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IMMIGRATION AND THE COURTS

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ANDERSON COURT REPORTING
706 Duke Street, Suite 100
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

PARTICIPANTS:

Moderator:

RUSSELL WHEELER
Visiting Fellow, Governance Studies

Featured Panelists:

ROBERT A. KATZMANN
Judge, U.S. Court of Appeals for the Second Circuit

JUAN P. OSUNA
Chairman, Board of Immigration Appeals

ANDREW I. SCHOENHOLTZ
Professor of Law, Georgetown University Law Center
Deputy Director, Georgetown University's Institute for the Study of International Migration

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P R O C E E D I N G S

MR. WHEELER: Good morning. My name is Russell Wheeler; I'm a visiting fellow here at Brookings, and I'm happy to welcome you to one of our series of judicial issues forums here at Brookings, today on immigration and the courts, with a special attention to the courts in the United States that handle the vast bulk of cases involving application of the nation's immigration laws, the courts in the Department of Justice.

And on the panel with me to discuss those courts are -- and you have the biographical materials in your material -- Robert Katzmann, formerly a senior fellow here at Brookings, now a judge of the United States Court of Appeals for the Second Circuit.

To my immediate right, Juan Osuna, who has been on the Board of Immigration Appeals in the Justice Department since 2000, and last year was appointed to chair the board.

And Professor Andrew Schoenholtz of the Georgetown University Law Center and deputy director of the University's Institutes for the Study of International Migration.

Format today will be: I'll put a question or maybe two to each of the panelists and we'll get some discussion going, and we'll try to reserve enough time so at about 11:00, 11:05, to take questions from those of you who are here.

Before we do that though, let me provide, if I may, just a brief overview of immigration and the courts, the immigration courts themselves, but also other courts that are effected by immigration, and I'll be referring to the handout in your materials. It's a one-page handout that looks like this, if you want to read along with me.

First, the United States District Courts, the 94 districts, Federal Judicial Districts scattered across the country with about 670 judges, who, hear, in the immigration area, principally cases involving

criminal violations of immigration laws, and, as you can see from the chart, the percent of criminal defendants prosecuted for violation of the immigration laws, typically illegal reentry has gone from about 15 percent of all defendants in 2002 up to 25 percent of defendants, and those are concentrated heavily in the 5 districts along the border, southern Texas, western Texas, New Mexico, Arizona, and southern California.

As you can see from the chart, in those districts, immigration defendants constitute, for the most case, over half or close to half of the total criminal defendants in those courts, largely, as a result of the Bush Administration's Operation Streamline, a policy that, rather than, when illegals cross from Mexico, simply returning them to Mexico instead, in the hope of some deterrent effect, of prosecuting them for, typically, as I said, illegal reentry in the hopes that a six-month prison term, the word may get back to Mexico and serve as a deterrent.

I should also mention, especially because the Supreme Court will hear a case on this matter next

Wednesday, illegal immigrants or immigrants generally are subject to criminal and civil prosecution, but, in particular, as a result of various workplace raids, often charged not with violation of immigration offenses, but with fraudulent use of Social Security numbers, and the case before the Supreme Court next Wednesday is whether or not, to be convicted for that offense, the defendant must know that the Social Security number that he or she presented did, indeed, belong to someone else.

Now, there's a little bit on the chart about state courts. Obviously, admission and removal and status changes of aliens are a federal matter, but, nevertheless, state courts are affected by immigration in a variety of ways. Obviously, shifting demographics can affect the caseload and the need for judicial services. And many states have laws affecting immigrants.

In Mississippi, for example, it's a felony for an illegal immigrant to hold a job. So, those cases get prosecuted in the state courts, and I should

also mention a conviction for numerous state court crimes can result, can trigger a federal deportation.

So, the state courts are wrapped up in immigration in all sorts of ways.

Turning to the immigration courts themselves, it's a bit of a oversimplification, but, basically, the immigration courts and the Board of Immigration Appeals are concerned principally with hearing petitions by aliens who are seeking to avoid enforcement of a Department of Homeland Security order that they be removed, or, in the old parlance, deported.

The immigration courts themselves consist of over 200 judges serving in 50 or so courts around the country, and, as you can see, compared to the caseload of the district courts, they really have an overwhelming workload.

As the figures before you show, last year, they heard some 272,000 matters, which is a bit of a technical term; there were other matters, as well, but

272,000 removal matters; that's a caseload per judge of about 1,200 cases a year. The average federal district judge, criminal and civil, has about a 480 caseload per judge.

So, they are, as we'll discuss, under heavy pressure.

Also, as we'll discuss, the aliens in the immigration courts are not represented by counsel in over half the instances. The Congress has very graciously said that aliens may be represented by counsel, but it said, in the words of the statute, "at no cost to the government." And, then, furthermore, the decisions of these immigration judges are pretty much final in all cases. There are appeals to the Board of Immigration Appeals, but it's about a 10 percent appeal rate. So, for all practical purpose, the decisions of these immigration courts are final.

And the courts have been in the news, of course. Last year, they were in the news because of reports of politicized hiring practices by aides to

Attorney General Gonzales. And, occasionally, they're in the news because of a, perhaps, bizarre decision or a tongue-lashing they get from the courts of appeals.

Now, as to the Board of Immigration Appeals, as I mentioned, this is a 15-member board, appointed by the attorney general, as are the immigration judges. And, as I said, they heard last year about 23,000 cases.

Appeals from the Board of Immigration Appeals by the alien go directly to the U.S. Courts of Appeals, so, that brings us back to the third branch.

In the Courts of Appeals, appeals from district court decisions involving criminal immigration offenses are a rather modest part of a caseload, whereas you can see from the chart, appeals from the Board of Immigration Appeals, especially since 2002, when there were a series of revampings that we'll talk about, have really skyrocketed, and they've skyrocketed especially in two Courts of Appeals: The very large U.S. Court of Appeals for the

Ninth Circuit out in the western United States and Judge Katzmann's court, the U.S. Court of Appeals for the Second Circuit, which consists of three states, principally New York. And I should also mention that although appeals generally have increased in the Court of Appeals and appeals from the BIA have increased dramatically, Congress has not added any judgeships to those courts since 1990.

So, with that background in mind, let me turn first to Juan Osuna, and ask you did I miss anything of real significance that we ought to mention? And, in your sense generally, what are the major problems facing the immigration adjudications system?

JUDGE OSUNA: Yes, Russell. You didn't really miss anything. I think that was a good overview.

There are a number of issues, but let me just start off with the one that I think is the most significant issue, and that is basically the lack of

resources. There are simply too many cases and too few judges to hear them.

You mentioned some of the numbers. An immigration judge, on average, has a caseload of well over 1,000 cases every year, 1,200 in some cases. Some cities have more, some cities have less, but that's the national average. And they do so, I might add, with really inadequate resources.

We're all used to hearing that judges, in general, have law clerks, and immigration judges do have law clerks, but six immigration judges, on average, have to share one law clerk, nationwide, and that's an improvement from what it was a few years ago. It used to be eight-to-one ratio, and now it's six to one.

These are not easy cases; these are very complicated cases. More than half of these cases deal with asylum, meaning that somebody is actually asking for protection from this country because they may be persecuted overseas in their home countries. They are

really literally life and death decisions, and immigration judges often have to make due, and I might add generally do an excellent job with very inadequate resources.

