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The Limits of Pro Se Assistance in Immigration Proceedings: Discussion of *NWIRP v. Sessions*

Ryan D. Brunsink and Christina L. Powers*

ABSTRACT

This Article discusses issues regarding assistance of pro se litigants in the context of immigration law. In particular, Part II of this Article highlights programs such as the Legal Orientation Program (LOP) and Immigration Court Helpdesk (ICH) that attempt to alleviate some of the inherent difficulties non-citizen detainees face in immigration proceedings. Part III of this Article focuses on a 2008 Regulation by the Executive Office of Immigration Review (EOIR), which calls for discipline against attorneys that engage in a pattern or practice of failing to enter a Notice of Appearance when engaged in practice or preparation. Lastly, Part IV of this Article discusses a recent case brought by the Northwest Immigrant Rights Project (NWIRP) against the EOIR, the potential impact of this case on similar programs offering assistance to pro se immigrants, and recent developments in the litigation.

I. INTRODUCTION

This Article seeks to illuminate a significant but narrow problem within the larger pro se litigation landscape through the lens of pending litigation. The case of *Northwestern Immigrant Rights Project v. Sessions*¹ (“*NWIRP v. Sessions*”) presses the question of the degree to which pro se respondents in immigration removal proceedings can receive outside legal assistance in preparing their cases without being formally represented by an attorney. The stakes are high, and the resolution of *NWIRP v. Sessions* will likely clarify the

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1. *Nw. Immigrant Rights Project v. Sessions*, No. C17-716 RAJ, 2017 U.S. Dist. LEXIS 118058 (W.D. Wash. July 27, 2017) [hereinafter *NWIRP v. Sessions*].

limitations on legal assistance to pro se respondents by way of current regulations. On each side of this issue—whether strict limitations apply or the result is more permissive for pro se respondents—there will be a significant impact on the individuals facing removal from the United States, the courts that adjudicate their proceedings, and the advocates left navigating the treacherous and hotly contested landscape.

Pro se litigation raises myriad complex and interesting issues, but in the context of immigration law, those issues are compounded. Despite being civil proceedings, in some ways, immigration removal proceedings more closely resemble criminal proceedings; life and liberty are often at stake. In criminal proceedings, due to the constitutional right to counsel, a defendant seldom appears pro se, and then only as a result of his or her choice to self-represent. In immigration proceedings, whether for a lack of monetary or social means, the majority of respondents appear pro se. They are left with no other option. Fewer constitutional protections apply. Without delving deeply into constitutional theory, in most civil litigation, the non-guarantee of counsel seems generally reasonable because only money is often at stake. In removal proceedings, however, life and liberty may hang in the balance with no person trained in the law advocating on behalf of the respondent. In addition, there are significant barriers to self-representation in the immigration context beyond merely the respondent's need to litigate as a layperson. Pro se litigants face limited access to important resources due to detention, language barriers, and compressed timelines for adjudication. Critical evidence can also become practically inaccessible. Communication with anyone in a position to assist is either intentionally thwarted or unintentionally stymied through a series of unfortunate circumstances that are indifferent to the pro se respondent's plight.

The natural solution to the unique challenges pro se respondents face in the immigration context is universal representation. While legal coalitions are currently making efforts in certain locations within the United States to advance universal representation models, the United States is far from universal representation nationally.² Government sanctioned legal orientation and helpdesks grew to fill this gap. The Legal Orientation Program (“LOP”) was established in 2003 to educate detained non-citizens in removal proceedings about the immigration court, processes, and basic informa-

2. See, e.g., Oren Root, *Universal Representation for Immigrants Facing Deportation*, VERA INST. JUST., <https://www.vera.org/projects/universal-representation-for-immigrants-facing-deportation> (last visited Apr. 23, 2018).

tion on forms of relief.³ The Immigration Court Helpdesk (“ICH”) program was established in 2016 to educate non-detained persons in removal proceedings, with objectives similar to the LOP.⁴

While the LOP and the helpdesk models admirably attempt to fill the void, they are incomplete. They only provide for the education, rather than the representation, of the pro se respondent. In the absence of universal representation, many LOP providing organizations seek to address the remaining gap between legally oriented pro se respondents and represented respondents. LOP providers often supply additional services funded by means entirely apart and separate from LOP/ICH funding.

