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Briefing Paper

To: United Nations Special Rapporteur

From: National Immigrant Justice Center¹

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RE: **Access to Counsel and Due Process for Detained Immigrants**

INTRODUCTION

Immigrants facing deportation are often unable to access counsel, placing them at great risk because immigration laws are among the most complex and confusing in the American legal system. Without representation, immigrants are subject to proceedings that are fundamentally unfair. Consequently, without counsel, they are deprived of due process. Although the Sixth Amendment to the Constitution guarantees that all individuals subject to criminal proceedings, regardless of their citizenship status, are entitled to the appointment of counsel, this mandate does not extend to immigrants facing deportation. Deportation proceedings are considered non-criminal in nature, despite the fact that individuals facing deportation may be deprived of their physical liberty, separated from their family and loved ones, and ultimately returned to countries where the threat of torture and even death remains a real possibility. The spirit of fundamental fairness is betrayed when such individuals are denied the right to appointed counsel and when their access to lawyers is unduly limited. Under the current system in the United States, most individuals facing removal lack legal representation.

Even if the Sixth Amendment of the Constitution does not apply, the Fifth Amendment of the Constitution does apply. Under the Fifth Amendment, immigrants should have access to appointed counsel. Lack of appointed counsel is particularly detrimental to detained individuals. As discussed below, detainees face significant hurdles in accessing and securing counsel.

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Statistics from the Executive Office for Immigration Review (EOIR) reveal that most persons in removal proceedings appear without counsel, or *pro se*, and that the lack of counsel has a pronounced, negative impact on case outcomes.² This data demonstrates that individuals who are unable to secure representation often cannot obtain the relief available to them under existing domestic and international law. According to EOIR statistics, 65 percent of individuals facing removal from the United States in the year 2005 did so without representation. In the same year, 31 percent of appeals to the Board of Immigration Appeals were filed *pro se*.³

In light of the significant personal interests at stake and the complexity of the law, access to counsel is critical to ensure that individuals in removal proceedings are able to exercise their due process rights and seek relief for which they may be eligible. As discussed below, several specific issues relating to access to counsel and due process arise when an immigrant is placed in removal proceedings. The most egregious due process violations generally occur when an individual is detained. Therefore, this briefing paper will focus on access to counsel and due process protections in the context of immigration detention. The document provides an overview of the right to counsel for individuals in removal proceedings. It also includes a description of the circumstances faced by detained immigrants and the hurdles they must overcome in accessing legal counsel. Finally, the document contains recommendations to ensure that non-citizens are allowed to exercise their right to counsel.

RIGHT TO COUNSEL FOR IMMIGRANTS

I. United States Law

Pursuant to existing United States law, non-citizens have both a statutory and Fifth Amendment right to counsel in removal proceedings. In the Immigration and Naturalization Act (INA), Congress codified a statutory right to retain counsel and the right to be informed of that privilege by the Court. The INA states that, “in proceedings...the alien shall have the privilege of being represented, *at no expense to the Government*, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”⁴ (Emphasis added). The right to representation in removal proceedings extends only to those who have access to and can secure counsel. The statute indicates that the government cannot pay for representation in removal proceedings, but it does not imply that the Court does not have the *power* to appoint counsel.

The right to counsel in immigration proceedings is rooted in the Due Process Clause of the Fifth Amendment of the U.S. Constitution and codified in federal law.⁵ Deportation hearings can have very serious consequences, thereby requiring that individuals have the right to a fair hearing. To ensure these essential standards of fairness, the regulations require immigration

² “Revisiting the Need for Appointed Counsel,” Donald Kerwin, Migration Policy Institute, *Insight*, April 2005, available at www.migrationpolicy.org.

³ See U.S. Department of Justice, FY2005 Statistical Year Book, available at <http://www.usdoj.gov/eoir/statpub/fy05syb.pdf>.

⁴ INA §240(b)(4)(A); 8 U.S.C. § 1229a(b)(4).