Our former chief immigration judge had a good way of capturing the immigration court system. He called it a traffic court volume with Supreme Court consequences. And that really does kind of capture it.

If any of you have been in immigration court, I think you will see that it's a very high-paced, fast-paced, somewhat-chaotic-at-times environment, with a lot of comings and goings, with immigrants that are appearing with significant language barriers, of course, with a very complicated set of laws, and, as Russell mentioned, over half of them appear without counsel.

It requires, often, the immigration judge to have to take extra time to make sure that the individual, who was appearing pro se, was appearing

without a lawyer, understands what's going on. That takes more time and certainly slows things down, but that's what most judges have to do in order to deal with it.

So, I do think that the biggest single problem with the system right now is too many cases and too few judges.

I might add that I'm very hopeful and optimistic under the new administration that there is an awareness of this issue. I think that the new attorney general and the new secretary of Homeland Security are aware of the resources issue and I think are committed to addressing it.

Now, obviously, we will have to be realistic. We're not going to be competing with the Federal Bailout of banks and resources are going to be tight, but I do think that there is an awareness of this issue, and I'm optimistic that additional resources will be coming the immigration courts' way.

MR. WHEELER: Before turning to the other two, let me just ask about one thing that I've noticed. There is a degree of role ambiguity on the part of these immigration judges who make, as you say, "life and death decisions," but they're appointed by and subject to removal by the nation's chief law enforcement officer.

How big a problem is that?

JUDGE OSUNA: Well, in a vast majority of cases, it's not a problem. I mean, it's not -- I've never really seen instances where the immigration judges' judicial independence is compromised. So, I don't see much of a problem, but I think that if you talk about long-term changes, that's something that, probably, people will look at, but I'm not seeing that as a major issue these days.

MR. WHEELER: Comments from the other two about some of the major problems in the courts?

JUDGE KATZMANN: I have a question for Juan, and that is: Looking at the immigration judges that

we have, what percentage of them dealt with immigration before they became immigration judges? What sort of training is there for immigration judges coming in? And, also, what is the nature of the review process for immigration judges once on the job?

MR. WHEELER: You mean performance review?

JUDGE KATZMANN: Performance reviews.

JUDGE OSUNA: I don't have a number on the percentages of immigration judges that had immigration experience before they were appointed. I think a large number of them did. But I don't have the actual percentages.

Some of them had experience in being judges, which I think is often just as important, if not more important. A lot of the immigration judges appointed now, for example, came from the state courts, from other administrative tribunals that are similar to the immigration court system, and they have that kind of experience, and, certainly, others have immigration law experience. But I don't have the exact numbers.

In terms of the training that immigration judges go through, I believe when an immigration judge is appointed and comes onboard, I believe they go through a six-week training program that involves both substantive law, observing experienced immigration judges on the bench. We used to send them to the National Judicial College for a weeklong training.

Because of budget cuts, that has not happened, but, certainly, it is hoped that that will start up again in the future. But, in general, they do a six-week substantive and procedural law training that involves also observing experienced immigration judges on the bench.

In terms of supervision, once they are on the bench, they do have -- there are a series of what we call assistant chief immigration judges around the country that are responsible for supervising immigration judges primarily in the major cities, but every court is supervised by an assistant chief immigration judge. There are, I believe, six or seven of these assistant supervisor judges in the field that

are responsible for observing or supervising the judges, as well as some at headquarters, as well.

MR. SCHOENHOLTZ: Let me add a few thoughts to expand on the issue about the overburdened and under-resourced system, and I'll have to disagree with Juan to some degree on a couple of the issues that he's raised.

I think some of the changes he's just mentioned are very, very recent. And the first thing to sit back and understand is that this is a neglected area of the law. And it is part of the larger view, if you will, of what we think of as immigration exceptionalism in American law; that is there's something different about immigration that has placed us in this situation where we have an overburdened system and an under-resourced one.

Why is it overburdened? It's overburdened, in part, because Congress has enacted laws that require, to a certain degree, the removal of individuals who have been permanent residents or have

had placed into removal proceedings after a worksite raid or for other reasons, and there are a variety of groups who are in removal proceedings who may have relief available to them, that is, who may be able to stay in the United States.

And these are very -- as I think both Juan and Russell said, we're talking about very important stakes in this situation; they're people who are fleeing persecution, there are lawful, permanent residents, who have been here for most of their lives and may have committed a minor crime earlier in their lives, and we haven't asked ourselves the initial question: Who should be placed into removal proceedings and by whom?

And I think one of the reasons we have an overburdened system is Congress has created a very complex set of laws and made it such that anybody who infringes on -- commits any type of crime is going to be placed into removal proceedings no matter what equities they have to stay in the United States. Their entire families are here, they have several U.S.

citizenship children, their spouse is a lawful, permanent resident or an American citizen. Congress has made that rather difficult and made the law challenging to enforce.

So, I think there's an overburdening in that sense, and I agree with Juan that there's an under-resourced adjudications system. Why? Because my sense is that the political will has not been there to do what should be done properly to ensure that there is a fair process for immigrants who are placed into removal proceedings to at least have a day in court. That means having representation, that means having a chance to a fair review, and here is where I have to disagree with Juan about the independence of the Executive Office for Immigration Review.

That is the immigration courts and the Board of Immigration Appeals. They sit as employees of the attorney general. They are not independent judges. And I do think it's time they we try to move to a more independent system because one of the problems has been they have been too subject to political

manipulation, and because of some very serious streamlining that was done by Attorney General Ashcroft, we have a weakened review system. I think if those --

MR. WHEELER: -- could you describe, just briefly, that streamlining?

MR. SCHOENHOLTZ: Sure. It's very appropriate for any government agency when they have too many cases to try to figure out a way to address those cases. That's a perfectly appropriate issue for managers to address. The asylum system went through that crisis with what was then the Immigration and Naturalization Service, and did it very well. And, today, it's operating in a much better manner because it has eliminated a certain amount of abuse in that system.

What they did though was they added to the number of asylum officers to make decisions, they professionalized the corps, trained them very well,

and all of these ingredients, frankly, are missing in our system.

What's happened in 2002, after they first attempted to deal with an overload of cases -- the Board of Immigration Appeals -- is the attorney general decided we're not going to have three-member panel decisions, the administrative review, three-member panels reviewing an immigration judge's decision, an immigration judge who does not write a decision, does not issue a written decision in these merits cases on persecution or somebody being removed who's a lawful, permanent resident. It's an oral decision they issue.

So, the review decision-making body, the board, is very important. That was weakened because Attorney General Ashcroft decided that most of the cases could be decided without opinion or by single members with very short opinions.

Now, recently, that has shifted a bit, but they have not yet restored what I think would be

important at the end of the day, which is more full review by panels and merits cases.

MR. WHEELER: He educed the size of the board, also.

MR. SCHOENHOLTZ: Exactly, thank you, Russell. And they reduced the size of the board significantly, and I then have to say, back to the issue I was saying before, about the politicization. They reduced the board in a political fashion. Those who were asked to leave or were encouraged to leave were those who were seen as being out of line with Attorney General Ashcroft's point of view on immigration.

MR. WHEELER: Do you want to say anything?