Venturing into the realm of pro se assistance has led to the present dispute highlighted in *NWIRP v. Sessions*. At what point does the assistance given to a pro se individual become the practice of law, thus subject to certain oversight and regulation? And at what point do strict limitations on such assistance encroach on constitutional protections, such as freedom of speech and association and powers reserved to the states? These are some of the issues presented by *NWIRP v. Sessions*.

II. THE LEGAL ORIENTATION PROGRAM AND THE IMMIGRATION COURT HELPDESK PROGRAM AS LIMITED FIXES TO A LARGER PROBLEM

Representation rates among non-citizens in removal proceedings are low. Nationally, 37 percent of respondents appearing before the immigration courts are represented.⁵ That rate falls to 14 percent when we consider only detained respondents.⁶ Further, non-citizens with representation are significantly more likely to succeed than those without representation on their claims for relief or terminating their proceedings.⁷ With no guarantee to appointment of counsel, these disparate figures suggest pro se respondents may not receive a fair trial. At the very least, pro se respondents face a

3. See *Executive Office for Immigration Review: Legal Orientation Program*, THE UNITED STATES DEP’T OF JUSTICE (Apr. 25, 2018), <https://www.justice.gov/eoir/legal-orientation-program>.

4. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, EOIR’S OFFICE OF LEGAL ACCESS PROGRAMS FACT SHEET 4 (Aug. 2016), <https://www.justice.gov/eoir/file/882786/download>.

5. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 5 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

6. *Id.*

7. *Id.* at 18–22.

significant challenge appearing before immigration courts without counsel.

Historically, certain programs were developed to address concerns regarding non-citizens in removal proceedings without representation. The Legal Orientation Program (LOP) and a more recent program, Immigration Court Helpdesk (ICH), are the progeny of efforts that date back to the early 1990s.⁸ Those earliest efforts were independent of government involvement. The Florence Immigrant and Refugee Rights Project (“Florence Project”), a not-for-profit agency in Florence, Arizona, is an example of a pioneering organization that sought to address those concerns. The Florence Project developed a “rights presentation” model.⁹ The model “encouraged people in detention to play an active role in their own cases, whether or not they were represented by counsel.”¹⁰ The federal government became interested in the Florence Project’s model and conducted a study on its impact. The study resulted in findings that the rights presentations resulted in certain benefits to the government—namely, time and cost-savings—as respondents appeared before immigration courts better prepared and equipped to meaningfully participate in their proceedings.¹¹ By the early 2000s, Congress appropriated significant funds to further develop and expand what had become the LOP.¹²

Currently, the LOP operates¹³ at 38 detention facilities across the country and is conducted by 18 nonprofit legal service providers.¹⁴ The LOP offers services in the form of group orientations, individual orientations, and self-help workshops.¹⁵ The primary avenue for dissemination of legal information is through group

8. NINA SIULC ET AL., VERA INSTITUTE OF JUSTICE, LEGAL ORIENTATION PROGRAM EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II 7–8 (2008).

9. *Id.* at 7.

10. *Id.* at 8.

11. *Id.*

12. *Id.*

13. In April of 2018, the U.S. Department of Justice decided to halt LOP funding. *Statement on DOJ’s Decision to Halt Legal Orientation Program*, VERA INST. JUST., <https://www.vera.org/newsroom/press-releases/statement-regarding-legal-orientation-program> (last visited May 7, 2018). The DOJ reversed course only a few weeks later, as it deferred to Congress’s expressed intent to fund the program for fiscal year 2018. *Statement on DOJ’s Decision to Continue Legal Orientation Program*, VERA INST. JUST., <https://www.vera.org/newsroom/press-releases/statement-on-doj’s-decision-to-continue-legal-orientation-program> (last visited May 7, 2018).

14. Marina Caeiro, *Legal Orientation Program*, VERA INST. JUST., <https://www.vera.org/projects/legal-orientation-program> (last visited Apr. 5, 2018).

15. *Id.*

orientations. Attorneys or Department of Justice-accredited representatives conduct group orientations that cover a basic overview of the immigration court process, potential avenues of relief from removal, and rights and obligations under law.¹⁶

In addition to providing detained individuals with basic information on rights and responsibilities, immigration court procedures, and potential avenues for relief from deportation, the LOP also serves as a vehicle for referring the meritorious cases of indigent detainees to pro bono attorneys or for preparing participants to proceed with their cases pro se.¹⁷ These objectives can be accomplished through additional services such as individual orientations and self-help workshops. This assistance, however, is not without serious limitations. It can be challenging to identify attorneys willing to represent individuals pro bono. It certainly is not possible to do this at any rate nearing universal representation without engaging an entirely different model. Further, pro se assistance through self-help workshops and more individualized assistance is subject to strict rules. These rules limit the conferral of legal advice and preparation of materials submitted to the immigration courts.¹⁸

Faced with limited resources and the impossibility of representing every detained individual in removal proceedings, advocates sought to fill the remaining gap between merely orienting pro se respondents and representing them. In doing so, these advocates entered more unsettled legal terrain. Herein lies the heart of the matter presented in *NWIRP v. Sessions*, examining the point at which pro se assistance becomes representation, and the boundaries of the First and Tenth Amendments.

