Testimony of Mark H. Metcalf
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Before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law:

Madame Chair, Ranking Member Mr. King and distinguished Members:

Thank you for this opportunity to testify today. As a youth, I served in this, the finest deliberative chamber the world has ever known. I briefed bills and attended hearings for my boss and your colleague, Harold Rogers of Kentucky. I am a grateful son of this great Nation and this great House.

Under President Bush I served in several challenging and rewarding positions at the Justice Department, among them Special Counsel at the Domestic Security Section and as a judge on the immigration court in Miami, Florida. In these two positions I learned the risks posed by porous borders, lax enforcement of our immigration laws and the institutionalized ineffectiveness of our immigration courts. In the next few minutes, I will summarize for you.

America's immigration courts beg reform. From 1996 through 2008, the U.S. allowed 1.8 million aliens to remain free upon their promise to appear in court. 736,000—41% of the total—never showed. From 1999 through 2008, 42% of aliens free pending court —put differently 582,000—did the same. In the shadow of 9/11, court evasion exploded. From 2002 through 2006, 50.3% of all aliens free pending court disappeared. Dodging court produced deportation orders numbering in the hundreds of thousands. In 2002, 602,000 orders lay backlogged. By end of 2008, 558,000 still remained unenforced. Millions may, in fact, lie fallow—and unreported. The present court system—one without authority, one diminished by abuse—is broken. An about face is needed. Rule of law is the answer.

The Constitution directs that Congress "shall establish a uniform Rule of Naturalization." Numerous proposals—all possessing merit—embrace different means to bring order to a sometimes orderless system. A specialty court—an Article I court under the Constitution is—in my opinion—the surest means to protect those fleeing persecution, while balancing this nation's fundamental interest in sovereign borders and authentic legal processes. The reason is simple.

Disorder prevails. Immigration courts cannot enforce their own orders. Forty-eight different classes of Homeland Security (DHS) officials may order alien offenders arrested and removed. Immigration judges—the system's sole judicial officers—cannot. Absent judicial authority is the common thread that finds expression in every aspect of the courts' work. Absent authority equals enfeebled courts, no-show litigants, unenforced orders, listless caseloads, tardy relief and annual reports that mislead Congress and the public. An example is revealing. Cases that routinely take less than three hours to try often require more than five years to complete. Empowered courts solve these problems.

Absent authority does more than inhibit rule of law. It obscures the work of highly effective jurists. In 2006—the courts' busiest year on record— 233 judges completed 407,000 matters. All work of DoJ's trial and appellate lawyers combined equaled only 289,000. By comparison, federal district and circuit courts, with 1271 judges, completed 414,000 matters. The ability of America's immigration judges is unmatched, however, by authority equal to the challenges in their courtrooms.

As cases are completed, judges lose control of their judgments—especially those authorizing deportation. Instead, ICE takes over these orders—and leaves them unenforced. Meanwhile, few aliens choose to appeal—not more than 9% in 2008—and, instead, walk from court and disappear. ICE's August 2009 announcement that it would not remove aliens who skipped court or disobeyed orders to leave the U.S. assures others will do the same. And while many will disappear, many others will be summoned to court—and risk removal—years after convictions for minor offenses. Courts able to extend second chances to the deserving are needed.

Most troubling, though, is lack of accountability. The courts' annual reports are a pretense of candid audit. Reports consistently understate the dynamics of those who evade court and, in doing so, fail to sound the needed alarm. In 2005 and 2006, for example, court numbers stated 39% of aliens summoned to court never showed. Actually, 59% of aliens —all who were outside custody—vanished. The same defects continue today. For 2009, EOIR declared 11% of aliens failed to make court. The real number—a scandal in any other court system—was 34%. An independent court—a court independent of DoJ—safeguards truthful reporting. Trial courts are not alone, however. The BIA too has its problems.

Contrary to ABA guidelines, the BIA fails to complete 95% of its appellate caseload from year to year—yet this is an improvement. In 2002, nearly 58,000 cases had been pending up to five years. In 2008—and despite Attorney General Ashcroft's streamlining measures—more than 29,000 cases awaited judgment. Streamlining, however, accomplished very real improvements. When put in place, the BIA had 23 seats with 19 judges then serving. Despite years of growing backlogs and increasing numbers of judges, progress was absent. Streamlining—among other changes—reduced backlogs by reducing the number of judges needed to consider and rule on cases. Congestion—like errant reporting—is corrosive. Streamlining brought a needed fix to a still unresolved problem. In the balance rests more than unmet deadlines and unenforced orders. In the balance are lives entrusted to a U.S. court. Completing this balance is an American public that expects its courts to perform with the same precision and candor they must bring to their own businesses. Immigration courts, in critical respects, do neither.

The overburden of DoJ has other consequences. Filing fees and court costs have not paced taxpayer commitment to the courts. Fees have not increased since 1990. Since then court

budgets have swollen 827%—with taxpayers footing the entire bill. Worse still, fees do not support the courts. DHS keeps them. Adding to public expense, tax dollars pay aliens' court costs—even the costs of those who have committed crimes in the U.S. Dollars that could support the courts—and reduce taxpayer expense—underwrite private litigation. Revised fees and costs are justified. They summon from alien litigants expenses largely met by citizens whose ranks they wish to join. They are a down payment on the broad processes of justice in which we are all stakeholders. Simply making fees on non-asylum cases the same as those imposed by federal district courts would raise $71 million using 2008 caseload numbers. That figure is 27% of the courts' 2009 budget.

Heated debates leave untold stories that affirm America's singular past—and a vast, optimistic future. Nearly one in ten of those who have died in Iraq and Afghanistan were immigrants. Indeed, the first serviceman to die in Iraq was not one of America's native sons, but one she adopted. Marine Lance Cpl. Jose Gutierrez, an orphan raised in Guatemala's slums, died in freedom's cause at Umm Kasr on March 21, 2003. His sacrifice echoes history. Nearly one-quarter of the Union army was foreign-born. So are 20% of those holding the Medal of Honor

American commitment to compassion, pluralism and rule of law is as large and generous as the continent we occupy. The *Immigration and Nationality Act* is among the most powerful expressions of that commitment. It redeems the persecuted. It welcomes the skilled. It confirms the exceptionalism of America. To continue this legacy, the INA and the institutions that interpret and enforce it must change. A court of law equal to this legacy is essential for reform. A rule of law nation should seek no less.