CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL TWO: SHOULD THERE BE REMOTE PUBLIC ACCESS TO COURT FILINGS IN IMMIGRATION CASES?

MODERATOR

*Hon. Robert Hinkle**

PANELISTS

David McCraw[1]

Daniel Kanstroom[2]

Eleanor Acer[3]

Elizabeth Cronin[4]

Mark Walters[5]

JUDGE HINKLE: This next panel is a more specific application of some of the general principles that were addressed in the panel that we just finished. When CACM was first developing the privacy policies that led later to the adoption of the rules that we are operating under, Social Security cases were cut out for different treatment than all other kinds of cases, so that the Social Security files were available at the courthouse, but were not available electronically over the PACER system. Then, as it went on through, immigration cases got added to that, so that immigration cases now are handled like Social Security cases.

One of the questions is whether that should be done that way, and what adjustments, if any, should be made to the way they are handled. We have a panel of some people with a great deal of expertise in the immigration area to address it.

The first speaker we have is David McCraw. He is the Vice President and Assistant General Counsel for *The New York Times*, a job that I think

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probably 90% or maybe 100% of people at some point in their careers have aspired to. What a great thing to do.

MR. MCCRAW: I guess I am happy they do not reveal what I get paid. That would cut that number down. That is why privacy is so important.

Professor Dan Capra very wisely invited Nina Bernstein to be here today, . . . who is a *New York Times* reporter who covers immigration, on the theory that you probably will hear from a lot of lawyers today, and should hear from some real people. Nina, to her great fortune, is being honored this morning in Washington, at the American Society of Newspaper Editors, for her coverage of immigration. So to completely reverse the tables on Dan, she sent a lawyer in her place.

She did prepare remarks about Rule 5.2 for me that begin, highlighted in yellow: "Terrible mistake." That phrase comes up in the first paragraph of her remarks and her statement concludes with how many times government officials tell her privacy is important—right after someone has died in detention.

I will try to give a lawyerly gloss to those remarks.

As most of you know, and as I came to learn as I prepared for this, Rule 5.2 does have a carve-out, as Judge Hinkle suggests, for immigration cases, where you have electronic access at the courthouse for the whole docket; outside of the courthouse, you are limited to the docket itself, orders, and other dispositions. It is our view that this attempt at privacy, in effect, serves neither of the public policy goals that are implicit in that. It neither protects privacy very well nor does it bring the kind of transparency the court system should have. It is, in effect, a version of what you heard in the last panel, practical obscurity.

In my mind, "practical obscurity" is actually a code word for "elite access." It is a method by which we decide that certain people in this democracy should have greater access to information than others. We do that by making sure that people who cannot hire private investigators, who do not have lawyers to go down to the courthouse, who live far away, who are disabled, who do not know how the system works, do not have access. To me, that is fundamentally a very, very bad approach to transparency.

I think it is also a bad approach to privacy, if you look at how it actually plays out. I looked at about three months of Southern District filings in immigration cases, just using PACER. What you can see when you go onto the system are the orders and the decisions. You can see certain orders on scheduling and so forth. You know who the litigant is. You know who is seeking asylum. You know who is objecting to a deportation. If you look at the online decisions, you can find out a great deal about the cases.

What you do not find and what you cannot get is the habeas petition, and what you cannot get are complaints, usually in the nature of mandamus. Those are very, very important for people like Nina, who are trying to find out what is going on in a system that, on the administrative side, is shrouded in secrecy. It is when they pop up in court that there is a chance to understand what the complaints are about, what mistreatment is being alleged. It is very important for her and for others like her and for

researchers to see that, and to see not only individual cases, but to see patterns.

Nina came to poignantly realize how the system worked when she wrote a story about a woman, whose name is Xiu Ping Jiang, a Chinese woman who came to the United States.[6] In China, she, of course, did what is unthinkable: she had a second child. Therefore, she was being subjected to mandatory sterilization. She fled to this country, and later she was detained and in the process of being deported for violation of the immigration law. During her hearing, the judge asked her name and she responded twice, giving her name, not waiting for the Mandarin translator. The judge, an administrative judge, thought this was some example of bad faith that she was responding in English rather than waiting for the translator, and said, "I am going to treat you as if you did not appear."

Fortunately, she had relatives here, who were able to find a lawyer in New York who took her case.

Her habeas petition would never have been known and would never have been reported on except for the fact that it was misfiled. Even then it would not have been found, except that Xiu Ping happens to have the same name as the former wife of the gun man who shot up the Binghamton immigration center last year.[7] So while *Times* reporters were doing stories on him, they came across her filing. It had been misfiled. It had been filed publicly and was available remotely.

My point here is rather obvious, which is that it should not take a mistake for people to know about that and to write about that case and cases like it.

JUDGE HINKLE: Next we have Professor Daniel Kanstroom, of Boston College. He is the Director of the Immigration and Asylum Clinic and the Director of the International Human Rights Program at Boston College.

PROF. KANSTROOM: Thank you very much. It is an honor and a pleasure to be here.

I am going to speak from the perspective of both the theory and practice of immigration law, an area that has sometimes been referred to as standing in the same relationship to civil litigation as mud wrestling does to the Bolshoi Ballet. I was asked to speak specifically about the current bars on remote access to immigration cases.[8]

My understanding is that the bars were motivated by two background principles: one, a concern about sensitive information, and the second, a concern about volume. I think these are surely significant concerns and, in some cases, compelling ones. But my ultimate conclusion, which I will get to in a minute, is guided by a couple of fundamental principles that I will disclose as a suggested way of thinking about this.