III. 2008 EOIR REGULATION

In June 2000, when the Executive Office for Immigration Review (EOIR) implemented a regulation, ‘Professional Conduct for Practitioners—Rules and Procedures,’ to “protect the public, preserve the integrity of immigration proceedings and adjudications, and maintain high professional standards among immigration practitioners.”¹⁹ The overall thrust of this regulation was to place limits

16. *See id.*

17. SIULC ET AL., *supra* note 8, at iii–iv.

18. Memorandum from Steven Lang on DOJ/OLAP Orientation v. Representation (July 11, 2011) (on file with the author).

19. *EOIR’s Attorney Discipline Program and Professional Conduct Rules for Immigration Attorneys and Representatives Fact Sheet*, EXEC. OFFICE FOR IMMIGR. REVIEW, U.S. DEP’T OF JUSTICE, 1 (2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/23/EOIRsDisciplineProgramFactSheet.pdf>.

on the assistance that can be given without entering into a formal attorney-client relationship. In 2008, the EOIR amended its regulations to expand its disciplinary authority.²⁰ Among the changes was the addition of 8 C.F.R. §1003.102(t) (“Regulation”), which allows EOIR to discipline individuals who have engaged in a pattern or practice of failing to submit signed and completed Notices of Appearances when engaged in practice and preparation.

The regulations contain important definitions relevant to advocates. “Representation” includes “preparation and practice.”²¹ 8 C.F.R. §1001.1(i) defines “practice” to include “the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge or the Board.”²² 8 C.F.R. §1001.1(k) broadly defines preparation to mean “[t]he study of the facts of the case and the applicable laws, combined with the giving of advice and auxiliary activities, including the incidental preparation of papers.”²³ It excludes assistance that consists solely of completing blank spaces on printed forms for free or nominal remuneration.²⁴

The EOIR justified this change as necessary to improve the clarity and uniformity of existing rules and increase the ability of EOIR to regulate unscrupulous practitioners.²⁵ EOIR’s purpose in promulgating §1003.102(t) was to “advance the level of professional conduct” in proceedings, and “foster increased transparency” in the client-practitioner relationship. It is difficult for EOIR to discipline wayward practitioners when they cannot be identified.²⁶ Immigration law has been particularly fertile ground for unlicensed practitioners to take advantage of vulnerable and desperate people.²⁷

20. Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76,914 (Dec. 18, 2008) (codified at 8 C.F.R. 1001, 8 C.F.R. 1003, 8 C.F.R. 1292).

21. 8 C.F.R. § 1001.1(m) (2018).

22. *Id.* § 1001.1(i).

23. *Id.* § 1001.1(k).

24. *Id.* § 1001.1(i).

25. Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76,914, 76,915 (Dec. 18, 2008).

26. *Id.* at 76,919 (“It is difficult for EOIR to enforce those standards when practitioners fail to enter a notice of appearance or sign filings made with EOIR.”).

27. Memorandum, A.B.A. Comm. on Immigration, Avoiding the Unauthorized Practice of Immigration Law 1 (June 13, 2017), <https://www.americanbar.org/content/dam/aba/administrative/immigration/fightnotariofraud/uplmemojune2017.authcheckdam.pdf> (“This practice, often referred to as ‘unauthorized practice of immigration law’ or ‘UPIL,’ has been a chronic problem for decades; it results in serious consequences including devastating financial loss and severe immigration ramifications[.]”).