⁵ See 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A).

judges to inform the respondent of his or her right to counsel and ascertain “then and there whether he or she desires representation.”⁶ The regulations further require the immigration judge to provide the respondent a full understanding of his or her rights. In particular, the immigration judge is required to advise the individual of the availability of free legal services provided by local organizations and attorneys and to make sure that the respondent has received a list of such programs.⁷

II. International Law

International law, like the U.S. Constitution, guarantees a right to due process of law. Denial of the right to counsel, even where such denial is circumstantial rather than deliberate, is a denial to due process of law. Immigrants in detention have a right to counsel, even though that right does not extend to counsel paid for by the government. The International Covenant on Civil and Political Rights (ICCPR) states that due process requires that criminal defendants receive adequate time and facilities to prepare a defense and to communicate with counsel.⁸ That protection arguably extends to immigration detainees, who face deportation, a very serious consequence under the law. In addition, the Vienna Convention on Consular Relations⁹ requires that detained foreigners be afforded the opportunity to contact consular officers of their home country.

Detention of individuals in removal proceedings implicates international treaty obligations and other human rights norms and practices. Although the United States government typically views its roles and responsibilities through the lens of domestic law, including domestic statutes and the U.S. Constitution, it also bears a responsibility to adhere to international law. Protecting the human rights of immigrants is of particular concern in the post-September 11, 2001, environment, given the trend toward increasingly punitive laws and regulations for immigrants in general, regardless of an individual’s lack of criminal history or links to terrorist activities.

International covenants that provide protection to detained individuals include the United Nations Declaration on Human Rights (UNDHR),¹⁰ the International Covenant on Civil and Political Rights (ICCPR),¹¹ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹² The U.S. has adopted or ratified each of these treaties, with certain reservations. The protections for immigrants who are detained include the right to be

⁶ 8 C.F.R. § 1240.10(a)(1).

⁷ 8 C.F.R. § 1240.10(a)(2), (3) (2006).

⁸ ICCPR, Art 14(3)(b).

⁹ Vienna Convention on Consular Relations, 596 U.N.T.S. 261, *entered into force* March 19, 1967, Art.36, “Communication and Contact with Nationals of the Sending State,” (“Vienna Convention”), *available at* untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

¹⁰ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *available at* <http://www.un.org/Overview/rights.html>.

¹¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 2 (“ICCPR”), *available at* <http://www.ohchr.org/english/law/ccpr.htm>.

¹² International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, (“ICERD”), *available at* http://www.unhcr.ch/html/menu3/b/d_icerd.htm. ICERD was ratified by the U.S. in 1994.

informed of the charges against him, to have a court review such charges without delay, and to be treated humanely and without discrimination based upon race, national origin, religion, or other factors. Moreover, the ICCPR protects all persons against arbitrary arrest and detention.¹³

Both the U.S. Constitution and international human rights law protect individuals from arbitrary detention.¹⁴ In addition, international human rights law, norms, and practices require that all individuals be treated equally before the law and have the right to due process of law.¹⁵

DETAINED IMMIGRANTS' ACCESS TO COUNSEL AND DUE PROCESS PROTECTIONS

I. Overview of U.S. Immigration System

Over the last decade, an elaborate system of detention facilities has been developed by the U.S. immigration system, to accommodate more than 230,000 immigrants held in administrative detention each year. The average daily population of immigrant detainees in the custody of U.S. Immigration and Customs Enforcement (ICE) has risen from 19,000 to 26,000 since July 2006, and ICE has increased detention capacity in the Southwest border area by creating 6,300 new beds in 2006.¹⁶ These facilities, which are known as Service Processing Centers (SPC) and Contract Detention Facilities (CDF) and are dedicated solely to ICE detention, are located near major ports of entry on the Eastern Seaboard, the West Coast, and along the Mexican border. However, throughout the rest of the United States, ICE detains thousands of immigrants in rural county jails. These county jails are under contract to ICE to hold detainees for a set dollar amount per individual per night, and are known as Inter-Governmental Service Agreement (IGSA) facilities.