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6. Nina Bernstein, *For a Mentally Ill Immigrant, a Path Clears Out of the Dark Maze of Detention*, N.Y. TIMES, Sept. 11, 2009, at A20.

7. *See* Robert D. McFadden, *Upstate Gunman Kills 13 at Citizenship Class*, N.Y. TIMES, Apr. 4, 2009, at A1.

8. Rule 5.2(c) of the Federal Rules of Civil Procedure and Rule 25 of the Federal Rules of Appellate Procedure bar electronic remote access by the public to filings in Social Security appeals and certain types of immigration cases. FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25.

The main principle, as others have noted, is a general background norm of openness, which I think is mandated by the First Amendment, in addition to due process and some deep common law traditional principles. The most basic idea is that federal court case files are generally presumed to be available for public inspection and copying.[9] Now, of course, these principles are not absolute. Still, I would suggest that we start with them and hold them, at least, as a kind of tiebreaker. I often tell my students in Administrative Law that when you have these kinds of "tectonic" conflicts, what you may really need is some sort of tiebreaker principle. I think the principle here ought to be a strong presumption of open access.

Those who have concerns about problems caused by openness, in my view, bear burdens of both production and persuasion. And I think those are heavy burdens. In immigration cases, especially in deportation cases, they are particularly heavy, due to a couple of other principles that derive from the nature of the cases.

First of all, as the Supreme Court has long recognized—and just recently reiterated in the *Padilla v. Kentucky*[10] case—deportation, while not technically a criminal punishment, is a severe penalty. The stakes are very, very high—sometimes, literally life and death. Although removal proceedings are technically civil, deportation "is nevertheless intimately related to the criminal process."[11] Also, as the Court has recently noted, "The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[12] So I think we ought to look to the norms of criminal cases for some sort of analogous guidance. These are, for the most part, norms of open access. They are certainly not categorical bars.

Another guiding principle is the legendary, sometimes humorous, sometimes teeth-gnashing complexity of immigration law. One court has referred to immigration as an area of law that would "cross the eyes of a Talmudic scholar";[13] another, an area of law where "morsels of comprehension must be pried from mollusks of jargon."[14]

Complexity in this context, I think, matters, particularly because the exact boundaries of these rules are, to my eyes, rather unclear. I could not tell, upon reading the text of these rules, whether they would cover a case like, for example, *Hoffman Plastics*,[15] which was a Supreme Court case that

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9. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–78 (1980); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (recognizing common law right "to inspect and copy public records and documents, including judicial records and documents").

10. 130 S. Ct. 1473 (2010).

11. *Id.* at 1481. *See generally* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

12. *Padilla*, 130 S. Ct. at 1478 (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

13. Cervantes v. Perryman, 954 F. Supp. 1257, 1260 (N.D. Ill. 1997).

14. Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

15. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

dealt with the intersection between the National Labor Relations Act and immigration law. It is also far from clear whether these rules cover all habeas corpus challenges, particularly if they are just focusing on the conditions of detention, naturalization appeals, etc.

The point here is that immigration cases arise in a wide variety of contexts, and I fear the rules, as drafted, may be overbroad in ways that call their validity into question. In fact, I am fairly certain that they are.

Finally, though, as our President likes to say, "Let me be clear." In *certain* types of immigration-related cases, privacy concerns are quite compelling. For example, asylum cases, Convention against Torture[16] cases, S visa cases,[17] T visa (trafficking-victim) cases,[18] U visa cases,[19] mean that many of these cases require substantially *more* protection than the rules give. So the rules are overbroad in light of the background constitutional and immigration law norms, but they may be under-protective in others.

The over-breadth problem, I think, also relates to—as David was saying and as I will validate—the tremendous value that is brought by close public scrutiny to these cases. It has really made a huge difference, for a variety of reasons, which, if we have time for questions, I would be happy to talk with you more about.

A second feature of the system that I think should be highlighted in this vein is the prevalence of transfer and detention decisions. This is a powerful concern. Many thousands of people each year are arrested, placed in removal/deportation proceedings, and then summarily detained and transferred from, say, Massachusetts, where I have experienced it quite a bit, or New York to remote parts of Texas or Louisiana, where their cases proceed and where judicial review, if there is any, follows in that district, in that circuit. So, remote access to these cases is incredibly important, and incredibly difficult if you have to actually go to the courthouse to get it. I apologize to anybody who lives in either Texas or Louisiana, but for those of us practicing in Massachusetts or New York, I think it is a compelling problem.

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16. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (as codified in 8 C.F.R. § 208.18 (2010)) [hereinafter *Convention Against Torture*].

17. S visas may be given to noncitizens who assist U.S. law enforcement to investigate and prosecute certain crimes and terrorist activities. *See* 8 U.S.C. § 1101 (a)(15)(S) (2006). They are strictly numerically limited.

18. T visas may be given to noncitizens who are victims of "a severe form of trafficking in persons," as defined in section 103 of the Trafficking Victims Protection Act of 2000. 8 U.S.C. § 1101 (a)(15)(T)(i).

19. U visas may be granted to noncitizens who have suffered substantial physical or mental abuse as a result of having been a victim of certain types of criminal activity; who possess information concerning such criminal activity; and have been helpful, are being helpful, or are likely to be helpful to a federal, state, or local law enforcement official, to a federal, state, or local prosecutor, to a federal or state judge, to the Service, or to other federal, state, or local authorities investigating or prosecuting criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U).

