NATIONAL CENTER FOR ACCESS TO JUSTICE
at Cardozo Law

Language Access in the Federal Courts

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About The National Center for Access to Justice

The National Center for Access to Justice is the single academically affiliated law and policy organization dedicated to achieving policy reform that assures access to our civil and criminal justice systems. In addition to working to increase access to justice for people with limited proficiency in English, NCAJ is engaged in initiatives to build an online Justice Index, strengthen law student pro bono services to increase access to justice, and, establish new models for providing legal assistance, including new roles for nonlawyers. In carrying out its reform initiatives, NCAJ partners with the legal services and indigent defense communities, the courts, the law schools, and many other justice system stakeholders. At the same time, its independence as a free-standing non-profit organization can help its partners to see the world through the eyes of those who rely on them. NCAJ's tools include litigation, books and reports, public education and policy advocacy, conferences, and legislative drafting.

NCAJ makes its home at Cardozo School of Law in New York City. Cardozo Law provides legal services to the poor through its extensive clinical education program, which includes the Innocence Project as well as the Access to Justice Clinic taught by NCAJ at the school each spring.

About The Language Access Project

Courts function well only when judges, witnesses, parties and other people in the courtroom understand each other. When court participants have limited proficiency in English, courts may need to provide interpreters, translate documents and offer other types of assistance. The National Center for Access to Justice works to ensure that courts, lawyers, government officials and other members of the public understand the importance of assuring language access in the courts. The Center's additional initiatives to increase language access in the justice system have included serving on the New York Office of Court Administration's Court Interpreter Advisory Committee, participating in the development of the American Bar Association's Advisory Group on Language Access Standards, and publishing data in the Center's Justice Index to illuminate the quality of language assistance services available in the courts.

About the Author

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Executive Summary

Once leaders in providing access to justice for limited English proficient (LEP) people, our nation's federal courts have not kept pace with the progress made in the rest of the federal government and in the American state courts.

The Report finds that federal courts fail to live up to emerging national language access norms. In contrast to the practices that are increasingly becoming established in federal agencies and in the state courts, the federal courts often:

- deny interpreters to LEP parties and witnesses, particularly in civil cases;
- fail to ensure the competence of interpreters, particularly in languages other than Spanish; and,
- do not make forms and information available in languages other than English.

Our findings are the result of our research into the constitutional and statutory standards, which govern the provision of interpreters and the translation of documents in the federal courts, and our further investigation into the rules, policies, and web sites that describe the provision of language assistance services and other language-related practices in the federal courts.

At the constitutional level, the federal courts have been slow to secure a constitutional right to an interpreter in federal court proceedings. The courts have recognized the right to an interpreter in criminal trials, immigration cases, and some prison disciplinary hearings, but have not ensured full effectuation of the right in those cases. In civil cases, the federal courts have not yet recognized a right to an interpreter: some lower courts have found no due process right; some have suggested the right may exist only when the litigation consequences would be serious for the party in need of the interpreter; some have said the question remains open.

At the statutory level, the limitations of the federal Court Interpreters Act, long considered a model of language access legislation, have become clear. Pursuant to the Act, federal courts provide interpreters only in criminal cases and in the subset of civil matters that are initiated by the federal government. In all other cases, the general policy of the federal courts is not to provide interpreters.

The practical failure of the federal courts to assure the provision of interpreters and the translation of documents is especially apparent when comparisons are drawn with state courts and federal agencies. The Department of Justice has interpreted Title VI of the Civil Rights Act of 1964 to require all state courts that receive any federal funds to provide interpreters in all civil cases. In recent years, DOJ has stepped up Title VI enforcement, investigating states that have not provided adequate interpreter services. Similarly, Executive Order 13166 requires the provision of language access in federal agencies to match the level of language access required in state courts.

Troubling conceptual anomalies are starkly apparent when one compares language access in the federal courts to that which is available in the state courts and federal agencies:

- A state court case for which an interpreter is provided could be removed to a federal court where no interpreter is provided;
- A person provided an interpreter in a federal administrative proceeding can be denied one in the subsequent federal court appeal; and,
- DOJ's enforcement of Title VI against a state court for its failure to provide language assistance services could advance in a federal court, which itself, lacks such services.

Even when federal courts provide interpreters, there sometimes are deficiencies in quality. The federal courts issue certifications only for Spanish language interpreters, even though over 100 other languages are spoken in the federal courts. Court interpreting requires a high degree of skill, and interpreters lacking certification may not adequately appreciate the unique culture of the courtroom, the complexity of the cases, or their own ethical responsibilities.

In cases in which the Court Interpreters Act mandates the provision of an interpreter, courts may deny an interpreter to a party who speaks some English. The Act has been narrowly construed by some circuit courts to require an interpreter only for litigants who speak no English. Of course, meaningful participation in a court proceeding requires fluency, a distinction not lost in the state courts, where the standards contemplate the provision of an interpreter even for parties who speak basic English. The methods used by federal courts to evaluate whether a party requires an interpreter are inadequate as compared to the practice in the state courts.

Translation is another problem for the federal courts, as they trail behind the new national standards designed to assure access for all parties to court forms, instructions, web sites, and other written materials in commonly spoken languages. This Report finds that most federal courts do not provide resources, services, or notices in languages other than English, including informational documents intended for unrepresented parties. Federal courts are just beginning to translate documents into multiple languages, trailing well behind the state courts where the practice is increasingly to offer documents and web sites in a wide variety of languages.

The Report recommends that Congress, the bodies administering and providing support to the courts, and the courts themselves, take steps to remove the obstacles encountered by LEP individuals. Specifically, our recommendations are the following:

- Congress should amend the federal Court Interpreter Act to clarify that federal courts must provide interpreters in all matters involving an LEP participant, and also should allocate funding to cover this modest but necessary expansion;
- The Judicial Conference should exercise its authority to adopt a policy of assuring the provision of interpreters to LEP parties and to LEP witnesses in all types of categories of court proceedings;
- The Administrative Office of the U.S. Courts should certify interpreters in commonly spoken languages other than English, assess the skills of interpreters in the languages for which certification is not available, and help the courts update web sites by translating text into commonly spoken languages;
- The Federal Judicial Center should update the Judicial Benchbook to provide judges with best practices for assessing the quality of interpreters and for determining whether a party or witness has sufficient English proficiency;

- Federal judges should exercise their authority under the Court Interpreters Act and the Federal Rules of Civil Procedure to appoint competent interpreters for LEP individuals whenever an individual's level of English proficiency is insufficient to permit meaningful communication; and,
- Federal courts should translate frequently used civil forms, instructions, and web sites into commonly spoken languages, giving priority to documents commonly used by unrepresented parties.

Many of our recommendations cost little, or nothing, and some will even save money. If our federal agencies and state courts can provide improved access despite the budgetary constraints within which they operate, we should not tolerate practices that are inferior by comparison within our federal courts. The recommendations we make today will put the federal courts on the path to complying with modern expectations and with our federal courts' commitment to justice for all.

November 1, 2013

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I. Introduction

The nation's federal courts, which once led the way in providing access for limited English proficient (LEP) people, have failed to keep up with emerging national norms.[1] In 1978, Congress passed the Court Interpreters Act, requiring federal courts to use interpreters for LEP participants in all criminal cases and in civil cases brought by the U.S. government.[2] The Court Interpreters Act also requires that courts use certified interpreters whenever they are reasonably available, prompting the federal courts to create some of the first, and most rigorous, tests for certifying court interpreters.[3] Before the federal legislation, California was the only state requiring its court interpreters to be certified.[4] Many of the other state court interpreter programs developed since then are modeled after the federal courts' program.[5]

Federal courts have not kept pace, however, as the rest of the federal government and state courts have expanded language access far beyond what the federal courts provide. In 2000, President Clinton issued an Executive Order requiring all federal agencies to ensure their own activities, and the activities they fund others to conduct, are accessible to LEP people.[6] Attorney General Eric Holder reaffirmed the government's commitment to language access in a 2011 letter to the head of every federal agency.[7] In response, many federal agencies have taken significant steps to ensure their personnel can communicate with LEP members of the public, and that crucial documents are translated into the languages commonly spoken by those served by the agencies.[8] For example, the Equal Employment Opportunity Commission (EEOC) uses bilingual staff and interpreters to communicate with LEP individuals in field offices, in fact-finding conferences, and "throughout the outreach and enforcement processes."[9] The Social Security Administration (SSA), which holds the vast majority of federal administrative hearings, likewise provides interpreters at its hearings.[10] The SSA also makes benefits information and forms available in sixteen different languages.[11] Notably, many agencies have recently expanded their language access services despite the current financial pressures facing the federal government.[12]

At the same time, a series of warning letters from the Department of Justice (DOJ) have informed state courts receiving federal financial assistance that to comply with Title VI of the Civil Rights Act of 1964 (Title VI), they must provide interpreters free of charge in all types of cases—not just the limited types in which the federal courts currently provide interpreters.[13] The DOJ has followed up with investigations in at least seven states, resulting in the implementation of far-reaching plans for improved accessibility to the state courts in Colorado and Rhode Island.[14] In spring 2012, the DOJ found the North Carolina courts in violation of Title VI for failure to provide interpreters in many types of civil cases.[15] Despite what the state judiciary terms a "time of economic hardship," North Carolina has since decided to stop charging nonindigent parties for their interpreters, and has put in place a plan to phase in interpreter services in all types of civil cases over the next two years.[16]

Today, Colorado, the District of Columbia, Georgia, Maryland, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Utah, Washington State, and Wisconsin are among the jurisdictions that expect courts to provide interpreters to LEP individuals in all court proceedings.[17] More than forty states have joined the Consortium for Language Access in the Courts, which makes court interpreter certification tests available in at least sixteen languages.[18]

The emerging national norm is encapsulated in the American Bar Association's Standards for Language Access in Courts (ABA Standards), adopted in February 2012 and intended to apply to all adjudicatory tribunals, including the federal courts.[19] Adopted after a long consultative process, the ABA Standards urge courts to "ensure that persons with limited English proficiency have meaningful access to all the services . . . provided by the court."[20] The measures that the Standards urge courts to take include: providing interpreters in all types of cases, ensuring the interpreters they provide are qualified, and translating vital documents in the languages commonly spoken by court users.[21]

As this Report describes in Part III, the federal courts have a significant amount of work ahead to live up to the ABA Standards, and to provide the level of language access now provided by federal agencies and the state courts. The federal courts deny interpreters to many LEP parties and witnesses.[22] Most federal district and bankruptcy courts do not provide LEP individuals with interpreters in the many civil cases brought by someone other than the federal government.[23] Even in the criminal cases for which the Court Interpreters Act requires interpreters, the federal district courts' standards and procedures result in the denial of interpreters to some people who can neither speak nor understand English well enough to participate meaningfully in the proceedings. In contrast, many state courts have clear guidelines in place to ensure that interpreters are provided to all such litigants.[24]

There are serious quality issues as well. The federal courts certify only Spanish interpreters,[25] while many state courts certify interpreters in a wide variety of languages.[26] For languages in which certification is not available, the federal courts' measures for ensuring interpreter competence are far less rigorous than many state courts.[27]

Finally, while some federal courts make certain criminal forms available in Spanish, federal courts do not make civil case instructions or forms available in any language other than English.[28] In contrast, a number of state court systems have developed information documents and court forms in Spanish, Vietnamese, and other languages.[29]

The federal courts' failure to provide competent interpretation whenever it is needed has serious consequences. LEP individuals are forced to proceed in court without an interpreter, and they are unable to participate effectively in their own cases.[30] Crucial laws go unenforced.[31] Immigrants are left vulnerable to exploitation.[32] Courts suffer because judges cannot understand or communicate with litigants. Members of the public who learn of communication difficulties justifiably lose faith in the ability of the courts to administer justice.[33]

The inability to communicate affects federal court litigants and witnesses in a broad range of civil cases. Attorneys providing assistance to pro se litigants in federal district court confirm that LEP parties appear often in civil cases concerning civil rights, employment, and intellectual property issues.[34] In addition, thousands of LEP individuals appear as debtors or creditors in bankruptcy courts each year.[35] LEP persons who cannot afford to hire an attorney and must file pro se face the additional obstacle of navigating the legal system on their own. Most pro se LEP court users are plaintiffs, but LEP persons are also forced to defend civil suits pro se when, for example, their children are sued for illegally downloading music or when bar owners are sued for broadcasting cable programs without permission.[36] It is likely that many LEP individuals who have federal claims never make it to federal court because the language

barriers are too high.[37]

The Judicial Conference of the United States has recognized these problems. In 1995 it warned: "As the numbers of non-English speakers and the number of languages spoken in the U.S. population increase, the courts will be challenged as they seek to ensure the integrity of the truth-finding process."[38] Accordingly, it recommended that "[c]ourt interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide those services for themselves."[39] In its most recent strategic plan, the Judicial Conference recognized that "[m]any who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants," and "continued efforts are needed."[40]

Committees established by several of the federal circuits have also emphasized the importance of court interpretation, with a Second Circuit task force warning that "[w]ithout interpretation, non-English speakers sit in federal court as an incomprehensible storm of events swirl around them."[41] In 2011, the U.S. Bankruptcy Court for the Central District of California noted the toll the lack of interpreters takes on its docket:

> Court hearings regularly get continued when non-English speaking parties appear and the judge must wait for the parties to bring in their own interpreters. Because these parties usually cannot afford paid professional interpreters, the Court is faced with the dilemma of either allowing a family member, friend or other English speaker to do the interpreting, or denying the party any opportunity to be heard on their case.[42]

The rest of this Report proceeds as follows: Part II describes the due process implications of the gap in language access in federal courts. Part III describes the current practices in the federal courts. Part IV recommends steps that courts can take to increase access for LEP individuals. Finally, Part V explains why the federal courts can adopt these remedies despite current budget pressures.

