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## ***Immigration Law: The Constitutional Rights of Non-Citizens***

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**T. Alexander ALEINIKOFF, Dean, Georgetown University Law Center**

Good morning everybody. Let's try that again. Good morning everybody.

**Audience/Panelists**

Good morning.

**T. Alexander ALEINIKOFF**

I'm Alex Aleinikoff. I work up the street at Georgetown University Law Center here, and the panel today will be talking on the constitutional rights of non-citizens. Let me say a little about it to introduce the topic, briefly introduce our speakers, but give them most of the time here.

As we think about the rights of non-citizens we, these days, tend to think about this in post-9/11 terms. So we worry about lengthy detentions, and arrests, and removals of people based on issues of ethnicity, or other issues of due process relating to the anti-

terrorism fight. But actually this is a far broader topic. And though we will touch on 9/11 issues, I don't want us to be restricted just to those issues. So let me just introduce a few of the kinds of issues one might think about when thinking about the rights of non-citizens.

In equal protection terms, in 1996 Congress adopted legislation that terminated welfare benefits, most means-tested federal benefits for immigrants, even for immigrants, permanent resident aliens, lawfully in the country, currently on the welfare rolls where their eligibility was terminated. Laws like that were upheld by the courts with a very low level of scrutiny applied under equal protection. The question is why? Why do we allow those kinds of discriminations between citizens, at least lawful permanent resident aliens, to be judged by such a low standard of review?

In due process terms immigrants are afforded some rights under statutes by Congress, but the courts have given Congress great leeway in structuring the procedures for the admission and removal of immigrants. Immigrants are not entitled, as a matter of constitutional law, to counsel in immigration proceedings. The Fourth Amendment doesn't apply. Judicial review is severely restricted for certain classes of immigrants. Restrictions on the right of habeas corpus have been adopted and upheld. What do we think of these situations?

Voting rights, that may seem strange to you to think about how can we be talking about voting rights for immigrants, for non-citizens, but in many countries around the world, non-citizens have been enfranchised, at least in local elections. There are very few jurisdictions in the United States that allow non-citizens to vote; one up the street here in Takoma Park, but this has not been the rule of the United States. Why not a right to vote? If we believe that taxation without representation is wrong for permanent settled immigrants, why not a right to vote?

Even the issue of citizenship is an interesting issue when...judge for the rights of non-citizens. We have a very broad citizenship rule in this country, that anyone born in the United States is a citizen of the United States. And that includes children of undocumented immigrants. But there have been bills introduced in Congress, both statutory and for constitutional amendments, to restrict that right of citizenship for the children of undocumented immigrants.

So, we'll touch on some of these issues, just to give you a sense of the breadth. And we'll also talk about efforts that will expand the rights of immigrants. So, for example, legalization proposals currently pending in Congress that would bring status to millions of undocumented immigrants would obviously have a dramatic impact on extending rights to immigrants.

Labor rights, the protection of temporary workers in the United States; there have been proposals for large-scale temporary worker programs. So what kinds of rights should accompany those worker programs as well?

It's incorrect to say that immigrants have no rights in the United States. In fact the constitutional rights that we enjoy on a daily basis are enjoyed by all immigrants, including undocumented immigrants, at least in terms of the criminal process, or someone who's arrested and put before...in a criminal proceeding, they have the right, Fourth Amendment rights, Sixth Amendment rights, Fifth Amendment rights, that we are used to in criminal proceedings. What's been carved out, are rights in the immigration process. So it's wrong to say that immigrants have no rights.

But, it's correct to say that they certainly have fewer rights, and that their condition remains always precarious. Because even if Congress, even if an immigrant has a First Amendment right to speak, the Court seems to say that they can be deported for that speech, so they couldn't be put in jail under our First Amendment, but there may not be a First Amendment limit on the rights of deportation. So the exercise of constitutional rights may well be burdened through the immigration process. It's an interesting tangle of rights.

To help us through these issues, we've got a great panel sitting in front of you. Let me briefly introduce them to you. I think you've got some of this material in your packet, and then we'll turn things over to them. Sitting to my immediate left, Judge Raymond Fisher from the U.S. Court of Appeals for the Ninth Circuit. He's been on the Ninth Circuit, appointed by President Clinton since 1999; educated at the Stanford Law School, President of the Stanford Law Review, and clerked for Skelly Wright and for Justice William Brennan in 1968.

Judge Fisher had a distinguished career as a trial attorney in Los Angeles, and also served in the Department of Justice in the Clinton administration as Associate Attorney General, the third ranking official in the Department of Justice. He also worked on Los Angeles issues, being a member of the Los Angeles Police Commission in 1996-1997, and then Deputy General Counsel for the independent commission on the Los Angeles Police Department, the so-called "Christopher Commission." So, Judge Fisher has, I guess, seen it from all angles, from federal government, from state and local government, and from the bench now. And we are glad to have him here.

Let me briefly introduce the last two speakers, and then I will turn things over to the judge. Rachel Moran, continuing down to my left here, clerked for Judge Feinberg on the Second Circuit, and worked for the San Francisco law firm of Heller, Ehrman White McAuliffe. She has been a member of the Boalt faculty since 1983, and visited at UCLA, Stanford, NYU, and other places. She served as Chair of the Chicana-Latina Policy Project at UC Berkeley's Institute for the Study of Social Change, and in 1995 received The UC Berkeley Distinguished Teaching Award. Her publication list is long. Let me just mention a couple of recent publications, "Fear Unbound: A Reply to Professor Sunstein." "Law and Remembrance" in *Language and the Law* and, "The Elusive Nature of Discrimination" published in the *Stanford Law Review*.

And finally, on my far left here, Dan Sutherland who is the Officer for Civil Rights and Civil Liberties in the Department of Homeland Security; a new position in our

government, created at the time that the Department was established. Dan's been in that position now for two years. He is called upon to provide legal and policy advice to the Secretary and the senior leadership of the Department on a range of civil rights and civil liberties issues, such as the use of race or ethnicity in law enforcement and intelligence activities, detention policies relating to aliens deemed of special interest to national security investigations, the need to engage with Arab-American and Muslim-American communities, and integrating people with disabilities into emergency planning and preparedness. Before that job, he worked as a civil rights attorney in the Civil Rights Division at the U.S. Department of Justice. He was a trial attorney there for 14 years and he has co-authored a book, "Religion in the Workplace," and delivered speeches on the role of Arab-Americans and Muslim-Americans in the war on terror. Dan welcome.

Let me first turn to Judge Fisher. I've asked the panelists to keep their remarks brief, hopefully under ten minutes; closer to five would be great. And then we would love to have a discussion. I know there are many people in this room with lots of knowledge and interest in these issues, and a discussion is always the best way to run these kinds of panels. So, Judge Fisher...

**Judge Raymond FISHER, U.S. Court of Appeals, Ninth Circuit**

Well, I usually impose time limits. We have a clock, and I'm used to ten minute arguments, so I'll keep mine half. I'm going to try. I'll cede the rest of my time to my colleagues. First of all, let me say, I am delighted to be here. I speak as a sitting judge, and for that reason, want to be understood as speaking for myself, not for the Ninth Circuit. Although I will be descriptive about what the Ninth Circuit does. And, anticipating these hearings that are coming up, I refuse to comment on any case that may come before us, or any issue about which I know nothing, which is a lot.

*Laughter*

And so I'll have a lot of cop-outs when I get called on. So with that caveat, what I would like to do is cover basically three areas. One is to tell you a little bit about what we do when we talk about immigration cases; what triggers the kinds of cases that we get involved in, give you some examples of that. And I also want to talk about the non, at least the non-immigration process, the other area where we do get constitutional issues involving immigrants, largely in the boarder area; illegal re-entry, boarder search issues, which also affect, of course, citizens as well. And then, lest I ignore the potential, and actual lawyers in our audience, I'd like to make a plea for your participation in this field if you aren't already involved.

