



**Comments to the Administrative Conference of the United States on the draft report
“Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication”
February 17, 2012**

Introduction:

Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. As part of this effort, we seek to ensure that refugees have access to asylum by advocating for fair asylum procedures, by pressing for U.S. compliance with international refugee and human rights law, and by recruiting and training pro bono attorneys to represent indigent asylum seekers in U.S. asylum and immigration court proceedings, as well as before the Board of Immigration Appeals and U.S. federal courts. Human Rights First operates one of the largest and most successful *pro bono* asylum representation programs in the country. Through our partnership with law firms in New York, New Jersey, Washington DC, Virginia, and Maryland, Human Rights First provides legal representation, without charge, to hundreds of indigent refugees each year. Our asylum advocacy is informed by the experiences of our refugee clients and their *pro bono* lawyers.

Human Rights First has been deeply concerned about the multiple challenges that have affected the fairness of the immigration court system within the Executive Office for Immigration Review (EOIR) over the years, including the:

- overwhelming lack of legal representation for asylum seekers and immigrants unable to afford private counsel, as documented by various studies, including the recent report of the Katzmann Study Group;¹
- impact of escalating detention, often in remote locations, on access to fair proceedings and counsel;
- lack of sufficient resources to ensure adequate staffing and training at the immigration courts;
- extensive delays in immigration court proceedings due to inadequate resources and the significant increase in enforcement in recent years; and
- increasing use of video teleconferencing to conduct merits hearings, including in cases involving requests for asylum and protection from return to persecution or torture.

Human Rights First appreciates the attention of the Administrative Conference of the United States (ACUS) to the challenges facing the U.S. immigration court system and are grateful for

¹Accessing Justice: the Availability and Adequacy of Counsel in Immigration Proceedings, *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

the opportunity to comment on the draft report, “Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication.”

As detailed below, we welcome a number of the recommendations included in the report, in particular:

- Suggesting steps to decrease the number of cases requiring time at the immigration courts by allowing many asylum cases to be resolved more efficiently through an initial interview at the asylum office;
- Urging the U.S. Department of Homeland Security (DHS) to allow for a presumption of work authorization eligibility 150 days after the application has been filed and for EOIR to stop using adjournment codes to track delays in asylum adjudications; and
- Encouraging EOIR seek additional appropriations for expansion of the Legal Orientation Program (LOP) and prioritize LOP within the U.S. Department of Justice (DOJ) budget.

We also urge that additional recommendations be included in the report, including:

- Congress should provide appropriations to ensure the immigration courts have the necessary staffing (judges, law clerks, etc) to hear cases – in person – in a fair and expeditious manner;
- Congress should eliminate the one asylum filing deadline;
- Congress should provide funding to expand LOP nationwide so that all detained immigrants appearing before the immigration courts have access to legal information;
- U.S. Immigration and Customs Enforcement (ICE) and EOIR should improve coordination related to location, court facilities and staffing, and availability of LOP at all detention facilities especially at those touted as “model” facilities; and
- EOIR should revise its database to track key matters relating to fairness and efficiency in the courts, including video conferencing and the one year asylum filing deadline.

For ease of review, Human Rights First is presenting our comments and suggested edits in the same order as the sections of the draft report. These comments are not intended to be comprehensive. The absence of comments on any particular issue should neither be interpreted as concurrence nor dissent with the findings, rationale or recommendations made in the draft report. As our expertise is informed primarily by our pro bono asylum legal representation program, we have limited our comments to those aspects of the report that most directly impact asylum seekers.

COMMENTS TO IMMIGRATION REMOVAL ADJUDICATION: OVERVIEW OF ORGANIZATION AND PROCESS.

- On page 18, the draft report states, “proceedings in immigration court basically implicate two questions: is the respondent in the country illegally and, if so, is the respondent

nevertheless eligible for one of the limited forms of statutory relief from removal, such as asylum.” Human Rights First would recommend either removing the specific reference to asylum here, or expanding it to give examples of other forms of relief from removal regularly filed in immigration court, including cancellation of removal and adjustment of status.