Because of language barriers, cultural barriers, and other structural issues, immigrants have been particularly vulnerable to this phenomenon. The issue is so entrenched in immigration proceedings that appellate courts have noted its prevalence.²⁸ Some scholars have opined that immigrants may be better off without any representation than some of the low-quality representation that some immigrants endure.²⁹

IV. THE NWIRP LAWSUIT BACKGROUND

The Northwest Immigrant Rights' Project ("NWIRP") is a non-profit organization located in Washington state that provides a variety of services to low-income immigrants. Its Tacoma office focuses on assisting individuals detained at the Northwest Detention Center ("NWDC"). The NWDC has a 1,575 bed capacity. It may process as many as 10,000 non-citizens in a year.³⁰

The NWIRP is one of 18 organizations nationwide that provide LOP services to 38 detention facilities across the country.³¹ With funding independent of federally appropriated LOP money, the NWIRP also provides direct representation to clients and referrals to pro bono attorneys.³² The organization represents approximately 150 individuals per year and finds pro bono attorneys for 40 more.³³ Additionally, the NWIRP provides limited services to pro se individuals, separate from services provided through LOP.³⁴ These services included filling out applications for relief, and assisting with template motions to reopen.³⁵

28. *E.g.*, *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) ("All too often, vulnerable immigrants are preyed upon by unlicensed *notarios* and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation. Despite widespread awareness of these abhorrent practices, the lamentable exploitation of the immigrant population continue[.]").

29. *E.g.*, M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 286, 288 (Jaya Ramji-Nogales et al. eds., 2009) ("[S]ome individuals may be better served without counsel than by the assistance of an incompetent attorney or unqualified nonlawyer[.]").

30. *Detention & Deportation Defense*, NW. IMMIGRANT RIGHTS PROJECT, <https://www.nwirp.org/our-work/direct-legal-services/detention-deportation/> (last visited Apr. 5, 2018).

31. Caeiro, *Legal Orientation Program*, *supra* note 14.

32. Complaint for Declaratory and Injunctive Relief at 5, *NWIRP v Sessions*, No. 2:17-cv-00716 (W.D. Wash. Apr. 8, 2017), ECF No. 1.

33. *Detention & Deportation Defense*, *supra* note 31.

34. *Id.*

35. Complaint for Declaratory and Injunctive Relief at 4–7, *NWIRP v. Sessions*, No. 2:17-cv-00716 (filed Apr. 8, 2017), ECF No. 1.

When 8 C.F.R. §1003.102(t) was promulgated, the NWIRP met with the local court administrator to discuss how this regulation would affect its services. Based on this discussion, the NWIRP agreed that when assisting detainees in preparing motions, it would clearly mark the motions as being prepared with the assistance of the NWIRP.³⁶

In August 2016, the NWIRP was contacted by EOIR Fraud and Abuse Prevention Counsel, Brea C. Burgie. The purpose of this conversation was to coordinate efforts combating “notario fraud.”³⁷ During that conversation, the subject of the NWIRP’s asylum workshops arose. The NWIRP conducts these workshops to help unrepresented people fill out the form needed to apply for asylum. Ms. Burgie then requested a follow-up call with the NWIRP. That call took place on October 11, 2016.³⁸ EOIR disciplinary counsel Jennifer Barnes was also on that call. Ms. Barnes informed the NWIRP that EOIR regulations limit organizations from assisting individuals in filling out applications.³⁹

In April 2017, the NWIRP received a cease and desist letter from EOIR disciplinary counsel regarding their limited services. The letter cited two instances of the NWIRP’s assistance that EOIR concluded violated the prohibition against representation without the entry of a notice of appearance in immigration proceedings. One instance was a template motion to reopen in which an employee of the NWIRP had handwritten some facts relating the case. The other was a pro se motion to reopen with an attached asylum application. The NWIRP staff attorney Maggie Chang prepared the pro se motion and the attached application. In response, the NWIRP filed suit.⁴⁰

V. THE NWIRP LAWSUIT LEGAL THEORIES

In its complaint filed in the United States District Court for the Western District of Washington on May 8, 2017, the NWIRP asserted two primary causes of action against the EOIR: a violation of the First Amendment (both facially and as applied) and a violation of the Tenth Amendment (both facially and as applied).⁴¹

The NWIRP’s First Amendment cause of action lies on the basic assertion that EOIR’s interpretation of “practice” and “prepara-

36. *Id.* at 7–8.

37. *Id.* at 6–7.

38. *Id.* at 7.

39. *Id.*

40. *Id.* at 7–8.

41. *Id.* at 11–15.

tion” as defined at 8 C.F.R. § 1001.1(i) and (k) and incorporated into 8 C.F.R. § 1003.102(t) is vague and overly broad.⁴² The argument is that these definitions infringe upon the NWIRP’s exercise of freedom of speech, freedom of assembly, and right to petition the government through its screening, consulting with, advising, and assisting of immigrants in need of legal services.⁴³ The NWIRP advances this constitutional argument against EOIR’s Regulation both “as applied” and facially.