So let me start with the types of cases that we get in the Ninth Circuit. The process that generates these is an administrative process that comes to us. We get the final orders of the Bureau of Immigration Appeals (BIA), or since they started fast-tracking things, we essentially get the immigration law judge's administrative determination, a determination for asylum, withholding of removal, or application of the convention against torture. What that means is we get, excuse me, an administrative record, we get an oral, usually

an oral decision reduced to type-written form by an IJ (Immigration Judge). The IJs handle an enormous numbers of cases. They do not have much staff. A lot of times where we get our edited transcripts of hearings that have been typed up months after the actual hearing. So the record we get tends to be a little rough, let us say.

A while back, a few years back, Attorney General Ashcroft decided because of the large, I think it was 50,000 case back-log, in the processing of the appeals, that they would streamline them. What that meant, in essence, is that one member, instead of a three-judge panel at the BIA, one member would review the IJs record, and essentially adopt it. So we, in practical and legal effect are reviewing a decision of the IJ

That streamlining process, we held, and other circuits held, not a denial of due process, which is essentially the governing constitutional principle that we go by. As Alex said, the full range of constitutional protections to criminal defendants is not available in the civil proceedings to these immigrants, but they do have Fifth Amendment due process rights. And that's the fundamental fairness test, essentially, that we're applying in these. And the streamlining process was held to satisfy fundamental principles of due process.

What that means, though, is that, we get a lot of cases. And we act as, essentially, the first level of any meaningful review of the IJ orders. To give you a concrete picture of what that means, in our calendar year 2001, the Ninth Circuit had 954 immigration cases. Now at the time, that seemed a lot, and we sit in panels of three, and we sit for a week. I, because I was at the Justice Department, technically oversaw, I did oversee, the civil division. And within the civil division is the Office of Immigration...

**T. Alexander ALEINIKOFF**

Litigation.

**Judge Raymond FISHER**

Office of Litigation. OIL, right. I knew it by OIL. Although I never actually did any review of their cases. And also Attorney General Reno had, when I became an associate , suggested I might assume responsibility for INS, which I, since I worked with the LAPD, and she considered it a somewhat troubled agency. And I said, 'sure, why not?' In total ignorance, coming from California to Washington, 'sure, why not oversee the INS?'

*Laughter*

Eric Holder decided he wanted to keep jurisdiction. So, you can talk to Eric sometime about whether he regrets that. And no offense to Alex at all, but I didn't assume responsibility. But because, technically, I had responsibility for it, I was recused from all of the immigration cases for the first several years of my sittings. And therefore I was a very popular member of three-judge panels because that meant the clerk's office did not assign any immigration cases to any panels on which I sat.

My recusal period ran out right about 2001. So, we had 954 immigration cases there. In the last year for which we have current statistics, 2004, we had 5,368 immigration appeals. That is 50% of all of the immigration cases that go through the courts of appeal nationally. So, the Ninth Circuit accounts for 50% of the workload generated by this streamlining process and clearing out the back-log by DOJ. It constitutes 37% of our docket right now. So, it's a major, major part of what the Ninth Circuit does these days.

Now, the D.C. Circuit has been called, "The Second Most Important Court in the Country." The Ninth Circuit likes to think that's not true. The Third Circuit, clearly, is up there. The Ninth Circuit, we think we get a wide range of interesting cases; and we do, a very wide range. And the immigration cases have now assumed a major proportion of that interesting range of cases. And the kinds of issues that we get involve a variety of persons from different countries, different backgrounds, different circumstances, religious persecution, political persecution; the various issues that give rise to claims for asylum. And they are very heart-rending cases.

Jamie Gorelick said, in an early program, that judges are human. Sometimes we are, although we try to be automatons and apply the law as given to us, both by the Supreme Court and by Congress. But occasionally, and not to be facetious about it, truly, these cases have real faces on them. These are real individual people and families whose ability to stay in the United States or not depends on the fairness and the validity of this process that we are going through.

Now the IJs have a very important role. They have to screen out the wheat from the chaff. There's a lot of fraud that goes on, it appears, from my perspective. And it goes on in trying to put together a case for asylum. We see this in the record. We find this in the decisions of the IJs; that they just don't believe what they are being told; that this person who claims to have been a persecuted Chinese Christian, persecuted and knows nothing about the Christian religion when asked about it by the IJ. The IJ comes to the conclusion that this immigrant is making this story up; that he came in, was caught, and decided to convert to Christianity, and was given a little bit of information.

I don't know as a judge, we can't tell whether or not that's a proper finding because we don't see the person before us. We go on this sparse record. And yet, there are very persuasive arguments made that this person is, because he's Chinese, he's a rural peasant; the fact that he doesn't know, in detail, the Christian tenants of the Bible, but can recite the Lord's Prayer, is this person a fraud, as the IJ has intimated and found, or has this person been really, unfairly questioned by an IJ because she was asking him about a form of Christianity that isn't quite what is learned in China, and therefore she's essentially, overturning his really true Christian beliefs as he does believe them and as he claims to have been persecuted for them in China?

That's the kind of human story we see in a variety of circumstances play out as we review the IJ and the BIA determinations when we're reviewing the denial of asylum, the denial of withholding of removal because of an IJ finding that the person is simply not

credible. So that, I would say, accounts for a substantial portion of the kinds of review that we get involved in.

Let me move away from the immigration context and talk about the other area that generates interesting and more normal constitutional issues, and that is the border crossings. We get immigrants who come across the border and are prosecuted criminally for the illegal reentry, 1326 cases. And just to give two examples of the kinds of issues that those generate, we get search and seizure and normal Fifth Amendment self-incrimination issues arising because of the way the person has been caught and given up evidence about his, or her, illegal re-entry.

And a current issue before us, for example, is whether or not the Department of Homeland Security (DHS) can prove the illegal re-entry that has proved that the person did not have permission from the Attorney General to re-enter, can prove the absence of such okay from the Attorney General by introducing what they call a “certificate of non-existence.” That’s not quite the right thing, but it’s a CNR. I know it know by the acronym. But, in effect, it’s a declaration by the custodian of records of the DHS, that there is no application in the file showing a request for authorization.

That raises the confrontation clause issue under the Sixth Amendment as to whether that’s testimonial or non-testimonial evidence, and whether or not the custodian has to come out from, or send somebody from DHS, to testify that they searched the records or not. An interesting issue under Crawford, the Supreme Court’s recent case on Crawford that says testimonial evidence cannot be brought in because it is unconstitutional hearsay. So, we get that kind of issue.

And then finally, let me talk very briefly as I said I would, about the representation of immigrants. Historically, because of the low number of cases, it was not a high-level area of practice of the bar, and as a result, the quality of representation, to the extent immigrants get representation, and they often do get it through “notarios” – people who either are or purport to be attorneys – and they get lousy representation.

Over the past several years, the quality of representation as the volume of these cases, and the kind of “sexy issues” that are raised by some of them, have become apparent to folks like yourselves. We are starting to see a much better quality of immigration bar. We at the Ninth Circuit track the quality by keeping a list, maintaining a list of attorneys who do repetitious cases, cookie-cutter pleadings, who don’t show up for hearings, and the like, so we can institute a certain amount of disciplinary action.

But, on the positive side, we have a pro bono program, where we get young lawyers and experienced lawyers to come in and represent immigrants on various cases. There are a number of non-profit organizations now, and law schools, who are establishing programs. Stanford has a well-publicized immigration clinic. They’ve actually had the law students come in and make the appearances; they get the trial experience. They also get the appellate experience. And organizations like Public Counsel, which are in my neighborhood in Los Angeles, have a full-time program. And indeed, one of my former

law clerks of a couple years ago is now heading up a government-funded project to represent juvenile immigrants. Because, as Alex mentioned, the kids are often caught up in this – they’re born here, or brought here. The parents are the ones who are being disposed of, but there’s a family connection there, obviously, and there is a lot of impact.

