

Prof. Benson, Mr. Wheeler, Mr. Olorunnipa et. al.,

Thank you for the well-written and well-compiled ACUS draft report.

It would be extremely helpful if the report provided additional information on those mandatorily detained pending removal proceedings under INA 236(c). Mandatory detainees are uniquely and directly affected by the backlog you describe, as the processing time for their cases equals their time in detention. This raises several issues, some practical (i.e. increased detention costs due to an increased backlog, see pp. 58-59), and some relating to fairness or larger concerns (i.e. the longer detention is prolonged, the more likely detainees with valid claims challenging removability or seeking relief are likely to abandon their claims, cf. pp. 49-50, as those claims take longer to adjudicate, see p. 35).

To the extent that a significant percentage of detainees are mandatory detainees under 236(c) – two-thirds of the detention population in 2009 (about 20,000 detainees) – if statistics regarding the 236(c) mandatory detention caseload could be broken out and provided, it would help to target achievable reforms to make their case processing faster (and case processing generally for detainees). (See Dora Schriro, Department of Homeland Security Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations, at 6 (Oct. 6, 2009).

To that end, it would be helpful if the report provided information on the 236(c) mandatory detention population and caseload, such as:

- Statistics regarding case dispositions specifically for mandatory detainees under 236(c). For example, on pp. 16-21, there are various charts summarizing the immigration court caseload. Is it possible to have a chart summarizing the 236(c) mandatory detention caseload?
- Additionally, is it possible to ascertain case processing times for 236(c) mandatory detainees? (It has been shown that detention times are longer for pre-removal order detainees, and longer for those with criminal convictions, but the distinction between mandatory detainees and discretionary detainees is not clear. See Migration Policy Institute, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities* 1 (Sept. 2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.) Since mandatory detainees likely have the most complex claims and spend the most time in detention, to break out statistics for them would be helpful.
- Further, is there any difference in case processing times depending on whether a 236(c) mandatory detainee's case is heard in an immigration court **inside** a detention facility, rather than a court outside a detention facility? It appears from the TRAC Immigration Court backlog tool (http://trac.syr.edu/phptools/immigration/court_backlog/) that some courts inside detention centers have shorter backlogs, i.e. average days pending for criminal/national security/terrorism charges. Yet it is unclear which of those cases involve mandatory detainees

(as opposed to discretionary detainees), and thus automatically involve additional taxpayer-supported detention costs, *see* p. 58.

- Additionally, anecdotally, it appears that in some courts outside detention centers, the detained docket moves more slowly (perhaps because of the additional time and resources necessary to adjudicate detained cases). It is not clear whether the same effect occurs in courts inside detention centers.
- Concurrently, however, is it possible to ascertain how many 236(c) mandatory detainees stipulate to removal? It may be, as you suggest, that many 236(c) mandatory detainees could reduce the length of their detention by stipulating, as they may not have valid claims to challenge removability or seek relief. (And it may be that many do in courts inside detention centers.)

Conversely, though, it may be that 236(c) mandatory detainees with valid challenges to removability or claims to relief abandon their claims because of the time in detention it would likely require to litigate, or because a legal orientation program is not available to them. There are documented cases of 236(c) mandatory detainees with valid challenges to removability or claims to relief. One review of caselaw found 117 cases over ten years where a decision that a crime constituted an “aggravated felony” was overturned. Amnesty International, *Jailed Without Justice*, 19 & ns. 77, 82 (2009). Another review of *Joseph* hearing decisions appealed to the BIA over a four-year period found 45 immigration judge rulings finding for the immigrant. Julie Dona, *Making Sense of “Substantially Unlikely”: An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 12 (Oct. 28, 2011), *available* at <http://ssrn.com/abstract=1856758>.

Stipulated removals appear to be used more commonly with discretionary detainees. (See Jennifer Lee Koh, et.al, *Deportation Without Due Process*, at 8 (September 2011) (only 20% of stipulated removals involved criminal charges). In any case, it may be that at least some 236(c) mandatory detainees are waiving their rights to stipulate to removal.

It would also be helpful if the report provided information on the *Joseph* hearings, which are the only avenue for 236(c) mandatory detainees to seek release, short of stipulated or voluntary removal. If a mandatory detainee wins a *Joseph* hearing, he likely has solid grounds to win termination, and thus be released from taxpayer-supported detention; conversely, if he loses a *Joseph* hearing, he may wish to stipulate to removal (although because of the high burden at a *Joseph* hearing, he still may possess a valid claim). To that end, the following information would be helpful:

- Are there statistics on the numbers of *Joseph* hearings held? There are statistics provided on the numbers of bond redeterminations or motions. (See pp. 17-18) Are *Joseph* hearings included in these statistics, and if so, as bond redeterminations, motions, either, or both?
- What percentage of mandatory detainees ask for, or receive, a *Joseph* hearing?
- What percentage of *Joseph* hearings are held by video or telephone (see p. 62 et. seq)? Anecdotally, do IJs or Trial Attorneys report that this raises problems, because *Joseph* hearings can be fact-intensive, and require review of criminal convictions etc.?)
- In how many *Joseph* hearings were continuances granted, thus prolonging detention and lengthening removal proceedings (see p. 58), because either the petitioner or the Government needed additional evidence (given that *Joseph* hearings can be fact-intensive, and require review of criminal convictions etc.?)
- How many *Joseph* hearings (or bond redeterminations) are appealed? (see p. 25 et. seq.) In how many cases does DHS exercise an automatic stay, thus prolonging detention?

Additionally, you raise at p. 39 concerns regarding insufficient review of NTAs by ICE attorneys. Is there any similar review of custody decisions, as distinct from NTAs? Would additional review of custody decisions obviate unnecessary detention and/or hearings challenging detention?

Lastly, you raise the issue of limited representation at p. 64. Has there been any consideration of limited representation at *Joseph* hearings or bond hearings, given the impact there on detention, and detention's associated impacts on representation, lengthened removal proceedings, and costs? Legal Aid Society in New York has a pilot program, with permission of the immigration courts in New York, to provide unbundled representation at bond hearings. See <http://nycicop.wordpress.com/2011/10/19/unbundled-representation-in-new-york-city-immigration-courts/>.

Thank you for your consideration of these comments.

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