"Building an Immigration System Worthy of American Values"
U.S. Senate
Committee on the Judiciary
Wednesday, March 20, 2013
Statement of Paul Grussendorf

Thank you Chairman Coons, Ranking Member Grassley, and distinguished members of this Committee. It is my honor to appear before you today.

I've spent a total of twenty eight years working in the area of immigration law. I've been the director of a law school immigration clinic, an immigration judge appointed by the Attorney General to make the tough calls involving deportation and immigration benefits, and a DHS adjudicator of refugee applications with U.S. Citizenship and Immigration Services (USCIS).

For four years I was the sole immigration judge responsible in Philadelphia for the Institutional Hearing Program, in which immigrants who are convicted of federal offenses receive accelerated removal hearings while serving their sentences. I conducted hearings in the Allenwood Federal Correctional Institute in Allenwood, Pennsylvania. Later I was responsible, in San Francisco immigration court, along with my excellent colleague Judge Michael Yamaguchi, for the detention docket, presiding over the cases of all migrants who were detained by Immigration and Customs Enforcement (ICE) in northern California and placed in removal proceedings. These included those who were detained on the street by ICE, those who were taken into custody by ICE after completing prison sentences and being released from state and county jails, and those who were detained at San Francisco International Airport due to document irregularities and other issues of suspected fraud. These also included the tragic cases of unaccompanied minors who were detained pending a resolution of their cases. I adjudicated a total of over 8000 cases. These experiences have tempered my remarks today relative to the state of immigration detention and the issue of judicial discretion.

As a judge I presided over scores of cases involving immigrants detained by ICE, who were deported after months or even years of unnecessary detention. Typically migrant workers, construction laborers, hotel and restaurant employees would be detained during an ICE sweep of an immigrant community or factory raid. They would usually already have spent several weeks in jail before making it to court. I would inform such "respondents" (responding to charges of removability from the U.S.) at their initial court hearing, of their right to counsel, though not at the expense of the government, and whether or not, given their individual circumstances, they had the right to a bond determination. Many respondents would finally accept deportation rather than seeking relief from removal in court because of the frustration of having been detained for so long –either because they were deemed ineligible for bond under the law, or they could not afford to pay a bond even though they were eligible for release. Some of them would have qualified for refugee status, and others would have had other legal means to remain in the country. The vast majority of such detained migrants posed no danger to the community or public safety, and often had no criminal convictions that would mandate their detention. Nevertheless, they would ask me to sign a deportation order rather than enduring additional time

in detention while fighting their case. Sound policy would have encouraged their release to their families so that they could continue as wage earners, sustaining their families (often consisting of U.S. citizens), and so they could continue contributing to the U.S. economy.

RESTORING JUDICIAL DISCRETION

Restore due process and judicial review over immigration cases.

Over the past two decades, Congress has severely curtailed the discretion of immigration judges to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. Moreover, under current law, the federal courts have also been stripped of their jurisdiction to review most deportation and agency decisions. It is the great frustration of the immigration bar as well as my former colleagues on the bench that the immigration judges' discretion has been so whittled away. Congress should restore judicial review and ensure due process to all people who are facing deportation

Our system, amended in 1996 by harsh provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), often blocks individuals subject to removal from presenting evidence of their equities to an immigration judge. Instead, low-level immigration officials are empowered to act as judge and jury, and federal courts have been denied the power to review most agency decisions.

Congress should restore fairness and flexibility to our system by expanding the authority of immigration judges to consider the circumstances of each case. Judges are drawn from the ranks of immigration professionals, those who have spent their careers working in government as well as those who have advocated on the side of immigrants. They should be trusted to make the correct calls. The numbers bear out their approval ratings. In fiscal year 2012, immigration judges completed 382,675 cases. Of those decisions, only a total of 26,099 were appealed to the Board of Immigration Appeals. It appears that most parties to the proceedings come away satisfied with the judges' decisions.

Cancellation of Removal

One of the few remaining opportunities for an immigration judge to grant relief from deportation based on a person's specific circumstances is called "Cancellation of Removal." Cancellation relief is available for noncitizens who have been in the U.S. for a long time, a minimum of seven years for lawful permanent residents, and ten years for non-LPRs. But Cancellation has very stiff requirements that often bar people – including long-time LPRs – from relief despite significant equities. The hardship bar, that one must show "exceptional and extremely unusual hardship" to a qualifying relative, that is a U.S. citizen spouse, child or parent, is set too high. Congress, when enacting this provision, did not inform the adjudicators how to interpret that language. Nowadays, a successful Cancellation case largely comes down to showing that the respondent's children suffer from some grave disease for which they could not receive medical care in the prospective country of removal. A very senior judge with whom I spoke last week

lamented that Cancellation has become the "sick kid" provision. These requirements restrict a judge's ability to look at the totality of circumstances in a case and grant appropriate relief.