II. Interpreter Access is a Matter of Due Process

Central to the notion of due process is the idea that court users must be able to participate meaningfully in their own case.[43] The ability to understand the proceedings and to communicate with the judge and counsel are necessary for meaningful participation.[44] In the case that prompted passage of the Federal Court Interpreters Act, the Second Circuit characterized a criminal trial against an LEP individual who lacked the assistance of a court interpreter as "an invective against an insensible object."[45] While the need for an interpreter to permit LEP parties to participate meaningfully would appear to be self-evident, federal cases have found a right to an interpreter only in criminal matters and in some immigration matters.[46] This section reviews that case law.

Since the Supreme Court's ruling in *Gideon v. Wainwright*, it has been clear that when a court

user cannot meaningfully participate in his case without legal assistance, courts or other government agencies must provide that assistance.[47] The level and type of assistance depend on the potential consequences of a faulty ruling, the risk of error, and the cost of providing the assistance.[48] Thus, under both the Due Process Clause of the Fifth and Fourteenth Amendments, and under the Sixth Amendment, criminal defendants must be provided with counsel.[49] In civil cases, when the governing law or the evidence likely to be presented in a case are too complicated for laypeople to understand, courts may need to provide a form identifying the critical issues, a mental health professional to explain expert testimony, or an "institutional attorney" to help prisoners file habeas corpus petitions.[50] In both civil and criminal cases, courts may be required to make "reasonable accommodations" to ensure that people with disabilities are able to access the courts.[51]

These principles extend to the provision of a court interpreter for an LEP court user. A trial conducted in only English that concerns a person who cannot understand or communicate in English is the epitome of a case lacking due process. In criminal cases, it is well settled that the Constitution requires the government to provide an interpreter so an LEP criminal defendant can understand the proceedings in his or her own trial.[52] In *U.S. ex rel. Negron*, which prompted Congress to pass the Court Interpreter Act,[53] the Second Circuit stated: "Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, unless by his conduct he waives that right."[54] Other cases have held the right to an interpreter in criminal cases implicates due process, equal protection, court access, and the rights to a fair trial, to be present at trial, to confront witnesses against you, and to effective assistance of counsel.[55]

Several circuits have ruled that due process also requires interpreters for LEP individuals in various categories of immigration cases, including those involving asylum and deportation.[56] In 1984, for example, the Second Circuit held the statute authorizing aliens to petition for relief from deportation or return to a country in which their life or freedom would be jeopardized, creates a substantive entitlement to which due process protections apply.[57] At a minimum, the court ruled, LEP petitioners must be afforded a hearing at which interpretation is provided, sufficient to enable them to understand the proceedings and present their claims.[58] A few federal district courts have also held due process requires an interpreter for LEP prison inmates during disciplinary hearings.[59]

In other categories of civil cases, though, there is less case law directly considering whether an LEP individual has a constitutional right to an interpreter. There are no federal cases holding that a constitutional right to an interpreter exists outside of the criminal, immigration, and prison-discipline contexts. A number of lower federal courts have held that no such right exists, although most of these decisions contain little analysis.[60] Some state courts have gone further, holding there is a constitutional right to an interpreter in cases concerning the welfare of a child, domestic violence restraining orders, employment issues, landlord–tenant disputes, or trespassing.[61] A number of decisions have gone the other way, holding there generally is no due process right to an interpreter in civil cases.[62]

At the same time, the American Bar Association (ABA) and some academics have opined that due process may require the appointment of an interpreter in other types of civil cases with

serious consequences for the people involved.[63] Moreover, some federal courts have left the door open for claims that the Due Process Clause requires an interpreter.[64] For instance, in *Abdullah v. I.N.S.*, the Second Circuit held the Due Process Clause did not require the government to provide an interpreter during an interview with immigrants seeking to change their immigration status from undocumented to special agricultural worker.[65] The Second Circuit's decision hinged on its characterization of the immigration status that the workers sought as "one of extraordinary . . . grace and generosity,"[66] stating:

> When government seeks to inflict punishment on an individual, or to deprive him of liberty or property or to inflict some significant mandatory change on the conditions of the individual's life, that individual's interest in being furnished with an interpreter at government expense is far greater than when the individual affirmatively initiates a proceeding seeking the benefits of a "generous" statutory exception.[67]

Under this analysis, the Due Process Clause might require the appointment of an interpreter in the types of cases distinguished by the court—those in which "government seeks to inflict punishment on an individual, or to deprive him of liberty or property or to inflict some significant mandatory change on the conditions of the individual's life."[68]

While this Report focuses on due process, it is important to note that language access in the courts also implicates a number of other constitutional provisions.[69] Article III of the Constitution and the separation of powers are implicated because language access benefits the courts as much as it benefits individual court users; when the courts cannot understand or speak to the people before them, they cannot administer justice.[70] The Equal Protection Clause is also implicated when LEP people cannot exercise the fundamental rights of access to the courts and due process.[71]

III. Language Access in the Federal Courts

A. Federal Courts Do Not Provide Interpreters in Civil Cases, Unless the United States Participates as a Plaintiff

1. Current Practice

The Court Interpreters Act identifies two categories of cases in which the federal courts are required to provide interpreters for LEP parties and witnesses. First, in criminal or civil actions brought by the federal government, the court "shall" provide an interpreter,[72] although it may tax interpreter fees as costs at the end of the proceeding.[73] Second, in all other cases, the court "upon the request of the presiding judicial officer, shall, where possible, make [interpreter] services available . . . on a cost-reimbursable basis, but the judicial officer may also require the prepayment of the estimated expenses of providing such services."[74] The second category encompasses all civil cases brought by someone other than the federal government, meaning it includes the vast majority of civil cases. The courts' authority to provide interpreters in these

cases, at least at trial, is bolstered by Rule 43(d) of the Federal Rules of Civil Procedure, which states that when an LEP witness testifies at trial, "[t]he court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs."[75]

Despite the apparently mandatory nature of the Court Interpreter Act's statement that, when requested by the presiding judicial officer, courts "shall, where possible," appoint interpreters in civil cases brought by someone other than the federal government, as a general matter, federal district courts and bankruptcy courts usually do not provide interpreters in such cases.[76] This policy is embedded in court rules,[77] proclaimed on court websites,[78] and acknowledged in Judicial Conference documents.[79] As a result, LEP civil litigants are often denied interpreters.[80] Some are told to bring "a trusted friend or family member"—whose language proficiency is unknown, and who may have separate interests in the litigation—to interpret court proceedings.[81]

While this is the general policy, recent versions of the Guide to Judiciary Policy describe two methods the courts can use to provide interpreters in civil cases not brought by the federal government. First, the Guide to Judiciary Policy states that courts *may* provide interpreters "on a cost-reimbursable basis."[82] However, rather than acknowledging the apparently mandatory nature of the Court Interpreters Act provision requiring courts to do this when possible,[83] the Guide to Judiciary Policy warns that this should be done "only in limited circumstances when no other options are available."[84] The Author is not aware of any district courts that do this.

Second, the version of the Guide to Judiciary Policy in use during winter 2009–2010 states that a court can use "its non-appropriated funds," such as attorney admission fees, to provide interpreters in civil cases.[85] This language has been omitted from the most recent version of the Guide to Judiciary Policy.[86] Nonetheless, a few federal district courts do provide reimbursement for interpreter expenses in this manner, although most do so only for attorneys who have been appointed by the court to represent pro se individuals pursuant to 28 U.S.C. § 1915(e):[87]

- District of New Jersey: permits court-appointed pro bono attorneys to seek reimbursement of interpreter expenses from the "Attorneys' Admission Fee Account" administered by the clerk of court. If the total expenses for which the attorney will seek reimbursement are over $5,000, the attorney must seek "pre-approval for the services needed during litigation."[88]
- Eastern District of New York: covers fees incurred by court-appointed pro bono attorneys for court-appointed interpreters through the Eastern District Civil Litigation Fund when the attorney "is unable to conveniently bear the cost of expenses of the litigation or believes" that doing so would raise ethical issues.[89] Attorneys must seek pre-approval if the total expenses will exceed $200.[90]
- Eastern District of Wisconsin: interpreter fees incurred by court-appointed pro bono attorneys may be reimbursed by the District Court Pro Bono Fund.[91] The fund, which is administered by the clerk of court, consists of a $25 fee collected from every attorney admitted to practice in the district.[92] Before an attorney is appointed, the client must agree in writing to reimburse the fund out of any proceeds obtained as a result of settlement or prevailing in the matter.[93] There is a $3,000 limit on total

reimbursements in a single case, and expenditures over $500 require judicial approval.[94]

- Western District of Tennessee: interpreter fees incurred by court-appointed counsel in civil cases may be reimbursed by a pro bono fund.[95] The fund, which is administered by the clerk of court, contains a portion of attorney admission and pro hac vice fees and all annual attorney enrollment fees.[96] The clerk of court may authorize expenditures up to $3,000 per case, and reimbursements of more than $5,000 must be approved by the en banc court.[97]

By limiting eligibility for reimbursement of interpreter expenses to those cases in which the court appoints counsel, the courts exclude the many pro se cases in which counsel is not appointed,[98] as well as all cases in which civil legal aid attorneys or private counsel appear. Recently, New Jersey interpreted its local rule governing the use of the attorney admissions fee fund as permitting reimbursement of interpreter expenses for a civil party who was represented by a civil legal aid lawyer.[99] However, the Eastern District Civil Litigation Fund established by the U.S. District Court for the Eastern District of New York uses attorney admission fees to pay for live interpreters in some civil hearings and trials involving pro se litigants and for interpretation over the telephone by Language Line Services in other pro se matters.[100]

2. The Federal Courts Provide Less Access to Interpreters for Civil Proceedings than State Courts and Federal Administrative Agencies.

Title VI of the Civil Rights Act of 1964 requires state courts that receive federal funds to provide interpreters in all civil cases.[101] Title VI requires federal funding recipients to ensure that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination."[102] In 1974, the Supreme Court held that San Francisco's public schools violated that provision by failing to provide English classes or instruction in Chinese to Chinese-speaking students who spoke no English.[103] The Court stated: "It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations."[104] The Court continued, in language arguably applicable to the federal courts' failure to provide interpreters in civil cases not brought by the federal government: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[105]

The DOJ interprets Title VI as requiring state courts to provide interpreters in all civil matters,[106] and at least half the states do so.[107] A number of the remaining states either are under investigation by the DOJ for Title VI violations or have agreed to extend interpreting services to civil cases as the result of a DOJ investigation.[108]

The DOJ's enforcement actions against state courts for a practice that is widespread in federal courts has the potential to place the federal courts in an extremely awkward position. Indeed, in March 2012, the DOJ found the North Carolina judiciary in violation of Title VI; a failure to provide interpreters in most types of civil cases was one basis for the finding.[109] The DOJ has

threatened to file suit to enforce the statute unless the judiciary comes into compliance.[110] If the DOJ does file this lawsuit, it will be in a federal court that also does not provide interpreters in most civil cases.