So the rules, as I said, are both overbroad and they also seem under-protective in some cases. This under-protective aspect can inspire a false and, I think, dangerous sense of security. I would not want people to think that these rules are sufficiently protective in the cases in which more protection is warranted. I think all of this amounts to a call for greater nuance and texture in the rules as they are drafted.

One last issue, which comes up a lot in current discussions about immigration law, is the question of volume. I do think that volume is a major problem, both for the administrative agencies and for the courts. I am not quite sure precisely how it compares to Social Security or other areas of law. I do think, though, that volume has disparate impact in certain circuits compared with others—more in the Second and Ninth, probably, and the Fifth and the Eleventh; maybe a little less so in the Seventh and the First. Anyway, it is certainly a concern. But I think it is a concern that should be more technically and more historically understood. The volume of appeals into the judicial system rose dramatically in the early 2000s for quite specific reasons. Though I do not have time to go into details, there was a confluence of three factors. One was vastly increased, post-9/11, workplace- and security-related immigration enforcement. A second was vastly increased and, in my view—and, it now seems, in the view of the Supreme Court[20]—rather overenthusiastic and legally incorrect criminal/immigration enforcement. This concerns a certain type of deportation case, where the person, often a person with legal status, is being deported because of criminal conduct. I have referred to this as "post-entry social control deportation" as opposed to "extended border control" deportation, which deals primarily with undocumented people.[21] The Court on that score, by the way, has ruled in a series of cases, nine-to-nothing, eight-to-one,[22] that the government theories in those cases were wrong. So there are a vast number of cases that are not going to be prosecuted as aggravated felonies anymore.

A third factor is the reduction in the size of the Board of Immigration Appeals that was championed by John Ashcroft.

None of these factors are now true. The Obama Administration has stopped the workplace raids. As I said, the Supreme Court has definitively rejected the Department of Justice's legal theories in major crime-related cases. Increased resources are now, properly in my view, being directed to the Board of Immigration Appeals and to the immigration judges, where the quality of administrative adjudication should improve. You can go to the website of the Executive Office for Immigration Review to see some

20. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

21. *See generally* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (analyzing these types of controls).

22. Lopez v. Gonzales, 549 U.S. 47 (2006) (holding that an "aggravated felony" includes only conduct punishable as a felony under the Federal Controlled Substances Act, regardless of whether state law classifies such conduct as a felony or a misdemeanor); Leocal v. Ashcroft, 543 U.S. 1 (2004) (holding that state drunk driving offenses, which do not have a mens rea component or require only a showing of negligence in the operation of a vehicle, do not qualify as an aggravated felony "crime of violence").

statistics on this.[23] I should also disclose that I am on the Immigration Commission of the American Bar Association. We have just released a major report, written primarily by Arnold & Porter, about this last set of issues, and calling for certain further reforms, but highlighting the reforms that are already taking place.[24]

So I do think—though perhaps I am too optimistic about this—the volume concern is actually going to diminish, and I would bet that it already has diminished, as the quality of administrative adjudication has risen. Also, as I am sure you know, appellate court jurisdiction over deportation cases has been substantially limited in recent years, particularly in cases involving challenges to the denial of discretionary relief from deportation.[25]

In any case, the volume concern cuts two ways. High volume, while a concern for federal courts, also indicates to me that deportation can be a sort of enforcement tsunami that bears close watching, especially by lawyers, advocates, policy groups, and the press. Remote access to immigration cases has been crucially important to determine whether there have been patterns of racial disparities in enforcement, patterns of wrongful deportations of U.S. citizens, deportation of low-level offenders in categories that superficially appear to involve major crimes (e.g., "aggravated felonies"), and much more. Much of my own scholarly work has been in this vein.

So in sum, the general exemption of immigration, and especially deportation, cases from remote access seems to me to require much more substantial justification than I have yet heard. Certain types of cases clearly do require protection. But for those cases, sealing and redaction are much more appropriate.

But, in general, given the harshness of deportation, its convergence with the criminal justice system, the complexity of the law, the lack of counsel for most deportees, and the prevalence of detention and transfer policies, it seems to me that the costs of general exemption are much greater than the potential benefits.

Thank you.

JUDGE HINKLE: Next we have Eleanor Acer. She is the Director of the Refugee Protection Program at Human Rights First.

MS. ACER: Thank you very much. It is a pleasure to be here.

Human Rights First works in partnership with lawyers at law firms in New York, Washington, and other places around the country to help provide legal representation to asylum seekers who are indigent as they

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23. *See Statistical Year Book*, DEP'T OF JUSTICE, http://www.justice.gov/eoir/statspub/syb2000main.htm (last visited Sept. 23, 2010).

24. ARNOLD & PORTER LLP FOR THE ABA COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

25. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006/07).

navigate their way through the asylum system. And we provide this representation at the Asylum Office level, before the immigration courts, and before the federal courts as well. We also advocate with the U.S. government to urge that U.S. asylum standards are in accordance with our obligations under the 1968 Protocol Relating to the Status of Refugees (Refugee Protocol)[26] and other international human rights standards.

Asylum has a long history in this country. The pilgrims came here seeking some protection from persecution. In the wake of World War II, the United States led the international community in setting up a regime to ensure the protection of those who fled from persecution. In 1980, the United States enacted a law that actually created the status of asylum.[27] That law just celebrated its thirtieth anniversary last month.[28]

I am giving you a little bit of background just to set the stage for the importance of maintaining confidentiality and some protections for confidentiality in asylum cases and in similar cases involving withholding of removal due to refugee status[29] and withholding of removal under the Convention Against Torture.[30] I actually agree with many of the points raised by my fellow panelists. I agree that this is not an easy issue to navigate, but I think it needs some closer examination.