A case that illustrates the point about judges needing more discretion and how the hardship bar is too high for Cancellation: the case of Janelle Ngo Chin, a 35 year old woman from the Philippines had a Cancellation hearing. She is the mother of three U.S. citizen children. She was convicted seventeen years ago, at the age of nineteen, for petty theft. She is the sole caregiver of her aging parents, who are not U.S. citizens, both of whom have multiple health problems, including the father suffering several heart attacks and the mother battling both diabetes and cancer. The immigration judge felt compelled to deny the Cancellation application, finding that the hardship presented did not rise to the level of "exceptional and extremely unusual." The Board of Immigration Appeals initially upheld the judge's decision and the case was appealed to the 9th Circuit Court of Appeals, but during this time the parents' health has continued to deteriorate and the children have been suffering emotionally at school. ICE opposed requests for Prosecutorial Discretion, but the BIA recently granted a motion to reopen and remand to the judge based upon the new evidence of hardship in the family. The case is now pending further deliberations. This long journey of several years litigation and appeals could have all been avoided if the judge had initially had the discretion to grant the case based upon a lower hardship bar, one of "extreme hardship."

Among the bigger challenges for LPRs is that any "aggravated felony" conviction automatically bars relief, despite the fact that this category now includes many misdemeanor offenses and crimes involving no violence. Additionally, the barriers to cancellation relief are retroactive, meaning that someone who pled guilty to a disqualifying offense *before the criteria were even enacted* is still penalized. Furthermore, the cancellation rules require an applicant to have been present in the U.S. continuously for a minimum period of years. But this "continuous presence" period is cut off when DHS issues a charging document or when a disqualifying criminal offense is committed, whichever is earlier. (this is called the "stop-time rule"). This means that individuals may be barred from relief by something that happened a very lont time ago, even if they can demonstrate rehabilitation or substantial hardship to qualifying family members in the U.S.

Legislation should fix these problems and return to those who have deep roots in our communities and have not committed a serious offense the right to apply for Cancellation of Removal. Immigration judges should have discretion to grant relief in deserving cases by looking at the hardship to the respondent in proceedings, as well as the hardship to family members, and judges should also be encouraged to evaluate the contributions to society that an individual has made over the years.

Discretionary Waiver of General Applicability

Currently, immigration law provides only narrow and specific waivers for some noncitizens in some circumstances. Each waiver has a different (often complex) standard, and each applies to only *one segment* of immigration adjudications – either when one is technically seeking "admission" to the U.S. or when one is about to be deported from the U.S. A universally-applicable, simple and generous waiver could be proposed to provide judges the authority to grant relief. For those with prior criminal offenses, there is a waiver in the "admission" context, but it is far too narrow, does not apply to any minor convictions, and ironically punishes some

AILA InfoNet Doc. No. 13031447. (Posted 3/20/13)

long-time lawful permanent residents (LPR) more harshly than other noncitizens. In the deportation context, many minor, old convictions categorically bar even long-time LPRs from relief.

In most cases it makes no sense to place individuals into removal proceedings because of criminal violations that are remote in time. Sometimes incarceration **does** work, either as a rehabilitative or preventive measure. As a judge I saw over the years scores of individuals who, many years earlier, had been convicted of an offense, had served their time, and had gone on to form families, create small businesses, buy houses and pay mortgages, even become "model citizens" of their communities. I personally felt in many such cases that a couple of years in the slammer had brought home to such offenders the serious consequences, including deportation and banishment from our great nation and destruction of their families, of their actions. Yet, years and even decades later, ICE would come knocking, and often, because of the categorization of "aggravated felony" of their offense, they were left with no legal means to remain in the U.S. Current immigration law provides only limited waivers for those with convictions. The lack of more generous waivers has resulted in deportations of people with extremely compelling life circumstances.