- In the same vein, on page 19, under “Merits Decisions and Other Completions,” the draft report list in bullets, “30,838 grants of ‘relief,’ such as asylum.” By only listing asylum, a reader may be left with the inaccurate impression that asylum grants constitute a higher percentage of grants of relief in immigration court than they actually do. In FY 2010, the immigration courts only granted asylum in 9,869 cases, the equivalent of 32% of their total grants of relief.² We would recommend either including other forms of relief after “such as asylum” or deleting the “such as asylum” clause.
- On page 23, the draft report notes that 44% of “completed proceedings involved respondents who were detained during the adjudication.” It would be helpful to provide information about the speed of the detained docket, EOIR’s case completion goals for the detained docket, or how the increased percentage of detained cases has put stress on the overall court system.
- On pages 23-24, the draft report discusses detained cases but provides only limited discussion of the impact of detention on immigration court proceedings, particularly from the standpoint of the respondent. For example Human Rights First calculated that in October 2011, over 40% of ICE detention beds were located more than 60 miles from an urban center.³ Detention impedes an individual’s ability to obtain legal counsel (and legal information), contact witnesses and gather evidence for case preparation, particularly due to the expense of phone calls and lack of access to email. It also compromises an applicant’s presentation in court, as immigrants in detention often appear in court in their blue, orange or red prison jumpsuits and, in some jurisdictions, appear in shackles. While the authors made clear they did not have the time and resources to conduct a thorough examination of the impact of detention on the immigration courts, a few significant points should at least be highlighted.
- On pages 23-24, the draft report cites transfer statistics from 2008 and a statistic from 2008-09 on the percentage of detainees held in state or local jails that are out of date. To ICE’s credit, in recent months the agency has significantly reduced the number and frequency of transfers and has released a new policy on transfers. In addition, as of

² U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf/>.

³ Human Rights First, “Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review,” available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>.

October 2011, 50% of its detention beds were in actual jails, down from the 70% in 2008-09 cited in the draft report.⁴

- On page 24, the draft report notes that it “did not explore in any depth the level of coordination between EOIR and DHS with respect to the planning and construction of detention facilities in which judges might conduct proceedings.” The draft report notes that this “may be a matter worthy of further inquiry.” Human Rights First encourages ACUS to conduct, or for the final report to recommend the conducting of, an inquiry into the level of coordination between EOIR and DHS regarding EOIR’s detained docket. In March 2010, for example, Human Rights First researchers visited an ICE detention facility in Otero, NM and were surprised to see that, although the facility has courtrooms, detainees appeared in court via video because the immigration judges were based in El Paso and would not travel to the detention center to hear cases in person. Similarly, Human Rights First is concerned that ICE is touting new “civil” facilities in Karnes County, TX, and Newark, NJ as “models,” even though both facilities lack fully staffed courtrooms and detainees are appearing in court via video. As the detaining authority, ICE bears some responsibility in these coordination efforts. In other places, the draft report offers recommendations for where responsibility can be shifted to the USCIS Asylum Office, so it should – and could – also make recommendations for changes to ICE practices that may affect the courts.
- On page 30 under “Contesting Removability and Seeking Relief,” the draft report states, “The general view among immigration judges is that almost all respondents concede removability but seek to remain in the country by applying for some form of relief from removability, for example, by making a statutory claim of asylum pursuant to treaty obligations.” Again, Human Rights First is concerned that referencing only asylum here is misleading as to the percentage of cases such claims represent. While the following sentence points out that only 25% of all proceedings involved applications for relief, it does not point out that only 8% of immigration court receipts in FY 2010 involved applications for asylum and only 12% of completions involved applications for asylum. (Total completions: 325,326; total asylum completions: 40,545; total receipts from EOIR’s FY 2010 Statistical Yearbook: 392,888. Total asylum applications filed in same period: 32,961.)⁵
- On page 31, the draft report describes the consequences of the increase in per judge workload. These statistics, which are from September 2010, could be updated, and current statistics only emphasize the importance of ACUS’s effort. TRAC has updated its statistics several times since September 2010 and the backlog and wait-times have increased during that time. TRAC reported that the backlog of cases in December 2010 was 267,752 and the average time for a case pending in immigration courts as of February 2011 was 467 days, a 2.6% increase from September 2010 and a 44% increase from FY 2008. More recently, TRAC reported that the backlog had increased again, this

⁴ Id.