In the states that do provide interpreters for civil cases, the failure of the federal courts to provide interpreters in many civil cases is thrown into sharp relief. For example, the Federal District Courts for the Southern District of New York and the District of Massachusetts instruct pro se LEP civil litigants to bring "a trusted family member or friend" to interpret for them.[111] In contrast, the New York and Massachusetts state courts provide interpreters for all court proceedings at which an LEP individual is present.[112] And, in order to avoid conflicts of interest, both state court systems avoid the use of even professional interpreters who are friends, relatives, or associates of the LEP individual.[113] The availability of interpreters in civil cases in these states, and the lack thereof in the federal courts, could provide court users with an incentive to remove cases to the federal courts in order to deprive an LEP opponent of access to an interpreter. This would be ironic (and even tragic) given the removal statute's goal of providing access to a forum that can "more accurately interpret federal law."[114]

The federal courts' policy on the provision of interpreters in civil cases also contrasts unfavorably with federal agency practice. Under Executive Order 13166, federal agencies are required to provide the same level of language access that Title VI obligates federal funding recipients to provide.[115] In 2011, Attorney General Eric Holder reaffirmed the administration's commitment to providing language access under this Executive Order.[116] In a letter to the head of each federal agency, Holder wrote, "Whether in an emergency or in the course of routine business matters, the success of government efforts to effectively communicate with members of the public depends on the widespread and nondiscriminatory availability of accurate, timely, and vital information."[117] Federal agencies now provide interpreters for people in a wide variety of administrative proceedings.[118]

As a result, individuals may obtain language access in a federal administrative proceeding, only to be denied such access in a subsequent appeal to a federal court.[119] For example, the EEOC has a comprehensive, detailed language access plan for LEP persons, which includes making bilingual staff members and interpreters available to help parties "throughout the outreach and enforcement processes."[120] In a recent employment discrimination case in the Southern District of New York, when an LEP Ethiopian plaintiff, who received a notice of right to sue from the EEOC, filed a lawsuit and moved for appointment of an interpreter, her motion was denied by the federal district court judge hearing her case.[121]

A similar disparity in language access resources affects LEP bankruptcy filers. Shortly after filing for bankruptcy, each debtor must attend a "meeting of creditors under section 341," at which the trustee examines the debtor regarding his or her assets and debts.[122] The U.S. Trustee Program (a DOJ entity bound by Executive Order 13166) provides interpretation for these meetings.[123] In the more formal bankruptcy court proceedings, however, interpreters are provided only for the few cases brought on behalf of the government.[124]

B. Certified Interpreters Are Available Only in Spanish, Haitian Creole, and Navajo

While federal interpreters for Spanish generally are held to a high standard of excellence,[125] the

courts have little control over the quality of interpreters in other languages. This is, for the most part, due to the fact that federally certified interpreters are available only in Spanish.[126] Certification programs for Haitian Creole, and Navajo did exist for a short time. However, in March 1996, the U.S. Judicial Conference directed that all resources be devoted to the certification of Spanish-language interpreters and suspended certification programs for Haitian Creole, and Navajo.[127] While the Administrative Office of the U.S. Courts has begun exploring the possibility of developing certification for additional languages,[128] it has not yet implemented certification for any language other than Spanish.[129] Today, while there are still some interpreters certified in Haitian Creole and Navajo, their numbers are dwindling. There are no federally certified interpreters in any other languages.[130] In 2008, the Court Administration and Case Management Committee (CACM) of the Judicial Conference of the U.S. Courts stated there is a "critical need" for interpreters in languages other than Spanish and for certification or other methods of ensuring the quality of such interpreters.[131]

The lack of certified interpreters in languages other than Spanish has harmful effects on litigants, law enforcement personnel, and the courts themselves. While Spanish is by far the most frequently spoken language other than English, more than 100 other languages are used in the federal courts, too.[132] Among the languages used most frequently are Mandarin (for which interpreters were used 1,682 times in 2011), Russian (for which interpreters were used 1,376 times in 2011), and Cantonese (for which interpreters were used 813 times in 2011).[133]

Court interpreting is a highly specialized skill. According to the ABA, it requires "language fluency, interpreting skills, familiarity with technical terms and courtroom culture and knowledge of codes of professional conduct for court interpreters."[134] As the Ninth Circuit has warned, "[m]any people claim 'fluency' in a foreign language, but '[t]here are few persons in the United States who can interpret with the degree of precision and accuracy required at the Federal court level.'"[135] When interpreters make mistakes, the result can be that people plead guilty to crimes they did not commit.[136] This is a tragedy for the defendant. Courts, prosecutors, and public defenders all incur unnecessary costs as interpreter errors are assessed by several layers of appellate courts.[137]

In some instances, a lack of qualified interpreters can also make it impossible for law enforcement to pursue prosecutions. In fact, prosecutors have routinely dismissed immigration-related criminal charges against non-Spanish-speakers in the Operation Streamline program.[138] In that program, as many as eighty individuals have been prosecuted for illegal reentry in a single proceeding on the U.S.–Mexico border.[139] As Joanna Jacobbi Lydgate reported in a 2010 article, only Spanish interpreters were available in Tucson, so the U.S. Attorney's office routinely dismissed charges against LEP Operation Streamline defendants who did not speak Spanish.[140] The result was an unusual form of discrimination against Spanish speakers who were criminally prosecuted while speakers of other languages—usually indigenous Latin American languages—went free.[141]

The lack of certified interpreters in languages other than Spanish violates congressional intent. In 1988, Congress explicitly amended the Court Interpreters Act to provide the Administrative Office of the Courts with discretion over the languages in which it would certify interpreters.[142] The amendment was apparently motivated by budget concerns and by evidence that less than one-third of 1% of all federal cases presented a need for interpreting in other languages.[143]

However, the Senate Judiciary Committee stated at the time that "in the view of the Committee, the judiciary must act to meet the needs of non-English speakers in other language groups, as well."[144] Accordingly, it stated: "The Committee envisions the certification of a growing list of languages in the near future."[145]

For Spanish, Haitian Creole, and Navajo, the Court Interpreters Act and the Guide to Judiciary Policy require the use of certified interpreters whenever they are "reasonably available."[146] Some districts appear to adhere to this requirement. In the U.S. District Court for the District of Arizona, for example, certified staff and contract Spanish interpreters handled more than 76,500 proceedings in 2011, while noncertified Spanish interpreters handled only fourteen proceedings.[147] However, in other districts, the use of noncertified Spanish interpreters is the norm.[148] In the District of Idaho, noncertified Spanish interpreters handled 457 proceedings in 2011, while certified Spanish interpreters handled only 140.[149] In the District of Montana, noncertified Spanish interpreters handled 101 proceedings in 2011, while certified Spanish interpreters handled only one.[150]

Because interpreters are certified only in Spanish, for the more than 100 other languages for which interpretation is required courts generally use "professionally qualified" interpreters or, if they are not available, "language skilled/ad hoc interpreters."[151] An interpreter will be deemed "professionally qualified" if he or she has passed particular tests administered by the U.S. Department of State, the United Nations, or one of several interpreter associations.[152] The local court will deem interpreters "language skilled/ad hoc" if they can demonstrate their ability to interpret court proceedings to and from another language.[153]

This policy does not require either "professionally qualified" or "language skilled/ad hoc" interpreters to demonstrate familiarity with the unique culture of the courtroom, any legal matters the interpreter will need to interpret, or the ethical duties of an interpreter—all of which are widely recognized as essential for courtroom interpreting.[154] In this respect, the practice of the federal courts compares unfavorably to the practices of many state courts. For example, in Minnesota, when a certified interpreter is not available, a state court can appoint a noncertified, but otherwise qualified, interpreter.[155] Among the requirements for obtaining that designation are completion of an interpreter orientation program and a passing score on a written ethics exam.[156]

While standardized certification tests are the best practice for assessing language and interpreting ability,[157] when those tests are not available the most effective assessments use staff who possess court interpreting expertise, have been trained to perform interpreter assessments, and perform such assessments regularly as part of their job.[158] As the National Center for State Courts warns: "It is inefficient for trial judges to be responsible for the *ad hoc* determination of interpreter qualifications in the courtroom, and the results of in-court voir dires . . . remain problematic in the best of circumstances."[159] In a 2001 survey, Indiana trial judges reported that "they were often unable to determine whether" a given interpreter was "genuinely qualified."[160] In the same vein, the Ninth Circuit has warned that "the judge and other participants in the courtroom usually have no way of confirming whether the translation is accurate."[161]

Some districts do assess the interpreting ability of noncertified interpreters. For instance, the

Southern District of New York administers an in-house exam to determine whether an interpreter is capable of interpreting at 150 words per minute and at 75% accuracy level.[162] However, the Guide to Judiciary Policy implies that all districts are not as rigorous, instructing the district courts to inform parties and attorneys that the list of local, noncertified interpreters includes some who "have not been tested or certified to interpret the language in question in the courts and that neither the [Administrative Office of the Courts] nor the clerk's office can attest to the level of interpreting skills of the listed interpreters."[163]

C. Some Judges Deny Interpreters When the LEP Individual Can Speak or Understand Some English

For several reasons, there is a serious risk that people who lack sufficient proficiency in English to participate meaningfully in a court proceeding may be denied interpreters, even in the types of proceedings in which the Court Interpreters Act mandates the provision of interpreters (i.e., those brought by the United States). As this Report describes in more detail below, some courts construe the Court Interpreters Act as permitting the denial of an interpreter when an individual can speak some English. Accordingly, federal district court judges often fail to conduct a voir dire adequate to identify individuals whose level of English proficiency is insufficient to allow meaningful participation.

The Court Interpreters Act requires that in "criminal actions and in civil actions initiated by the United States," an interpreter "shall" be provided if a party or witness:

> speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[164]

Several circuits have interpreted "inhibit" narrowly, permitting the denial of an interpreter to someone who can speak or understand some English but still may not be able to meaningfully participate in the proceedings.[165] For example, in *Gonzalez v. United States*, the Ninth Circuit found no clear error in the district court's decision not to appoint an interpreter for a Spanish-speaking criminal defendant who could not speak English well, could not read English at all, and responded to questions in a manner the dissent characterized as "inarticulate."[166] The Ninth Circuit agreed with the district court that the Court Interpreters Act required appointment of an interpreter only if a defendant's difficulty with the English language was a "major" problem.[167] Dissenting, Judge Reinhardt noted that "[n]othing in the legislative history or statutory language supports the narrow application of the Act by the district court."[168] He explained, "Congress mandated the appointment of interpreters *whenever* a 'language-handicapped' defendant's comprehension of the proceedings is impaired because Congress concluded that the appointment of an interpreter represents a fundamental premise of fairness and due process for all."[169]

In contrast to the Ninth Circuit's major-problem standard, the DOJ has warned state courts that Title VI requires them to provide an interpreter if an individual lacks sufficient proficiency in English to participate meaningfully in a judicial proceeding.[170] Similarly, the National Center for State Courts recommends that interpreters be appointed when "the services of an

interpreter are required to secure the rights of non-English speaking persons or for the administration of justice."[171] A number of state court systems follow the meaningful-participation standard.[172]

Under the meaningful participation standard, an ability to speak or understand *some* English does not preclude the appointment of an interpreter.[173] As the National Center for State Courts notes, "[m]any individuals have enough proficiency in a second language to communicate at a very basic level. But participation in court proceedings requires far more than a very basic level of communicative capability."[174] Rather, an interpreter should be provided when the individual's English language facility is insufficient to permit meaningful communication and comprehension in the context of a fast-paced, potentially jargon-laden, and emotionally taxing legal proceeding.[175]

The methods some federal district court judges use to determine an individual's level of English proficiency are insufficient to satisfy this standard.[176] The Federal Judicial Center's Benchbook for U.S. District Court Judges only recommends that federal judges ask if an individual can speak and understand English, or, if he or she has an attorney, whether the attorney has been able to communicate with the individual.[177] Asking a litigant or witness whether he or she can speak and understand English is likely to elicit a "yes" from people too embarrassed, nervous, or scared to admit difficulty with the national language. Moreover, a litigant who is not familiar with courtroom culture may not know what level of English is necessary for meaningful communication in that setting.[178]

Other judges, without asking specifically about English language ability, accept a "yes" or "no" answer to a question as evidence that a defendant can speak and understand English.[179] This practice flies in the face of the widespread recognition that open-ended questions calling for more than a "yes" or "no" answer are the best method for assessing an individual's ability to understand and speak English.[180] The National Center for State Courts' model guide for court interpretation recommends that "[t]he voir dire should include 'wh-questions' (what, where, who, when) and questions that call for describing people, places or events or a narration."[181] According to Georgia's Uniform Rule for Interpreter Programs, a court should ask questions on identification, "[a]ctive vocabulary in vernacular English," and the court proceedings.[182] A bench card for Ohio judges suggests that judges ask: "Please tell me about your country." "How did you learn English?" "Describe some of the things you see in this courtroom."[183]

Courts should also carefully assess the specific language spoken by LEP court users. The following incident illustrates how a lack of rigorous assessment of language ability can lead a court to appoint an interpreter who speaks the wrong language. In a 2008 raid on a meatpacking plant in Iowa, more than three hundred undocumented workers—many from Guatemala and Mexico—were arrested.[184] The workers were appointed counsel and provided certified Spanish interpreters.[185] Within two weeks, almost all of the workers pled guilty and were sentenced to prison, followed by deportation.[186] The court failed to realize, however, that many of the workers spoke and understood only indigenous South American languages, not Spanish.[187]

To assess the specific language spoken by the LEP court users, judges should specifically ask which language a litigant speaks and use a language identification card to help the litigant

identify the language. The National Center for State Courts' model bench card for court interpretation in protection order hearings directs the court to determine the language of the LEP litigant using a language identification card.[188] The bench card further recommends that "[i]f the party cannot read, or if language ID cards are not available," the court should "contact a court interpreter or a commercial telephonic service . . . to determine the language of the party requiring services."[189]

Additionally, judges should not rely on a party or the party's attorney to request an interpreter. A pro se litigant may not even be aware of the right to an interpreter and thus may not know to request one. Rather, as several circuits have held, judges should use their discretion under the Court Interpreters Act to inquire into any litigant or testifying witness's level of English proficiency.[190]