Expand Time Frame of Voluntary Departure Often, when a migrant is apprehended and placed in removal proceedings, all that is desired is a reasonable amount of time to put affairs in order, perhaps sell a house or a business, before voluntarily returning to the home country. Voluntary Departure is a statutory remedy by which an individual can avoid an order of removal, as long as one is capable and willing to pay for the means of departure. Unfortunately, the period of voluntary departure has been reduced to a mere 120 days, thus again impinging upon the discretion of the judge to evaluate the circumstances and act according to the best interests of the community. Perhaps in many cases all an individual needs is a maximum of 120 days to depart. But several circumstances come to mind: a family is facing removal and would opt for voluntary departure, but the teenage child needs six more months to finish high school. Or, a wife is facing a serious operation which will, including period of convalescence, necessitate several months of bed stay beyond the period of 120 days. Under today's law, the respondent facing such a dilemma might opt for a costly and lengthy battle in court, rather than accepting the first opportunity for a grant of Voluntary Departure, because the stakes for the family member are so high. Judges should be afforded the discretion to use their judgment and grant lengthier periods of Voluntary Departure.

The above proposals would allow our immigration judges to more effectively do their job. Permitting judges to consider the facts presented by both parties and then to grant relief based on merit will give the American people a legal immigration system that is efficient and just, one that will serve our nation well in the 21st century.

REFORM OF IMMIGRATION DETENTION SYSTEM

The use of detention for immigration enforcement has grown dramatically in recent years. In fiscal year (FY) 2011, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) **detained an all-time high number of 429,000 individuals** at a cost of about

$166 per person per day. For context, in FY 1994 the federal government detained fewer than 82,000 migrants. Immigration detention is a civil authority, despite the use of penal institutions. The sole purpose of immigration detention is to ensure compliance with immigration court proceedings and judicial orders.

For many migrants in ICE custody, detention is not legally required. In these cases, ICE has the discretion to decide whether a person should be detained, released, or placed into an alternative to detention (ATD) program. Historically, ICE has not always exercised this discretion, resulting in the needless detention of hundreds of thousands of people, and costing taxpayers billions of dollars. Recently, ICE developed and deployed a risk assessment tool to make informed detention decisions based on individual circumstances. However, because current appropriations language requires ICE to maintain 34,000 daily detention beds, individualized detention decisions may be overridden by the requirement to meet a detention quota.

At a time of unprecedented pressure to cut government spending, we should be reducing detention costs and should not be detaining people who pose no significant risk of flight or danger to the community. The total price tag to the American taxpayer is $2 billion annually. Effective alternatives to detention have proven overwhelmingly successful at a cost of a few dollars a day per person.

End mandatory spending on a fixed number of detention beds.
Homeland Security appropriations language has been interpreted as mandating a daily detention level of 34,000 people, an approach that does not exist in any other law enforcement context. The bed "mandate" distorts agency priorities and results in the unnecessary use of jail detention on people who do not need to be detained, and it makes any meaningful discretion and prioritization in immigration enforcement impossible. The bed mandate should be eliminated from future appropriations bills. Eliminating the bed mandate would enable DHS to increase the use of alternatives to detention and reduce spending on detention and custody.

Detention is a costly way for the government to ensure appearances at immigration proceedings and protect public safety. Legislation should permit judges to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities, and to consider in each case whether continued detention is necessary and lawful. Legislation should also specify a clear timeframe within which ICE must make its decision whether to formally charge a noncitizen after arrest. Detainees often languish in detention with no hearings scheduled in their cases because charging documents have not been served on them or filed with the immigration court.

I propose that in the routine case of a migrant laborer or mother of U.S. citizen children who is detained at a traffic stop or community sweep, the migrant should be processed, issued charging documents, given a court date and sent home. Let them continue to provide for the family and continue to strengthen the community and the economy.

Eliminate mandatory detention except for serious offenders.

Each year mandatory detention results in the jailing of tens of thousands of people who pose no danger to their communities and are not a flight risk. Feeding this detention system is the mandatory detention provision of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), requiring that most people in deportation proceedings, based on their past offenses, no matter how remote in time, are held in custody, even if they are non-violent and the criminal system has determined they are not a risk to the community. Such a system cannot differentiate between a terrorist and a single mother of U.S. children or a green card holder who's lived here his whole life. The respondent remains in custody until completion of the immigration court case, and pending any appeals to the Board of Immigration Appeals and federal circuit courts, which can easily amount to years of detention.

Section 236(c) of the Immigration and Nationality Act provides a laundry list of types of crimes that make an individual subject to mandatory detention, most of them non-violent in nature. A term of imprisonment of one year makes one subject to mandatory detention. In many cases the sentence will be suspended, meaning the person does not even serve the time. For example, a college student who steals a candy bar from a convenience store and receives a one year suspended sentence will remain in ICE custody pending the outcome of his removal case. A case I presided over in San Francisco illustrates the problem:

> A mother from El Salvador who had received a suspended sentence for shoplifting baby diapers for her U.S. citizen child came before me on the custody docket, and I had to inform her that I could not even consider bond in her case. She chose deportation so as not to be separated from her infant, although she may even have been eligible for a green card.