JUDGE OSUNA: Yes, let me agree with Andy on a few things and disagree with him on a few things, and he's used to this.

First, on the streamlining changes, when you talk about streamlining, you really have to talk about two versions of streamlining. One was a version

enacted by Attorney General Reno in 1999, and then the second version was enacted by Attorney General Ashcroft in 2002. I think that you can look at the 2002 streamlining program as having been an experiment that has been adjusted.

Andy mentioned that the majority of decisions envisioned by that program were no decisions really, one-line, streamline decisions that basically said the immigration judges' decisions is affirmed and we don't need to say anything more.

And, initially, there were a large number of cases that were being decided under that program. That's called the Affirmance Without Opinion or Summary Affirmance Program. More than one-third of the board decisions five years ago were that type of decision.

Currently, the board has really diminished the Affirmance Without Opinion System so that now only 5 percent of the board's decisions are affirmances without opinion. Everything else is written

decisions, fully-written decisions that provide some analysis or some basis for the decision of the board and why the immigration judge's decision is being upheld or reversed.

So, I do think that while streamlining has been the subject of a lot of discussion and a lot of controversy, we're talking about a different program today than it was when it was initially enacted by Ashcroft in 2003.

And I disagree with Andy to the extent that there is inadequate review. There is not inadequate review. The board members and the attorneys at the board look at these cases very, very carefully and issue decisions that are warranted under the specific issues raised on appeal.

The resources issues are where I'm going to agree with Andy on a few things.

If you're looking at too many cases and too few adjudicators, you basically have three options, I think. One is what we call comprehensive immigration

reform, what's been discussed in Congress over the last couple of years about enacting really significant changes to the immigration system, that would probably fix a lot of these cases. It would probably provide some sort of legalization to a large number of people. We're not going to count on that because that is certainly speculative at this point, it is unclear what form it'll take, if it ever happens. So, that's not really an option.

The second option is a mass infusion of resources. Again, I think while we expect some resources coming our way, it's probably not going to be anywhere near what you would hope, given the type of budget deficits and so forth.

The third option is what I think Andy was alluding to, which I do endorse, which is what I call a holistic approach, the removal proceedings.

SPEAKER: A what proceeding?

JUDGE OSUNA: A holistic approach. And what I mean by that is that there has to be a balance

between the number of cases coming into the system and the number of judges in the system to handle the cases. What this means is that there has to be a little bit more of a selective process as to who we, as a country, decide to put in removal proceedings.

It is disturbing to me to know that there are, for example, 500,000 removal orders that have never been enforced. So, the question becomes: If we have all these removal orders that are never enforced, why are we putting more people in the removal proceedings if there's a possibility that that's never going to result in anything?

Why are we putting people in removal proceedings that have visa petitions pending at the Department of Homeland Security that are likely to result in their getting a immigration visa to remain in the country permanently? Not only is that traumatic for the individual to be in removal proceedings; in my opinion, it is a waste of government resources because that case is likely to wash out at some point, and it's going to take a lot

of the judge's time and the board's time to review that case.

So, I do think that a little bit more of an intelligent approach as to how we are doing these cases and what decisions we make as -- and I'm talking "we" collectively in the government -- as to how many cases and which cases we're putting in proceedings would help on the resources issue and would probably lead to some better policy choices in the end.

MR. WHEELER: Let me turn to Judge Katzmann.

One of the problems I mentioned and Andy mentioned, as well, is the lack of representation. You've been very active in this. You see these cases and they come from the Board of Immigration Appeals.

Say a little bit, if you would, about what you see, from where you sit, as to the availability of counsel and the problems that result from the lack of it.

JUDGE KATZMANN: The problem of quality representation is a severe problem in the courts.

From my perspective on the Second Circuit, we've seen the immigration docket increase from 4 percent of our cases in 2001 to roughly 39 percent of our cases. And, observing all of the cases before me, I've had severe doubts about the quality of representation.

To be sure, there are many fine immigration lawyers, but, all too often, I see cases where the immigrants' representation is substandard. And, so, that led me a few years to make this subject the topic of the Marden Lecture of the New York City Bar, and, in the years since, to do what I can to work with groups in the American Bar Association to stimulate improved representation of immigrants.

Let's step back for a minute. Roughly only 35 percent of immigrants have representation. The numbers vary, 35 to 50 percent in immigration proceedings themselves. That's extraordinary when one thinks of the stakes. We're talking about large numbers, but let's think about the individual person.

What's at stake for that person? What's at stake is whether that person can stay in the United States, can stay with his or her family, be united with his or her family, participate in the mainstream of economic life. The stakes are huge. And when there is not quality representation by lawyers of immigrants, there is a real problem.

Studies have shown -- for example, Andy Schoenholtz's study -- that a lawyer who gives representation is an enormous benefit to the immigrant. An immigrant with representation is four to six times better off in terms of a likelihood of receiving asylum than someone who is not represented.

For the immigrant who comes to the United States not knowing the language, not knowing the culture, often in fear, often escaping persecution such that experiences with government are often uneasy, for those immigrants, coming to the United States is not easy. And when those immigrants come and do not have quality representation, their chances of making their case are substantially reduced.

Immigration proceedings are fact-intensive, language is a problem. If you don't have quality representation, it's going to be harder to make your case.

And then you've got immigrants who are the prey of what are known as notarios. There are immigrants who give their hard-earned dollars or family dollars to those who will say that they will file papers for them, who will provide good counsel or will recommend good counsel, only to find that these notarios are not giving quality representation at all or advice at all, and the lawyers are often not giving good advice at all.

What we found in our circuit is -- there was a study done by a John Palmer, Elizabeth Cronin, and Steven Loehr at Cornell. What they found at one point was that 38 percent of the cases in our court were handled by 10 law offices, and most of those offices we were talking about offices where there was just a solo attorney. And many of those cases, and many of

those firms, you would have a lawyer having 100 cases in our court.

Well, these cases are so fact-intensive, that one has concerns about the amount of attention that the immigrants were getting in these cases. And one often has the sense that if only the quality of representation were better, things might be better because by the time that we, as judges on the Courts of Appeals, get these cases, the record has already been made or not made. And our role is very constrained. Except where there are errors of law or if there is not substantial evidence to support NIJ's findings -- except in those cases, we are very much constrained and limited as to what we can do.

So, what that means is that what is done at the very outset of the process for immigrants in immigration proceedings, in immigration court, is critical. It is the record that is made before; that is the record that we see. And that's why quality representation should really occur not just at the

court of appeals but at the very outset of the process.

It seems to me that the quality of justice should not depend upon one's income, whether one has access to free legal services or not, but, often, that, in fact, is the feeling that one is left with.

Now, immigrants often have another problem, and that is that, because of various regulations, they cannot work. And, therefore, they cannot earn the money necessary to secure the kind of quality representation that's necessary.

So, quality of legal services is a problem, recognizing that there are many fine immigration lawyers out there, but, too often, we see substandard briefs, we see briefing that is very unfortunate.

And, of course, the immigrant is in a different situation from the rest of us. The rest of us, if we are so motivated, can file a malpractice suit, but you're not going to find immigrants filing malpractice suits for obvious reasons.

So, improving quality of representation is a critical issue, I think, in terms of changing the system.