⁵ See EOIR FY 2010 Statistical Yearbook at supra note 2.

time to a total of 300,225 at the end of December 2011, up from 297,551 at the end of September 2011. Similarly, wait times increased to 507 days from 489 days at the end of September 2011.⁶

- On pages 31-32, regarding consequences and pressure, the report should mention how the increased percentage of detained cases has put stress on the overall court system, including the speed of the detained docket and EOIR's case completion goals for the detained docket.

COMMENTS TO ANALYSIS AND RECOMMENDATIONS.

Resource Enhancement

- On page 28 and again on page 34, the draft report acknowledges the “gap between resources—in particularly the number of judges—and the workload facing the courts...” and notes that “almost all the recent reports about immigration adjudication recommend outright increase in resources – especially more judges—as well as changes that hinge on additional resources.” The draft report however declines to discuss in detail the funding and budget challenges facing the courts and instead states that “EOIR and DOJ have sought vigorously and with some success, to receive additional appropriations with which to hire more judge ‘teams’ (a judge, law clerk, and support staff) but substantial additional resources are not in the cards.” The draft report also does not address the direct correlation between years of generous funding for DHS enforcement activities without corresponding funding for adjudications. Staffing and funding limitations are among the most significant reasons why immigration judges have such crushing caseloads, why the backlog has continued to increase, and why EOIR increasingly relies on video conferencing.

While Human Rights First is well aware of the current fiscal challenges, the fact remains that a well-functioning immigration court system needs adequate resources to adjudicate cases in a fair, accurate, thorough and timely manner. Given that this study aims to assess and enhance the quality of immigration court adjudications, the draft report's failure to address the critical issues of funding and staffing for the immigration courts is a glaring gap in this report and its recommendations. Without adequate attention to this central issue, the immigration courts will remain chronically under-resourced. Failing to describe and analyze that reality in the context of a report like this one ultimately does a disservice to the persons whose fates are determined by this system, as well as to the many immigration judges and other EOIR personnel who are trying to conduct careful and fair adjudications under increasingly difficult conditions.

⁶ Transactional Record Access Clearinghouse (TRAC), “Immigration Backlog Rises Again for Another Year,” available at <http://trac.syr.edu/immigration/reports/269/>.

Reducing the Demand for EOIR Services

- In its discussion relating to reducing demand for EOIR’s services, the draft report does not discuss the impact of the one year asylum filing deadline on the immigration courts, or the ways in which the Asylum Office can improve its approach to adjudication of claims with one year bar issues in order to prevent cases from being unnecessarily referred to the immigration courts. As detailed by Human Rights First in a September 2010 report, the filing deadline pushes the cases of credible refugees into the overburdened immigration courts, thereby diverting limited time and resources that could be more efficiently allocated to assessing the actual merits of asylum applications.⁷ According to DHS Statistics, between 1998 – when the filing deadline went into effect as a bar to asylum – and 2010, more than 53,400 applicants have had their requests for asylum denied, rejected or delayed because of the filing deadline.⁸ Many of these cases are referred to the immigration courts for further adjudication and are piled on top of the court’s growing backlog of cases. A recent independent, academic analysis of DHS data concluded that during this time period it is likely that, if not for the filing deadline, more than 15,000 asylum applications – representing more than 21,000 refugees – would have been granted asylum by DHS without the need for further litigation in the immigration courts.⁹

Directing Some Disputes to Other Decision-Makers--Preliminary Administrative Adjudication of All Asylum Applications---Expedited Removal