Nationwide, a majority of immigrant detainees are held in IGSA facilities.¹⁷ In terms of the lack of oversight, the number of people affected, and the cost to society, the IGSA system represents one of the greatest challenges to guaranteeing basic due process protections and international human rights norms in the United States. The detention of immigrants in IGSA facilities presents unique legal and social issues that differ significantly from concerns frequently raised with regard to the traditional prison system. ICE detainees are held on administrative rather than criminal charges. They have far fewer legal protections than criminal defendants and have no guaranteed right to counsel. Moreover, access to counsel is

¹³ ICCPR, Art 9(1).

¹⁴ ICCPR Article 9, Section 4.

¹⁵ ICCPR Article 26.

¹⁶ "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, April 2006, *available at* http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-33_Apr06.pdf; "Executive Summary ICE Accomplishments in Fiscal Year 2006, *available at* <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>.

¹⁷ Illinois is the only one of the five first-tier states for immigration in which immigrants are *exclusively* detained in contracted county jails. Detainees under the jurisdiction of the ICE Chicago District are held as far afield as Hastings, Nebraska and Tri-County Detention Facility in Ullin, Illinois, both of which are located hundreds of miles from major population centers, making access to families and legal services virtually impossible.

extremely limited, with severely inadequate phone and mail systems and no recognition of attorney-client privilege. IGSA facilities are ill-equipped to provide even minimal language interpretation. Jail officials and staff members frequently have little or no training in the unique cultural differences of the immigrant population.

Furthermore, IGSA facilities are typically located in rural counties far from major urban centers, impeding meaningful representation, especially for indigent immigrants who depend on *pro bono* attorneys. *Pro bono* attorneys already donate their time and cannot be expected to cover out-of-pocket expenses, which can add up quickly as attorneys travel to and from facilities. The Department of Homeland Security has become far more secretive regarding detainee numbers and locations. In addition, the rapid transfer of detainees between facilities creates a system in which attorneys frequently cannot locate their clients. The distance between jails and immigration courts has resulted in government reliance upon video teleconference technology for court hearings, which denies the detained immigrant an opportunity to see the judge and for an in-person hearing. The use of video teleconferencing violates basic standards of due process.

II. Failures to Provide Access to Counsel in Immigration Detention as Documented by the Department of Homeland Security, Office of the Inspector General

On January 16, 2007, the Office of Inspector General (OIG) of the Department of Homeland Security (DHS) released a report on the treatment of immigrants held in detention by U.S. Immigration and Customs Enforcement (ICE).¹⁸ Reviewing five detention facilities around the nation, investigators documented systemic failures to implement the ICE detention standards.

ICE's detention standards were developed in November 2000 by the then-Immigration and Naturalization Service to ensure the "safe, secure, and humane treatment of individuals."¹⁹ Each of the facilities visited by the OIG was noncompliant in one or more ways.

The OIG report detailed practices that prevented detainees from communicating with their attorneys. OIG described one example in which the jail facility "took at least 16 business days to grant a detainee's request to call an attorney as opposed to the 24 hour time limit required by the [detention] standard." According to the ICE standards, immigrant detainees are to be provided with private telephones and phone numbers to contact attorneys. When OIG investigators tested the phones and phone numbers provided by one of the ICE facilities, they were unable to get through to any of the *pro bono* legal representation phone numbers, and very few of the consulate numbers. Additionally, phones are routinely out of service, and privacy is frequently limited by the constant presence of facility guards, even during calls regarding confidential legal matters.

In addition, the ICE detention standards require that each detainee be allowed at least 5 hours per week of access to facilities' law libraries. However, the OIG audit found in several

¹⁸ Department of Homeland Security, Office of Inspector General, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities, December 2006, *available at* http://www.dhs.gov/xoig/assets/mgmtreports/OIG_07-01_Dec06.pdf.

¹⁹ See Detention Operations Manual, *available at* <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

facilities that detainees were allowed as little as one and a half hours of library access, and that libraries had incomplete or obsolete material.