MR. WHEELER: I want to turn to Juan in a second. Let me just mention one thing though. There's a certain irony that an alien arrested and prosecuted for a criminal violation of a immigration law, such as along the southwest border or in a workplace raid, is probably entitled to counsel under the Criminal Justice Act, but an alien who's facing removal in the immigration courts is not. And let me give you a citation, too.

Judge Katzmann was recognized by *The Green Bag*, which is a journal devoted to good legal writing, as was my colleague, Ben Wittes, who's here, and the Katzmann opinion that the editors cited -- I'll give you the citation. It's Aris vs. Mukasey 517 F.3d 595 Second Circuit 2008. You might find that instructive as an illustration of one particular type of problem. Now, you see the problems are lack of counsel or lack thereof, also.

Do you want to comment at all?

JUDGE OSUNA: Yes, I would generally agree with Judge Katzmann. I think that the -- my biggest shock when I joined the BIA eight-and-a-half years ago was to see really how badly immigrants are represented in removal proceedings. And it really runs the gamut.

I mean, certainly, there are some very, very outstanding lawyers out there who really do a tremendous job representing their clients, but it is not unusual at the board and in the immigration courts to see, for example, briefs that are exact duplicate briefs filed in case after case. Sometimes, even the gender of the individual -- it's a male respondent, but the brief, first, it's "she did this" and "she did that." And that happens repeatedly. And, so, even if somebody -- we mentioned that over half of the immigrants are pro se. Even if they do have representation, sometimes that representation is really substandard.

Now, what can be done about that? I mean, I think that the immigration court system is trying to do a few things to try to address that. We have a very active legal orientation program in detention centers where immigrants are given basic information about immigration law, about what their cases may hold in store for them, about their options, and that's in a number of sites around the country.

The board has a very active *pro bono* appeal program where cases are pulled out of the normal process if it appears that *pro bono* counsel would help the immigrant on appeal with a brief, and that's been a very successful program.

And one that we're very excited about: we're doing something innovative with the Ninth Circuit in San Diego, a pilot program to try to obtain *pro bono* counsel for asylum immigrants or asylum applicants in San Diego. And we'll see where that goes.

I think all of these programs are important, but I think that, in the end, they're not going to

have a huge impact by themselves. I think that the problem is, unfortunately, going to continue for awhile.

MR. WHEELER: Andrew Schoenholtz, do you want to comment on that, and let me also ask you this: Bob referred to your analysis of outcome in asylum cases and your study with two others, aptly called "Refugee Roulette." Do you want to comment any about the representation issue and could you tell us a little bit in any event about results of that study and similar studies that even the Government Accountability Office has undertaken?

MR. SCHOENHOLTZ: Sure. Thanks, Russell.

So, what I would add to what these judges have said about the representation in the immigration court system and the adjudication system as a whole is, in addition to the stakes with the individual, there's a stake for the government, and, in fact, every player in this system recognizes that the system would be better off if non-citizens had quality

representation from the beginning, that is the immigration judges believe this, the trial attorneys -- and I've met with trial attorneys, DHS counsel, Department of Homeland Security counsel, on this. They would like to see a system, too, where the issues are better met when you have quality lawyers involved on both sides.

So, I think the immigration court system would be more efficient, more effective, and, obviously, the individual, him or herself is better off when there is quality representation. So, this really matters as a systemic issue, as well, for the efficiency of the system.

And one thing to add when we talked a little before about the overburdened system. Every actor in this system is overburdened. The trial attorneys, too. They do not have the time to prepare for cases, they have too many cases. Again, it comes back to having too many cases, perhaps not using prosecutorial discretion as well as it should be used.

In this system, strangely enough, it is the law enforcement officials, the investigators employed by the Immigration and Customs Enforcement agency, for example, who make the decisions to place people into proceedings. It's not the trial attorneys or the lawyers higher up who make those decisions.

So, representation, at the end of the day, would help this system work more efficiently and effectively.

In terms of this study that I did with Phil Schrag and Jaya Ramji-Nogales called "Refugee Roulette" -- and the first thing, let me just say, is something complimentary to our asylum system before I tell you about some of the surprising and disturbing findings.

We look at asylum decisions, and we looked at the merits decisions. That is, when cases have actually reached the point where an immigration judge, an asylum officer, the board, or the federal courts

can make a decision about an actual claim, somebody's had their day in court, what's the outcome there?

Well, nationally, the situation actually looks reasonably good. On the merits, the Asylum Office, which is part of the Department of Homeland Security, in the very first instance where people come forward voluntarily to claim asylum, their grant rates have been in the 30 to 35 percent range in recent years.

The second instance, the immigration court, they've been in the 40 percent-plus range in recent years, and those are the most important courts, as was said previously by our speakers. Those are the most important courts. They decide the vast majority of the cases on asylum.

So, nationally, this looks like a good picture, I would argue better than many countries in the world. When you look at the robustness it says this is not a highly-abused system. Most people are coming from countries of conflict or persecution and

they're being recognized when they have their day in court.

But we then looked underneath this to try to understand what is it that's happening at the individual level. Does it matter if you have asylum officer X or asylum officer Y in the same regional office? There are 8 regional asylum offices; there are 50-plus immigration courts around the country. Does it matter which immigration judge you get in a particular court?

And the disturbing finding was that, unfortunately, it matters too much. That is, there's a tremendous degree of inconsistency in the adjudications when you control for other factors.

So, for example, if you were to try to even just look at one major nationality or different nationalities that are often in the asylum system, it matters tremendously which judge or asylum officer you end up with. That's a disturbing issue because it means we may have on the national picture a good sense

that this is a robust system, but who's getting their day in court? What sort of justice do we have here? And then you have to ask yourself: Why is that the case? Why should it matter so much?

Well, one of the issues, I think, that could make a difference would be representation. It appears when we control for that, that the outcomes aren't quite as inconsistent, but the other side of this is we have to face the fact that, in our current system, one we've had for many years, the adjudicator's personal histories and their, I would say, proclivities play more of role in these decisions than they should.

Now, why can I say that? I can say that because we actually were able at the immigration court level to try to look at those personal characteristics. So that we found that such things as gender and professional history, whether they worked in the government or outside the government mattered a great deal.

And the bottom line, in my view, with regards to this, is that this has been a neglected adjudicatory system for many years, neglected by Congress, neglected, unfortunately, by many attorneys general over the years.

And that's one of the reasons I have to disagree with Juan about the problem of the review system sitting at the Justice Department. It's been neglected there. Despite the work that Juan and colleagues have done to try to improve it over the years, and they have made some improvements, without a doubt, but I think there's a long way to go, and we're at a different stage of development in our immigration history.

We are now fully feeling the effects of changes that Congress put into play back when they changed the law in 1965. We now have about 1 million legal, permanent residents who come every year to the United States, and these are people who are citizens in waiting, and I think it's time that we put the attention to these inconsistencies and the quality of

the adjudication and put the resources needed to hire the best lawyers, hire the best adjudicators, those who are really fit to serve, in effect, make them more like the judges we would like them to be.

MR. WHEELER: You found disparities between immigration courts, but also within immigration courts, right?

MR. SCHOENHOLTZ: Yes, and the reason we looked inside individual immigration courts is we wanted to control for possible variations in the nationalities who appear at different courts and get the census.