- On page 41, in supporting the recommendation of allowing Asylum Officers to grant asylum following a credible fear interview, the report lists three reasons: “First, the Asylum Office is qualified to make these assessments in the affirmatively filing context. Second, the adjudication by the Asylum Office reduces immigration court workload. Third, this additional authority provides an ***expedited process to a bona fide refugee.***” [Emphasis added]. Human Rights First suggests revising the language about “bona fide refugee” at the end of that paragraph as it could be misread to imply that asylum seekers who are not granted at this stage are not “bona fide.” In many cases, bona fide applicants will not have the necessary documents or other evidence ready or available at the credible fear stage and they may not sufficiently understand the eligibility criteria to know what facts are and are not relevant to qualify for asylum. Moreover, credible fear interviews are often conducted under challenging conditions, with communication significantly impeded by high levels of background noise in the detention centers where these interviews take place, poor sound quality on the telephones made available to the Asylum Office to call contract interpreters, and, in many cases, poor quality interpretation, all this affecting asylum applicants who in

⁷ Human Rights First, “[The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency](http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf),” available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

⁸ Id.

⁹ Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, “Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum,” *William and Mary Law Review*, December 2010, available at <http://wmlawreview.org/files/Schrag.pdf>.

many cases are struggling with the effects of multiple levels of trauma. These circumstances do not make the applicant any less of a “bona fide refugee.” Alternative language could be: “provided an expedited process for refugees who are sufficiently prepared to present their applications at the time of the credible fear interview.”

- Recommendation 6: As discussed below, Human Rights First supports the recommendation to allow defensive asylum applicants to have access to non-adversarial USCIS asylum office interviews which should decrease the number of asylum cases referred into the immigration courts. We urge that the draft report’s recommendations be adjusted to make clear that individual’s who are found to meet the credible fear screening standard should be permitted to have their cases decided by USCIS in an asylum office interview. This approach would allow a significant percentage of cases to be resolved without the need for an immigration court hearing, while – given the practical realities of the U.S. expedited removal, detention and asylum systems and the difficulty in obtaining legal counsel – very few asylum seekers would likely be granted asylum at the credible fear interview stage. As the draft report notes, in 2005 the U.S. Commission on International Religious Freedom urged DHS to allow asylum officers to grant asylum at the time of the credible fear screening interview. USCIS subsequently conducted a pilot project to test the feasibility of this concept, and concluded that the lack of a completed I-589 Asylum application and the lack of preparation due to the recentness of arrival made such an endeavor impractical. An alternative, compromise solution – which was included in the Refugee Protection Act of 2010 (S. 3113) – would be to implement a single non-adversarial interview process for all asylum seekers, including those who apply at the time of their arrival. This would be a less expensive, more efficient, and more appropriate means to conduct an initial asylum determination than an adversarial hearing. As with the current affirmative asylum application process, applicants rejected after this initial non-adversarial determination would still be eligible for *de novo* review before the immigration court, but the resolution of a significant proportion of these cases at the Asylum Office level would lessen the strain on the EOIR.
- Recommendation 8. Consistent with Recommendation 9, Human Rights First supports the recommendation that arriving asylum applicants post credible fear should be given the opportunity to file their asylum applications affirmatively with the Asylum Office. If the applicant is denied at that time, the officer should be able to prepare an NTA and refer the case to the immigration court, as is done now. Where possible, a non-adversarial asylum adjudication is preferred. The adversarial system is intimidating and threatens to re-traumatize vulnerable asylum seekers. It is also inefficient and expensive, relying on multiple hearings requiring the services of two government lawyers (the immigration judge and the trial attorney), rather than a single interview conducted by one asylum specialist. It is notable that most developed countries have non-adversarial proceedings for all first instance asylum claims.

Preliminary Administrative Adjudication of All Asylum Application--- Affirmative and Defense Asylum Applicants