D. Most Vital Documents Are Only Available in English

Another area in which the federal courts lag behind national norms is in the translation of court forms, instructions, websites, and other written materials into languages commonly spoken by the people using the courts. The DOJ has made clear that Title VI requires state courts to provide vital documents to court users in the languages commonly spoken by such users.[191] The ABA agrees, stating that courts should consider translating information about court services and programs (including information on websites), court forms, and court orders.[192]

Nonetheless, a significant minority of federal district courts report that they provide resources, services, or notices in a language other than English.[193] As a result, many instructions and forms aimed at pro se litigants are available only in English. Here are some examples:

- a one-page sheet containing information for pro se civil complaints in the U.S. District Court for the District of Columbia and its bankruptcy courts,[194]
- the U.S. District Court for the Western District of Washington's instructions for pro se litigants on filing complaints and seeking the appointment of an attorney in a civil rights case,[195]
- the mandatory civil cover sheet, form summonses, subpoenas, and applications for leave to proceed without prepaying fees or costs and to obtain a transcript, all available on the website of the U.S. Courts,[196]
- the U.S. District Court for the Southern District of New York's form for filing civil complaints.[197]

Even some information specifically targeted to LEP individuals is available only in English. For instance, on the website of the Southern District of New York the response to the question "I do not speak English. What do I do?" is provided only in English.[198]

Access to translated materials does appear to be slowly expanding. The Federal Judicial Center makes available a Spanish version of a notice of class action form, and some district court judges require that a plaintiff's attorney provide notice of pending class actions and forms for opting into or out of those matters, in the languages commonly spoken by class members.[199]

The U.S. District Court for the District of Massachusetts makes its manual for civil pro se litigants available in Spanish.[200] The website of the U.S. Bankruptcy Court for the District of Nevada provides a link to a Spanish bankruptcy manual created by the Legal Aid Center of Southern Nevada.[201] And, the Administrative Office of the U.S. Courts' 2011 annual report promises that "Spanish translations of criminal court forms are available on the Judiciary intranet and translations for civil court forms will be added in the coming months."[202]

Nonetheless, in many states, there is far more access to information and forms in Spanish and other languages in the state courts than there is in the federal district courts. For example, the New York Office of Court Administration provides a variety of information and forms on its website in Spanish, Chinese, French, Korean, Punjabi, Russian, Wolof, and Haitian Creole.[203] The California courts do so in Spanish, Chinese, Vietnamese, Korean, Russian, Tagalog, Hmong, and a number of other languages.[204] The federal courts should provide no less.

IV. Recommendations for Reform

This Report has described serious obstacles that LEP individuals encounter when they try to access the federal courts. Many LEP individuals cannot obtain interpreters, either because they are involved in a civil case brought by someone other than the U.S. government or because a judge has deemed their communication difficulty to be insufficiently serious to warrant appointment of an interpreter. Some are provided with interpreters whose competence has not been adequately assessed, resulting in serious communication errors. Most websites, court information documents, and forms (except for a few criminal forms) are only available in English.

Congress, the bodies administering and providing support to the federal courts—including the Judicial Conference, Administrative Office of the Courts, and Federal Judicial Center—and the courts themselves can all take steps to remove these obstacles.

A. Congress

Congress should amend the Court Interpreters Act to clarify that federal courts should provide interpreters in all matters before the federal courts involving an LEP participant, regardless of whether the matter is criminal or civil in nature. Specifically, the phrase "in judicial proceedings instituted by the United States" should be struck from 28 U.S.C. § 1827(d)(1), as follows:

> The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, ~~in judicial proceedings instituted by the United States,~~ if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—

> (A) speaks only or primarily a language other than the English language; or
>
> (B) suffers from a hearing impairment (whether or not suffering also from a speech impairment)
>
> so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[205]

Congress should also allocate sufficient funding to the federal courts to cover the expansion of the court interpreter program to cover all civil cases and to enable the federal judiciary to certify interpreters in additional languages. As described above, both moves are necessary to ensure that the nation's Article III and bankruptcy courts are able to provide the same level of access to LEP individuals as federal agencies and many state courts provide.[206] Doing so would also comport with the ABA's Standards.[207]

B. Judicial Conference

The Judicial Conference sets policy for the federal judiciary.[208] It consists of the Chief Justice of the Supreme Court, the chief judges of each circuit and of the Court of International Trade, and a district judge from each regional circuit.[209] By statute, the Judicial Conference has authority to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business."[210] The Judicial Conference should exercise that authority to adopt a policy of providing interpreters to LEP parties and witnesses in all types of court proceedings and amend the Guide to Judicial Policy to reflect this policy change. In addition, to ensure courts do not deny interpreters to LEP individuals who are inhibited in their comprehension of the proceedings, the Judicial Conference should adopt a policy that interpreters should be provided to parties and witnesses who lack sufficient English language proficiency to participate meaningfully in the proceedings. The Judicial Conference should amend the Guide to Judicial Policy to reflect this policy change.

As discussed above, both moves would bring the federal courts in line with the practice of federal agencies and many state courts, which provide interpreters in all sorts of proceedings.[211] Doing so would also be consistent with the federal judiciary's tradition of abiding by the spirit of the nation's civil rights statutes, even though separation of powers concerns have led Congress to exempt the federal courts from coverage under those statutes.[212] The Judicial Conference's decision to provide reasonable accommodations to people with disabilities, discussed below, is one example.[213] Likewise, when Congress passed legislation specifically obligating itself to provide congressional employees with the protections of four antidiscrimination statutes, the Judicial Conference declared that the federal judiciary would follow the spirit and intent of each statute.[214]

The Judicial Conference has not yet adopted a policy to expand interpreter access to all civil cases and ensure that interpreters are provided to parties and witnesses who lack sufficient English language proficiency to participate meaningfully. However, the Judicial Conference's *authority* to do so is clear from the actions it has taken to adopt policies allowing judges to

appoint interpreters for the deaf and hearing impaired, even in cases not required by the Court Interpreters Act.[215] As enacted in 1978, the Court Interpreters Act provided for the appointment of interpreters at government expense for the deaf and hearing impaired, but only in cases brought by the federal government.[216] Apparently, the Judicial Conference initially believed it was necessary to amend the Court Interpreters Act in order to provide sign language interpreters in all other cases.[217] Accordingly, in 1995, it attempted to persuade Congress to amend the Court Interpreters Act.[218] However, that same year, without waiting for congressional action, it adopted a policy that sign language interpreters should be appointed in all cases in which they are needed.[219]

Congress subsequently amended the Court Interpreters Act to allow the appointment of sign language interpreters in any case in which they were needed.[220] However, as the Judicial Conference has noted, the federal courts continue to provide broader access to sign language interpreters than even the amendments to the Court Interpreters Act require:

> Under 28 U.S.C. § 1827(l), a judge may provide a sign language interpreter for a party, witness or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States.
>
> Under Judicial Conference policy, a court must provide sign language interpreters or other auxiliary aides and services to participants in federal court proceedings who are deaf, hearing-impaired or have communication disabilities and may provide these services to spectators when deemed appropriate.[221]

The Judicial Conference could, and should, adopt a similar policy regarding the appointment of spoken language interpreters in all cases in which they are needed.

C. Administrative Office of the U.S. Courts

The Administrative Office of the U.S. Courts (AOC) describes itself as the "central support entity" for the federal judiciary.[222] It is funded by Congress and operates under the supervision of the Judicial Conference.[223] Among its many duties is oversight of court interpreter certification.[224] The AOC also provides website templates that individual courts can use when they upgrade their own websites.[225] As described above, while Congress has expressed a desire for interpreters to be certified in languages other than Spanish,[226] due to budget concerns the AOC is only certifying interpreters in Spanish.[227] The AOC should continue its efforts to begin certifying interpreters in languages other than Spanish. For those languages for which certification is not available, the AOC should use trained, dedicated personnel to assess language capabilities and interpreting skills. This is the practice of some, but not all, individual federal district courts.[228] To ensure uniform interpreter quality in all federal courts, the AOC should assume this task itself.[229] Additionally, the AOC should incorporate multiple languages into its website templates to help individual courts make their websites available in the languages commonly spoken in each district.

D. Federal Judicial Center

The Federal Judicial Center (FJC) was established by Congress to provide research and education to the federal judicial system.[230] Among its judicial education activities are writing and periodically updating the Judicial Benchbook used by federal district courts and providing training opportunities to federal judges.[231] There are a number of improvements the FJC should make in the Judicial Benchbook and in its judicial training modules to facilitate language access in the federal courts.

First, to deal with the situations in which judges or court staff must assess a court interpreter's credentials, the FJC should include in the Judicial Benchbook a standard set of questions designed to assess: (1) Whether the interpreter can communicate effectively in English and the target language; (2) whether he or she has court interpreting experience; and (3) whether he or she is familiar and able to comply with the applicable ethics code.[232] The FJC should also develop and conduct trainings for new and sitting federal district judges on how to assess interpreters based on the above criteria.[233]

Second, to help judges determine when to appoint an interpreter, the FJC should include in the Judicial Benchbook a standard set of open-ended questions that a judge can use to assess whether a party or witness possesses a sufficient level of English language proficiency to participate meaningfully in the proceedings.[234] The FJC should also train judges on how to conduct the assessment. Additionally, the FJC should include in the Judicial Benchbook, and in judicial trainings, guidance for judges on when to inform parties and witnesses of their right to an interpreter and when to conduct a voir dire to assess whether a party or witness possesses a sufficient level of English language proficiency to participate meaningfully in the proceedings.[235]

E. Federal District Court Judges and Bankruptcy Court Judges

Federal district court and bankruptcy court judges have the power to decide when to appoint an interpreter and which interpreter to appoint, pursuant to the Court Interpreters Act and court rules.[236] Federal district court and bankruptcy court judges should exercise their authority under the Court Interpreters Act and Rule 43(d) of the Federal Rules of Civil Procedure to appoint interpreters for LEP witnesses in civil cases.[237] As this Report discusses above,[238] the Court Interpreters Act requires courts to provide interpreters for LEP individuals on a cost-reimbursable basis, while Rule 43(d) states that when an LEP individual testifies at trial, "[t]he court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs."[239] Before the passage of the Court Interpreters Act, federal courts relied on Rule 43 and on its counterpart, Rule 28 of the Federal Rules of Criminal Procedure, to appoint interpreters for the deaf and hard of hearing and for LEP individuals.[240] These rules remain in effect today and continue to provide a basis for appointing interpreters at the discretion of the court, even in civil cases.[241]

However, there is a flaw in the appointment system authorized by the Court Interpreters Act and Rule 43; the court may require one or more parties to pay for the interpreter.[242] As the DOJ and ABA recognize, requiring LEP individuals to pay for their own interpreters amounts to

imposing an extra surcharge on them solely because of their national origin, and it can chill their exercise of the right of access to the courts.[243] For this reason, courts should look for other sources of funding to pay for interpreters, such as attorney admission fees.[244]

Judges should also use their authority to ensure the interpreters they use are competent. In accordance with the Court Interpreters Act and the Guide to Judiciary Policy, judges should use certified interpreters for in-court proceedings whenever they are reasonably available.[245] When certified interpreters are not available, however, courts should use trained, dedicated personnel to assess the language capabilities of noncertified court interpreters. In the rare instances in which judges or court staff are used to assess the credentials of interpreters, they should do so on the record, using a standard set of questions designed to assess whether the interpreter: (1) can effectively communicate in English and the target language with the specific LEP person; (2) has knowledge of the legal or other terms to be used; (3) has court interpreting experience; and (4) is familiar and able to comply with the applicable code of ethics.

Finally, judges should ensure that an interpreter is provided whenever a party's or witness's English language facility is insufficient to permit meaningful communication and comprehension in the context of a fast-paced, potentially jargon-laden, and emotionally taxing legal proceeding. Judges should use their discretion under the Court Interpreters Act to inquire into the level of English proficiency of any litigant or testifying witness and ask specific, open-ended questions of LEP individuals to ensure they understand the proceeding.

F. Federal District Courts and Bankruptcy Courts

Each federal district court decides what information to make available to the public through its website and at the courthouse. In order to ensure that LEP individuals are able to access the court, each district court should translate frequently used civil forms and instructions into the languages most frequently spoken in each district.[246] Priority for translations should be given to documents used most frequently by pro se litigants, such as manuals for pro se litigants, information about language-access rights, complaint and answer forms, requests to proceed without prepayment of fees, and applications for the appointment of counsel or an interpreter.[247] The court should make translated forms in hard copy available at the local clerk's office and any pro se or self-help office associated with the court, as well as on its website. Courts should also translate their websites into the non-English languages most frequently spoken in their districts.[248] As with hard-copy documents, priority for translations should be given to individual webpages used most frequently by pro se litigants, such as the sections covering frequently asked questions, information on how LEP persons should proceed, and court location and hours.