So, I encourage you to take away from all of this, is it’s not just a general problem. It’s something you can actually participate in by volunteering in one kind of those programs. Thanks.

**T. Alexander ALEINIKOFF**

Rachel?

**Rachel MORAN, Professor of Law, University of California, Berkeley-Boalt Hall School of Law**

I recently participated in a meeting at the Yale Chapter of the American Constitution Society. And at that meeting there was a press among some very prominent scholars to use citizenship as the new rallying cry, the revitalizing principle for a progressive agenda. At that meeting, I expressed deep concerns about the exclusionary possibilities of such an approach. And I thought that I might, today, reprise those remarks. And then I decided that that would be like fighting the last war. Because in many ways, the creation of this panel at the national meeting reflects, I believe, a conclusion by the Society, that the issues of immigrants as well as citizens, enjoy equal importance and prominence on a progressive agenda.

And so, what I thought I would do today is to think about the framing of this panel very carefully, so that as we move forward, we think about these issues in a way that will give us the greatest potential to both effect a progressive agenda, and to positively influence the lives of immigrants. So I want to take a look at each component: Immigration law, the constitutional rights of non-citizens. And I want to make three points.

First of all, is it appropriate to cabin immigration law off from other forms of law that affect the lives of immigrants on a daily basis? Second, constitutional rights: should we be thinking in terms of a rhetoric of rights that may, in fact, be isolated from other forms of law falsely, and in that way actually harm the possibilities, the life-chances of immigrants? And finally, is the terminology of “non-citizen” the most desirable and helpful one? In the interest of keeping to my time, I will not critique of the words “the and of.”

So, let me begin with my first point, which is I think there are real dangers in thinking of immigration law as somehow categorically distinct, and separable from other kinds of law that affect the lives of immigrants. I want to give you what I think is a fairly interesting, albeit perhaps to you, obvious example, and that is the relationships between immigration law and civil rights law. There has tended to be a divide between people

who do immigration work, and people who do civil rights. They have separate organizations. And very often these create problems.

Let me take, for example, affirmative action. There were prominent scholars writing that affirmative action really was not appropriately extended to Latinos. Their view was that affirmative action had been created to redress the wrongs to Black Americans, and that Latinos were essentially white immigrants who would naturally assimilate, as other groups of immigrants had, and therefore they didn't need the artificial subsidy of affirmative action in order to participate in America's institutions. These authors ranged from people like Paul Brest and Miranda Oshige in their piece, "Affirmative Action For Whom" in the Stanford Law Review, to people like Peter Brimelow, in his book "Alien Nation." And the message here was Latinos should not be eligible for affirmative action because they are really white immigrants. That was the discourse of that civil rights debate.

Now when you looked at the immigration law, that debate took on a very different cast. So, in that debate, there were concerns that Latinos should be restricted in their ability to immigrate because they would not assimilate as previous generations of immigrants had because of their racialized nature, and that they would end up becoming a dependent group, like African-Americans, who would not be able to effectively participate in the American Dream. And so for purposes of immigration debates, Latinos actually were not white immigrants. They were really, in a sense, going to turn out to be the racialized group like blacks.

The separation of those two debates made it possible for them to happen simultaneously, without any awareness of the inconsistency and the characterization of Latinos' racial and ethnic identities. Now, that point is my first concern. Should we actually have a little group segregated off from everyone else, talking about immigration law? Or should we think very carefully about how immigration law intersects with other bodies of law that affect immigrants.

Now my second point relates to the issue of constitutional rights. And Dean Aleinikoff pointed out in his opening remarks that immigrants enjoy a number of important constitutional protections because, regardless of whether they are citizens, they are persons for purposes of the Constitution. I do not want to understate the vital importance of that principle. It is one that I have defended vigorously, including at the Yale chapter meeting that I mentioned.

But I also worry that separating out a rhetoric of rights from other forms of law creates the danger that we will end up with a formalistic and empty account of equality. Rights talks really creates that danger, though it need not, of descending into formality and false equality. I think that story is most tragically illustrated by the aftermath of the Civil War. Reconstruction came to a halt because we drew a false divide between political equality for African-Americans and social equality for African-Americans. We labored under the belief; perhaps it was specious. Perhaps it was hypocritical. Perhaps it was strategic. We don't know all the story there, but, the belief that somehow you could accord people

formal political rights as citizens, and somehow their social subordination would not interfere with the affected exercise of those rights.

We cannot divide off different forms of participation from each other and expect genuine equality, liberty, dignity, and membership. Today's immigrants face, in some ways, the mirror of the aftermath of the Civil War and the false distinction between political equality and social integration. Today there is an assumption that many immigrants will "naturally assimilate." That is to say, become socially and economically integrated, even as their rates of political mobilization remain deeply depressed. And I think that there is a profoundly important question for us. And that is, 'can you actually, socially and economically, integrate a population that is politically, severely underrepresented?'

In California the story is particularly stark because of the high proportion of immigrants in our population. And I want to focus here on Latino immigrants because I know the Latino population best. But if the current rates of under-representation of Latinos in the California electorate persists, scholars Jack Citron and Benjamin Heighten predict that by 2040 we will have in California, a white population that constitutes 35% of the state, but 53% of the electorate. So they will be a majority of the voters, even though they are a minority, a clear minority of the state's population. Latinos, by contrast, will represent 40% of the state's population, but only 26% of the voters. Will the social and economic participation of Latinos be real when their political presence is so severely curtailed?

Now my final point goes to the decision to use the term "non-citizen." And I think that that terminology actually, once again, privileges citizenship as the relevant axis rather than personhood in understanding the lives of immigrants. And I believe that there is still a danger in choosing the terminology of "non-citizen" over "person," for example. But I want to also argue that the use of the term "non-citizen" suggests that you can draw a bright line between citizens and non-citizens, and that that bright line has meanings beyond the realm of formal, legal distinction. And I would suggest to you that that also is a false assumption.

Because if we look at immigrant enclaves today, recent data on the Latino population suggests that those communities are mixed; that non-citizens, both documented and undocumented, live side-by-side with citizens in the same neighborhoods, living the same lives in terms of their job opportunities, their education, and their family structures. And when you move from the level of community to family, the substantial number of mixed-status families, families in which children and parents may be citizen, undocumented, permanent resident alien, all living together, means that for immigrants themselves, the distinction between citizen and non-citizen in every day life may be quite insignificant, even if you think it matters a great deal to you as a lawyer.

Now I want to argue to you that these concerns are of great importance to the future of organizations like this, which hope to advance a progressive agenda. Fourteen percent of the national population in 2004 was Latino according to the Pew Hispanic Research Center. And 20% of the population under five years of age was Latino in 2004. We know

that the Latino population is the fastest growing population now, and that is occurring not simply due to immigration, but mostly due to high birth rates.

So even if we were to curtail immigration in some ways, we would still see a very rapidly growing population. We cannot depend on traditional approaches to reaching this burgeoning constituency – approaches that were forged with an eye to a white population, including immigrants, or an African-American population, which has been racialized.

I believe that there are unique questions of political socialization going on in these communities because of globalization and trans-nationalism. And that we know very, very little about what political socialization and civil engagement look like for communities like these and mixed-status families.

I believe that political incuriosity about the lived experience of these immigrants will prove costly in effecting any kind of agenda for change. And that it will prove costly not just for organizations like this one, but for those Latino immigrants themselves. Thank you.

**T. Alexander ALENIKOFF**

Daniel?