Let’s say you’re a Chinese asylum-seeker. That’s one of the larger groups of asylum-seekers in the United States. Well, you may have, in different courts, different types of Chinese from different part of their country coming, they may have different quality claims, that’s possible. But if you look at the same court where most of the Chinese, for example, in New York, are going to be coming from similar

regions and would have similar claims, you would expect that there would some place where there would be an agreement as to just how many of these asylum-seekers are eligible for protection in the United States.

Unfortunately, it's all over the map in that sense, so, even within each court, it might be judge X has a 5 percent grant rate, and you can keep going up the line all the way to 85, 90 percent, and the judges are all over the place.

And we're not suggesting that there's a correct grant rate. We don't know that. I'm sure there is, but nobody knows what it is.

On the other hand, we are fairly sure that with a very generous measure of what inconsistency is, which we used, more than a 50 percent differential from the mean in a particular court, that this is way out of line.

MR. WHEELER: Does that tell us that some aliens are being granted asylum who probably don't

deserve it and some are being denied asylum who probably do deserve it?

MR. SCHOENHOLTZ: I'm sure that that is the case. There's no way to get around that, and that means, in my view, that we need to attend to how to fix it.

MR. WHEELER: Do you want to comment on that at all?

JUDGE OSUNA: Yes, let me make some comments on the disparities issue because it's gotten quite a bit of attention, it's been in the news.

Judge Katzmann referred to the nature of these cases as being individual cases, "fact-intensive" cases. Credibility is a big issue in these cases, and the burden of proof by law in these cases is on the individual. And I'm talking about asylum cases, by the way, per se, where people are seeking asylum.

When you have that, you're going to have some disparity. I mean, you're going to have some --

even similar cases might have different outcomes because of the nature of the cases that are coming before the courts.

There was an interesting decision a couple of years ago by, I think it was the Seventh Circuit, where there was a suggestion made that maybe what we should go to is something like the Social Security Administration, which uses a grid system, so, if a certain fact pattern falls into a particular grid, it's a grant of asylum; if it falls outside of that, it's a denial of asylum.

I am opposed to that. I am adamantly opposed to something like that because I don't think that that kind of system allows for the individual variation in the myriad fact patterns that come before the immigration courts. It would promote consistency. I mean, if you want consistency, you can do that, but I don't think that a lot of people would think that that's a good idea to go to that kind of grid system.

Having said that, while some variation in these cases is to be expected, I don't think that you can defend and you shouldn't try to defend very, very wide variations with similar cases in similar courts with similar judges. I don't think that those sorts of things you should even try to justify.

So, what you have to look at is what else is going on in these cases because what you don't want to do is you don't want to tell an independent adjudicator like an immigration judge, "You're granting too many cases" or "You're denying too many cases." You want to stay away from that, because, again, we don't know what the appropriate grant rate or denial rate in the particular set of cases is.

So, you want to look at what else is going on there. Is there a deficiency with that judge in some other way? Does he or she not know the law well enough? Does he or she have something else going on in the case or in the way he conducts the cases that are worth looking at?

And I might add that the Office of the Chief Immigration Judge is doing just exactly that. These assistant chief immigration judges that I referred to earlier are responsible for looking at these types of variations and seeing what else is going on and whether some appropriate action is taken. Peer review, retraining, things like that, and I think that that goes on every day at the Office of the Chief Immigration Judge, and I think they do a tremendous job with that effort.

But I do agree with Andy that, to a large extent, this depends on hiring decisions, on making the right hiring decision at the outset because it's very hard, and this is where I go back to my statement that knowledge of immigration law is not the only thing that we look for. Knowing how to be a judge is really more important. You can always learn the law; it is a lot harder to teach somebody how to be a judge if they don't have the judicial temperament to do these types of cases in these types of positions.

So, that is what the hiring process focuses on right now, trying to assess this type of judicial temperament, and I think if you make those right decisions right at the outset, a lot of these issues of consistency and some of the other problems that have propped up really do go away. Or, at least, it's not foolproof, but at least you can diminish them.

JUDGE KATZMANN: I would add that, while recognizing the real problems in the system, we shouldn't forget those immigration judges who are doing outstanding jobs, and, unfortunately, they get tarnished when there are these instances of those immigration judges who are not performing, and, certainly, as a judge on the circuit, I've had occasion to make note of immigration judges who have not performed as we might expect them to perform. But there are so many immigration judges who are very devoted to the work before them, and they should be the models. After all, you're not going to have a system of fully competent immigration judges unless lawyers will be attracted to the system, and having

immigration judges who are able is, in many ways, a great recruitment tool.

MR. WHEELER: Did you want to say something?

JUDGE OSUNA: Yes, let me just echo what Judge Katzmann was saying. I think that there's been a lot of attention placed on some immigration judges that may not have handled the cases as well as they should have.

Having seen these cases for eight years now, the vast majority of immigration judges do really an outstanding job with inadequate resources. The problem cases are limited to a very small number of cases and a very small number of judges.

Now, that's not to say that when somebody is not treated respectfully or when an immigration judge behaves inappropriately that action is not warranted. It certainly is. In fact, it is warranted not just for the immigrant that may have had a problem with that case with the judge, but it is warranted for the vast majority of the immigration judge corps, who do

an excellent job every day, again, under very tough conditions. So, I do echo Judge Katzmann's sentiments on that.

MR. WHEELER: You've been talking about the immigration courts, but we've referred briefly to the burgeoning caseload in the Courts of Appeals of these appeals from the BIA. Many more appeals and no more judgeships.

Do you want to comment a little bit on the effect on the court of appeals, and why is the increase centered so much in the Ninth Circuit and the Second Circuit?

JUDGE KATZMANN: Well, a lot depends on the venue for these cases and where the immigrants are located in terms of their immigration proceedings. BIA appeals, if you compare March 2001 and March 2008 in the Second Circuit, you will observe that there was an increase of 1,412 percent of BIA appeals. As I noted earlier, the docket increased in our court in

immigration cases during that period from 4 percent to 39 percent.

At the present time, some 90 percent of the federal agency appeals that we hear are cases from the BIA. So, you get a sense of the extraordinary docket.

As Russell was telling us earlier, there was a great increase in cases going through the system when, in 2002, the BIA undertook to basically move out of its own system, a huge backlog of cases, some 56,000 cases, and those cases moved from the Bureau of Immigration Appeals, for the most part, directly to the Courts of Appeals. They don't go to a district court as an intermediary body.

And when those cases first came to us, it was very difficult. We had an automatic backlog of some 4,000 cases basically given to us as a court. And, in most of these cases, we were the first line of review because, remember, during that period, we were reviewing cases where there would be one word affirmances; there were not fully-developed opinions.

We were reviewing cases which were summary affirmances, opinions, decisions by one judge, not three judges. So, we were not seeing fully considered decisions. And we, as a court, had to develop mechanisms to essentially be the first line of review in many of these cases.

And, so, our circuit designed a system largely through the efforts of one of my colleagues, Jon Newman, to deal with these cases in a way that would provide considered attention to each of these cases.

As a circuit, we have had a tradition of oral argument in every case for which argument is sought except in prisoner cases. And we wanted to find some way to preserve oral argument, recognizing, however, that given the vast number of immigration cases that we had that would be simply impossible to guarantee oral argument in every case as a matter of course.