III. Denial of Access to Counsel and Due Process Violations faced by Non-Citizens In Immigration Proceedings

The following is a compilation of the issues regarding access to counsel and due process faced by non-citizens throughout the United States provided by legal service providers and advocates from around the country:

- *Remote locations*: Many immigrants are detained by ICE in isolated and remote facilities, far from legal service providers and/or individuals that provide low-cost or *pro bono* legal services to immigrants in detention. In addition, ICE often detains immigrants in facilities located far from family members who might be able to assist in securing legal counsel if the detainee were located in a more accessible facility.
- *Lack of phone access*: Since immigrants are not guaranteed court-appointed counsel, and are often detained in remote locations across the country, access to telephones is a critical means of communicating with legal service providers or with family members. However, telephone access in the jails where immigrants are detained is unreliable. Not all jails allow immigrants to purchase calling cards. In these facilities, detained immigrants can only make collect calls. Many jails' phone systems are impossible for detainees to decipher, particularly those immigrants who do not speak English.²⁰
- *Denial of access to conduct legal rights presentations*: Because jails are often located in remote locations and because phone service is unreliable in most jails, it is common for detained immigrant to rely solely upon legal orientation presentations, often called "Know Your Rights" presentations, for information on their rights and potential relief. Unfortunately, these presentations are not available nationwide to all immigration detainees. In Iowa, legal service providers have been repeatedly denied access into local county jails to offer such information, despite the fact that the presentations are essential for immigrants in detention. The orientations not only inform a detained immigrant of his or her rights under U.S. immigration law, but they typically provide an opportunity for the immigrant to discuss his or her case with a legal aid provider, often on a *pro bono* basis.
- *Transfers and lack of notice to detainees and families*: A frequent occurrence that directly impedes a detained non-citizen's right to access counsel is transfer of the immigrant without notice to counsel or family members. Such transfers are a significant concern for individuals in the Southeast United States. Individual accounts

²⁰ According to the Florida Immigrant Advocacy Center, phones are often turned off as punishment, which makes it impossible for attorneys to communicate with detained clients. This was reported as recently as March of 2007 at Monroe County Detention Center in Key West, Florida. Reports stated that this same facility, Monroe County Detention Center, turned phones off for 5 days.

submitted for this briefing paper describe instances in which individuals who were represented by counsel were nonetheless transferred without notice to areas outside of counsel's ability to continue representation. Even when legal service providers were informed of the transfer, they were frequently provided with inaccurate information, causing delays in the counsel's ability to locate clients.

- Video-teleconferencing: The use of video-teleconference technology (VTC) is a growing concern of legal services providers in the Midwest and around the nation. Appearance by VTC means that the detained individual appears by video before an immigration judge. This practice serves to deprive an individual in detention of meaningful participation in his or her removal proceedings. When an individual is not present in the courtroom, it can create obstacles to that individual's ability to receive and confront evidence submitted by the government against the individual, a right recognized under U.S. law.²¹ Furthermore, practitioners are concerned that the use of VTC has a particularly negative impact on asylum-seekers. Credibility is a key component of an asylum claim. VTC may make an asylum seeker uncomfortable or nervous, in ways that serve to impact the judge's assessment of the asylum seeker's credibility. Finally, the reliance upon VTC detracts from the dignity of the court proceeding itself. Detained individuals who appear via VTC have reported feeling confused during proceedings and left out of their own case.²²
- Stipulated Orders of Removal: ICE routinely pressures detainees to waive their rights by signing "stipulated orders of removal," which are documents in which an immigrant admits to his or her own deportability. When an immigrant signs a stipulated order, he or she can be deported without seeing a judge, without consulting an immigration lawyer, without understanding their legal rights, and without hearing a basic presentation on how to navigate the legal system alone.
- Expedited Removal: Expedited removal is a procedure that allows an immigration officer to remove an undocumented non-citizen without a hearing or review before an immigration judge. Its purported purpose was to give U.S. Customs and Border Protection more flexibility in removing illegal immigrants while retaining protection in the law for genuine asylum seekers. However, the government all too often fails to extend this protection.