**Daniel SUTHERLAND, Officer for Civil Rights and Civil Liberties, U.S. Department of Homeland Security**

Thank you. This is such a broad topic. I wasn't quite sure where to go. And I think as you hear our comments, you'll see different perspectives on the topic from the bench, from an academic, and then somebody who's trying to be a daily practitioner, trying to apply some of these things on a daily basis.

Let me just briefly introduce what my office does which is, as the dean said, unique. Our job, the Office for Civil Rights and Civil Liberties at the Department of Homeland Security, our role is to help our colleagues to secure the country, while also preserving our way of life and our constitutional framework. We try to do that in four ways. One is we provide legal and policy advice that tries to help shape policy up front in ways that will be mindful of the Constitution and federal law.

The second way we do it is that we do investigate complaints that come from members of the public about departmental policies or actions that are taken, sometimes, with regard to a particular person. For example, 'I was not allowed to fly on an airplane; my name must be on a no-fly list. Can you check that out? It must be because I am Muslim,' or because of a larger policy issue. We investigate complaints in both.

We also provide leadership to the department's Equal Employment Opportunity Program so that our internal civil rights house is in order as well, which has both internal and external effects. And the last thing is that we serve as an information and communication

channel to members of the public. In other words, we explain what the department is doing, or try to. And just as importantly, we go to outside groups and listen to their critique of what the department is doing and bring that information back in to help try to shape our policy. And so, those are the four, sort of, things that we are trying to do.

As I said, we're trying to apply some of these principles that have been talked about in a daily basis, on a practical level. And as we look at the issues, we see that the Constitution requires certain choices to be made. We see that federal law or statutory law requires certain choices to be made. But we also see that sound public policy requires certain choices to be made. And so in our office we are looking at all three of these issues. And so I am going to really refer more to some of the sound public policy questions and I would commend that approach to you as advocates trying to influence government to differentiate in your own minds and in your arguments, that level.

So I thought I would just pick a particular topic that we have looked at, that dean had referred to, 9/11 issues, and so let me just apply to the question of non-citizens in the context of 9/11, and give you just a few thoughts on a particular issue, and how we handled it.

In June of 2003 the Department of Justice Inspector General issued a report that was critical of the way the investigation after the 9/11 attacks had been handled. I'm sure a number of you are familiar with it. They issued a report titled "The September 11<sup>th</sup> Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11<sup>th</sup> Attack."

The I.G. Report examined the cases, or the treatment, of 762 aliens who were detained in connection with the terrorism investigation. At the conclusion of this very thick report there were 21 recommendations that were made. It was extremely helpful in that sense. It analyzed and critiqued an issue, and then said 'here's what we specifically recommend be done,' and there were 21 issues that were laid out.

Now the I.G. report looked at events that happened well before the Department of Homeland Security was created. But when we were created many of the immigration functions that were referred to there came to us. So the first decision that we made as senior leadership was, 'we're going to take that report seriously.' Let's read it. Let's study it. Let's understand it. And let's go from there. We didn't just dismiss it and say, 'that it doesn't apply to us; we weren't around at that point.'

As part of our review of the issues, we met with civil rights and civil liberties groups, and immigration groups who provided feedback and input; a couple in the audience today who helped us think these things through. And we also received insight from scholars such as the dean's colleague, Doris Meissner, who had studied this and written reports upon it. So we tried to take a broad approach in terms of understanding the issues.

We made the commitment to adopt the recommendations in the I.G. report fully. And so here are the things that we have done. The first thing that happened was we issued a new

detention standard. I don't know if you remember the issues associated there. But there were issues about poor treatment of people that were incarcerated or detained in that time frame; primarily those related to facilities that we did not control. But we felt that we could improve our detention standards, and therefore did issue new standards that required us to more effectively monitor people who were being held in facilities that we did not control. So we made efforts to work on the detention side of things, and the Inspector General told us we had satisfied their recommendations there.

In terms of the due process though, and perhaps this is the more interesting part of the procedure. In April of last year, Under Secretary Asa Hutchinson, who was then our Under Secretary for Border Issues, issued a guidance memorandum, not a regulation, but a memorandum from him to the field. There are advantages and disadvantages, to those of you who've been in government, to such a document; that he could write what he wanted to write and give guidance to the trial attorneys, the several hundred thousand trial attorneys under his control, and the thousands of law enforcement officers under his control, 'here's how we're going to handle this situation procedurally.' And he said three things.

First – the three main topics – the first is, notice of charges provided to a detained alien. In other words, you're detained, now you know why you have been detained. The Inspector General raised concerns that aliens detained after 9/11 weren't provided with an explanation for why they were under detention, certainly not in a timely way. And they were not served with the documents that tell them why they were detained, and then allow them to begin to get counsel and make the process move.

So, under Secretary Hutchinson's guidance memorandum, he required that aliens who have been arrested must be formally charged within 48 hours of the time they are detained. They must be served with the documents within 72 hours of the time that they are detained. This is not required by the Constitution. It's not required by federal statutory law. It's required under the policy procedures that he laid out.

There are times, and certainly after 9/11, might have been a time when you can't do that. The jail, the detention facility where many of our detainees were held was destroyed at the time and had to be evacuated. That was a major achievement of the first, you know, 12 hours, was to get people out safely to another place. So there are certain circumstances where his guidance memorandum allows for flexibility under extraordinary circumstances.

We were conscious that if you allow an opening like that, you allow then, anybody to say, 'well, that's an extraordinary circumstance. I couldn't get my work done. I had my kid's ball game I needed to get to. And so I will get to that then Monday, three or four days later.' But to try to build in checks and balances there, we tried to build in that these exceptions could only be done by a top official of the agency and not just somebody on the day-to-day basis who is supposed to administer the papers. It had to be done by the top officials in the agency. And then there are also review procedures to make sure that, if

an exceptional circumstance ground is taken by someone, that is reviewed by the top officials of the agency. So we tried to build in those sorts of procedural safeguards.

The second major area, and those charges being the first, the second is an independent review. In the 9/11 context, as in many of the contexts, you have one federal law enforcement agency, in that case the FBI, turning over information about individuals who needed to be detained, to another agency, in this case, the immigration services. And so what the Under Secretary Hutchinson's memorandum says, is that it is our responsibility, to independently review the information given to us about the individual. It is the responsibility of the DHS Law Enforcement Officer to independently review the information. It is the responsibility of the immigration attorney to independently review that information because he or she has a responsibility to the court to make a representation about that information and about the case.

And so attorneys who represent DHS in immigration courts have to independently review that information and also must independently review any claims that proceedings should be closed. And also need to independently and individually review whether there are claims that an individual should be denied bond for any particular reason. So those are layers that we have tried to lay into the process.

I guess the last major area is post, or custody reviews, which basically means people who have been held beyond the 90 days that they are typically held. We put in place certain procedures to make sure that people who are in long-term detention that those cases are reviewed and people are not held for a long period of time.

Another major area that was a reality within the bureaucratic structure was, in terms of communication after an event like that. There were people within the immigration service who had concerns about the way the investigation was being handled. The I.G. said that they did not have a method of communicating their concerns beyond their direct supervisor. And we have created a system, or a process, where if there is another 9/11 event, God forbid, that those in the field, who would have concerns about the way things are being handled and feel that they are not being heard, will have channels of communication to me and to the general counsel of the department, to be able to independently raise these issues so that we can address them quickly. Another major area's dealing with improved communication with the DOJ; there is a lot of work in these areas.

After these were announced, I'll just conclude with this, a lot of civil rights groups were a little bit shocked to see what we had done, and applauded it, both in press releases that they issued, but also, just in phone calls. But just to complete the picture, the civil rights and immigration groups that we deal with have asked for further work. And I just want to highlight what they have asked for in this area so you get the breadth of the issue.