- In response to the question posed on page 43, “how much of an immigration court workload reduction might this change accomplish?” Human Rights First encourages the final report to reference its earlier recommendation on “weighted caseload analysis” as well as the amount of time immigration judges and clerks spent on asylum cases—which are often the most factually and legally complex cases they hear—in comparison to other cases. Factors to consider in the reference include the time spent on both adjudication of the merits of the claim, including country conditions and forensic evaluations, as well as adjudication of whether the applicant was able to “demonstrate by clear and convincing evidence” that s/he filed within a year of arrival in the United States and time taken for other technicalities such as the work authorization clock. Presently, however, EOIR does not adequately track cases involving the filing deadline or how the deadline impacts adjudication or outcomes. We urge that the report include a recommendation to EOIR begin tracking that data.
- The draft report provides information on pages 43-44 about differences in asylum cases court-to-court, highlighting that “[i]n 2010, five courts accounted for 62 percent of the asylum receipts and, in those courts, asylum claims were on average 30 percent of all proceedings received.” This is a good illustration of how any changes to the asylum system would affect individual courts differently. Again, it is important to reference the “weighted caseload analysis” and data collection that would better enable EOIR to allocate resources between courts and seek additional resources from Congress.
- Recommendation 9. As mentioned in the discussion of Recommendation 8 above, Human Rights First supports part of this recommendation, and believes that to the extent possible, a non-adversarial system is more efficient, less expensive, and less traumatic for the asylum applicant. However, for the reasons described in our discussion of Recommendation 12 below, we do not agree with the recommendation that Asylum Officers be given the authority to grant withholding of removal.
- Recommendation 11. A fee is not appropriate for the filing of any asylum application and should not be considered as a means of sustaining the resources of the Asylum Office or any other component of the immigration adjudication system. Refugees should not be discouraged or prevented from filing applications for protection because they do not have the financial means. Furthermore, the proposition would impose a significant hardship for minimal revenue. As a policy matter, fee waivers take time to adjudicate and, as with other forms of humanitarian benefits, when a high percentage of applicants will potentially be eligible for a waiver, USCIS would be spending time adjudicating the fee waiver application that could otherwise be allocated to adjudicating the asylum claim. As stated in the “Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization,” USCIS has concluded that “imposition of the fee at this time would likely impose administrative burdens that would not be offset by the anticipated

receipts from the fee. Accordingly, the provisions relating to the fee are not included as part of the final rule.”¹⁰

Preliminary Administrative Adjudication of All Asylum Application---Asylum Office Adjudication of Eligibility for the Closely related Claims of Withholding of Removal or Eligibility for Withholding Due to the Convention Against Torture (CAT)

- **Recommendation 12.** The draft report recommends amending 8 CFR §208.16 to authorize the Asylum Office to adjudicate eligibility for withholding of removal, with the provision that if the Asylum Office grants withholding, there would be no automatic referral to the immigration court. While Human Rights First sees the efficiency value in this recommendation, we have strong reservations, both because of BIA precedent that a grant of withholding of removal requires the issuance of an order of removal, and because we believe that applicants in this situation should have access to immigration court adjudication if not granted asylum by the Asylum Office. However, we would support a provision which allows for asylum officers to determine that an applicant has established that he or she is entitled to withholding of removal, if that determination would then be binding upon the DHS Office of Chief Counsel which acts as opposing counsel in the Immigration Court proceeding. This would allow for the asylum claim to be adjudicated by the Court with the understanding that DHS has already found that the applicant satisfies the higher burden for withholding of removal, and therefore also satisfies the lesser burden for asylum. In other words, this would allow the immigration judge to receive a case on referral from the Asylum Office with the clear understanding that DHS has stipulated to a grant but for a particular statutory bar to asylum or discretionary factor, which would be the only aspects of the case that would remain to be adjudicated in Court.

As USCIS explained in its response to the CIS Ombudsman’s report on the U.S. asylum system in 2006, “The adjudication of asylum claims by USCIS must be distinguished from decisions on withholding of removal under the Refugee Convention or the Convention Against Torture. Withholding is a form of relief from removal that does not confer an immigration status on an alien; a decision on withholding of removal cannot be made without a removal order. Thus, a decision on whether to grant withholding is not a decision on status eligibility.”¹¹ The response goes on to recognize that – at that time – 8 C.F.R. § 208.16(a) authorized USCIS Asylum Officers to adjudicate claims for withholding of removal in very limited cases but USCIS has never exercised that authority” and intended to “remove [that provision] from the regulation when [USCIS] next update[s] it.”¹² USCIS explained, “If enforcement implications make benefit adjudications enforcement activities, and hence within the purview of ICE and EOIR, then benefit adjudications cease to exist as a separate category from enforcement actions. However, Congress in the HSA explicitly conceived benefit adjudication and immigration enforcement as separate functions requiring separate

¹⁰ 59 FR 62284 at 62287.