There are a number of reasons, which I will touch on, for maintaining confidentiality in cases involving asylum and similar forms of immigration relief. One is, of course, the potential for some kind of retaliation against an individual if he is returned home. Another reason is the potential for some kind of harm to family members or other colleagues who may actually still be in the country of persecution. In addition, asylum applications often involve very confidential types of information. Finally, another reason is that the very nature of an asylum application requires that applicants be honest about very intimate details of their lives, as well as about information that could affect the lives of other individuals, and so the assurance of confidentiality is actually incredibly important to the people in the process and also important to the strength of the asylum system, so that applicants and witnesses really do provide accurate information and are not scared to provide information that is important to the process out of a fear that it may later be publicly disclosed.

U.S. regulations, as some of you may know, actually contain specific protections for confidentiality in asylum cases. These regulations appear in

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26. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force 1968).

27. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1522 (2006)).

28. HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT 1 (2010), *available at* http://humanrightsfirst.org/asylum/refugee-act-symposium/30th-AnnRep-3-12-10.pdf.

29. *See* Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 208.16 (2010).

30. *See Convention Against Torture*, *supra* note 16.

two different places. They appear at 8 C.F.R. Section 208.6[31] as well as 8 C.F.R. Section 1208.6.[32] The reason they appear in two different places is that since the Department of Homeland Security took over the responsibilities of the former INS, the U.S. Immigration and Naturalization Service, in 2003, responsibility for immigration and asylum matters now rests with the Department of Homeland Security, though the Department of Justice continues to play a role as well. As a result, these regulations are essentially mirror regulations appearing in two different places.

Under 8 C.F.R. Section 208.6(a), "Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination . . . pertaining to any reasonable fear determination . . . shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General."[33] Now, under the Homeland Security Act, that discretion actually rests with the Secretary of Homeland Security.[34]

The regulations include an exception for "[a]ny Federal, State, or local court in the United States considering any legal action," including that "[a]rising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part."[35]

In addition to these regulations calling for confidentiality in asylum proceedings, the instructions on the asylum application form actually inform the individual applicant at the time he or she actually fills out the initial asylum application.[36] The asylum application form's instructions state,

> The information collected will be used to make a determination . . . . It may also be provided to other government agencies . . . for purposes of investigation . . . . However, no information indicating that you have applied for asylum will be provided to any government or country from which you claim a fear of persecution.[37]

Then the instructions cite to the regulations, i.e., to 8 C.F.R. Section 208.6 and 8 C.F.R. Section 1208.6.[38]

Why does this matter? I can tell you why I think it matters, and I will in a little bit. But I am going to cite the Department of Homeland Security's explanation of why confidentiality matters first.

There is a fact sheet that was prepared by the U.S. Citizenship and Immigration Services (USCIS) Asylum Division and that fact sheet is

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31. 8 C.F.R. § 208.6.
32. *Id.* § 1208.6.
33. *Id.* § 208.6(a).
34. Homeland Security Act of 2002, 6 U.S.C. § 271 (2006).
35. 8 C.F.R. 208.6(c)(2).
36. U.S. Citizenship and Immigration Services, I-589, Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589.pdf.
37. *See* U.S. Citizenship and Immigration Services, Instructions, I-589, Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589instr.pdf.
38. *See id.*

posted on the USCIS website.[39] This fact sheet was prepared for those in the USCIS Asylum Division who actually adjudicate asylum cases.[40] In both the first paragraph and in the response to the first of the frequently asked questions, USCIS explains some of the reasons why the regulations protect asylum-related information.[41] The fact sheet explains that "[p]ublic disclosure of asylum-related information may subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin."[42] Public disclosure also can, in rare circumstances, and only if the individual can meet the standards, give rise to a potential asylum claim in and of itself, based on potential for persecution based on the release of that information.[43]

The U.S. Court of Appeals for the Fourth Circuit, in its decision in *Anim v. Mukasey*,[44] has actually cited to this particular USCIS memorandum and its explanation of why maintaining the confidentiality of asylum seekers is important.[45] So, too, has the Court of Appeals for the Second Circuit in its decision in *Lin v. U.S. Department of Justice*.[46]

I am also going to read briefly from the policy of the UN Refugee Agency. The United Nations High Commissioner for Refugees (UNHCR) was actually created before the 1951 Refugee Convention.[47] The United States is a member of the Executive Committee of UNHCR and is also one of UNHCR's leading donors. UNHCR has explained, in a policy letter, that "the nature of asylum proceedings call[s] for strict observance of the duty of confidentiality."[48] The UNHCR itself has a confidentiality policy for all the refugee status adjudications it conducts itself across the world. As a general rule, UNHCR will not share any information with the country of origin (i.e., the country of feared persecution). The policy letter also stresses that information relating to the applications needs to be kept strictly confidential. The letter includes several additional paragraphs describing the importance of maintaining confidentiality in asylum cases.

For people who have actually applied for asylum, many kinds of information are included in their asylum applications. This information can be very personal and sensitive information: the details of an individual's

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39. *See* U.S. Citizenship and Immigration Services, *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 3, 2005), *available at* http://www.uscis.gov/files/pressrelease/FctSheetConf061505.pdf.

40. *Id.*

41. *Id.* at 2, 3.

42. *Id.* at 3.

43. *Id.*; *see also* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

44. 535 F.3d 243 (4th Cir. 2008).