And, so, we developed a separate, non-argument calendar system whereby, every week, apart from our regular caseload, panels of judges would get packets of 9 to 12 cases. And, as a court, we would be adjudicating from 32 to 48 cases a week through this non-argument calendar system.

And the way that it would work is that, let's say you have 12 cases, that each judge would be designated -- judge number one for four cases.

So, if I were judge number one, I would first review the case. I would have a recommendation from the staff attorney's office. I would review that recommendation, I would carefully consider it, I would review the record. I would then pass it on to judge number two.

If I had said upon reading the case that this case deserves, I think, oral argument, then that settles the matter. The case goes from a non-argument calendar to the regular argument calendar, and then that situation wouldn't go to judge number two; it

would end it. But let's say I had no problems basically with the outcome or the disposition; it would go to judge number two.

Judge number two could, at any point, move the case to the regular argument calendar, and that would stop the process and would not go to judge number three.

So, anyway, you have a sense of the process.

As a consequence of this, we eliminated the backlog, but, at the same time, the number of cases keeps coming, and there seems to be no end in sight, and we are continuing to adjudicate some 12 cases -- from 32 to 48 cases a week. Now, I think, is the case that each judge, for 27 weeks, sits on a non-argument case panel. So, that's the way that we've been trying to deal with it.

I would note that since Bureau of Immigration Appeals has tightened up its own procedures and eliminated, for the most part, summary affirmances, and produced more opinions of

precedential value, that what you see is that reversal rates in the Courts of Appeals have declined, indeed. In the last few years, they've been cut in half in the Second Circuit. I think, in 2006, our reversal rate of Bureau of Immigration Appeals was something like 22 percent, and now it's something like 11.5 percent.

So, these cases are a steady part of our diet at this point, and it seems to me that unless and until there are larger changes, we can expect these cases to continue to be part of our diet.

MR. WHEELER: Roughly, what percent of cases get moved to the oral argument calendar, and how long is the oral argument typically in an immigration case as opposed to a regular case?

JUDGE KATZMANN: I think that the data on cases that get moved to the regular argument calendar, I believe it's something like 15 to 20 percent of the cases get moved to oral argument calendars, and that's a pretty healthy number. And the cases that are given oral argument time are given the same amount of time

as any other cases. There's not distinction that's made.

MR. WHEELER: How many of the cases that you see are counseled?

JUDGE KATZMANN: Most of the cases that we see are counseled. I think that at the court of appeals some 76 percent of the cases are counseled, but, as Juan Osuna pointed out and as Andy Schoenholtz verified, too often, the quality of representation we see is deficient, and it's a very disturbing thing to see.

MR. WHEELER: I want to turn to the audience for questions, and we'll do so in just a second. But let me briefly ask each of you: There have been all sorts of proposals floating around to change the immigration court system, radical proposals down to relatively minor ones.

If you could identify, and do so briefly, please, one or two things that you think would have

the biggest impact in improving deficiencies, what would they be, briefly?

We'll start with you, Andy.

MR. SCHOENHOLTZ: Thanks, Russell.

Well, my basic proposal is that we need to have our immigration judges and the board to be more like the judges we're familiar with and what we expect in court, more like a real court where we have the adversarial parties represented and represented by quality attorneys. So, independence, in my view, is a serious issue, and greater professionalization.

How to get there? I do think, number one, that the immigration court and the Board of Immigration Appeals should be independent of any cabinet agency. It should be outside of the Department of Justice.

There are proposals for it to be an Article I court. There are proposals for it to be an independent agency. I think both should be looked at very carefully; there's a much greater improvement, I

think, to professionalize the types of lawyers that we'd like to move into this system to attract the most qualified lawyers. I think that's the type of independence and professionalization that we need.

Number two, in the current system, I do think the Board of Immigration Appeals, as it's moving in this direction, should return fully to the situation that existed before Attorney General Ashcroft administered the second very radical streamlining.

The first streamlining that was implemented by Attorney General Reno did start addressing in a very good way the backlogs of cases at the board, and I think if that were left to play itself out, it would have handled it just fine over a period of a few years. We should return to that because, as Juan has said, these decisions are very difficult decisions, and I agree with him. They're challenging, and people can have different points of view on close cases. Better to have what we had for more than a half a

century at the board, panels making the merits decisions.

Third is resources, so that we actually have judges writing opinions at the immigration court. One of the -- what Judge Katzmann and his colleagues had to face was reading a lot of oral decisions issued by immigration judges because that's what they're required to do right now.

And, finally, I think we're talking about mandated representation for those indigent, non-citizens who cannot find *pro bono* or other types of quality representation.

MR. WHEELER: Very briefly, anything to add to that? We could go on all day about this stuff.

JUDGE KATZMANN: Yes, I would like to make note of a project that I think could serve as a model in the same way that the Ninth Circuit project of Judge McKeown and Juan Osuna, and that's a project in the Second Circuit. Second Circuit lawyers in the aftermath of the Marden Lecture, after discussions

with Pete Eikenberry and Robert Juseum, two fine lawyers, I got involved in trying to create a project that would involve lawyers in representation efforts.

And, as a consequence, three taskforces were created, one looking at how to increase the level of commitment to *pro bono* across the board, second, looking at models of service delivery, and, third, looking at how to boot out inadequate counsel and to improve and educate lawyers in the process.

And these taskforces continue to meet, and on March 11 at Fordham Law School, they'll be a working colloquium with the objective of involving the New York legal community in the effort to represent immigrants, and I would suggest that models like this should develop across the country because we can't wait for more dramatic changes. We, as lawyers, have a responsibility to our society to do more. After all, the state gives us a monopoly in the administration of justice, and that should mean, certainly, that, as a consequence, we have some obligation to provide services for those in need.

MR. WHEELER: Okay. Very briefly, and then we'll go the audience.

JUDGE OSUNA: Yes, very briefly.

I do think that the resources issues is something that has to be looked at. In the absence of a large influx of resources, given current times, I do think that this correlation between the number of cases coming into the immigration court system and the resources available in the immigration court system to handle those cases and the calibrated approach to this is really what we need to look at, and I am hopeful that the new attorney general and the new administration are looking at that.

MR. WHEELER: We should say, in 2006, Attorney General Gonzales offered a whole series of revampings, many having to do with the resources. I think the efficacy and the implementation of those steps are still open to question.

Okay, let's get some questions from the group. We have microphones.

Ben, you can go first.

MR. WITTES: Sure.

MR. WHEELER: If you could state your question and also your affiliation, it'd be helpful.

MR. WITTES: Ben Wittes from Brookings.

I just wanted to ask Judge Katzmann to talk a little bit more about the reaction in the bar in New York to the Marden Lecture because there are areas that are very faddish for *pro bono* purposes, and, I mean, you have no trouble finding big firms that are willing to represent Guantanamo detainees in endless habeas litigation, and I'm certainly not criticizing them for that. But what happens when a judge of the Second Circuit goes to the bar and says "Hey, look, we have a tenfold increase in immigration cases in our court, it's a huge problem for our court, and the problem begins a lot earlier than our court, which is that stuff is coming up to us with basically no record. We need your help"?

Is the result of that three taskforces or is there some more immediate and more substantial -- I

mean, are more cases now represented in the Second Circuit? What happens when you do that?

JUDGE KATZMANN: Well, I think that it's not because I asked for this, but we have seen changes in terms of representation in these cases.

