

Questions for the Record for Hilarie Bass  
From Senator John Cornyn

1. Ms. Bass in your testimony you talk about legal representation for aliens. Unlike in criminal proceedings, aliens in removal proceedings are not provided representation but can secure representation at no cost to the government. Some advocates argue that government provided legal representation should be mandated for aliens in removal proceedings.

- a. **Do you believe the U.S. constitution requires the Government to pay for representation of aliens in removal proceedings?**

The courts apply a case-by-case approach to determine whether the Fifth Amendment requires counsel to be appointed for noncitizens in certain immigration cases. This standard was first set out in the Sixth Circuit case of *Aguilera-Enriquez v. INS*. The court held that “the test for whether due process requires the appointment of counsel for an indigent noncitizen is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness’ — the touchstone of due process.” While the courts to date have rejected an absolute right to appointed counsel in removal proceedings, the ABA believes that this “fundamental fairness” test may in appropriate cases require government appointed counsel.

- b. If yes, why?

We believe this test fails in cases of certain vulnerable populations, particularly where the respondent is not competent to pursue immigration relief on their own. Unaccompanied children and mentally ill or disabled persons, for example, may not be able to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. In order to receive the “full and fair hearing” required under the law, we believe that there is no adequate substitute for legal counsel.

Aside from constitutional due process considerations, as a policy matter, increasing legal representation is a wise investment that would benefit both respondents and the immigration court system. Legal representation benefits the system overall by increasing efficiency and reducing the costs of immigration proceedings (by, i.e., improving appearance rates in court, reducing the number of requests for continuances, and reducing the length of time in custody for certain respondents). Representation also ensures that viable claims for relief are advanced and others are not, that the proper legal standards are applied, and that decisions turn on the full merits of the claims, all of which reinforce the legitimacy of immigration proceedings. We therefore also would urge Congress to enact a statutory right to counsel for certain vulnerable populations such as unaccompanied children and the mentally ill and disabled.

2. Director McHenry stated in his testimony that EOIR’s performances measures are designed to assess efficiency and ensure quality. He also said EOIR’s standards are in line with the standard guidelines recommended by the ABA.

**a. Are EOIR's measures different from the ABA guidelines for evaluation of judicial performance?**

On March 30, 2018, Director McHenry issued a memo ("March 30<sup>th</sup> memo") announcing that new performance metrics would be added to the current immigration judge Performance Work Plan and would be utilized in performance appraisals. The metrics consist of a lengthy list of time-based case production quotas and deadlines for which the judges would receive "satisfactory" or "unsatisfactory" ratings.

The ABA recommends a judicial performance review model based on the ABA's Guidelines for the Evaluation of Judicial Performance (Guidelines) and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System. While the Guidelines provide for the evaluation of administrative capacity, it is only one of five broad-ranging criteria that must be given equal consideration, including legal ability, integrity and impartiality, communication skills, and professionalism and temperament. In addition, the Guidelines provide that evaluations should operate through an independent and diverse committee, including members of the bench, the bar, and the public, and that evaluations should not be used for judicial discipline.

These and other essential components contained in the Guidelines do not appear to be contemplated by the evaluation criteria outlined in the March 30<sup>th</sup> memo and the Performance Work Plan. They appear instead to be singularly focused on rating each individual judge's performance based solely on meeting strict numeric case quotas and deadlines. Therefore, we do not believe that the performance evaluation model that EOIR intends to implement is consistent with the ABA's Guidelines.

The Department of Justice also had issued a separate memo on January 18, 2018 establishing EOIR's specific priorities and goals in the adjudication of immigration court cases. The memo cited the ABA Standards Relating to Trial Courts to support the proposition that "[c]ourt performance measures and case completion goals are common, well-established, and necessary mechanisms for evaluating how well a court is functioning at performing its core role of adjudicating cases."

As a stand-alone proposition, that is correct. What the memo fails to point out is that the ABA Standards were specifically designed for state trial courts, which are sited in the judicial branch of state governments and are therefore independent from executive control. State trial judges are either appointed or elected for set terms and generally cannot be removed without cause. This stands in stark contrast to the current status of immigration judges. In addition, we would emphasize the significant difference between the adoption of case completion goals which are intended to measure the performance of the court according to certain standards, and the imposition of numeric case production quotas upon which individual judges will be evaluated. The latter has serious implications for decisional independence.

Questions for the Record for Hilarie Bass  
From Senator Mazie Hirono

1. 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?**

The ABA believes that suspending or terminating the Legal Orientation Program (LOP) would have significant, negative consequences for immigration judges and immigration courts. Numerous studies have shown that LOP participants cases move an average of 12 days faster through the court system. Without LOP, immigration judges will be forced to spend additional, and scarce, court time ensuring that respondents are aware of their rights and responsibilities. This, in turn, will slow the movement of cases through the courts, which already face a historically high backlog.

2. 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?**

The ABA believes that effective legal representation is vital to ensuring due process for unaccompanied children in immigration proceedings. Due to their age, lack of education, language and cultural barriers, and the complexity of U.S. immigration law, these children face often insurmountable obstacles to proving their claims for protection before an Immigration Judge or asylum officer on their own. The vast majority of these children are not able to determine whether they might qualify for legal relief. In fact, on their own, they may not be able to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings. Without a lawyer, immigrant children with legitimate claims for relief do not have a fair chance of obtaining a favorable outcome.

3. 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?**

The ABA has long supported government appointed counsel, if necessary, for unaccompanied children. We first adopted this position in 2001, supporting appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and

proceedings. We reiterated our policy in 2004, with the adoption of comprehensive ABA *Standards for the Custody, Placement and Care, Legal Representation, and Adjudication of Unaccompanied Alien Children in the United States*. Most recently, in 2015, we reaffirmed our position in support of appointed counsel and urged immigration courts not to conduct any hearings before children have had the opportunity to consult with counsel. We strongly support legislation such as the Fair Day in Court for Kids Act, which will ensure that the due process rights of children are protected by providing for appointed counsel where necessary.