45. *Id.* at 253–55.

46. 459 F.3d 255, 263–64 (2d Cir. 2006).

47. *See About Us*, UNCHR: THE UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c2.html (last visited Sept. 23, 2010).

48. Letter from Joanne Kelsey, Protection Officer, UNHCR, to Sandra Saltrese, Miller & Associates (July 12, 2007) (on file with Human Rights First).

rape or torture; the rape or torture of the applicant's family members or colleagues; details about an individual's sexual or gender identity, or the sexual or gender identity of another.

Sometimes asylum applications and testimony can include names of individuals who helped an asylum seeker escape from his or her persecutors; names of other individuals who participated in prohibited political activity with the asylum seeker; or the names of individuals who are members of an underground church. Often during the asylum process, the applicant will need to describe how other individuals who are similarly situated are treated, and U.S asylum adjudicators will want names, specifics, dates, and other detailed information to assess credibility and eligibility for asylum.

Oftentimes, the very fact that a person has applied for asylum can be viewed by a persecuting government as an act of treason, or at least as a blatant criticism of the government and its human rights policies.[49] This danger was publicized more at the height of the Cold War, but this danger is still very much present, whether we are talking about China or Iran or many countries where state and non-state persecutors may target individuals for a wide range of reasons.

In closing, I would like to thank the Judicial Conference Privacy Subcommittee and Fordham University School of Law for inviting me to participate in this panel. I actually did not realize that the confidentiality of asylum claims was a subject of discussion by the Judicial Conferences' Privacy Subcommittee. In looking at this issue in preparation for our discussion today, I realized that there needs to be a lot more attention devoted to these issues.[50]

JUDGE HINKLE: Thank you.

Next is Elizabeth Cronin. She is the Director of Legal Affairs and Senior Staff Counsel at the Second Circuit.

MS. CRONIN: Thank you, Judge. Good morning. Thank you so much for inviting me.

From the viewpoint of the federal courts, there are two issues that I think are relevant to the discussion here today. One is the public availability of the A-number, or the alien registration number, and then whether the federal rule 5.2(c)[51] should be reexamined or what the implications of that rule are. I am going to address the A-number issue very briefly. I think I am going to let Mark Walters talk about that in more depth. I would like to focus on the public access portion of the federal rule.

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49. *See* Virgil Wiebe et al., *Asking for a Note From Your Torturer: Corroboration and Authentication Requirements, in Asylum, Withholding and Torture Convention Claims*, IMMIGR. BRIEFINGS, Oct. 2001, at 6 n.24 (on file with Human Rights First).

50. *See* Memorandum from Bo Cooper, INS General Counsel, to Jeffrey Weiss, INS Director of Int'l Affairs, *in Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Committee on the Judiciary*, 107th Cong. 41 (2002), *available at* http://judiciary.house.gov/legacy/82238.pdf.

51. FED. R. CIV. P. 5.2(c).

To set the stage, I would like to explain that, for the most part, up until about 2002, the federal circuit courts dealt with immigration cases, particularly asylum cases, on a relatively small scale. Prior to around 2002, immigration cases accounted for less than four percent of our circuit's caseload. Within just a couple of years, the filing of immigration cases exploded, and by 2004 to 2005, they accounted for over forty percent of the court's caseload.[52] So you can see that it increased exponentially over a really short period of time. As a result, many people in the court ended up becoming experts in a lot of different areas of immigration law, as a necessity.

As many of you are probably aware who are involved in this field, our court tried many different methods of handling the influx of cases, both to address a rising caseload and out of a desire to provide a timely forum for the litigants. Ultimately, the court developed a non-argument calendar, which we call the NAC,[53] successfully eliminating the backlog. But the cases continued to come, predominantly to the Second and the Ninth Circuits.

Prior to this time, I do not think a lot of thought was given to A-numbers or the implications of having A-numbers available. However, once the deluge of immigration cases came, it quickly became clear that the only reliable method for keeping track of the thousands of immigration cases that we were dealing with was to have the A-number utilized to identify who the cases belonged to. There is a letter from Molly Dwyer, who is the Clerk of Court in the Ninth Circuit, addressing this issue in the materials that were given out this morning.[54]

There have been some suggestions that the A-numbers should be redacted as a way of protecting the confidentiality of the litigants. But, as Molly says in her letter—and our clerk of court agrees—absent a suitable replacement system, this could really wreak havoc on the courts and the ability of the courts to maintain order of the thousands of cases that get filed.[55]

Some of the issues that are relevant with respect to the availability of the A-numbers:

First, the names in many of these cases are incredibly similar. In our circuit, a large majority of the cases are Chinese immigrants filing asylum.[56] There has been a lot of confusion in how the names are reported when they get to us, whether their first names are substituted for their last

52. MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 7 (Federal Judicial Center, 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/$file/immlaw09.pdf.

53. *See generally* 2D CIR. R. 34.2.

54. Letter from Molly C. Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit, to Professor Daniel Capra, Fordham Law School (Nov. 2, 2009) (on file with Fordham Law Review).

55. *Id.*

56. *See* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 71–72 (2005).

names. Many of the last names are similar. Without having some other identifier, like an A-number, it would be impossible for the clerk's offices to keep track of who the cases belong to.

Second, immigration cases, as you know, can go on for many, many years. They go from the agency up to the circuit. They go back to the agency, sometimes many times. It is an effective way of making sure that the case is tracked properly.

Third, clerks are always concerned that somebody may get deported by mistake because they were misidentified. The A-number is a way of preventing that from happening.