They have asked that any time an alien is detained that the alien sees an immigration judge within 48 hours of the time he or she is detained. That is not the current system, and that's what they've asked for, and there's proposed legislation on the Hill for that.

We have said, ‘you must serve the documents within 48 hours.’ They’re saying, ‘you’ve got to go in front of a judge within 48 hours.’

The second major issue deals with this whole definition of what an emergency circumstance is. And they have asked that, instead of that being in a guidance document that that be in regulation, and that it also be tightened up to be a narrower definition than what we came up with.

So, just in conclusion, we’ve talked about theoretical issues relating to due process and non-citizens. This is a very practical circumstance where we tried to make that all play out. There are a number of factors associated with developing government policy. And the policy, the way we worked it out, and the circumstances as well as what civil rights and immigration groups and those on the Hill are also pushing for. So I hope that gives you a breadth in a specific circumstance.

### **T. Alexander ALEINIKOFF**

Thanks Dan, for that. Let me start with one question, and then we’ll turn things over to the audience here; a general question, really with three parts, one for each of the panelists. I want to focus in on the phrase that Rachel used about a “progressive agenda.”

My question to Judge Fischer is the following: why do you think, to get into the minds of judges, why do you think that due process concerns, which seem obvious to members of the academy and to many advocates, have less purchase in the judicial process than they might? Why have we tolerated the speed-up from the BIA? The courts have upheld that. Why have we allowed the situations of ‘no right to counsel?’ I’m not asking you to comment on a particular case, but can share some thinking that you think is going on in the judicial mind that allows that kind of distinction to be made for immigrants where we wouldn’t normally tolerate it for citizens.

For Rachel, you talked about a progressive agenda, but most of your talk was on critiques. So I guess I would ask you, what is the progressive agenda, if we’re worried about abuse of the word’s “non-citizens,” and if we are worried about cabining off immigration law, but at the same time, I think you concluded by saying, there are unique situations that you have to pay attention to about the way immigrants live. What is the progressive agenda? Can it really be all-inclusive, and what would it look like?

And then I guess for Dan, I’d guess I say, on the progressive agenda question, what’s the department’s position on the right to counsel, which Judge Fischer raises? Is there a really crying need for fairness in immigration proceedings for lawyers to be provided? Even if there’s not a constitutional right, does the department have a position on making funds available for attorneys or supporting legislation that would provide a right to counsel in proceedings? I think that’s one question.

*Laughter*

At least under one. If we can have quick answers, then we can get to the audience.

**Judge Raymond FISHER**

He asks broad questions, you know ‘what’s the meaning of life?’ and then says, ‘give a short answer.’

*Laughter*

The academy meets the bench.

*Laughter*

And I always admonish counsel, ‘listen to what you got asked, and answer the question.’ So, I’ll try. The question was, ‘why does the judicial mind tolerate these lesser rights?’ I think I’m fairly summarizing it. And I can’t speak for any judicial minds beyond my own. And sometimes, my clerks will tell me, I don’t do a good job of that either.

*Laughter*

So let me...it’s a serious question, and I haven’t had, obviously, a whole lot of time to formulate my thoughts about it, but, a couple of quick reactions.

First of all, as I mentioned about this whole area of law, immigration, this is a new phenomenon. I never confronted an immigration case until about two years ago, or three years ago. And most of my colleagues on the bench probably say the same thing. This whole area of law has sort of bubbled up and with its intensity, both because of the enormity of the onslaught of cases; plus, when you throw in 9/11, and the sensitivity to immigrants that we now have, which is connected to national security, you have just a whole new landscape.

So, for example, I hearken back to then Justice Renhquist’s opinion in an early case where he was talking about the rights of the INS to do random checks of people coming across the border. And there was a long discussion in the opinion, in his opinion about, essentially saying, ‘look, the government has the right to control who comes into this country,’ very pragmatic. And saying that you can take a lot of actions that would not normally be tolerated because it was a high level of interest. That may have been actually, Justice O’Connor.

And then, more recently, in the Flores-Montano case, which is a reversal of one of our cases, which said that when you come across the border, the border patrol can take apart your gas tank, without any reasonable suspicion whatsoever. They can just take it apart. They think you’re smuggling drugs; you can come across, because it’s the border. And so there’s been a real move, even recently, to recognize broader intrusions on constitutional rights than would be tolerated. And this affects both citizens and non-citizens, or immigrants and non-immigrants alike in this context.

So there's a situational factor there that I think affects why judges have been willing to give some greater deference to interpretations of constitutional rights or constraints on them in the immigration context. Because you are essentially controlling who comes into the United States. And in the case of the immigration cases, it's people who have come in, overstayed visas, or who are looking for permission to come here and be brought within the ambit of the statutory grounds of fear of persecution if they are sent out of the United States.

So, it's a context that requires some education of the judiciary. We are sort of feeling our way through it. Our circuit tends to be fairly, depending on the panel you get, more generous than other circuits. And the Real ID Act was just adopted. Actually got a brief look at; it seems to have cut back on some of the Ninth Circuit's more, if you want to call them, progressive interpretations of rights of immigrants. So, there's a lot to tell us as judges, both from Congress and from the Supreme Court, that we have to move cautiously in this area, and that's what shapes our mind.

### **Rachel MORAN**

One of the things that wasn't mentioned in my introduction is that I now direct the Institute for the Study of Social Change. I mention this because in answering the question, I want to talk briefly about some research that a graduate fellow of ours has done in South Central Los Angeles. He went down to South Central Los Angeles because it was a neighborhood in transition; shifting from what was seen as a classic, African-American community, to one that is now heavily Latino. So if you go down the streets of South Central, you'll see a braiding place next to a taqueria.

And when he went to South Central, and he spoke with people, what he discovered was that there were two constructions of that community, side-by-side. One is what he called "the enclave," that is this immigrant community of Latinos. And the other was what he called "the ghetto," which was the African-American component of the community. And "the ghetto" had a sense of entitlement to government services; that government should help people to get ahead, to have vibrant communities, to leave the communities if they wanted to. And "the enclave" did not, because of the consistent cutbacks in California in government services, and in particular, services to immigrants. So in many ways "the enclave" had already been privatized.

And we also find in other research, that Latino youth had the lowest levels of interest in voting, the lowest levels of interest in high school civics and government classes; because for the future of these children, government has been quite irrelevant in many ways.

Now where do the Latinos in South Central Los Angeles find structures of opportunity? What he discovered is that many of them turn to the Catholic Church, that the Catholic Church has stepped in to fill the void left by the absence of public services, to give promising, ambitious Latino youth an opportunity. This means that for people who are interested in, for example, faith-based services, there's a natural appeal now, to Latinos

who see little government, small business opportunities, faith-based assistance, in an alternative viewpoint about how to construct their futures. And it strikes me that the first object of anyone interested in a progressive agenda in which government plays a role in shaping the life chances of its population, is to revitalize the sense that civic life is an important component of the futures of these communities.

And the second thing I think to do is not to mandate a blueprint for progressive reform from organizations like this, but to mobilize these communities in discussions about what matters to them, including the ways in which their civic participation in the United States relates to the vital ties that many of them do retain to their home countries where they actually are politically active and civically involved, very often in trans-national localities. So the politics is very local for many of these individuals.

The final thing that I think we need to be sensitive to is we need to really understand these communities and the differences within them. For example, what we are finding is a gender gap in Latino political participation. It is Latinas, it is the women in these communities who are most likely to have an interest in civic life, and government, and participation. And so, we are not seeing some of the more traditional patterns in which men stepped forward for leadership, but that the women are really the core of a lot of the organizing work that is being done.

And so I think we really need to understand these communities, and not presume that we know them, because we've studied other immigrant groups, or because we've studied other groups that are poor, are segregated. I think we really need to meet these communities where they are, and think about what they think of as their future. But given the levels of poverty, given the limited education, given the problems of labor, I think that there are real opportunities to have a dialogue about what we might offer to these folks who are a growing segment of our population.

