not be suspended. The vast majority of Immigration Judges who have had the benefit of the presence of the LOP in a detention facility have found the program to be of tremendous help in providing assistance to judges to process cases in a more efficient and fundamentally fair manner. The LOP provides lengthy group information sessions consisting of detailed explanations of a individual's due process rights in a non-adversarial setting. Additionally the LOP assists Immigration Courts by assisting individuals in filling out applications for relief in settings where respondents do not speak English and have no access to reliable individuals in completing the application for relief. Alternatively, if the respondent is not eligible for relief, LOP is a source of information to allow the respondents to better understand their options and make an informed decision in foregoing additional litigation and accepting an order of removal. This assists the Court in not only ensuring that due process is provided but that the fundamental fairness of proceedings is met. It further assists in reducing detention costs.

The Immigration Court help desk provides similar services to individuals in a non-detained setting.

While, Immigration Judges are by regulation and statute required to provide rights advisals to pro se respondents, the LOP services help reduce the amount of court and judge time necessary to ensure that the respondents are fully aware of their rights and responsibilities. Additionally, LOP provides information and services beyond that required to be given by Immigration Judges. LOP services help reduce the number of times the case has to be continued for *pro se* litigants to complete and support their applications for relief. Moreover, when an application has been completed with the assistance of LOP, the Court can more readily rely on

the contents of the application and thus narrow the scope of inquiry during trial, thereby saving court time and resources. It is noteworthy that the Judges' experiences are consistent with the findings and recommendation of the Booz Allen Hamilton report ("Report) assessing the Immigration Court, disclosed recently by the Department of Justice. The Report finds that the LOP program should not only be preserved but expanded.

Again, NAIJ is pleased that since the hearings before this subcommittee, the Department has temporarily reconsidered its decision in halting these programs but NAIJ hopes that the decision to continue the services will become permanent.

3. Currently, unaccompanied alien children under the age of 18 who enter the United States alone are not entitled to have legal representation provided for them in removal proceedings before an immigration judge and in any related appeal proceedings. This means that some of these children have to represent themselves in immigration proceedings.

Do you think children under 18 are equipped to represent themselves in immigration court?

While this decision must be made on a case-by-case basis, there are clearly instances where a minor child cannot represent himself/herself before the Court. During a training session provided several years ago by the Department, experts in child development field noted that Courts and judges should be mindful of children's developmental milestones, most of which are not fully complete until a person has far surpassed the age of majority. For example, emotional and intellectual maturity, impulse control, judgement calls, ability to grasp complex concepts are all yet to be mastered by a juvenile. Moreover, the ability to fully mature is greatly impaired when a child has experienced malnourishment, emotional and physical trauma, or similar challenges in their childhood.

Thus, the Court has concerns about the Department's recently (December 2017) issued Operating Policy and Procedural Memorandum (OPPM) on juvenile cases. This OPPM stands as a stark contrast to a previous OPPM on the same subject, issued in 2007, where the Department recognized the special considerations necessary for addressing cases of juveniles. For example, the new memo removes suggestions contained in the 2007 memo for how to conduct "child sensitive questioning" and adds reminders to judges to maintain "impartiality" even though "juvenile cases may present sympathetic allegations." The new document also changes the word "child" to "unmarried individual under the age of 18" in many instances. In cases where children are called to testify, the old guidance instructed judges to "seek to limit the amount of time the child is on the stand." The new guidance says that judges should "consider" limiting the child's time on the stand "without compromising due process for the opposing party," which is generally a government prosecutor.

As NAIJ has stated before, the "overall tone" of the memo "is very distressing and concerning to Immigration Judges;" "There is a feeling that the Immigration Courts are just

being demoted into immigration enforcement offices, rather than neutral arbiters;" and "There has been a relentless beating of the drum toward enforcement rather than due process." [2]

Unlike in Family Court proceedings, where Family Court Judges are empowered to appoint guardians ad litem for children and the best interest of the child is a recognized guiding principle, Immigration Judges can only reach out to child advocates but have no authority to appoint guardians or counsel for minors or to consider the child's best interest as that factor does not appear in the Immigration and Nationality Act provisions. Pro Bono/free service providers fill an invaluable role for our Court, by educating and guiding unrepresented individuals and providing direct representation when possible. Their efforts are a huge step towards leveling the playing field in our proceedings and helping Immigration Judges assure that justice is served in each and every matter that comes before us. Their presence is judicially economic as cases can be decided more expeditiously without compromising due process or risking erroneous determinations. The important contribution of counsel to the process should not be underestimated.

4. Earlier this year I introduced a bill first introduced by Senator Harry Reid called the Fair Day in Court for Kids Act. This legislation requires that unaccompanied children be provided with counsel at the government's expense.

Do you support the provision of unaccompanied children with counsel at the government's expense?

While our members have had some concerns about government funding for attorneys, given severe shortages in funding to the Immigration Courts overall, our judges agree that *Pro Bono* service providers fill an invaluable role for our Court, by educating and guiding unrepresented individuals and providing direct representation when possible. Their efforts are a huge step towards leveling the playing field in our proceedings and helping Immigration Judges assure that justice is served in each and every matter that comes before us. Their presence is judicially economic as cases can be decided more expeditiously without compromising due process or risking erroneous determinations. The important contribution of counsel to the process should not be underestimated. NAIJ endorses efforts to provide free legal services to those appearing before the Immigration Court, especially vulnerable populations such as the mentally impaired or juveniles.

[2] Exclusive: U.S. memo weakens guidelines for protecting immigrant children in court, Reuters December 22, 2017, Mica Rosenberg