Fourth, the Board of Immigration Appeals (BIA) issues presidential decisions with A-numbers, except in asylum cases. But many cases begin as asylum cases and then turn into something else when they get to the circuit court.

Fifth, courts do not want to be in the business of doing redaction, for obvious reasons. They do not want to be taking documents that come to them and altering them in some way. Also they do not want to be charged with the awesome responsibility of perhaps taking something out that should not be taken out.

Lastly, there is a question of what harm could come to petitioners as a result of the A-numbers being made available, and even some Immigration Judges have asked courts to put the A-number on their decisions so that they can track the case that they had when it was at the agency level.

I will let Mark deal with that more. But those are some of the issues that are relevant to the A-number.

With respect to Federal Rule 5.2, as I understand it, initially the Social Security cases were the ones that were given protection from unlimited public access, because they are inherently different from regular civil cases. They are a continuation of an administrative proceeding, the files of which, at that level, are confidential. Moreover, according to the report of the committee when they were discussing this rule, the cases in the Social Security context are of limited or no legitimate value or use to anyone who is not a party in those cases.[57] As you know, with Social Security cases, they are replete with medical records, because the person has to put that information in, in order to qualify for the benefits.

Immigration cases were included in the new version of the rule because they presented similar privacy issues as those in the Social Security cases. As discussed, this federal rule limits access to actual documents at the courthouse and does not permit electronic access, other than to the docket sheets and the court's decision. I think, as both Mr. McCraw and Professor Reidenberg said, it ends up being practical privacy or practical security, because fewer people have physical access to those records.

It is not surprising to me that the media and research academics would want greater or easier access to court documents. I think in the written materials, Mr. McCraw mentioned judicial transparency. This is obviously

57. FED. R. CIV. P. 5.2 advisory committee's note.

a very important concept to the federal courts as well. Under this particular rule, the judiciary is trying its best to balance the court's own support of open access to records with the privacy of litigants. As everyone has discussed from this morning's panel to this panel, it is a very difficult and complicated issue. The rule is not perfect, but it is an effort to balance those two competing interests.

In this day and age of electronic availability of just about everything, I guess the question is, is this rule an anachronism, or is it a euphemism for "elite access"? Or is it trying to address a legitimate concern that unfettered electronic access to immigration records through the courts can lead to what, I think, one professor this morning said could be data mining that would create dangerous situations for petitioners because Internet access may allow for private or personal information to go viral?

Professor Kanstroom talked also about whether immigration cases are more akin to criminal cases, and mentioned that it would be helpful to look at the criminal privacy rules. But criminal cases, as we know, are available, for the most part, electronically. In my view, having read a lot of immigration cases and looked through a lot of immigration records, there are some differences between immigration and criminal cases that would make immigration cases more akin to Social Security-type cases that would warrant, perhaps, a stronger look at those privacy issues.

As I said earlier, Social Security cases originate in the administrative agency and then they come right to the Federal Circuit courts. The administrative records, as Ms. Acer so ably described, are replete with personal information. There is a letter from the government to a judge involved in the beginning process of developing these rules about what kinds of records are available.[58] If you have the ability to look through an administrative record in an immigration case, you can see that it is not in discrete areas, that this personal information is woven throughout the entire record, in the same way as the Social Security case. There are copies of passports, which include photographs. There are photographs of the individuals and their family members. They have history of their origin, their dates of birth, the addresses where they lived in the country from which they are coming to the United States. There is information about their children. There are often very detailed medical records. There are a lot of different statements, because these petitioners are giving statements, often from the time that they arrive in the United States, regarding torture, domestic violence, gender identification, political dissent, sexual assault, among many other issues.

As you know, in asylum cases, often what the immigration judge is looking at are credibility determinations. A lot of times, the decision as to whether or not to find the petitioner credible rests upon the information that that person is providing. If they are providing very little detail, then it is

58. Letter from Peter D. Keisler, U.S. Department of Justice, Civil Division, to Hon. Sidney A. Fitzwater, U.S. District Court for the Northern District of Texas (Oct. 15, 2004) (on file with Fordham Law Review).

more likely that the immigration judge may rule against them. It is important for them to provide as much personal detail as possible.

One of the problems that our court has experienced is the lack of the quality of representation of asylum petitioners. About eighty percent of petitioners in our court are represented by counsel, which would sound like a good thing. But many times they may often be better off representing themselves than having counsel. These are retained counsel. They are not appointed for them. So there is some concern that even if redaction rules are put into effect, these attorneys are not going to be providing the kind of redaction that would protect the people whom they are filing on behalf of.

Thank you.

JUDGE HINKLE: Thank you.

Mark Walters is the Senior Litigation Counsel at the Office of Immigration Litigation, the Department of Justice.

MR. WALTERS: Thank you, Judge Hinkle.

I have been doing appellate and trial litigation in the area of immigration law for twenty-five years at the Department of Justice, twenty of them as both a litigator and supervisor. For reasons I can no longer remember, I became the principal point of contact for the Ninth Circuit when there were issues related to mediation, or when general administrative matters needed to be addressed. One of the recurring topics of discussion with the Ninth Circuit was the process of getting administrative records to the court from the BIA. As we moved toward electronic filing, almost every aspect of that process needed to be looked at again: How are we going to transmit records? Will they be paper records or electronic? Are the records going to go online? If so, what portion of each record is going to be kept from the general public and what will be available to the public online?

The practice right now, as you all know, is that the public has limited access on PACER, but unlimited access at the courthouse for those who are willing to go there and ask for the file.