**Daniel SUTHERLAND**

My question was about right to counsel...

*Laughter*

There is no right to counsel in the immigration context so that's the reason why Dean Aleinikoff stated it in a context of supporting legislation, which, of course, I couldn't comment on. I'm not aware of any legislation to be honest with you. But if there is, I couldn't, on behalf the department, commit to any reaction to proposed legislation.

But I would say that based on my experience, counsel matters in these contexts. I wonder if Judge Fisher agrees. But I think what we've seen, just anecdotally, he has far more exposure to this in terms of quantities of cases, but counsel matters a lot to the ultimate results. And counsel also matters a lot to the way the process works, because our system is built on the premise, it's an adversarial context in that it's built on the premise that

there are two competent people representing a point of view. So in a number of situations we've seen that counsel really matters.

So you as individuals out practicing law, I'd encourage you to take on a pro bono case, honestly. If I can suggest a particular entity, I'd go to Human Rights First, and find an asylum case that they would give you, and I think you'll find it quite fascinating and it will help the system. It helps us. When there's a lawyer, it always works better. Asa Hutchinson was a U.S. Attorney early in his career, and he told a group of asylum lawyers that the system works better, he knew it as a prosecutor, the system works better when there is a good defense lawyer. The whole thing works better. So I would encourage you to do that.

But I wonder if, Judge Fisher, if you have that experience or feeling as well that counsel matters to the ultimate result of the case?

**Judge Raymond FISHER**

Well, absolutely. And let me cite a statistic to make my point, to reinforce Dan's point. I mentioned the high volume of cases that we got, and I also said earlier that a lot of us, as judges, are learning a lot about immigration in a real hurry. Out of all of the cases, over almost 5,400 cases that we heard in 2000, excuse me, almost 5,400 of those, we wrote opinions in only two percent of those cases. So we published precedential opinions in only two percent. Now that's a very small percentage.

But what happens is that by writing those opinions, at least within the Ninth Circuit, we establish principles that then apply to all the others. I mean, that seems like an obvious truth. But what then happens is that having litigated a particular case through to an opinion, then a lot of the cases in our mix of cases are disposed of either by order, or by short memorandum, a disposition which is technically not published and is certainly not binding on any other panel.

I say that because what I am now seeing is that we are getting in some of the so-called test cases if you will, or the cases that are likely to generate an important principle, we are seeing pro bono counsel out of law firms. I just recently had a very, I can't remember what the issue was, but we had a very important immigration law related issue, where Munger Tolles had taken on the case. It's not a plug for Munger Tolles, they just happen to be the counsel. And it was refreshing to get well-prepared briefs, and articulate counsel, and it put the Department of Justice to the test itself. It responded well. We got good briefs on both sides, as Dan said, from the side of the DOJ, having good lawyers on the other side, I think actually challenges them, brings out a better quality of legal and factual development, and gets better decisions out of the court, hopefully. So, I can't emphasize enough the importance of that.

The other part which is tragic, there was a case just on our last calendar, where a woman, a Chinese woman, had come in, self-represented herself through the IJ process. It happens that she has two children. Now Congress, in its wisdom, has determined that

anyone who can show that they suffered the threat of sterilization or forced abortion under China's One Child Family policy, automatically, under the statute, qualifies for asylum. It's a statutory grant, basically. But this woman never made the argument, and the IJ didn't pick up on it. And then she gets a, finally she gets a lawyer who comes in, and he misses the issue. And then she gets another lawyer to take it to the BIA, but of course by then the time limits have all be waived.

So, ultimately when it comes to us, we have a case start out self-representation, two lawyers each of whom is alleged to have committed ineffective assistance of counsel, and the BIA will look at IAC claims. They're not under the Sixth Amendment; they're under the Fifth Amendment as to whether the quality of representation has been so lousy, that it really has denied them fundamental due process.

And so the question is, 'what happens?' This woman has, what appears on the surface anyway, to be a slam-dunk asylum claim now. But she is currently under an order of removal. Now that's where lawyering can help. It can make a difference. And if you're coming in after the fact then it can't always be cleaned up because the statute of limitations have run, or whatever.

But, one thing I want to then add, and this is what I'd like to have Dan take back to both the DHS and to the DOJ.

*Laughter*

We've said it from the bench. We have a mediation program in the Ninth Circuit that we are quite proud of. When I was at DOJ, President Clinton introduced an Executive Order mandating alternative dispute resolution (ADR), or appropriate dispute resolution as my boss Janet Reno called it. And I am a big fan of it, and I disclose it, I'm on the ADR Committee for our court itself. The mediation program has worked well. And the government has started to participate in ADR and in mediation. And our court is quite unique among all the courts of appeal. We have a very large mediation staff and it has accomplished good things.

Well, under the split now that took DHS out of that function, out of the Department of Justice, the Department of Justice now has a client. The client is DHS. And what happens now is that the DHS makes the enforcement decision, and DOJ, through OIL comes in and makes its appearance. And we will say, 'why is this 80-year-old woman with long ties being threatened with removal? I mean she's 80 years old. Isn't there some way, there's a colorable claim here...or in this Chinese case, isn't there something that can be done about it?' And the DOJ lawyer will say, 'well, that's DHS policy.'

So what we have asked is that we will tell, invite, we don't direct, we invite the DOJ and DHS to a mediation conference where we bring both DHS in as the client agency, and DOJ as the litigation agency, and then hopefully there is counsel representing by now, and there is when it gets to us, there is counsel representing the immigrant. And we have had some successful mediations over the last several months. Where just bringing the

parties together helps. But critical to that is both the willingness of DHS and DOJ to engage in the mediation process, but also there's counsel for the immigrant now who can deal with the enforcement agencies. And there are some very heart-wrenching human-interest cases when you have a legitimate case.

Now I said earlier, when I said there was fraud, I didn't mean to claim the whole process is ripe with fraud. But that is the problem that I think the system is trying to deal with, with this onslaught of cases. The IJs are trying to sort out the good from the bad. What we see on appeal are all the ones where the IJs have decided they aren't credible, they aren't worthy, maybe for legal reasons.

So what we try to do at the court of appeal level, which is quite removed from the trial level, I know that as a litigator, we have to avoid trying to substitute our judgments. It's much easier for us from the bench to be able to deal with lawyers who are representing the immigrant, and enlightened counsel from the government. So the process can work. But, it's evolved. It's evolving as we speak. And it's a lot better today than it was even a year ago. I can tell you that.

**T. Alexander ALENIKOFF**

Questions? Judge?

**Audience Member**

Judge Fisher's comments really segue into my concern. And I haven't seen any comment about this in either academia, or in any decisions. He referred to the facts that the statute has been amended. It was amended in 1986. Most of you know that you can get asylum if you can show persecution, and you can show persecution on grounds of race, religion, and among other things, political view. And Congress amended that in 1986 to say that if you have been subject to some sterilization procedure, or the threat, or an abortion, that counts as political persecution. And then the BIA provided in an opinion, that that also applies to the spouse who hasn't been subject to any of this. This is all directed to China. And so what we see is that the man comes in, and is working in a Chinese restaurant; the wife who was subjected to this is in China with the children. And I imagine the Ninth Circuit sees it.

Now there's a policy issue that we have to consider. I think I threw it in a footnote. And some of you may not think it's much of a policy issue, but that is, China is faced with a tremendous population problem. And yet we have made the decision that we will impose our view as to their population decision to allow them to come in on that ground. And I wonder if the panel, or anybody here; now they are very harsh, I mean we've seen cases in which the Chinese government, the Chinese population people there, control people, come in really harsh. They'll destroy the furniture of families where somebody has gone through this. I'm not defending China.