V. Conclusion

This Report describes a number of serious problems that many LEP court users face when they encounter the federal court system, including lack of access to interpreters, inadequate quality control when noncertified interpreters are used, and too few written materials in languages other than English. In a nation that views its federal judiciary as a cornerstone of democracy, these problems are unacceptable. Accordingly, this Report recommends steps that Congress, the Judicial Conference, the Administrative Office of the Courts, the Federal Judicial Center,

federal district courts, and individual judges can take to remedy the situation.

Implementing these solutions will not be easy. The federal judiciary faces serious financial strains that make it difficult to pay for additional interpreters or for certifying interpreters in additional languages.[249] However, as the DOJ has stressed, financial constraints are no excuse for allocating funds in a way that disadvantages a discrete group of court users.[250] Many state courts have recently expanded their court interpreter programs, even though they are facing budgetary pressures more dire than those of the federal judiciary.[251] Both Colorado and Utah, for example, made court interpreter services available in all civil cases in 2011,[252] even though both court systems suffered several years of significant budget cuts.[253] These state court achievements should be particularly inspiring to the federal judiciary because the number of people needing interpreters in state courts—which hear 95% of the cases filed in the nation[254]—likely dwarfs the number of people needing such services in the federal system. The Colorado judiciary alone hears as many cases annually as the entire federal judiciary, with a budget that amounts to a fraction of the budget for the federal judiciary.[255]

In addition, some of the recommendations advocated in this Report will cost little or nothing. For example, developing guidelines to help judges assess the English proficiency of the people who appear before them is a low-cost endeavor with a potentially enormous impact. Indeed, some of the changes advocated here may even save the courts money in the future.[256] Providing interpreters in civil cases, ensuring that interpreters are provided to LEP individuals who speak some English but not enough to meaningfully access the courts, and certifying interpreters in additional languages, all reduce the risk of error and the inevitable appeals that follow.[257] Translating court information and forms into Spanish and other languages frequently spoken by court users can help pro se litigants understand court procedures and decrease the time that clerks and judges must spend explaining the procedures to them; it can also increase compliance with court orders.[258]

The difficulty of implementing the reforms urged here is ameliorated by the advantage the federal judiciary gains by being a late adopter; it can take advantage of the many creative techniques developed by state courts and federal agencies to provide language access efficiently and effectively. For example, it would be a simple matter for the federal judiciary to adapt for their own purposes the guidelines developed by the National Center for State Courts and many state court systems on topics such as assessing whether a court user needs an interpreter.[259] The federal judiciary could likewise adopt the certification tests that the Consortium for Language Access in the Courts has developed in at least sixteen languages.[260]

In all likelihood, the problems identified in this Report are merely the tip of the iceberg. Additional language access problems likely include a shortage of staff who are able to communicate with LEP individuals at clerks' offices and a lack of courthouse signs in languages other than English, among other problems.[261] For these reasons, both the Judicial Conference and individual courts would be well-advised to conduct a top-to-bottom review of language obstacles facing court users and to develop plans to remedy each of those obstacles.[262] This would put the federal courts on the path to complying with the ABA's recommendation that "courts should develop and implement an enforceable system of language access services"[263] and with the judiciary's promise of equal justice for all.

Endnotes

1. According to the author of a widely used text on court interpretation, "one seminal event can be seen as the driving force behind the current growing trend toward greater use of court interpreting in American courtrooms: the enactment in 1978 of . . . the federal Court Interpreters Act." SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 1 (2002); *see also* Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, 82 FLA. B.J. 21, 24 (2008) (calling the passage of the Court Interpreters Act a "watershed moment in the history of court interpreting in the U.S.").

2. Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978) (codified as amended at 28 U.S.C. §§ 1827–1828 (2006)).

3. 28 U.S.C. § 1827; *see Chronology: Three Decades of Court Interpreting*, PROTEUS, Summer 2009, at 15–16, *available at* http://najit.org/membersonly/library /Proteus/2009/Proteus%20Summer%202009.pdf.

4. *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1008–10 & nn.14 & 18 (2007).

5. Heather Pantoga, Note, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 630–31 (1999).

6. Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121–22 (Aug. 11, 2000).

7. Memorandum from Eric Holder, U.S. Att'y Gen., to Heads of Fed. Agencies, Gen. Counsels, & Civil Rights Heads (Feb. 17, 2011), *available at* http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

8. Federal agency LEP plans and other language access-related documents issued by federal agencies are compiled online at http://www.lep.gov./guidance/fed _plan_index.html (last visited Apr. 8, 2013).

9.*Plan of the Equal Employment Opportunity Commission for Improving Access to Services for Persons with Limited English Proficiency* § V(C)(2), U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/lep.cfm (last visited May 1, 2013).

10. OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HEARINGS, APPEALS AND LITIGATION LAW MANUAL, ch. I-2-6-10 (2005), *available at* http://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-10.html (stating that the SSA will provide interpreters free of charge for LEP individuals during administrative hearings); *see* U.S. GOV'T ACCOUNTABILITY OFFICE, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT 1 (2010), *available at* http://www.gao.gov/new.items/d1014.pdf (stating that the SSA employs 75% of all federal administrative law judges).

11. ADMIN. CONFERENCE OF THE U.S. & DEP'T OF JUSTICE, PROMISING PRACTICES FOR LANGUAGE ACCESS IN FEDERAL ADMINISTRATIVE HEARINGS AND PROCEEDINGS 10 (2012), *available at* http://www.justice.gov/atj/acus-doj-language-access-rpt.pdf (reporting that the SSA provides interpreters for LEP individuals during administrative hearings); SOC. SEC. ADMIN. LEP WORKGROUP, SERVICE TO OUR LIMITED ENGLISH PROFICIENT PUBLIC: STATUS REPORT 9 (2008), *available at* http://www.lep.gov/resources/2008_Conference_Materials/SSALEPStatusReport.pdf; *Multilanguage Gateway: Social Security Information in Other Languages*, SOC. SECURITY ADMIN., http://www.socialsecurity.gov/multilanguage/ (last modified Oct. 9, 2010); *The Social Security Administration's Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency (LEP)*, SOC. SECURITY ADMIN., http://www.socialsecurity.gov/multilanguage/LEPPlan2.htm (last modified Sept. 25, 2012).

12. *See, e.g.*, EXEC. OFFICE FOR IMMIGRATION REVIEW, PLAN FOR ENSURING LIMITED ENGLISH PROFICIENT PERSONS HAVE MEANINGFUL ACCESS TO EOIR SERVICES 11–12 (2012), *available at* http://www.justice.gov/eoir/statspub/EOIR LanguageAccessPlan.pdf (noting that immigration courts will expand interpreter services from the partial interpretation model to a model with "a full and complete interpretation of the proceeding" and will "prioritize the translation of vital documents").

13. *See, e.g.*, Letter from R. Alexander Acosta, Assistant Att'y Gen., to State Court Adm'rs (Apr. 22, 2005), *available at* http://www.lep.gov/guidance/courtsletter4_22_2005.pdf; Letter from Loretta King, Deputy Assistant Att'y Gen., to Dirs. of State Court and State Court Adm'rs (Dec. 1, 2003), *available at* http://www.lep.gov/guidance/courtsletter12_1_2003.pdf; Letter from Thomas E. Perez, Assistant Att'y Gen., to Chief Justices & State Court Adm'rs (Aug. 16, 2010), *available at* http://www.lep.gov/final_courts_ltr_081610.pdf.

14. Laura K. Abel & Matthew Longobardi, *Improvements in Language Access in the Courts, 2009 to 2012*, 46 CLEARINGHOUSE REV. 334, 335–40 (2012).

15. Letter from Thomas E. Perez, Assistant Att'y Gen., to Hon. John W. Smith, Dir., N.C. Admin. Office of the Courts 2 (Mar. 8, 2012), *available at* http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf.

16. N.C. JUDICIAL DEP'T, NORTH CAROLINA COURTS ANNUAL REPORT 4 (2012), *available at* http://www.nccourts.org/Citizens/Publications/Documents/2011-12_AnnualReport_web.pdf; Memorandum from John W. Smith, N.C. Admin. Office of the Courts, to All Judicial Branch Elected and Appointed Officials 1, 3 (Aug. 16, 2012), *available at* http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/Foreign_Language_Access_and_Interpreting_Services_Memo.pdf.

17. *See* LAURA ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS app. D (2009), *available at* http://www.brennancenter.org/content/resource/language_access_in_state_courts/; Abel & Longobardi, *supra* note 14, at 335–40; Jana J. Edmonson & Lisa J. Krisher, *Seen But Often Unheard: Limited-English-Proficiency Advocacy in Georgia*, 46 CLEARINGHOUSE REV. 343, 343–45 (2012).

18. NAT'L CTR. FOR STATE COURTS, CONSORTIUM FOR LANGUAGE ACCESS IN THE COURTS: MEMBER STATES (2011), *available at* http://www.ncsc.org/education-and-careers/~/media/Files/PDF/Education%20and%20Careers/State%20Interpreter%20Certification/Res_CtInte_ConsortMemberStatesPub2011.ashx.

19. AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS std. 1 cmt. (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.

20. *Id.* std. 2.

21. *Id.* stds. 2, 7, 8.

22. *See* discussion *infra* Part III.A–C.

23. 5 GUIDE TO JUDICIARY POLICY § 240.10 (2011).

24. *See* discussion *infra* Part III.A.2.

25. *See infra* notes 125–27 and accompanying text.

26. NAT'L CTR. FOR STATE COURTS, COURT INTERPRETING: CONSORTIUM ORAL EXAMINATIONS READY FOR ADMINISTRATION, *available at* http://www.ncsc.org/education-and-careers/state-interpreter-certification/testing-schedules-by-state/~/media/Files/PDF/Education%20and%20Careers/State%20Interpreter%20Certification/Oral%20Exam%20Ready%20for%20Administration%20rev%207%2011%2012.ashx; *see, e.g.*, *Court Interpreting Services: Exam Information*, N.Y. ST. UNIFIED CT. SYS., http://www.nycourts.gov/courtinterpreter/examinformation.shtml (last updated July 16, 2012) (listing twenty-one languages, in addition to Spanish, in which the New York state court system certifies interpreters); *Prospective Interpreters FAQs* (2013), JUD. BRANCH OF CAL., http://www.courts.ca.gov/2683.htm (follow "What does it take to become a court interpreter?" hyperlink) (listing fifteen languages in which the California courts certify interpreters).

27. *See* discussion *infra* Part III.B.

28. *See* discussion *infra* Part III.D.

29. *See* discussion *infra* Part III.D.

30. *See* discussion *infra* Part II.

31. ABEL, *supra* note 17, at 5.

32. *Id.*

33. *See id.* at 6.

34. *See, e.g.*, E-mail from Jennifer Greengold Healey, Supervising Att'y, S.F. Bar Pro Bono Project, to Joanne Albertsen, Clinic Student, Brennan Ctr. for Justice (Oct. 27, 2009) (on file with author) (stating that "the majority" of pro se LEP individuals that her clinic sees are bringing "employment discrimination and civil rights (e.g., police brutality) claims"); E-mail from Nauen Rim, Proskauer Rose Civil Justice Fellow, Pub. Counsel, to Joanne Albertsen, Clinic Student, Brennan Ctr. for Justice (Oct. 22, 2009) (on file with author) (noting that the pro se LEP individuals that she helps often face intellectual property and foreclosure cases).

35. *See* U.S. DEP'T OF JUSTICE, UNITED STATES TRUSTEE PROGRAM ANNUAL REPORT: FISCAL YEAR 2011, at 38 (2011), *available at* http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2011.pdf; *see also* U.S. BANKR. COURT, C.D. CAL., ACCESS TO JUSTICE IN CRISIS: SELF-REPRESENTED PARTIES AND THE COURT 5–6 (2011) [hereinafter ACCESS TO JUSTICE IN CRISIS], *available at* http://ecf-ciao.cacb.uscourts.gov/Communications/prose/annualreport/2011/ProSe Annual%20Report2011.pdf.

36. *See, e.g.*, J & J Sports Prods., Inc. v. Huong Thi Thuy Ngo, No. 12-CV-02267-LHK, 2012 WL 5270203 (N.D. Cal. Oct. 24, 2012) (granting the LEP defendant's motion to set aside default after determining that her failure to answer the complaint was a result of the language barrier); *see also* THE PUB. COUNSEL FED. PRO SE CLINIC, ANNUAL REPORT: FEBRUARY 2009–FEBRUARY 2010, at 13 (2010), *available at* http://www.ce9.uscourts.gov/jc2010/references/prose/Annual_Report_of_Public_Counsel.pdf (reporting that between February 2009 and February 2010, the clinic helped thirteen pro se restaurant owners, most of whom spoke only Spanish and all of whom had default judgments entered against them for failing to respond).

37. *Report of the Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 272 (1996) ("Our research suggests that the apparently small number of cases filed by non-English speakers may be due to barriers that potential litigants face before even getting to the courthouse.").

38. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 116 (1995), *available at* http://www.uscourts.gov/uscourts/Federal Courts/Publications/FederalCourtsLongRangePlan.pdf.

39. *Id.* Apparently, in the intervening years the Judicial Conference's Committee on Court Administration and Case Management has not attempted to carry out this recommendation. *See* ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS II-85 to -86 (2008).

40. JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, 14 (2010), *available at* http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf. Unfortunately, unlike the 1995 Long Range Plan, the 2010 Strategic Plan does not list any specific goals regarding expansion of the court interpreter program. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 38, at 116.

41. *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 289–90 [hereinafter *Report to the Second Circuit Task Force*] ("It is . . . disturbing that there seems to be very little focus on the need to improve the quality of interpretative services in the civil realm. A systemic study of interpretation services in civil cases is long overdue."); *see also Report of the Special Committee on Race and Ethnicity*, *supra* note 37, at 295–98 (discussing interpretation needs in the D.C. Circuit); *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355, 1722–57 (1997) [hereinafter *Report to the Third Circuit Task Force*] (discussing the use of interpreters in the Third Circuit); *Report to the Second Circuit Task Force*, *supra*, at 288–97 (discussing the needs of non-English speakers in the Second Circuit).

42. ACCESS TO JUSTICE IN CRISIS, *supra* note 35, at 6.

43. Tennessee v. Lane, 541 U.S. 509, 532 (2004).

44. *Cf. id.* at 532–34.

45. United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (quoting Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1969)) (internal quotation marks omitted).

46. *See, e.g.*, United States v. Edouard, 485 F.3d 1324, 1338 (11th Cir. 2007) (criminal case); Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (immigration case).

47. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

48. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

49. *Gideon*, 372 U.S. at 342.

50. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (noting that a father facing civil contempt charges should have been provided with: (1) notice that his ability to pay child support was a critical issue; (2) a form enabling him to provide information about his ability to pay; and (3) a hearing at which he could answer questions about his ability to pay); Murray v. Giarrantano, 492 U.S. 1, 14–15 (1989) (Kennedy, J., concurring) (noting that due process rights of prisoners on death row seeking state postconviction review were satisfied because "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief"); Vitek v. Jones, 445 U.S. 480, 498 (1980) (Powell,

J., concurring) (opining that a person facing involuntary commitment has at least a right to the assistance of a mental health professional who could help him or her "understand and analyze expert psychiatric testimony that is often expressed in language relatively incomprehensible to laymen").

51. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

52. *See, e.g.*, United States v. Edouard, 485 F.3d 1324, 1338 (11th Cir. 2007); United States v. Johnson, 248 F.3d 655, 663–64 (7th Cir. 2001); United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

53. 131 CONG. REC. S15635-02 (daily ed. Nov. 14, 1985) (statement of Sen. Orrin Hatch), 1985 WL 726904.

54. *Negron*, 434 F.2d at 389 (citations omitted).

55. *See, e.g.*, *id.* at 389; *Edouard*, 485 F.3d at 1338 (holding that the right to an interpreter implicates due process); Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000) (describing interpreter's role in ensuring a fair trial); United States v. Mayans, 17 F.3d 1174, 1180–81 (9th Cir. 1994) (collecting cases holding that an interpreter may be necessary to allow a defendant to confront witnesses); United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (discussing the right to an interpreter when due process is implicated); United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) (stating that the denial of an interpreter can interfere with the right to the effective assistance of counsel).

56. *See, e.g.*, Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) (holding that due process requires an interpreter in an asylum case); Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980) (holding that due process requires an interpreter in a deportation proceeding).

57. *Augustin*, 735 F.2d at 37.

58. *Id.* at 38.

59. *See* Sandoval v. Holinka, No. 09-cv-033-bbc, 2009 WL 499110, at *3 (W.D. Wis. Feb. 27, 2009); Powell v. Ward, 487 F. Supp. 917, 932 (S.D.N.Y. 1980) (applying the Supreme Court's holding in *Wolff v. McDonnell* that correctional institutions must provide meaningful access to illiterate prisoners); *see also* Franklin v. District of Columbia, 163 F.3d 625, 634–35 (D.C. Cir. 1998) (reversing a district court order requiring interpreters for LEP prisoners at all disciplinary and housing classification hearings because the order was overly broad).

60. *See, e.g.*, Loyola v. Potter, No. C 09-0575 PJH, 2009 WL 1033398, at *2 (N.D. Cal. Apr. 16, 2009) (citing no authority for its conclusion); *see also* Fessehazion v. Hudson Grp., No. 08 Civ. 10665(BJS)(RLE), 2009 WL 2596619, at *2 (S.D.N.Y. Aug. 21, 2009), *abrogated on other grounds by* Fessehazion v. Hudson Grp., No. 08 Civ. 10655(BSJ)(RLE), 2009 WL 2777043 (S.D.N.Y. Aug. 31, 2009).

61. *See, e.g.*, Gardiana v. Small Claims Court, 130 Cal. Rptr. 675 (Ct. App. 1976) (considering small claims case); *In re* Doe, 57 P.3d 447, 457, 459 (Haw. 2002) (outlining the due process right to an interpreter in child welfare proceedings); Figueroa v. Doherty, 707 N.E. 2d 654, 659 (Ill. App. Ct. 1999) (discussing the due process right to an interpreter in an unemployment benefits hearing); Sabuda v. Ah Kim, No. 260495, 2006 WL 2382461, at *3 (Mich. Ct. App. Aug. 17, 2006) (holding that due process would be violated if denial of an interpreter in a domestic violence protective order case deprives the LEP individual "of the opportunity to meaningfully participate in the hearing due to an inability to understand and respond to [the] evidence presented"); Caballero v. Seventh Judicial Dist. Court *ex rel.* Cnty. of White Pine, 167 P.3d 415, 421 (Nev. 2007) (holding that the court possesses the inherent power to appoint an interpreter for an LEP individual in a small claims case); Daoud v. Mohammad, 952 A.2d 1091, 1093 (N.J. Super. Ct. App. Div. 2008) (concluding that the failure to provide an official interpreter for a commercial tenant in a landlord–tenant dispute deprived him "of a full and fair opportunity to be heard"); Yellen v. Baez, 676 N.Y.S.2d 724, 727 (N.Y. Civ. Ct. 1997) (stating that "due process of law includes the right to have an adequate interpretation of the proceedings" in a landlord tenant matter); Strook v. Kedinger, 766 N.W.2d 219, 227 (Wis. Ct. App. 2009) (holding that in an action for trespassing, a person unable to understand English is unable to participate and is thus denied due process).

62. *See, e.g.*, Jara v. Mun. Court, 578 P.2d 94, 95–96 (Cal. 1978) (holding there is no due process right to an interpreter in most civil cases, but there is such a right in small claims court because most people appearing there lack attorneys).

63. AM. BAR ASS'N, *supra* note 19, std. 1 cmt.; Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899, 1928–30 (2000). Many civil cases handled by the federal courts have serious consequences for the people involved. *Report to the Second Circuit Task Force*, *supra* note 41, at 291.

64. *See, e.g.*, Abdullah v. INS, 184 F.3d 158, 164 (2d Cir. 1999) (applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), to hold that the Constitution did not require the Immigration and Naturalization Service to provide an interpreter during an immigration interview with those seeking a special agricultural worker status); *In re* Morrison, 22 B.R. 969, 970 (Bankr. N.D. Ohio 1982) (holding that the Constitution did not require appointment of an interpreter in a bankruptcy case because no fundamental right was at stake).

65. *Abdullah*, 184 F.3d at 164–65.

66. *Id.* at 165 (alteration in original) (quoting Senator Simpson's remarks, 129 Cong. Rec. 12814 (1983)) (internal quotation marks omitted).

67. *Id.*

68. *Id.*

69. AM. BAR ASS'N, *supra* note 19, std. 1 cmt.

70. *See id.* (discussing cases holding that an interpreter was necessary to guarantee various constitutional rights).

71. *See id.*

72. 28 U.S.C. § 1827(d)(1) (2006).

73. *Id.* §§ 1828, 1920(6).

74. *Id.* § 1827(g)(4).

75. FED. R. CIV. P. 43(d).

76. 28 U.S.C. § 1827(g)(4); 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 240.10 (stating that in bankruptcy cases parties must provide interpreters for LEP individuals unless the proceeding was instituted by the United States); *see also id.* § 260 ("Interpreter services needed to assist parties to civil proceedings, both in court and out of court, are the responsibility of the parties to the action.").

77. *See, e.g.*, U.S. BANKR. COURT, D.R.I., LOCAL BANKRUPTCY RULES AND FORMS, R. 5007-1(a), *available at* http://www.rib.uscourts.gov/newhome/rulesinfo /flashhelp/Local_Rules.htm ("The Court will provide interpreter services only in proceedings initiated by the United States or for persons with communications disabilities.").

78. *Representing Yourself in Federal Court* (Pro Se)*: Frequently Asked Questions: I Do Not Speak English, What Do I Do?*, U.S. D. CT. S.D.N.Y., http://www.nysd.uscourts.gov/courtrules_prose.php?prose=faq (last visited Apr. 8, 2013) [hereinafter *Representing Yourself in Federal Court*] ("The federal courts do not have the resources to provide free interpreters for litigants in civil cases. To conduct business at the Court, you should have a trusted family member or friend assist you by interpreting for you."); *see also Frequently Asked Questions: When Does a Case Qualify for a Court-Appointed Interpreter?*, U.S. D. CT. CENT. D. CAL., http://www.cacd .uscourts.gov/interpreters/frequently-asked-questions (last visited Apr. 8, 2013) ("Interpreters may be appointed only for defendants (or defense witnesses) in proceedings instituted by the United States. Interpreter services for all other proceedings must be provided and paid for by the parties to the case.").

79. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 39, at II-86 ("Presently, 28 U.S.C. § 1827, provides that interpreter services may be provided only for court proceedings initiated by the United States . . . .").

80. Loyola v. Potter, No. C 09-0575 PJH, 2009 WL 1033398, at *2 (N.D. Cal. Apr. 16, 2009) (denying an interpreter on the grounds that the court lacks the authority and the funds to

appoint one); *see also* Fessehazion v. Hudson Grp., No. 08 Civ. 10665(BSJ)(RLE), 2009 WL 2596619, at *2 (S.D.N.Y. Aug. 21, 2009) (denying an interpreter).

81. *See Representing Yourself in Federal Court*, *supra* note 78.

82. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 265.

83. 28 U.S.C. § 1827(g)(4) (2006).

84. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 265.

85. 5 GUIDE TO JUDICIARY POLICY § 260 (as posted on J-Net Jan. 22, 2010) (on file with author).

86. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 260.

87. 28 U.S.C. § 1915(e); *see* E.D. MICH., INSTRUCTIONS FOR COMPLETING NON-APPROPRIATED FUND VOUCHER: REQUEST FOR REIMBURSEMENT OF PRO BONO ATTORNEY EXPENSES IN CIVIL CASES § 1(f)(v) (2008), *available at* http://www.mied.uscourts.gov/Rules/Plans/probono3.pdf; E.D. MO., REGULATIONS GOVERNING THE DISBURSEMENT OF FUNDS FROM THE NON-APPROPRIATED FUND FOR ATTORNEY'S FEES AND OUT-OF-POCKET EXPENSES INCURRED BY ATTORNEYS APPOINTED TO REPRESENT INDIGENT PARTIES IN CIVIL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1915(e) § E(4) (2010), *available at* http://www.moed.uscourts.gov/sites/default/files/Attorney_RegulationsForExpenditures.pdf; N.D. TEX., PLAN FOR REIMBURSEMENT OF ATTORNEY FEES AND EXPENSES IN CIVIL CASES pt. IV.4, *available at* http://www.txnd.uscourts.gov/pdf/atty_handbook/ProBonoReimbursementPlan.pdf; W.D. TEX., AMENDED PLAN FOR THE PAYMENT OF ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES IN CIVIL CASES pt. IV.F (2011), *available at* http://www.txwd.uscourts.gov/rules/stdord/district/reimburse.pdf.

88. D.N.J., LOCAL RULES, APPENDIX H: APPOINTMENT OF ATTORNEYS IN *PRO SE* CIVIL ACTIONS § 8, *available at* http://www.njd.uscourts.gov/sites/njd/files/Apph.pdf; Letter from William T. Walsh, Clerk of Court, D.N.J., to Pro Bono Panel Members, *available at* http://www.njd.uscourts.gov/sites/njd/files/DNJ-ProBono-004.pdf (including interpreter fees on the list of expert fees for which pro bono panel attorneys may seek reimbursement).

89.E.D.N.Y., RULES GOVERNING PROCEDURES FOR APPOINTMENT OF ATTORNEYS IN PRO SE CIVIL ACTIONS, R. 6(B), *available at* https://www.nyed.uscourts.gov/sites/default/files/local_rules/probonoplan.pdf; *see also* E. DIST. CIVIL LITIG. FUND, GUIDELINES FOR REIMBURSEMENT OF EXPENSES INCURRED BY ATTORNEYS IN PRO SE CIVIL ACTIONS, *available at* http://www.nyeb.uscourts.gov/filing_wo_atty/pro_bono/EDCLF_Guidelines.pdf.