The current practice is working on a number of practical levels. That does not mean that public access cannot or should not be improved in the future. My concern is that we are not where we need to be technologically to improve access today.

Let me deal with the alien registration number, or A-number, issue first. I do not know if the Privacy Subcommittee has received any letters on this issue, but I know the clerks of the various circuits have gotten letters from time to time urging that the A-numbers be redacted from their orders. I think Elizabeth has given you a number of reasons why they should be left on court orders—common names, among other things. But also, more than in any other area of law, people in immigration proceedings are repeat litigants. Many immigration cases come to the Court of Appeals twice, and go through the agency two, three, or four times. You want to make sure you know, when you are dealing with somebody, whether there are already removal orders for this person, or whether they have already been granted immigration benefits. When aliens have interacted with the benefit side of the Department of Homeland Security, the U.S. Citizenship and

Immigration Services, USCIS, or even with the now-defunct Immigration and Naturalization Service, they would have done so under an assigned A-number. But their names might change over time. There are lots of legitimate reasons for a subsequent name change. Marriage is an example. In addition, after aliens have been here for a while, they may choose to anglicize the order of their names, or even change the spelling to make it more readable or pronounceable in English. There are also many illegitimate reasons for subsequent name changes, like the adoption of aliases for criminal activity or to avoid immigration enforcement. The A-number sticks to the individual despite these changes almost as well as the fingerprint. And it really helps avoid clerical error. In the end, it helps prevent mistaken removals, and promote accurate enforcement of court orders.

The Ninth Circuit has had hundreds of cases in the last several years where the surname is Singh; the Second Circuit, hundreds of Lin cases. One of my attorneys accused me of giving her only Lin cases after I assigned her three in a row. It was just a coincidence, but I think you get the point. The situation we have long had in the United States with an abundance of people named Smith and Jones presents itself even more frequently in some cultures, because of repetition or similarity of names.

Turning to the question of what should be available on PACER, the points made by Eleanor Acer on asylum are good points. The need for confidentiality in the asylum context is one of the primary reasons not to give public access to immigration records on PACER. The suggestion has been made to redact immigration records and then give the public full access online. This ignores the sheer volume of cases that would need careful redaction. In the last six years, the number of cases that have gone from the BIA to the courts of appeals have ranged from a low of about 7,500 to a high of about 12,300. To illustrate what redaction of these records would mean in practical terms, consider the experience of the Freedom of Information Act (FOIA) unit at the Board of Immigration Appeals. It takes a member of that unit about two hours to go through an inch of paper and redact it using FOIA standards. The average asylum record is four inches thick. This means one FOIA officer would have to work a full day to get just one average asylum record ready for transmission to the court of appeals in redacted form.

So why not ask the petitioners' attorneys to do it? For cases completed in immigration court in fiscal year 2009, only thirty-nine percent were represented, while sixty-one percent were unrepresented. For obvious reasons, it would be unwise to ask unrepresented aliens to apply the standards that trained FOIA officers apply if you expect to get a meaningful redaction. Such pro se redactions would be inconsistent in the extreme, sometimes to the public's detriment and sometimes to the alien's.

The Ninth Circuit has a pro bono program and makes a large effort to get quality law firms on the west coast to give their junior associates experience in the Court of Appeals by providing immigration training and asking them to take cases. If you are going to ask these firms and their lawyers to do

redaction when they agree to take these cases, what impact will that have on the number of firms and lawyers willing to participate in the pro bono program? I am not sure you would get quite as many volunteers if the commitment up front is to spend a day or so doing redaction.

I want to sum up by saying that I think the ultimate goal, to reveal as much as possible online, is a worthy one. But practical realities mean we must wait for the technology that will make this reasonably possible. Right now, if redaction has to be done manually, given the amount of time and money that it would take to deal with up to 12,000 records a year, we are not there yet.

JUDGE HINKLE: We are at the point of taking questions.

PETER WINN: I just have a question for Elizabeth Cronin, in terms of the technology of the access to a Social Security or an immigration file. I did some experiments in Seattle on this. My understanding is that an outsider can actually enter a notice of appearance in a case as an interested party or something and actually have online access to it. It is just not anonymous access. So the parties to the case would know who was watching and looking at the pleadings. They would have remote access.

MS. CRONIN: I do not know. According to our Clerk of Court, PACER access is available to pretty much anyone who files, but I do not know about that specific issue.

MR. WINN: With respect to an offline case, which is what Social Security and immigration cases are, even though there is no access through PACER, the parties have online access.

MS. CRONIN: Correct.

MR. WINN: So a third party who is not a party has, technologically, the ability to identify themselves as somebody who wants that access and can file using the same technology as the parties do. It is just that the parties would be able to see that and see that transparently and be in a position to protect themselves if they wanted to.

I just was not sure if you were sort of zeroed in on the technological capacity to deal with some of the concerns of the press about online access to these offline records. But the availability of this intermediate system would also allow, to some extent, online access on an individualized basis.

PROF. KANSTROOM: May I speak to that? In anticipation of this, I did a little bit of unscientific empirical research, and I started calling around to some lawyers who litigate nationally in these kinds of cases. A couple of people did mention that. That made me think that a lot of the problem here is a question of coding, whether we could code asylum cases to protect them at a sort of anterior point in the system or not, and the idea that if we cannot, we still have this other problem. A couple of lawyers, for example, said to me that they were now thinking that all they had to do to maintain access to their cases was not code them as immigration cases, but get them coded as habeas or something else.

So I think this is a big question. Maybe there are the kernels of a solution in that understanding.