¹¹ http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_24_Asylum_Status_USCIS_Response-06-20-06.pdf.

¹² Id.

entities within DHS to carry them out, and prohibited the recombination of these two functions. In this way, Congress rejected the view that benefit adjudications with enforcement implications should be considered enforcement activities. Your recommendation would be inconsistent with Congressional intent.”¹³

Human Rights First would only consider supporting this if there were a clear mechanism for ensuring that when an applicant is granted withholding, s/her can apply for asylum—or for other forms of immigration relief that an applicant, particularly an unrepresented applicant, may not have identified at the time of the asylum office adjudication—*de novo* before the immigration court. As recognized on page 48, “the Asylum Office interview is non-adversarial and the applicant is frequently unrepresented or the role of the representative is less robust in the adjudication process. The opportunity to present the claim *de novo* in the immigration court is seen as a serious protection of the individual’s rights.”

- Recommendation 13. Human Rights First believes that the current arrangement of an adversarial proceeding before an immigration court is preferable to an odd hybrid arrangement before senior asylum officers. We are also concerned that because of institutional “closeness,” senior asylum officers may be less inclined to reverse the decisions of their colleagues, thus undermining an asylum seeker’s access to *de novo* review.

Streamline Procedures within the Immigration Courts to Avoid Delays in Asylum Application Adjudication--Relieving Judges and Immigration Court Staff of Certain Case-Processing Related Tasks--Electronic Filing and Docket System

- Recommendation 22 is listed under the (b) work authorization subheading but should go under (a) electronic filing and docket system, along with Recommendation 21.
- Recommendations 21-22. Human Rights First sees the value in EOIR’s development of an electronic filing and docketing system. We also encourage EOIR to ensure that any public electronic docketing system – and the computer terminal – does not compromise confidentiality protections for asylum seekers and other vulnerable populations, such as victims of domestic violence or victims of human trafficking or juveniles.

Streamline Procedures within the Immigration Courts to Avoid Delays in Asylum Application Adjudication--Relieving Judges and Immigration Court Staff of Certain Case-Processing Related Tasks--Eliminating EOIR’s Role in Asylum Work Authorization Clock

- Recommendation 23. Human Rights First agrees with the discussion on page 55 that the purpose of Recommendation 23 (i.e. EOIR ending its use of adjournment codes to track the delays in the asylum adjudication) is to “allow for a presumption of work authorization

¹³ Id.

eligibility 150 days after the application has been filed. In appropriate cases, where DHS believes the respondent has frustrated the adjudication or unreasonably delayed the adjudication of the application for asylum, DHS can refuse the grant of work authorization or refuse to extend it beyond the initial authorization period,” noting this single change would allow the judges to focus on the adjournment codes for purposes of managing their dockets. However, the wording of Recommendation 23, simply stating that EOIR stop using adjournment codes, is not clear and should be revised to explain a little more about the intended results of the policy change, perhaps referencing the connection to Recommendation 24 and how they are interrelated and both recommendations must be implemented in order to accomplish the goal.

- Recommendation 24. Human Rights First enthusiastically endorses the recommendation for DHS to revise its regulations and procedures to allow asylum and withholding applicants to apply for work authorization provided that at least 150 days have passed since the filing of an asylum application. We would however recommend that the phrase “in the same manner as other people in removal proceedings” be deleted, as it is confusing, since many categories of people in removal proceedings are not in fact eligible to apply for work authorization.

Process Modification--Immigration Adjudication Case Management—Representation—Costs to the government and current efforts to compensate for lack of representation.