The NWIRP frames 8 C.F.R. § 1003.102(t) as a “compulsory-representation rule.” This means that it forces the NWIRP into a classic Hobson’s choice: enter a Notice of Appearance for each immigrant that it intends to assist and represent him or her formally in removal proceedings, or do not provide legal assistance at all. As the NWIRP describes EOIR’s interpretation of the Regulation, the NWIRP cannot continue to perform the critical services that it provides in screening, consulting with, advising, and otherwise assisting immigrants without being required to appear in immigration court on behalf of each of those individuals (or otherwise violating EOIR’s rule).⁴⁴ Clearly, if the NWIRP’s rendering of the EOIR’s rule is correct, this would be extremely burdensome on the NWIRP and would severely limit the free legal services that it provides. Further, if the NWIRP’s work can rightly be described as First Amendment protected speech or association, then EOIR’s rule would be infringing on the NWIRP’s constitutional rights. This is precisely the argument that the NWIRP advances. It asserts that as a not-for-profit legal advocacy agency, it has a constitutionally protected right to advise immigrants of their legal rights pursuant to the First Amendment as a matter of free speech.⁴⁵

The NWIRP’s Tenth Amendment cause of action is based upon the assertion that EOIR has regulated attorney conduct outside of its constitutionally vested purview. That is, that EOIR, as a federal agency, has exercised power beyond its authority and in breach of an exclusive right of the states.⁴⁶ The NWIRP acknowledges that while a federal agency may regulate individuals practicing before it, it cannot regulate for other purposes or substitute its judgment for the state licensing authority.⁴⁷ The NWIRP suggests

42. *Id.* at 11–12. 8 C.F.R. §1003.102(t) requires Notice of Entry of Appearance.

43. *Id.*

44. Motion for Preliminary Injunction at 13–15, *NWIRP v. Sessions*, No. 2:17-cv-00716 (W.D. Wash. June 8, 2017), ECF No. 37.

45. *Id.* at 16–17.

46. *Id.* at 25–29.

47. *Id.* at 26.

that EOIR is regulating for impermissible purposes and in conflict with rules imposed by state law.⁴⁸

VI. THE NWIRP LAWSUIT CURRENT STATUS

On July 27, 2017, the district court granted a preliminary injunction (and imposed its application nationally with respect to other similarly situated non-profits) finding the NWIRP likely to succeed on its First Amendment claim “as applied.” The court relied primarily upon *Nat’l Ass’n for Advancement of Colored People v. Button*⁴⁹ and its progeny to re-assert that non-profit organizations have speech, association, and expression rights that are protected by the First Amendment.⁵⁰ The court applied the strict scrutiny standard and found that EOIR’s compelling interest in identifying and preventing notario fraud and other incompetent or unethical practice was not sufficiently narrowly tailored to survive exacting scrutiny.⁵¹ It specifically cited the fact that the EOIR failed to produce any evidence that the NWIRP had provided deficient representation, and that the NWIRP had identified explicitly when it had assisted on pro se filings. These facts cut against the assertion that EOIR’s regulation as applied to the NWIRP advances its stated interest.⁵² Additionally, the court posited that the federal regulation would not withstand even intermediate scrutiny.⁵³

The court speculated as to some scenarios in which EOIR could enforce its regulation while comporting with constitutional limitations—namely with respect to private attorneys. Thus, it did not extend its rationale to the facial First Amendment argument.⁵⁴

Finally, the court did not find the NWIRP likely to succeed on its Tenth Amendment claims, as it found that EOIR had been authorized by Congress to regulate the conduct of attorneys appearing before it.⁵⁵

Finding that the NWIRP was likely to succeed on its First Amendment claims as applied, the court also found irreparable harm in breaching First Amendment rights and that the balance of equities and public interest fell in favor of the NWIRP and its legal

48. *Id.* at 27–29.

49. *NAACP v. Button*, 371 U.S. 415 (1963).

50. *See NWIRP v. Sessions*, 2017 U.S. Dist. LEXIS 118058, at *8–19 (discussing the application of *Button* and its progeny to EOIR’s regulations over the NWIRP).

51. *Id.* at *13–17.

52. *Id.* at *15–16.

53. *Id.* at *18.

54. *Id.* at *19.