But, as a progressive policy organization you might consider what right we as a country have, to impose our moral views of population control on a country that will not survive unless it can control its population. Comments?

**Judge Raymond FISHER**

I defer to the Third Circuit.

*Laughter*

I told you they were good.

*Laughter*

**T. Alexander ALEINIKOFF**

The Third Circuit has had a lot of these cases because of a boat that went aground off Long Island a number of years ago, and a lot of those folks ended up in New York, the detention facility. One way to think about this, it seems to me there is a difference between imposing one's views on another country, and saying that when someone comes to our country and requests political asylum, we will use our values to decide whether or not we want to keep that person in the country.

So, you can have different views on whether or not that should be a good asylum claim or not, but it seems to me a country might say, for example, on religious persecution grounds, that we will welcome people who we view to be persecuted on a particular ground, even if that's acceptable behavior in the country from which they came. So, I'd at least want to separate those out in trying to answer your question, which I will not try to answer any further than that. Jerry?

**Audience Member**

Judge Fisher's comment that it's better than it used to be is sort of like the man who at a 108 fever and it went down to 106. It's been almost an article of faith among NGOs, whose lawyers work in the immigration field, that the immigration service is rotten to the core, and needs wholesale reform.

A lot of things that have been said today sound good, if they are going to be implemented. But, you have case after case where immigration judges are arrogant, abusive, don't follow due process, then put out findings of fact that make it almost impossible to overturn because the court of appeals looks at the findings of facts, and takes them on faith.

And I don't know how you really get to reform the system. But all the people who are active in it, at least in the NGO field, just think it's a lousy system.

## **Judge Raymond FISHER**

Well I will comment on that because it's been public. Our circuit issued an opinion, a couple of opinions recently, taking to task, immigration judges for their poor behavior. So that's the public face of trying to deal with what you said. Administratively our chief judge has invited, over two court meetings, invited representatives, actually we had the chief immigration judge and representatives of DHS met with us as judges in our court meeting, quarterly court meeting, for them to share with us, their perspective on their jobs and their concerns about how we undermine some of what they do.

And one of the issues that they talked about, and of course it was a dialogue; I mean we talked back, too. Judges are never quiet. But the point was, it was a useful dialogue. It was to say that we're dealing with this in a judicial construct. Maybe it's a little unusual for us to sit down with the members of the construct. But it seems to me very practical, and it had a good effect to some extent.

That's how I learned, and we learned, about the constraints that the IJs work under. They have such precious little staff. And they hear these cases. And so the record gets garbled, and then they go back, sometimes they'll issue a written opinion, but it's dictated up long after the event. And I can tell you, I don't remember the details of the calendars that I had at least two months ago, in all that much detail. So for me to go back after the fact and dictate up reasoning – I do it in opinions, but I don't do it as a trial transcript type of thing, or a trial order type of thing. That was a pragmatic problem. And that does account for some of it.

One of the things I've encouraged is for the IJs to put on the record why they are making an adverse credibility finding. The case that I mentioned about the Chinese immigrant, the Christian issue; when he gave an answer, he would stare and look at the ceiling in silence for three minutes, and the IJ put that on the record. Now, ironically, one of my colleagues, and this is an open argument, so I'm not revealing any secrets, one of my colleagues thought that was a sign of hostility by the IJ. I was a trial lawyer, and I learned the hard way in a deposition by not putting it on the record that when I made a smart-alec remark, or the witness made a smart-alec answer, everybody laughed in the room. So that when the jury got it, they could see that it was joke, because all they got was a printed transcript. And the same principle applies to me as a former trial lawyer, if the IJ is saying, 'let the record reflect that the petitioner has not answered the question for two minutes, and has stared at the ceiling.' That gives us some feel for whether the IJ had some reason for some of the commentary that comes out on the transcript.

And another, I mean, Jerry, you make an excellent point, that it's not just the lawyers, it's all of us in the system, and the IJs are on the firing line, and there's some good IJs and there are some that are not good. The problem is how we, at the appellate level, can sort them out. We're the first external review. The rest of it is all administrative within the Department of Justice. We are the first external review, and for that reason you do find judges across the circuits coming to different conclusions, panels within the same circuit

coming to different conclusions, because it's how we react to what we see. And what we see is very, very limited. So...

### **Audience Member**

Given that we are a nation of immigrants, we have a federal legislative immigration law, again, that fairly bristles with hostility to immigrants. And the introduction of non-citizen voting legislation in New York earlier this year led to across the board condemnations, at least in newspapers including the New York Times.

My question is why is there this failure of, or at least solidarity given the prevalence, or the understanding that many people have descended from immigrants, given the fact that many families, as Professor Moran pointed out, have immigrant members, non-immigrant members, citizen members, given that the same is true in workplaces.

And I wonder is it a failure of political framing? Is it the fact that we talk about these issues in terms of illegal immigrants; that we use those terms rather than "undocumented?" Is it a failure of solidarity, the tensions that work themselves out in the labor movement? Is it a structural failure; the consequence of re-districting and increased gerrymandering, as Professor Moran suggested, as Professor Issacharoff has described elsewhere? Or is it 9/11, even though these things pre-date 9/11? And how does one change that absence of solidarity?

### **Rachel MORAN**

Well, I don't think that one has to choose among the explanations. I think they can all simultaneously be contributing to what we see, so I really like the way that you've laid out a number of alternative contributing factors.

I do want to say that it was interesting to me because San Francisco also considered an effort to allow non-citizens to vote. That was on the ballot. People originally thought it was going to pass, but it did not. Even so, it strikes me that for many immigrant groups, it will be extremely important to use the global cities as a place to think about reform and participation. Because if we look, you remember after the presidential election, they had all these maps of the blue states and the red states? What happened was then they did little maps of the, more by district by district, and you discovered that the bluest of the blue are the big cities, particularly the big global cities.

And I think that there is a recognition that immigration and diversity are going to shape the future of these places. And it strikes me that many of the progressives now believe that they need to use progressive localism to advance an agenda, rather than targeting so many resources at the national level. And so actually, I think in San Francisco, although the initiative did not pass, there wasn't the kind of acrimony that one might have expected. And it's interesting that there was such acrimony in New York because school board elections have allowed non-citizens to vote.

So it seems to me the first area is whether we have some consumer-oriented notions of participation that can create an opening for civic involvement. And then, when that is used in a responsible and effective way, to expand the kinds of civic engagement that are available. In terms of some of the hostilities, it is clear that there are problems in the big cities, based on a tradition of racial and ethnic division.

And when you looked at the Los Angeles election, in the previous round, James Hahn had beat Villaraigosa handily, partly by drawing on the loyalties of the black community to Hahn's father, an image of Villaraigosa as one step away from a gang member, right, and the San Fernando Valley's sort of anxieties about the Latino community. And in the second round, Villaraigosa prevailed with a very fragile coalition, but primarily because Hahn had managed to alienate so many constituencies in a four-year period by firing Bernard Parks, the black police chief; by vigorously opposing the secession of the Valley. And therefore, now Villaraigosa steps in with the chance to mend some of these racial and ethnic divisions, particularly the distrust between the black and Latino communities, which we see in other cities as well. And one of the big, big questions is will he do it? Will he be able to pull that together? One of our panelists isn't here today because he is going to be on the team that Villaraigosa is putting together.

But it seems very clear, that for Latinos in particular, the tensions with the black community are a big problem, in part, because many Latinos feel that blacks weren't willing to share power in municipalities with Latinos; some sense that Latinos have been closed out from municipal jobs. They didn't get their fair share of municipal goodies. And finally because many immigrants, when they go into government offices, are turned down for their benefits by someone who is a low-level, government employee, who is often going to be African-American. And so there is this interesting set of tensions that we see in communities that should have some shared interests, but for structural reasons, for historical reasons, for reasons of a sense of limited total, sort of, zero-sum gain fears, don't come together.