In 2005, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) issued a congressionally mandated study on expedited removal and its impact on

²¹ See INA §240(b)(4), 8 U.S.C. § 1229a(b)(4). In addition to the National Immigrant Justice Center, which is litigating over the use of VTC in immigration court, the American Immigration Law Foundation has argued that the use of a video hearing after a non-citizen has requested an in-person hearing "violates the respondent's statutory and constitutional right to present evidence on her own behalf, to cross-examine witnesses presented by the Government, to examine evidence used against her, and/or to be represented by counsel of her choice." Practice Advisory, "Objecting to Video Merits Hearings," American Immigration Law Foundation, December 2003, available at http://www.aifl.org/lac/lac_pa_121203.pdf.

²² "Videoteleconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court," Legal Assistance Foundation and Chicago Appleseed Fund for Justice, August 2, 2005, available at <http://www.lafchicago.org/immig%20case%20study.htm>.

asylum seekers. The USCIRF report found that Border Patrol and immigration officers frequently do not inform asylum seekers of their rights in the expedited removal process. DHS has twice in the past two years expanded expedited removal practices, but has still not responded to the problems brought forward by USCIRF in 2005. On the two-year anniversary of the release of the original report, USCIRF issued a scorecard on the government's response. According to the scorecard, which excoriated the government's performance, DHS made no effort to ensure that detained asylum seekers have access to legal service providers. This inaction occurred despite the USCIRF's finding in 2005 that asylum seekers who were able to obtain counsel had significantly higher rates of winning asylum in the United States.²³

CASE STUDY: WORKPLACE RAIDS

Nowhere are concerns regarding access to counsel and due process more acute than in the context of workplace raids. In the last few months, U.S. Immigration & Customs Enforcement has stepped-up enforcement in the workplace, resulting in the arrest, detention and removal of thousands of non-citizens.

On December 12, 2006, U.S. Immigration and Customs Enforcement (ICE) conducted a nationwide raid against employees of six meatpacking plants owned by Swift & Company. Many of the immigrants who were detained following these raids were denied the opportunity to receive basic information on their legal rights. Despite the fact that attorneys sought access to the detainees to offer them legal services, those requests were either ignored or denied by ICE. A large number of immigrants from the Swift plants in Grand Island, Nebraska, Marshalltown, Iowa, and Worthington, Minnesota were transferred to a National Guard facility, called Camp Dodge, in the Des Moines area. Despite repeated attempts by legal service providers to contact the detainees and provide legal orientation programs for them, ICE denied the attorneys access to the facility until many detainees had already been transferred again to detention facilities in other states. Such responses contravene the ICE Detention Standards, which require ICE to permit authorized persons to offer legal orientation programs.²⁴

On March 6, 2007, another large-scale raid occurred in the city of New Bedford, Massachusetts, resulting in the arrest and detention of hundreds of individuals, many of whom were rapidly transferred to detention facilities in Texas. The rapid transfer of detained immigrants hindered the individuals' access to legal counsel, prompting a lawsuit in District Court in Massachusetts.²⁵ In addition to being deprived of an opportunity to access counsel, many of the individuals detained were separated from family members, including children.²⁶

²³ See the Commission's website, *www.uscirf.org*, for the original report and scorecard.

²⁴ See Letter from Midwest Coalition for Human Rights to Senator Patrick Leahy regarding Swift raids and ICE's failure to provide detainees' access to counsel, January 11, 2007, available at http://www.immigrantjustice.org/documents/SwiftLettertoCongress2007.1.11_000.pdf.

²⁵ Jesse Harlan Alderman, "Judge temporarily forbids deportation of New Bedford immigrants," Associated Press, April 6, 2007.

²⁶ Yvonne Abraham, "As immigration raids rise, human toll decried: Arrests across US break up families," *Boston Globe*, March 20, 2007.