Another case I heard comes to mind:

> An Iranian woman, lawful permanent resident who was married to a U.S. citizen and had two U.S. citizen children, was diagnosed with schizophrenia. She had picked up a couple of shoplifting convictions. She had already been granted asylum from Iran, and we heard her asylum application again. ICE insisted she remain detained during a protracted hearing which, including appeal lasted over a year. A female Iranian psychiatric expert testified to the horrible fate awaiting someone in the respondent's condition in Iran, and yet ICE kept her detained until the Board of Immigration Appeals finally upheld my grant of asylum. During this time she was separated from her very supportive family and medical professionals whose assistance she desperately needed.

Do we really want to be paying for "three hots and a cot" for such individuals when thye could be out working and helping to sustain their families and the economy?

According to 2009 ICE data, 66 percent of detained immigrants were subject to mandatory detention but only 11 percent had committed violent crimes (for which they had already served their time). Mandatory detention also sweeps up primary caretakers, leading to complications with family structure and child custody. Mandatory detention laws should be repealed for all but

violent offenders. In addition, Congress should establish criteria to ensure that DHS uses detention only as a last resort.

Alternatives to Detention (ATD):
ATDs are a proven and highly cost-effective approach for ensuring that individuals appear at immigration proceedings. There are a range of options that ICE can utilize to encourage compliance. Some options, like release on recognizance or bond, carry little to no cost. More intense forms of supervision and monitoring, such as enrollment in an ATD program, cost around **$22 per person per day.** Compared to the billions spent each year on detention operations, ATDs represent a smarter, cheaper, and more humane way to ensure compliance with U.S. immigration laws. ATDs may also be more appropriate for detainees with certain vulnerabilities. Of particular concern are asylum seekers, torture survivors, the elderly, individuals with medical and mental health needs, and other vulnerable groups.

Policy Recommendations
Congress should require any restriction of liberty to be the least restrictive form of custody necessary and proportionate to meet government interests. All individuals in detention, including those subject to mandatory custody, should be screened for eligibility for alternatives to detention and placed in such programs unless they pose a flight risk or threat to public safety. Congress should also direct additional funding for ICE to contract with non-profit organizations to create a broader spectrum of ATD programs. Community-based non-profits are best suited to build trust with migrant participants, identify the needs of individuals, address those needs with available resources, and build resilience in the individuals to face the range of potential outcomes in their legal cases. Non-governmental organizations are mission-driven and generate more community resources because of their ability to attract volunteers and donations of goods and services.

Access to Counsel

Respondents in immigration proceedings, especially those who are unrepresented, face one of the most complex legal systems, yet they are not guaranteed representation if they are unable to afford one. Having immigration counsel directly correlates to successful outcomes for noncitizens pursuing claims to relief ranging from persecution abroad or family separation from U.S. citizen relatives.

The immigration court system is struggling to meet the demands of rapidly increasing caseloads, including record-breaking backlogs of about 1.5 years. The high numbers of respondents appearing in proceedings without counsel is a major contributing factor to this large backlog.

When the immigration system fairly and accurately processes cases, it reduces court delays and obviates the need for costly appeals, helping overburdened immigration courts and federal courts. Adequate process aided by competent counsel is more efficient for the system as a whole.

EOIR has stated that "[n]on-represented cases are more difficult to conduct. They require far more effort on the part of the judge."[1] If noncitizens lack lawyers, immigration judges must guide them through the proceedings, often through an interpreter. Judges frequently continue cases to give noncitizens time to try to find counsel. The Administrative Conference of the United States recently advised that "funding legal representation for . . . non-citizens in removal proceedings, especially those in detention, will produce efficiencies and net cost savings."[2] The American Bar Association also concluded that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"[3]

Every individual in immigration removal should have the right to counsel, and if that person cannot afford counsel, the government should provide counsel – especially if the person is detained. **It is un-American to detain someone, send them to a remote facility where they have no contact with family, place them in legal proceedings they are often unable to comprehend, and not to provide counsel for them**.

In Conclusion

Congress does not have an easy task before it given the present heated debate and emotional demands for immigration reform. But from the perspective of the bench, I am confidant that if some of the foregoing proposals are considered and enacted, we will have a more fair, more rational, and more economic immigration system that ensures due process and is worthy of American values.

---

[1] Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices (Dec. 2004), 8, available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf

[2] Administrative Conference Recommendation 2012-3: Immigration Removal Adjudication (adopted June 15, 2012), 3, available at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Recommendation-2012-3-Immigration-Removal-Adjudication.pdf

[3] American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. (2010), 5-8.