For example, in the Varick Street court, which is an area of detained cases, we're seeing more activity in terms of represented aliens. We are seeing the creation of law school clinics.

Cardozo Law School, as a consequence of the Marden Lecture, created a law school clinic, and that law school clinic was the clinic that made the Freedom of Information Act inquiry as to enforcement.

The taskforces that we've created don't just represent the work of individual lawyers. Individual lawyers are representing larger interests, and, so, we expect that there will be hundreds of more lawyers involved in these efforts as a consequence.

And a pitch that I've made in this area, and this really goes back to a project on *The Law Firm and the Public Good* that I directed at Brookings, is to

make the point that, for the young lawyer, especially the young lawyer in a large firm who just sees lots of document searches and discovery, working on a case where you can make a difference in somebody's life is very meaningful. And for the firm, for morale purposes, giving young lawyers that kind of opportunity is a good thing. It also provides more training for the young lawyer.

And, so, there is a community of interest, I think, in promoting this kind of work.

Now, that said, you might say well, even if we got 5,000 lawyers involved, how much difference would that make? Isn't the problem greater? Isn't it more systemic?

And that, of course, is a legitimate question that you might ask, Ben. But, for the individuals here and now and in the foreseeable future whose lives are affected by the absence of quality representation, having lawyers involved can make a difference.

The case that Russell referred to, Aris vs. Mukasey, is a case where a firm, large firm, Cleary Gottlieb, took on this client and made all the difference in the world.

So, I also like to remind people, and I think this resonates when I talk about the issue, that most of us are descendants of people who came to this country seeking a better life and that we'd all do well to remember our past and to honor that past by -- as lawyers trying to ensure that there is access to justice, as I say, not as an act of benevolence or charity, but one of responsibility reinforced by the mores and laws and customs of a state which gives us a monopoly as lawyers on the administration of justice.

MR. WHEELER: Other questions? Yes.

MR. SANTINI: (Inaudible) Jean-Louis for AFP, *Agence France-Presse*.

It's a couple of questions for Mr. Osuna. It's a question regarding a couple of decisions that were taken just before the new administration came in. One decision, it was appearing in the newspapers about

the attorney general and the constitutional protection for immigrants to apply in the event of a lawyer mistake. I don't know if you could tell me whether it's still on.

And another one, quite similar, or more disturbing, according to (inaudible) organizations is the fact that the U.S. is, from generally (inaudible) started to collect DNA samples from people arrested and detained for suspected immigration violations (inaudible) to be more clear. I don't know if you confirm all -- those two.

MR. WHEELER: The question's about an opinion issued by the attorney general in 2009. January 2009.

JUDGE OSUNA: Yes, I can't really comment on the last, on the DNA question. But I think a lot of people are aware of the attorney general's decision just a few weeks ago.

Actually, just before he left office, Attorney General Mukasey issued a decision reversing a precedent that had been around for a couple of

decades, basically standing for the proposition that immigrants who suffered from bad lawyering, whose lawyer was ineffective, have a constitutional basis for raising ineffective assistance of counsel claims, and, as a basis under the Constitution for doing that, and there have been some procedures established many years ago as to how to raise those claims.

Attorney General Mukasey reversed that, saying that there is no Constitutional basis for these claims, but he set up an administrative system so that there are still procedural things that people can do to raise these claims.

The standard is higher though. The standard is higher that somebody has to show in order to get these cases reopened. Basically what they're asking for is that their case be reopened because their lawyer made a mistake.

SPEAKER: But those (off mike) standards.

JUDGE OSUNA: There are a number of standards. The one that I'm referring to, the standard has to be higher. It used to be that,

basically, somebody had to show that there was a possibility that they have some relief available. The attorney general raised that standard, and now they basically have to show that they would have been granted relief but for the deficient lawyering.

So, it is a much higher standard. And that decision is still in place, although, I do think that the new attorney general, in response to questions before the Senate, indicated that he might review that decision, but, so far, the attorney general, Attorney General Mukasey's decision is still in place

MR. WHEELER: Let's take one more question up front, and then we'll go to the back of the room.

Please.

MS. ORCHOWSKI: Thanks. Peggy Orchowski, I'm a congressional correspondent for the *Hispanic Outlook* and also authored a book this year called *Immigration and the American Dream*: *Battling the Political Hype and Hysteria*.

So, I'm just curious. I thought the majority of your cases had to do with reentry of

foreign nationals who had been deported, which, of course, is a felony. But you seem to be talking mainly about asylum cases.

So, are they asylum or are these people who have reentered as -- who have been deported now applying for asylum? Are they people who are kind of switching their cases?

MR. OSUNA: No, the reentry after deportation cases are not typically handled in the immigration court system. They're handled mostly in federal court. In the district courts, primarily, in the federal court system.

What the BIA and the immigration courts handle are cases involving somebody whom DHS has charged with being deportable from the country. In other words, DHS finds an individual, charges them with being deportable from the country either because they were here illegally or because maybe they committed a crime or something, places them in removal proceedings, and it is that person who then appears before an immigration judge, and the immigration judge

has to decide whether that person is removable from the country and also may adjudicate any claims for relief, such as asylum.

So, the person may raise asylum as a defense to deportation in immigration court, and then that decision by the immigration judge can then be appealed to the Board of Immigration Appeals. And, as Russell indicated, about 10 percent of immigration judge decisions every year are appealed to the BIA. Actually, it's a little under 10 percent these days.

MS. ORCHOWSKI: And how many are granted asylum?

MR. OSUNA: The grant rate that was alluded to earlier by Andy, of immigration judges granting asylum is over 40 percent. I think it's about 42 percent, 43 percent these days. And these are, again, immigration judges.

MR. WHEELER: Questions towards the back of the room? Richard Hoffman?

MR. HOFFMAN: Yes, Richard Hoffman, justice system consultant.

I think knowledge in that the representation problem and the resources problem are the two dominant things that affect this. I guess my question of the Justice Department is this: That in the list of problems that have come up because of the way justice is administered through the system, one that strikes me is that they fought for many years toward making immigration judges -- even giving them the protections of ALJs, and, to me, this indicates a certain amount of disingenuousness in terms of judicial independence because you have, really, an inferior level of judge that doesn't even have the protections that our best administrative law judges have.

MR. WHEELER: Any comment?

JUDGE OSUNA: Yes, not specifically on the ALJ thing, but I won't disagree that the immigration courts --

MR. WHEELER: It's a question of changing immigration judge status from just basically employees of the attorney general to judges protected by the

Administration Procedure Act, at, for example, the Social Security Administration.

JUDGE OSUNA: Yes, I don't disagree that the immigration court system has been neglected in the past, both by Republican and Democratic administrations. But I do expect and we have very high hopes that the new attorney general is aware of these issues and will be looking at them, and I expect that to happen.

MR. WHEELER: What's the significance of Attorney General Holders selecting Kevin Ohlson from the Executive Office of Immigration Review as one of his close assistants?

JUDGE OSUNA: Yes, I think it's highly significant. I think that the attorney general selected the director of the Executive Office of Immigration Review to oversee both the immigration courts and the BIA as his new chief of staff. That is significant for a number of reasons, among others, that we actually have somebody at the right hand of the attorney general who knows the immigration court

system, who's familiar with it, who was its leader for many years. So, I expect that that's nothing but a good thing.