- Human Rights First appreciates the discussion on page 58 of the ways in which the government benefits from respondents having adequate legal representation. Similarly, we appreciate the draft report highlighting the distinction between representation and “quality” representation – both as it affects the respondent and the court. Finally, we appreciate the draft report including information regarding the range of representation levels – both between courts and between the detained versus non detained dockets, which are serious considerations. In the general discussion, however, this section would be strengthened by a short discussion of the complexity of US immigration law, the severity of the consequences of removal, and the daunting labyrinth that US immigration law and court procedures present for individuals going through the process.
- The draft report’s discussion of “Know-Your-Rights” presentations and EOIR’s Legal Orientation Program (LOP) on page 59 offers several reasons why LOP has received widespread (and bipartisan) praise. However, given the draft report’s focus on improving timeliness in immigration court adjudications, it should also include Vera’s finding that LOP participants conclude their immigration court cases an average of 13 days faster than detainees who do not receive LOP. Similarly, the draft report should include that immigration judges have praised LOP for better preparing immigrants to identify forms of relief and to recognize when no forms of relief are available and that participants released on bond or their own recognizance have been found to be more likely to appear for future court hearings than those who did not participate in the program. Finally, the draft report

should mention that despite these benefits, LOP is only funded for 27 sites and only reaches about 35% of immigrants in detention on EOIR's docket (and only about 15% of immigrants in detention overall on an annual basis).¹⁴

- Recommendation 26. Human Rights First agrees that it is important for EOIR to assess the “accuracy and usefulness of the pro bono lists provided at the courts” and notes this is also the list that is posted in detention centers and may be the only clue detainees have as to who they may be able to contact for legal assistance. It is vital these lists are kept up to date and accurate, which they are frequently not.
- Recommendation 28. Human Rights First supports this recommendation but suggests the draft report add language urging The Justice Department and the White House to seek Congressional appropriations to make LOP a nationwide program.

Process Modification--Immigration Adjudication Case Management—Technology to Enhance Representation

- Recommendation 31. We support “Know-Your-Rights” video presentations as a supplement to LOP – attorneys going into detention centers to provide presentations in person, meet with individuals one-on-one, organize pro se workshops and engage in pro bono coordination – not *in lieu* of LOP or as an excuse to not continue to take steps to ensure LOP is in every detention facility ICE uses to hold immigrants.
- Recommendation 33. Human Rights First sees great value in DHS providing video technology and making it available for private consultations between detainees and counsel, nevertheless, we add the caveat that all arrangements made within detention centers (including where a guard is standing during this video consultation) and the technology itself must ensure attorney-client privilege is protected at all times. Our support of video consultations should not be confused with supporting video conferencing for hearings, which we believe is a distinctly different matter involving different complications and potential consequences.
- Recommendation 34. Human Rights First recommends the final report delete the reference to “collect” calls, and simply state that DHS has a duty to assist attorneys or accredited representatives in scheduling calls with their clients in detention. Accredited representatives, by definition, are working for non-profits, and should be eligible for free phone lines and, even if people are paying for representation, it should be possible to schedule a free legal phone call, particularly since a number of facilities where DHS houses immigration detainees do not allow a person (whether an attorney or a family member) to receive collect calls from those facilities unless the recipient of the collect call has first set up an account with the facility's telephone provider.

¹⁴See “Jails and Jumpsuits,” at supra note 3.

Process Modification--Immigration Adjudication Case Management—Case Management Procedures—Pre-hearing, or Status, Conferences or Exchanges

- Recommendations 40 and 41. Human Rights First would welcome the institutionalization of pre-hearing conferences in the immigration court system, as it is our experience that when they happen, they are beneficial to efficiency and fair adjudication. It is our experience that currently, pre-hearing discussion between the parties outside of court, and pre-hearing conferences with the court, generally do not involve unrepresented respondents. Ensuring that unrepresented respondents are able to participate in a meaningful way in such discussions, use them to understand the issues in their cases and the evidence they needed to gather, and have their rights protected in them, would require further study.