55. *Id.* at *20.

services.⁵⁶ Thus, the preliminary injunction was granted and EOIR was enjoined from enforcing its cease and desist letter, to remain in effect until further order from the court.⁵⁷

Following the issuance of the preliminary injunction, EOIR filed a motion to dismiss on August 4, 2017, for lack of subject matter jurisdiction due to an alleged running of the statute of limitations and for failure to state a claim.⁵⁸ On December 19, 2017, the district court granted in part and denied in part EOIR's motion to dismiss.⁵⁹ The court disposed of EOIR's argument that the statute of limitations had run, finding that the statute of limitations does not apply to facial challenges invoking First Amendment protections, and additionally, that it begins to run only when plaintiffs know of or have reason to know of actual injury.⁶⁰ Further, the court found that the NWIRP had successfully stated a claim on the basis of facial and "as-applied" challenges under the First Amendment, surviving EOIR's motion to dismiss.⁶¹ However, the NWIRP's Tenth Amendment claims were dismissed, as the court also found that EOIR properly regulated the conduct of attorneys practicing before it in immigration courts through its promulgation of the 2008 Regulation.⁶² The issues having been narrowed, on January 2, 2018, EOIR filed its Answer to the NWIRP's complaint,⁶³ and the court set the trial date for November 13, 2018.⁶⁴

VII. CONCLUSION

The number of immigrants detained by The Department of Homeland Security is growing.⁶⁵ Detained immigrants are in desperate need of legal assistance with limited access to competent counsel. The stakes in their cases are high, and they often face challenges accessing things pro se individuals in other contexts

56. *Id.* at *21–22.

57. *Id.* at *23.

58. Defendants' Motion to Dismiss, *NWIRP v. Sessions*, No. 2:17-cv-00716 (W.D. Wash. Aug. 4, 2017), ECF No. 67.

59. Order, *NWIRP v. Sessions*, No. 2:17-cv-00716 (W.D. Wash. Dec. 19, 2017), ECF No. 79.

60. *Id.* at 3–4.

61. *Id.* at 5–6.

62. *Id.* at 6–7.

63. Answer, *NWIRP v. Sessions*, No. 2:17-cv-00716 (W.D. Wash. Jan. 2, 2018), ECF No. 81.

64. Order Setting Trial Date and Related Dates, *NWIRP v. Sessions*, No. 2:17-cv-00716 (W.D. Wash. Jan. 16, 2018), ECF No. 83.

65. See J. Rachel Reyes, *Immigration Detention Recent Trends and Scholarship*, CENTER FOR MIGRATION STUDIES, <http://cmsny.org/publications/virtualbrief-detention/> (last accessed May 29, 2018) (noting an increase of 1,196 detention beds in the FY 18 national budget).

might enjoy, such as the ability to make phone calls or gather evidence. Short of universal representation, creative and innovative methods to empower and assist these individuals must be employed. LOP is one such method that works by informing and empowering immigrant detainees. Nevertheless, LOP may fall short of meeting detainees' needs. This creates a gap that could be filled by pro se assistance of the sort that NWIRP seeks to provide.

The EOIR's stated purpose in more strictly regulating assistance to pro se litigants is to prevent abuse and fraud and to increase accountability among individuals providing legal services. These are serious issues. However, restricting the practice of an organization like NWIRP does not achieve this purpose. Unlike a fraudulent notario who might take a detainee's money and then fail to provide promised legal services, NWIRP is identifiable and accountable for the aid it gives to detainees. The court noted that EOIR has been unable to point to any specific incidents of malpractice or fraud on the part of NWIRP in the course of its expanded pro se assistance.⁶⁶ Organizations like NWIRP have proven their ability to competently provide legal services and should be afforded the opportunity to provide enhanced legal assistance with appropriate safeguards such as identification when such assistance is provided.

Implementing across-the-board regulations that create a sharp dichotomy between legal orientation and representation will lead to a larger number of immigrants lacking the means to competently pursue their cases. This in turn has the potential to create inefficiencies for the courts as well as, more importantly, unjust outcomes for the immigrants themselves. More modest means for EOIR to track the provision of legal assistance, such as those already embraced by NWIRP, can enable more detainees to be served while cutting the risk of fraud. The high stakes of immigration proceedings mean that true universal representation, on the model of criminal defense, remains the ideal. In the meantime, limited available resources can more effectively serve the needs of justice in the immigration system if organizations like NWIRP are permitted to provide expanded assistance to detainees pursuing their cases pro se.

66. Transcript of TRO Hearing, No. 2:17-cv-00716 (W.D. Wash. Dec. 19, 2017), ECF No. 36 at 39.