JUDGE TALLMAN: I am from the Ninth Circuit in Seattle.

I want to underscore a couple of points that Mark Walters and Elizabeth made. The letter that Molly Dwyer wrote was written at the direction of the fifty judges on our court, who process 8,000 immigration cases a year. I think about the privacy problems in immigration, the sensitive information in Social Security appeals, the sensitive information in criminal cases. We are working on a national security case right now, with top-secret information. If we have to redact or somehow deal with these problems in each of these cases, it will bring the Ninth Circuit to its knees.

And I do not think the Ninth Circuit is alone. I cannot underscore the practical problems that we have in just getting access to information that has already been partially sealed or redacted before the administrative agency or the court below, in trying to get a comprehensive appellate record so that the decision maker is presented with the information that he or she needs in order to make the decision.

You can talk about all of these interim steps to try to protect some of the sensitive information. But how do you describe in the opinion, when you are writing the decision, the reasons why you decided the case, without disclosing that which you are seeking to protect?

I also want to underscore the point with regard to the identifiers. We just have too many litigants by the same name. We are going to have to give them some kind of a number that is going to be unique, whether it is an A-number or a Social Security number or a new litigation number. I just do not know any other way to do it. Otherwise, we cannot have any confidence when we put that person eventually on the plane, if they are going to be deported, that we have the right Singh who is going back to the Punjab.

JUDGE HINKLE: What do you do now? You issue the opinion where you describe the information in, say, an asylum appeal. That opinion goes out, and it has the name and it has the information in it, right?

JUDGE TALLMAN: That is exactly right. And you run into the problem that Mr. McCraw was talking about, where in the wrong case, that information can have very harmful consequences back in the country that you are going to repatriate the alien to.

MR. MCCRAW: I certainly have a great deal of sympathy for the practical problems of the courts dealing with paper. But I hope those of you who are attorneys for civil litigants will share with me sort of the irony, having been in front of judges, where, when we explain how hard electronic discovery is, how many documents we have to go through, and having judges tell us, "Figure it out. The law requires you to disclose those documents."

The fact is, we understand that. These practical problems should be taken seriously, but they should not overcome constitutional rights and the greater common law values of transparency in the court system.

JUDGE RAGGI: I have a question that asks this panel to think beyond its particular task and may actually tread a little bit on CACM's responsibilities. When we talk about redacting immigration cases, we are

basically talking about creating an exception from the presumption in favor of open court files. We will hear in the course of today from any of a number of groups who will say, "Make an exception for me, too."

I am not sure I quite understand how the privacy concerns that you have articulated and that I recognize with respect to immigration warrant a different treatment from the privacy concerns of other litigants in a variety of cases, of jurors—we have just heard it said that for jurors it is tough. This is part of their civic duty. Why is not that also the answer with respect to any party that comes knocking at the court door? I am not suggesting that we may not recognize exceptions. But, why immigration and not other areas?

MR. WALTERS: I think one answer to that is the volume. The Ninth Circuit, in the last six years, has ranged from thirty-one to forty-one percent of their docket being immigration cases.

JUDGE RAGGI: You think that is an argument for sealing or redaction?

MR. WALTERS: That is an argument for why they should not have to be redacted, but, rather, limited access on PACER should continue, with only attorneys of record having access.

JUDGE RAGGI: Why limited access, though, for this type of case and not others presenting comparable privacy concerns or for jurors who have provided a host of private information to us?

MR. WALTERS: I think it is the practical problem with applying redaction rules to that volume of records, coupled with the fact that this would not be light redaction. As some of my co-panelists have indicated, in addition to the sensitive information in asylum cases, which are a large percentage of the immigration docket, you have quite a bit of personal information in every immigration case, having to do with Social Security, Selective Service, medical history, hardship claims with medical records, and marriage information, sometimes including very personal details. Is this a legitimate marriage or is it not? The list of sensitive and personal information frequently found in immigration records goes on and on. One of the letters in the materials gives a more comprehensive list. [59]

So I think it is volume combined with a need for thorough redaction that distinguishes immigration cases. It is not a light redaction, like you might see in some other cases, where there are only a few places in the record where you have to deal with sensitive or personal information. And it is not a manageable volume. These two factors call for an exception.

JUDGE RAGGI: If I can just press my concern, because the committee will undoubtedly discuss this at some length. This is not an area of simply a private dispute—contracts or anything else. This is an area of enormous public debate, reaching well beyond the judiciary. To not give broad access to what we are doing in this area raises some of the concerns that Mr. McCraw highlighted. I think we are a little hesitant about limiting access. Who would we limit access to? You have suggested just the litigants. How could we justify that in an area of serious public policy debate?

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59. *Id.*

JUDGE HINKLE: We are at the end of the panel, basically. I would say this to everybody. One of the reasons we have panels like this is to hear stories like David McCraw told us about accidentally coming on to a case that really needed to be reported. Yet the puzzle for everybody is to figure out a way to protect the private information. If that is an asylum case, it is probably chock-full of this really private information. Figure out a way to protect the private information while also allowing public access to the fact that there is an immigration judge who is being very arrogant and treating a person shabbily, which needs to be disclosed publicly. It is a very difficult problem.

MS. ACER: In many of these cases, at least in the asylum context, you are talking about returning people to places where individuals—either that individual or others—are at risk of persecution, torture, and serious harm, in states that either are not protecting individuals or are actively persecuting those people. We in the U.S. have no control over that.

I think that is one way in which these cases may be different. I am not at all commenting on the protections that other individuals should potentially enjoy or not.