In addition to these large-scale raids, many cities around the United States are witnessing raids on a smaller scale on a daily basis. At present, it is impossible to ascertain how many individuals have been deported from the United States because they signed stipulated orders of removal without speaking to counsel and without knowledge of any relief for which they might be eligible.²⁷

RECOMMENDATIONS

1. Indigent Detainees in Removal Proceedings Should Be Appointed Counsel

Indigent non-citizens detained in the custody of the Department of Homeland Security (DHS) and placed into removal proceedings, should have the right to appointed counsel. Removal proceedings are legally complex, adversarial in nature, and can result in consequences that have been found by this nation's highest Court to be severe and harsh, including "the loss of property and life; or of all that makes life worth living."²⁸ The Right to counsel is a due process right that is fundamental to insuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court appointed counsel should be available to detained immigrants.

The need for appointed counsel for indigent non-citizens in removal proceedings is critical, especially given the current political environment, which favors vigorous enforcement of laws authorizing detention and deportation. In addition to increased use of law enforcement tactics, and the criminal prosecution of immigration violations, there is a significant growth in the number of detainees and in federal or ICE-contracted detention bed space.

In 2006, the American Bar Association, the largest national voice of the legal community, publicly expressed its support of and recommendation for the due process right to counsel for all persons in removal proceedings.²⁹ Such a recommendation is consistent with U.S. domestic and national principles of a fair trial, and international standards relating to the same.

2. All detained immigrants should receive legal orientation or "Know Your Rights" presentations

ICE should ensure that non-citizens have access to legal orientation presentations. As stated above, these presentations are often the only means by which individuals learn of their rights and are given an opportunity to obtain legal representation. To ensure due process protections for all immigrants in the United States, legal service providers who seek to conduct these presentations should be allowed access to all facilities utilized by ICE. Further, following a workplace raid, detained non-citizens should receive a legal orientation presentation as soon as

²⁷ See generally Antonio Olivo, "U.S. Raid at Plant Nets 62 Arrests," *Chicago Tribune*, April 5, 2007; "Marin County Supervisors Sharply Critical of Immigration Raids," KCBS Television, March 13, 2007, available at <http://kcbs.com/pages/300146.php>.

²⁸ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1921).

²⁹ American Bar Association, Commission on Immigration, Report to the House of Delegates, February 2006, available at http://www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf.

practicable to ensure that they are apprised of their rights under U.S. immigration law and to invoke their right to whatever relief is available to them under the law.

3. *Detained non-citizens should be held in centers that are easily accessible to legal service providers and pro bono counsel*

Given that the difficulties in representing detained non-citizens are exacerbated when these individuals are held in remote and/or rural locations, ICE should ensure that the facilities holding non-citizens in removal proceedings are located near the detainees' counsel or near urban areas where the detainee will have access to legal service providers and *pro bono* counsel.

4. *Video-teleconferencing should be utilized only with the consent of the detained non-citizen*

Hearings conducted by VTC violate immigrants' due process rights by denying them the right to an in-person hearing with an immigration judge. The use of video-teleconferencing also impedes the immigration judge's ability to assess an immigrant's credibility. These outcomes are unnecessary and unfair. Congress should consider modifications to the law to ensure that immigrants are never deprived of a meaningful day in court.

5. *The Department of Homeland Security should promulgate the detention standards into regulations*

As noted above, the ICE detention standards purport to establish protections for immigrants in detention, requiring access to counsel, working telephones, health care and other basic rights. The ICE detention standards are useful benchmarks, but because they are not codified into regulations, they are not enforceable in law. Congress should enact legislation requiring the agency to codify the current regulations.

6. *ICE should terminate its practice of pressuring immigrants to sign stipulated orders of removal*

ICE should curtail the practice of pressuring immigrants to sign stipulated removal orders until after the immigrants have had a legal orientation and an opportunity to consult with an attorney. Some immigrants may be eligible for bond or other types of immigration relief under the law. Immigrants that are ineligible for immigration relief may still be eligible for voluntary departure, a better choice for many than waiting in detention for an indeterminate period of time until they are forcibly removed. Most importantly, no one should be pressured to sign away rights granted by our laws. ICE's actions are inconsistent with the values and traditions of the American justice system. Everyone deserves a day in court and the opportunity to present their case to a judge.