But we are seeing some other coalitions developing, for instance, among Latinos and Asians in the labor movement; some very interesting organizations in Los Angeles around labor. So I don't think that the divisions are insurmountable, but they have to be acknowledged in a way that doesn't stop the conversation. And I think that's really difficult, and maybe we haven't found good ways to do that yet.

### **Audience Member**

I was just wondering about the absence of non-citizens on juries. And it bothers me, as a juror, often from the disadvantages or advantages of living in the District of Columbia, is you wind up on a lot of juries, and particularly a federal grand jury, when I served two years on a federal grand jury, there were no Latinos, and often there were Latinos coming into the room.

But on the local juries, you can go in and the whole voir dire has no Latinos on it, and you wind up with a Latino being prosecuted. And so it seems to me somewhere down

there, I mean, we talk about voting rights, but jury duty service really impacts on our sense of what a fair jury looks like. I'd like you to comment on that. Are there places that allow non-citizens on a jury? I don't know.

### **Rachel MORAN**

You know, I actually I don't know the answer to the final question. I do want to say that in addition to the issues of citizenship barring jury service; I know one of the, I mean in Peter Chef's book, he says one of the few distinctions left between citizens and non-citizens relates to voting and jury service. So, at least, in a number of jurisdictions citizenship is a requirement.

But what you see is not only does citizenship preclude Latinos from serving, but very often they'll be stricken for other reasons. For instance, there was a case involving bilingual jurors, and the court held that if you said, when you were asked, that you would be influenced by the Spanish version of the testimony, rather than being bound by the English translation, that you could be stricken because that's for cause.

And what was so interesting was there's plenty of data suggesting that no one can turn off the cognitive recognition of the Spanish version. So that if you're either, you know, dishonest or lacking in self-awareness you can serve, because you'll answer that you won't be influenced. But if you're honest and self-aware, you can't serve because there's no way to avoid being influenced. So even Latinos who are citizens cannot necessarily participate.

And so, I think there are various ways in which Latinos don't end up getting on these juries. And finally, Latinos are a disproportionately youthful population. And so, both from the standpoint of voting, and from the standpoint of things like jury service, they are under-represented vis-à-vis their general population numbers because they are so young.

### **T. Alexander ALEINIKOFF**

We have time for one more question.

### **Audience Member**

I wanted to follow up on the issue about how the IJs don't seem to be doing well, in that the administrative review process isn't working well. I think it's a broader problem than that. It's the bureaucracy of the INS, and now the ICS. My experience with it has been, as a clerk on the Eleventh Circuit, and then in an appointed case representing somebody in front of the Eleventh Circuit; and, on the front end of that, he was ordered deported in absentia, and the reason why he wasn't there, was because he was in federal custody.

*Laughter*

He was in federal custody on criminal charges. Which is of course why ultimately, he ended up being deported. But, they didn't, at the time he was being deported for other reasons. So, you didn't have one part of the Executive Branch talking to the other.

On the back end of that, Dan, you mentioned the 90-day, the regulations that apply to detainees after 90 days. And I wrote the letter that I was supposed to write under those regulations that say, you know, 'review within 10 days, and tell me whether or not he should be subject to bond, and so forth.' I sent the letter. I sent it FedEx. I said, 'under my reading of the regulations, you have 10 days to respond to this,' and I got no response at all. Now, I assume that had my client not been deported before oral argument, I could have raised this in front of the Eleventh Circuit.

*Laughter*

Now whether the Eleventh Circuit would have done anything about it, I don't know. But, I assume that that is something that would be subject to review, but I couldn't really find any cases on it. But this demonstrates the problem, which is, as an attorney, the bureaucracy is absolutely frustrating. And maybe my question is directed to Dan, or maybe it's directed to Judge Fisher, what do we do as attorneys, to get the bureaucracy to function right?

**T. Alexander ALENIKOFF**

Dan?

*Laughter*

**Daniel SUTHERLAND**

I was hoping the judge would jump at that one. Quickly, the bureaucracy is frustrating to me as well. I'm in it. I think that it's important to recognize, and the judge has referred to this, the quantity of work is amazing. There are also questions, I think a lot of these problems have to do with basic information technology issues: computers don't talk to one another; data isn't connected. There are a lot of practical issues that, I think, produce all that.

I think, too, and this goes back maybe to the question before, the last few years have seen just incredible reforms to the immigration service, split in three or four different directions; people report in different structures. I think there have been a lot of positives that can come from it, and still a lot of challenges; but there have been positives. Some things have been structured in better ways, I think, and the system does seem to be working better. And then, of course, you had 9/11 on top of all that which produces more security checks and backlogs, and all the rest of that.

So, I don't have a good answer for on how to wind your way through the bureaucratic maze. I do feel that the people that I deal with, honestly, want the system to work the way

that it should work. I don't deal on a trial court level out in the field, and I don't have a sense of the quantity that the people are dealing with, that the judge referred to. So, I do think that people want to get it right. I do think the quantity is difficult, and the information technology issues. So, if you're concerned about it, I would suggest you talk to Congress about more appropriations...

*Laughter*

...we have to make all this work better because the resources just aren't there.

**Audience Member**

(Unintelligible)

**Daniel SUTHERLAND**

I don't know. I think Dean Aleinikoff...

**T. Alexander ALEINIKOFF**

I will just tell you, it's just not a high priority. Making the system better is not a high priority anywhere in the government because of the concerns about border control, anti-terrorism. That's where the money's going. That's where the effort's going. That's where the hard work is going. And if people, people are now waiting two, three, four years to get green cards that they're entitled to. Not because the visa is not there, but because the process of issuing the cards to them takes that long. No one cares about that. It's just not the priority.

**Judge Raymond FISHER**

Given the shortness of time, I just want to, there are lots of institutions, or organizations, ABA, for example, as Jerry adverted to implicitly, has taken a major role in trying to develop processes to deal with these issues. I think the ABA, the ACS, specialty Bar groups, which are, I know they are formed out in California, need to create a dialogue with each other; create some approach to take a constructive way of addressing it.

The people who practice in it, my experience at the DOJ, when I was there, the people who practice in the field have an interest, not everybody, but have an interest in trying to make their job feel and do right. Now people come from different perspectives on that. I understand it.

But, Dan just mentioned how, he went through in his opening remarks, about how the DOJ-IG's report triggered reforms at DHS. It shouldn't necessarily have to take that. I think there is a little bit of muscle behind it, or impetus. But, your experience is, I'm glad you did what you did. You have talent. You have energy. You have experience now. Take it, mobilize some folks; and instead of fighting your battle only by representing an

individual, you can take your experience and talk to Dan, and put together an effort to, at least, open up some shared experience.

I really, one of the reasons I came to this panel, and I talked to Mike Chertoff, who couldn't come; but, one of the reasons I wanted to have somebody from DHS here, that's why I agreed to be here, in part, that somebody would be here, is to have this kind of dialogue. So we can open it up.

From the court's standpoint, it's difficult to do. As I said, our chief judge took the initiative to call together some folks. But the people, the Mike Chertoffs and the Alberto Gonzalezs need to hear it, and get invested in it, and make it a priority. I mean, you were at INS, and it can work. The system can be made to work. Politics, there's a political aspect to it, but there's a professional aspect to it, I'm satisfied. And, at the professional level, there ought to be things that can be done. I don't get into the policy side anymore, but I do get into the process side. As a judge, I am interested in it because, as judges, we want quality representation in our courts, and anything that can make that happen is good for us, and good for the system. The system depends on it.

**T. Alexander ALENIKOFF**

On that positive, optimistic note, we will close. Thank you panelists. Thank you audience.

*Applause*