90. E. DIST. CIVIL LITIG. FUND, *supra* note 89.

91. E.D. WIS., REGULATIONS GOVERNING THE PREPAYMENT AND REIMBURSEMENT OF EXPENSES IN PRO BONO CASES FROM THE DISTRICT COURT PRO BONO FUND § D.5, *available at* http://www.wied.uscourts.gov/dmdocuments/probono fundplanregulations.pdf.

92. E.D. WIS., PLAN FOR THE ADMINISTRATION OF THE DISTRICT COURT PRO BONO FUND § A, *available at* http://www.wied.uscourts.gov/dmdocuments /probonofundplan.pdf.

93. E.D. WIS., *supra* note 91, § A.1.

94. *Id.* § B.3.

95. W.D. TENN., THE PLAN FOR APPOINTMENT OF COUNSEL FOR PRO SE INDIGENT PARTIES IN CIVIL CASES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE § III.C.5 (2010), *available at* http://www.tnwd .uscourts.gov/pdf/content/CivilProBonoPlan.pdf.

96. *Id.* § II.A.2.

97. *Id.* § II.C.

98. *See, e.g.*, D.N.J., PRO BONO REPRESENTATION: A PRIMER 1 (2005), *available at* http://www.njd.uscourts.gov/sites/njd/files/probono-primer.pdf ("Although approximately 1,000 *pro se* cases are filed each year in New Jersey, the court appoints counsel in only about 10% of those cases.").

99. Telephone interview by Tania Cohen with Lazlo Beh, Legal Servs. of N.J. (Mar. 22, 2011); Telephone interview by Tania Cohen with Jack O'Brien, Legal Counsel, D.N.J. (Mar. 8, 2011).

100. *Telephonic Translation Services*, U.S. BANKR. CT. E.D.N.Y., http://www.nyeb.uscourts.gov/search/translation_services.php (last visited Apr. 8, 2013).

101. 42 U.S.C. § 2000d (2006); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,470–71 (June 18, 2002).

102. 42 U.S.C. § 2000d.

103. Lau v. Nichols, 414 U.S. 563, 566–69 (1974).

104. *Id.* at 568 (footnote omitted).

105. *Id.* at 569 (quoting Senator Humphrey, 110 CONG. REC. 6543) (internal quotation marks omitted). Senator Humphrey was quoting President Kennedy. *Id*. at 569 n.4.

106. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. at 41,470–71.

107. *See* ABEL, *supra* note 17, at app. D.

108. *See* Abel & Longobardi, *supra* note 14, at 335–40; *supra* notes 14–15.

109. Letter from Thomas E. Perez, *supra* note 15, at 2.

110. *Id.*

111. *Pro Se Frequently Asked Questions*, U.S. D. CT. D. MASS., http://www.mad.uscourts.gov/general/pdf/prosefaqs.pdf (last visited Apr. 8, 2013); *Representing Yourself in Federal Court* (Pro Se)*: Frequently Asked Questions*, U.S. D. CT., S.D.N.Y., http://www.nysd.uscourts.gov/courtrules_prose.php?prose=faq (last visited Apr. 8, 2013).

112. MASS. GEN. LAWS ANN. ch. 221C, § 2 (West 2005 & Supp. 2012); CHIEF ADMIN. JUDGE OF THE N.Y. COURTS, ADMINISTRATIVE ORDER pt. 217 (2007), *available at* http://www.courts.state.ny.us/rules/trialcourts/217_amend.pdf.

113. COMM. FOR THE ADMIN. OF INTERPRETERS FOR THE TRIAL COURT, ADMIN. OFFICE OF THE TRIAL COURT, STANDARDS AND PROCEDURES OF THE OFFICE OF COURT INTERPRETER SERVICES § 4.04(L) (2009), *available at* http://www.mass.gov/courts/ocis-standards-procedures.pdf; N.Y. STATE UNIFIED COURT SYS., UCS COURT INTERPRETER MANUAL AND CODE OF ETHICS 13 (2008), *available at* http://www.nycourts.gov/courtinterpreter/pdfs/CourtInterpreterManual.pdf.

114. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 244–47 & n.13 (1970).

115. Exec. Order No. 13,166, 65 Fed. Reg. 159 (Aug. 16, 2000).

116. Memorandum from Eric Holder, *supra* note 7.

117. *Id.*

118. *See, e.g.*, ADMIN. CONFERENCE OF THE U.S. & DEP'T OF JUSTICE, PROMISING PRACTICES FOR LANGUAGE ACCESS IN FEDERAL ADMINISTRATIVE HEARINGS AND PROCEEDINGS 10 (2012), *available at* http://www.justice.gov/atj/acus-doj-language-access-rpt.pdf (reporting that the SSA and the DOJ provide interpreters for LEP individuals during administrative hearings).

119. *See supra* notes 111–18 and accompanying text.

120. *Plan of the Equal Employment Opportunity Commission for Improving Access to Services for Persons with Limited English Proficiency*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION § V(C)(2), http://www.eeoc.gov/eeoc/plan/lep.cfm (last visited Apr. 8, 2013).

121. *See* Fessehazion v. Hudson Grp., No. 08 Civ. 10665(BSJ)(RLE), 2009 WL 2596619, at *2 (S.D.N.Y. Aug. 21, 2009), *abrogated on other grounds by* Fessehazion v. Hudson Grp., No. 08 Civ. 10665(BSJ)(RLE), 2009 WL 2777043 (S.D.N.Y. Aug. 31, 2009).

122. 11 U.S.C. § 341(a), (d) (2006).

123. EXEC. OFFICE FOR U.S. TRUSTEES, LANGUAGE ACCESS PLAN FOR IMPLEMENTATION OF EXECUTIVE ORDER 13166 § 4-7 (2011), *available at* http://www.justice.gov/ust/eo/public_affairs/lep/docs/lang_assistance_plan.pdf.

124. *See, e.g.*, U.S. BANKR. COURT D.R.I., *supra* note 77, at R. 5007-1.

125. *See Three Categories of Interpreters*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx (last visited Apr. 8, 2013).

126. *See id.*

127. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (1996), *available at* http://www.uscourts.gov/judconf/96-Mar.pdf; *see also Three Categories of Interpreters*, *supra* note 125.

128. *See Court Interpreter Language Testing Program*, FED. BUS. OPPORTUNITIES (Dec. 29, 2010), https://www.fbo.gov/index?s=opportunity&mode=form&id=3f48590cd9ea5b6ae95c52d50ec75a4c&tab=core&_cview=0.

129. *See* ADMIN. OFFICE OF THE U.S COURTS, *supra* note 39, at II-86.

130. *See* United States v. Huang, No. 06-CR-103-LRR, 2007 WL 1283998, at *2 (N.D. Iowa, Apr. 30, 2007) ("[T]here are no 'certified' interpreters for Wenzhouhua, or for that matter, Mandarin or Cantonese.").

131. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 39, at I-17.

132. *Annual Report 2011: Key Studies, Projects, and Programs*, U.S. COURTS, http://www.uscourts.gov/annualreport_2011/Key_Studies_Projects_And_Programs.aspx#kspp_19 (last visited Apr. 8, 2013).

133. *Id.*

134. AM. BAR ASS'N, *supra* note 19, std. 8.1.

135. United States v. Bailon-Santana, 429 F.3d 1258, 1260 (9th Cir. 2005) (alteration in original) (quoting H.R. REP. NO. 100-889, at 58 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6019).

136. For example, in Florida, an interpreter's error lead a man to plead guilty to stealing a dump truck, which was a felony offense, even though he thought he was pleading guilty to taking a toolbox, which was a misdemeanor. de Jongh, *supra* note 1, at 30.

137. AM. BAR ASS'N, *supra* note 19, std. 3.2 cmt.

138. Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 512–13 (2010).

139. *Id.* at 481–85.

140. *Id.* at 512–13.

141. *See generally id.*

142. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 703, 102 Stat. 4642, 4654 (1988).

143. *See* H.R. REP. NO. 100-889, at 58–59 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6018–19.

144. *Id.* at 60.

145. *Id.*

146. 28 U.S.C. § 1827(d)(1) (2006); 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 320.20.20.

147. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, 2011 ANNUAL REPORT 80, *available at* http://www.ce9.uscourts.gov/publications/AnnualReport2011.pdf.

148. *See, e.g.*, United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003) (criticizing the Southern District of Iowa for using uncertified interpreters in most cases).

149. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, *supra* note 147, at 80.

150. *Id.*

151. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 330.20–.30.

152. The interpreter must have satisfied one of the following criteria:

> (a) Passed the U.S. Department of State conference or seminar interpreter test in a language pair that includes English and the target language. The U.S. Department of State's escort interpreter test is not accepted as qualifying.
>
> (b) Passed the interpreter test of the United Nations in a language pair that includes English and the target language.
>
> (c) Is a current member in good standing of:
>
> (1) the Association Internationale des Interprètes de Conférence (AIIC); or
>
> (2) The American Association of Language Specialists (TAALS). The language pair of the membership qualification must be English and the target language.

Id. § 320.20.20.

153. *Id.* § 320.20.30(a).

154. *See* AM. BAR ASS'N, *supra* note 19, std. 8.1; CONFERENCE OF STATE COURT ADM'RS, WHITE PAPER ON COURT INTERPRETATION: FUNDAMENTAL TO ACCESS TO JUSTICE 6 (2007); NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, POSITION PAPER: INFORMATION FOR COURT ADMINISTRATORS 2–3 (2003); NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, POSITION PAPER: PREPARING INTERPRETERS IN RARE LANGUAGES 2–3 (2005); NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 16 (1995), *available at* http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/accessfair/id/162/rec/19.

155. MINN. CT. R. 8.02(b), *available at* https://www.revisor.mn.gov/court_rules/rule.php?type=gp&id=8.

156. *Id.* at R. 8.01(b).

157. *See* AM. BAR ASS'N, *supra* note 19, std. 8 best practices.

158. *See id.*, std. 8.1 best practices (describing Washington state's use of qualified evaluators to assess "how well the interpreter speaks and comprehends the language for which he/she is attempting to become registered").

159. NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 127.

160. Arrieta v. State, 878 N.E.2d 1238, 1241 (Ind. 2008) (citing IND. SUP. CT. COMM'N ON RACE AND GENDER FAIRNESS, HONORED TO SERVE: EXECUTIVE REPORT AND RECOMMENDATIONS App. A, at 7 (Dec. 20, 2012)).

161. United States v. Bailon-Santana, 429 F.3d 1258, 1260 (9th Cir. 2005).

162. *See Fact Sheet: Interpreting for the Federal Courts*, S.D.N.Y. INTERPRETER'S OFF., (Feb. 6, 2009), http://sdnyinterpreters.org/?page=fact_sheet.html. The other desirable qualifications are: excellent command of English (written and oral), familiarity with federal legal terms and proceedings, and two letters of recommendation. *Id.*

163. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 330.20.20(b).

164. 28 U.S.C. §§ 1827(d)(1)(A), 1828(a) (2006).

165. *See* Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251, 255–56 (1999).

166. Gonzalez v. United States, 33 F.3d 1047, 1050–51 (9th Cir. 1994); *see also id.* at 1053 (Reinhardt, J., dissenting).

167. *Id.* at 1050 (internal quotation marks omitted); *see also* United States v. Hasan, 609 F.3d 1121, 1131 (10th Cir. 2010) (defining the Court Interpreter Act standard as asking whether a party is "inhibited in his [or her] ability to comprehend and communicate . . . to such an extent as to have been fundamentally unfair").

168. *Gonzalez*, 33 F.3d at 1052 (Reinhardt, J., dissenting).

169. *Id.* at 1053 (quoting H.R. REP. NO. 95-1687, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4654) (internal quotation marks omitted).

170. Letter from Thomas E. Perez, *supra* note 13.

171. NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 226.

172. *See, e.g.*, STATE OF ME. SUPREME JUDICIAL COURT, ADMIN. ORDER JB-06-3: GUIDELINES FOR DETERMINATION OF ELIGIBILITY FOR COURT-APPOINTED INTERPRETATION AND TRANSLATION SERVICES (2006), *available at* http://www.courts .state.me.us/rules_adminorders/adminorders/JB-06-3.pdf (defining an LEP individual for whom a court should appoint an interpreter as one "whose primary language is a language other than English and whose ability to speak English is not at the level of comprehension and

expression needed to participate effectively in court transactions and proceedings"); UNIFIED JUDICIAL SYS. OF PA., ADMINISTRATIVE REGULATIONS GOVERNING COURT INTERPRETERS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY AND FOR PERSONS WHO ARE DEAF OR HARD OF HEARING § 102(m) ("*Person with limited English proficiency* means a principal party in interest or a witness who speaks exclusively or primarily a language other than English and is unable to sufficiently speak and understand English so as to fully participate and be understood in a judicial proceeding.").