MR. WHEELER: Other questions?

Sure, go ahead.

MR. SMITH: Thank you. Bruce Smith from Brookings.

I come at this from the perspective, I guess, of a concerned taxpayer. I understand from the introduction that the nation faces really serious fiscal difficulties, and I am not quite sure where resources in this area will fit in that scheme.

Perhaps my simplistic way of looking at this problem is to divide it into three categories. One is the criminal offenses, second is the amnesty issue, and third is the one I'll call deportation, which may not be the proper label. It seems --

MR. WHEELER: What's the question?

MR. SMITH: It seems to me that within the area of criminal offenses, we simply change our prosecutorial priorities, we go after banks and we go

after corporations instead of defrauded the system, and we leave to other means illegal reentry.

With respect to amnesty, I assume that we have treaty obligations that have to be met, and, so, perhaps, nothing can be done there.

With respect to deportation, would it be realistic to simply enforce the laws against employers who hire illegal aliens, and, perhaps, have some sort of a national identity card that would allow employers to accurately verify the status of people applying for employment? Is this --

MR. WHEELER: Okay.

MR. SMITH: -- way out of the ballpark or is this realistic?

MR. WHEELER: Any comments from any of you about changes in prosecution policy?

MR. SCHOENHOLTZ: Well, one point to make is simply this, that this is an overburdened system, and if you have concerns about the best use of our taxpayer money, then we have to look at how the system begins, and I think prosecutorial discretion is the

first part of this system. There's no need to put people into removal proceedings, as Judge Osuna said earlier, who are not going to be removed from the United States because we don't have the political will to do it. There are many people who have U.S. citizen children and have other reasons that they perhaps should be allowed to stay here, and we're putting them through proceedings.

So, I think there are ways to address that. We talked a little bit about that, and I do expect to see developments in that direction from this administration.

SPEAKER: Maybe I'll just pick up a little on that issue.

To go to Judge Osuna's threefold classification there, comprehensive reform, resources, and the holistic one, it seems to me that this system is so difficult, as our two judges and the other colleagues have described it, that you never will have enough resources to catch up with it unless you do something of a more fundamental sort, and I think so

you come down to should you have legislative reform, and, if so, big reform, little reforms, or should you rely on sort of the administrative discretion?

And I think of, just to throw in, I heard Judge Chertoff defending his decision to chase employers on the grounds that well, since Congress didn't enact reform, I'm going to scare their pants off by sending raids out after employers, and he justified it on a deterrence grounds. And I think there might be some people in this system that say keep the system hideous so that it frightens people away, but, I mean, if you're really going to do something, don't you have to change some laws and you have to change some administrative processes?

MR. WHEELER: What are the chances of major legislative overhaul in the immigration court system?

MR. OSUNA: Well, I don't know. I mean, I do think that you raise an important point, which is that some of the issues with the immigration court system in general and with the immigration system in general are a function of trying to administer and

enforce the laws that may be time to look at the underlying, legislative framework.

And I do think that the long-term solution to a lot of these issues is some sort of comprehensive approach, comprehensive immigration reform that takes a look at the undocumented population, employers, et cetera, et cetera, and enacts something that makes sense on a national level because we are trying, to some extent, to address these issues and deal with these issues in a court system. I don't think that that necessarily makes sense because I think the issues go way beyond the walls of an immigration court.

I just don't know; I'm not optimistic that that's going to happen anytime soon. I mean, that there are a lot of other people that look at this a lot closer than I do, and you hear different things. That maybe reform is possible this year, maybe reform is possible next year.

I think that with the economy being what it is, I think it's going to be very, very difficult to

enact some sort of reform like that, but I do think that, in the end, we are dealing with something that goes -- that we can do things administratively, and we have done a lot of things administratively, but a lot of this is really more of a legislative effort.

MR. WHEELER: Was there much about the immigration courts and the BIA in the large immigration reform bill that failed in 2006?

MR. OSUNA: There was some. There was some, not a whole lot, but there was some. I mean, there was an effort to try to go to more three-member decisions, to do away with affirmances without opinion. Again, I would argue that the BIA has largely done away with affirmances without opinion administratively, but there were some efforts in the 2007 bill to try to address some of these things, but they really didn't go anywhere, and we'll see if that happens again.

MR. WHEELER: Comments from others?

JUDGE KATZMANN: I would expect that the immigration adjudication system we've been talking

about today will be highlighted more in any comprehensive immigration reform, and if it's not, while comprehensive immigration reform will help reduce the number of people placed in proceedings, it will not address all these other issues we've talked about. So, I'm hopeful that when we get to that point of comprehensive reform that this will be part of the reform.

MR. WHEELER: One last question. Go ahead.

MR. TAJEHA: Hi, Good morning. My name is Max Tajeha. I wanted to follow-up a little bit on the holistic approach.

What would you say are three regulatory changes that between DOJ and DHS can be done to have a more equitable process?

MR. WHEELER: Two minutes.

MR. OSUNA: Three changes. Well, I'm not sure that they would require regulation. I think it requires an agreement, if you will, between DHS and DOJ that certain cases are not going to be placed in

removal proceedings because it is not cost effective. Put it that way.

And, again, I would point to the large group of cases that are currently in immigration court and at the BIA where somebody also has a visa petition pending with DHS, because of an immediate relative or because of family member who's trying to sponsor them for an immigration visa, many, many of those cases, but not the vast majority of those cases, eventually wash out because the person is granted a visa.

Again, it's a huge waste of resources to have that case, to have immigration judges handle those cases, have it go through the system, and then, in the end, the case is terminated because the person got an immigrant visa. And there are thousands of those cases.

So, I think that is one thing that doesn't require regulation, doesn't require anything. It requires basically a decision made at the DHS level that those cases are not going to be placed into removal proceedings.

And, I mean, there's other cases that also are worth looking at. I'm tired of seeing, for example, a 70-year-old grandmother in removal proceedings. I don't think that that makes any sense.

Now, there's not a lot of those, frankly, but you'll see some of those once in awhile, and I just think that it really goes beyond prosecutorial discretion because, yes, that's a big part of it, but it's really more of a policy determination on the number of cases and type of those cases that are going into the system, and that, again, that calibration between resources and cases.

MR. WHEELER: Any final comments from you two?

MR. SCHOENHOLTZ: Yes, I would just add two other quick points to what I agree with what Juan has said.

And two other changes they could do right now is I would require written decisions by immigration judges so that, ultimately, when the board reviews them and the courts of appeal review them,

they're revealing an articulated and, hopefully, well-reasoned written decision.

And, secondly, administratively, we could strengthen the review at the Board of Immigration Appeals by returning to panel decisions on the merits in most cases. That may help address some of the inconsistency at the immigration court level if we have a strengthened administrative appellant review function.

MR. WHEELER: Any final comments?

JUDGE KATZMANN: Yes. I would say that whatever comprehensive reform is enacted, if it is enacted, the administration of justice will be a critical component of any reform.

And, finally, those of you in the audience who want to get involved in the D.C. area, you might get in touch with the ABA Commission on Immigration, which has been doing excellent work.

MR. WHEELER: Okay, I want to thank our panelists; I want to thank you for coming. That's enough said. Thanks a lot.

(Applause)

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CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

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