Process Modification--Immigration Adjudication Case Management—Case Management Procedures— Vertical Prosecution Cooperation and Conditional Decisions on Relief

- Recommendation 45-47. Human Rights First sees benefits to modifications designed to better facilitate the exercise of prosecutorial discretion and pre-hearing conferences, including by giving individual attorneys or teams of attorneys more opportunities to familiarize themselves with the cases, and assigning teams of trial attorneys to particular judges. However, we also have hesitations that are related to a point the draft report references on page 72 which states, “One judge also expressed a concern that this form of vertical prosecution diminished a perception of the court as impartial and create an appearance that the judge was ‘inappropriately’ too familiar with the DHS Trial Attorneys because anyone visiting that court—or regularly appearing respondent counsel—would always see the same prosecutor appearing in that judge’s court. Some commented that it might give an impression that respondent’s counsel were ‘outsiders.’” Human Rights First shares the concern that there is an appearance, and sometimes also a reality, of inappropriate closeness between some immigration judges and trial attorneys, but has found this problem to be present in the current system, regardless of whether ICE staffing is horizontal or vertical.

As the draft report notes, there are various possible variations on a “vertical” ICE staffing model, and one could envision models that would avoid tying particular ICE attorneys to particular judges. For example, one could assign ICE attorneys to cover all the cases heard at a particular master calendar hearing for the duration of those cases, but rotate ICE attorneys from master-calendar courtroom to master-calendar courtroom on a weekly or bi-weekly basis. Human Rights First believes that ICE should be able to staff its cases in whatever way best serves the interests of efficiency and justice, and that maintaining the actual and perceived impartiality of the immigration courts should be addressed as a separate and pre-existing issue. Regardless of the staffing arrangements at the local ICE office, Human Rights First strongly supports the recommendation that “EOIR instruct judges

to treat all ICE trial attorneys as responsible for the acts and omissions of other Trial Attorneys on the same case. Judges may hold ICE Trial Attorneys accountable for the commitments made in prior hearings, in the same manner the court holds private counsel working in the same law firm or non-profit responsible.”

Process Modification--Immigration Adjudication Case Management—Case Management Procedures— Enhancing Immigration Judge Authority by Enhancing Attorney Accountability

- Recommendation 51. Human Rights First supports the recommendation that EOIR develop procedures and provide judges with authority to reprimand and sanction both the private bar and ICE trial attorneys.

Process Modification--Immigration Adjudication Case Management—Video and Telephone Hearings

- Human Rights First appreciates the thorough and balanced discussion of the various pros and cons of EOIR conducting hearings via video teleconferencing (VTC). Human Rights First, however, believes that hearing cases by video threatens the due process rights of respondents, including their ability to be assisted in a meaningful way by counsel, their ability to make themselves understood to the court, their ability to be present in a real sense at their own removal hearings, and their ability to present evidence and to contest any evidence being presented by the government. We believe these concerns apply with particular force to the most vulnerable respondents: the unrepresented, the illiterate, those who do not speak or understand English, those whose eligibility for relief hinges on their ability to tell the court very painful and private information about themselves, minors, and survivors of torture and trauma.
- Recommendation 54. To the extent that VTC is a present reality, Human Rights First welcomes efforts to mitigate the stress and consequences. However, these short-term efforts should not serve to further institutionalize or normalize the use of VTC in the system.
- Recommendation 56. Human Rights First agrees that further evaluation and assessment of VTC beyond the informal monitoring EOIR conducts today is necessary. However, given that there has not been a formal assessment and the draft report recognizes in its discussion of VTC that “it is not possible to draw firm conclusions on the impact of VTC alone on outcomes” based upon research or evaluations that have been conducted, the recommendation should not – as it indicates – presume that VTC is here to stay. Human Rights First recommends the final report does not include the clause in recommendation 56 stating, “not for the purpose of revisiting the use of VTC, to which Congress and EOIR are committed, but rather.”

- Human Rights First suggests that the final report include a recommendation to require immigration judges to code for asylum cases in which the merits/individual hearing was conducted via video to allow for data collection and comparisons on whether VTC has an outcome determinative impact.
- Human Rights First suggests that the final report include a recommendation that EOIR encourage immigration judges to give favorable consideration to requests by respondents that hearings be conducted in person.

Please contact Annie Sovcik, Advocacy Counsel, Refugee Protection Program at Human Rights First with any questions regarding these comments. Ms. Sovcik can be reached via email at sovcika@humanrightsfirst.org; or by phone at 202/370-3318.