173. *See* GA. SUPREME COURT, AMENDMENTS TO RULES FOR USE OF INTERPRETERS FOR NON-ENGLISH SPEAKING PERSONS app. A(I)(B) (2008), *available at* http://w2.georgiacourts.org/coi/files/Rules%20on%20Interpreters%20-%20Final%20Version%20-%2011-5-2008%20-%20Advance%20Sheets%2012-25-2008.pdf (cautioning that "[t]he fact that a person for whom English is a second language knows some English should not prohibit that individual from being allowed to have an interpreter").

174. NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 125.

175. *See* AM. BAR ASS'N, *supra* note 19, std. 3.3 cmt.

176. *See, e.g.*, United States v. Perez, 918 F.2d 488, 489–90 (5th Cir. 1990) ("The magistrate pointedly inquired whether [the defendant] understood the proceedings. [The defendant] responded: 'I understand everything so far.' The magistrate then advised [the defendant] that if you have any difficulty in understanding what's going on, stop and let us know so that we can do something because we can get a translator to assist you." (internal quotation marks omitted)).

177. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 9 (5th ed. 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf ("If you are not sure the defendant understands English, ask the defendant: Are you able to speak and understand English? If the defendant has an attorney, ask counsel if he or she has been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter." (citing 28 U.S.C. § 1827 (2006))).

178. AM. BAR ASS'N, *supra* note 19, std. 3.3 cmt.

179. *See, e.g.*, United States v. Edouard, 485 F.3d 1324, 1339 (11th Cir. 2007) (finding there was no indication in the record that the defendant had difficulty with English, in part because he responded "yes" or "no" to short, simple questions).

180. *See* AM. BAR ASS'N, *supra* note 19, std. 3.3 cmt.

181. NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 126. The National Center for State Court's "Model Voir Dire for Determining the Need for an Interpreter" lists the following questions,

among others: "How did you come to court today?"; "What kind of work do you do?"; "What was the highest grade you completed in school?"; "Please describe for me some of the things (or people) you see in the courtroom."; "Please tell me a little bit about how comfortable you feel speaking and understanding English." *Id.* at 147 (internal quotation marks omitted).

182. GA. SUPREME COURT, *supra* note 173 at app. A(I)(C)(2).

183. SUPREME COURT OF OHIO, WORKING WITH FOREIGN LANGUAGE INTERPRETERS IN THE COURTROOM: A BENCH CARD FOR JUDGES 1 (2007), *available at* https://www.supremecourt.ohio.gov/JCS/interpreterSvcs/benchcard.pdf; *see also* BENCH CARD FOR IOWA JUDGES: TIPS FOR EFFECTIVELY WORKING WITH LANGUAGE INTERPRETERS IN THE COURTROOM 1 (2010), *available at* http://ujs.sd.gov/Uploads/Committees/11_2010_Handout_C.pdf (providing questions for the judge to ask: "For how many years have you spoken English?"; "How did you learn English?"; "Describe some of the things you see in this courtroom."; "Tell me about your favorite television program."); MINN. JUDICIAL BRANCH, BENCH CARD: COURTROOM INTERPRETING 1 (2007), *available at* http://www.mncourts.gov/Documents/0/Public/Interpreter_Program/Bench%20Card%20-%20Interpreter.pdf (warning judges to "[a]void questions easily answered with yes or no replies," and suggesting open-ended questions); N.Y. STATE UNIFIED COURT SYS., WORKING WITH INTERPRETERS IN THE COURTROOM: BENCHCARD FOR JUDGES 1, *available at* http://www.courts.state.ny.us/courtinterpreter/PDFs/JudBenchcard08.pdf (suggesting that judges ask: "What is your name?"; "How comfortable are you in proceeding with this matter in English?"; "In what language do you feel most comfortable speaking and communicating?"; "Would you like the court to provide an interpreter in that language to help you communicate and to understand what is being said?").

184. Donna Ackermann, Note, *A Matter of Interpretation: How the Language Barrier and the Trend of Criminalizing Illegal Immigration Caused a Deprivation of Due Process Following the Agriprocessors, Inc. Raids*, 43 COLUM. J.L. & SOC. PROBS. 363, 363–64 (2010).

185. *Id.*

186. *Id.* at 364.

187. *Id.*

188. NAT'L CTR. FOR STATE COURTS, COURT INTERPRETATION IN PROTECTION ORDER HEARINGS: JUDICIAL BENCHCARD (2006), *available at* http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/accessfair/id/103.

189. *Id.*

190. *See, e.g.*, Ramos–Martínez v. United States, 638 F.3d 315, 325 (1st Cir. 2011) ("Once the

court is on notice that a defendant's understanding of the proceedings may be inhibited by his limited proficiency in English, it has a duty to inquire whether he needs an interpreter."); United States v. Edouard, 485 F.3d 1324, 1337–38 (11th Cir. 2007); United States v. Si, 333 F.3d 1041, 1044 (9th Cir. 2003); *see also* AM. BAR ASS'N, *supra* note 19, std. 3.3.

191. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,463 (June 18, 2002).

192. AM. BAR ASS'N, *supra* note 19, std. 7.1 best practices.

193. DONNA STIENSTRA ET AL., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUSTICES 9, 11 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf (stating that only eight of the ninety district courts surveyed report providing resources, services, or notices in different languages).

194. D.D.C. & BANKR. D.C., INFORMATION FOR PARTIES WHO WISH TO FILE A CIVIL COMPLAINT (2010), *available at* http://www.dcd.uscourts.gov/dcd/sites/dcd/files/PaidCaseInstr2013.pdf.

195. Letter from William M. McCool, Clerk, W.D. Wash., to Plaintiff in a Civil Rights Action Which *Does Not* Involve Employment Discrimination (Title VII Action) (July 2011), *available at* http://www.wawd.uscourts.gov/sites/wawd/files/ApplicationForCourtAppCounselNonEmplDiscrimCover.pdf; *Representing Yourself ("Pro Se")*, U.S. D. CT. W.D. WASH., http://www.wawd.uscourts.gov/pro-se (last visited Apr. 8, 2013).

196. The English versions of these forms are available online at http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx and http://www.wiwd.uscourts.gov/assets/pdf/AO_435_Revised.pdf.

197. S.D.N.Y., COMPLAINT, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=forms&id=64.

198. *Representing Yourself in Federal Court*, *supra* note 78.

199. *"Illustrative" Forms of Class Action Notices*, FED. JUD. CENTER, http://www.fjc.gov/ (last visited Apr. 8, 2013) (follow "Class Action Notices Page" hyperlink); *see also* Yanez v. Cannoli Plus, Inc., No. CV-10-4284(BMC), Important Notice of Lawsuit with Opportunity to Join (Feb. 4, 2011) (on file with author).

200. D. MASS., PASO A PASO: MANUAL PARA LOS LITIGANTES POR DERECHO PROPIO (LITIGANTES *PRO SE*), *available at* http://www.mad.uscourts.gov/general/pdf/StepByStepSpanish.pdf.

201. LEGAL AID CTR. OF S. NEV. WILLIAM S. BOYD SCH. OF LAW, BANCARROTA: CLASE DE EDUCACION

PARA LA COMUNIDAD (2012), *available at* http://www.lacsn.org/images/stories/BK-LACSN-Manual-Spanish.pdf.

202. *Annual Report 2011*, *supra* note 132.

203. Information Available in Ten Different Foreign Languages, N.Y. ST. UNIFIED CT. SYS., http://www.courts.state.ny.us/languages/index.shtml# (last updated Apr. 8, 2013).

204. *Informational and Instructional Materials Translated by California Superior Courts*, CAL. JUD. BRANCH (2013), http://www.courts.ca.gov/partners/305.htm.

205. 28 U.S.C. § 1827(d)(1) (2006).

206. *See supra* Part III.A.2.

207. *See supra* Part III.A.2.

208. 28 U.S.C. § 331 (2006); *Judicial Conference of the United States*, U.S. CTS., http://www.uscourts.gov/FederalCourts/JudicialConference.aspx (last visited Apr. 8, 2013).

209. *Judicial Conference of the United States: Membership*, U.S. CTS., http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx (last visited Apr. 8, 2013).

210. 28 U.S.C. § 331.

211. *See* discussion *supra* Part III.A.2.

212. JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 5–14 (1996).

213. *See infra* notes 215–21 and accompanying text.

214. Dotson v. Griesa, 398 F.3d 156, 174 n.12 (2d Cir. 2005) (discussing JUDICIAL CONFERENCE OF THE U.S., *supra* note 212); *see also* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1633–34 n.253 (2006) ("[T]he Judicial Conference stated that it was well-established judiciary policy and practice to follow the equal employment opportunity principles applicable to private sector and government employers." (quoting JUDICIAL CONFERENCE OF THE U.S., *supra* note 212, at 6) (internal quotation marks omitted)).

215. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 38, at 116.

216. 28 U.S.C. §§ 1827–1828 (2006).

217. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 38, at 116.

218. *Id.*

219. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 39, at II-85 ("[I]n September 1995 the Judicial Conference adopted the policy (upon a CACM recommendation) that all Federal courts provide reasonable accommodations to persons with communications disabilities.").

220. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 306, 110 Stat. 3847, 3852

(codified as amended at 28 U.S.C. § 1827(l) (2006)); *see also* S. REP. NO. 104-366, at 12 (1996).

221. 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 255.10(b)–(c).

222. *Administrative Office of the United States Courts*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx (last visited Apr. 8, 2013).

223. 28 U.S.C. § 605.

224. *Id.* § 1827(a) ("The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.").

225. Memorandum from Hon. D. Brock Hornby, Chair, Comm. on the Judicial Branch, Admin. Office of the U.S. Courts, to Chief Judges, U.S. Courts, Dist. Court Execs., & Clerks, U.S. Dist. Courts (Jan. 31, 2011), *available at* http://legaltimes.typepad.com/files/fedct-memo.pdf.

226. *See* H.R. REP. NO. 100-889, at 60 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6020.

227. *See* discussion *supra* Part III.B.

228. *See* discussion *supra* Part III.A.1.

229. *See* AM. BAR ASS'N, *supra* note 19, std. 10.5.

230. 28 U.S.C. § 620 (2006).

231. FED. JUDICIAL CTR., EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS 2–3 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/About_FJC_English_2010_July.pdf/$file/About_FJC_English_2010_July.pdf; *see also* FED. JUDICIAL CTR., *supra* note 177.

232. *See* AM. BAR ASS'N, *supra* note 19, std. 8.4 best practices.

233. *See id.* std. 9 ("Educate judicial partners such as judges, mediators, arbitrators, court staff, attorneys and others about . . . the knowledge, skills, and abilities of a competent language service provider; [and] the policies, procedures, and rules for the appointment and use of credentialed language service providers . . . .").

234. *Id.* std. 3 best practices.

235. *See id.*; *see also, e.g.*, NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 126; SUPREME COURT OF OHIO, *supra* note 183, at 1.

236. *See* 28 U.S.C. § 1827 (2006); FED. R. CIV. P. 43(d); FED. R. CRIM. P. 28; FED. R. EVID. 604.

237. 28 U.S.C. § 1827; FED. R. CIV. P. 43(d).

238. *See supra* Part III.A.1.

239. FED. R. CIV. P. 43(d).

240. FED. R. CRIM. P. 28 ("The court may select, appoint, and set the reasonable compensation

for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct."); *Report to the Third Circuit Task Force*, *supra* note 41, at 1722 n.263. Federal Rule of Civil Procedure 43(d) was previously called Rule 43(f). However, the substance remains the same.

241. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 6056 n.23 (2d ed. 2007) ("There is no doubt that a court at least has the power to appoint interpreters in civil cases. However, a court also has the power in such cases to tax the parties for the cost of interpretation." (citations omitted)); *Report to the Third Circuit Task Force*, *supra* note 41, at 1722 n.263.

242. *See* FED. R. CIV. P. 43(d).

243. AM. BAR ASS'N, *supra* note 19, std. 2.3 & std. 2.3 cmt.; Letter from Thomas E. Perez, *supra* note 13, at 2.

244. *See* FED. R. CIV. P. 43(d); *see also* discussion, *supra* Part III.A.1.

245. 28 U.S.C. § 1827(d)(1) (2006); 5 GUIDE TO JUDICIARY POLICY, *supra* note 23, § 320.20.20.

246. AM. BAR ASS'N, *supra* note 19, std. 7.1 best practices.

247. *Id.*

248. *See id.*

249. *See* Letter from Thomas E. Perez, *supra* note 13, at 4 ("Fiscal pressures . . . do not provide an exemption from civil rights requirements.").

250. *Id.*

251. *See, e.g.*, *supra* notes 15–16 and accompanying text.

252. *See supra* note 17 and accompanying text.

253. Hon. Christine M. Durham, Chief Justice, Utah Supreme Court, State of the Judiciary Address 5 (Jan. 24, 2011), *available at* http://www.utcourts.gov/resources/reports/statejudiciary/2011-StateOfTheJudiciary.pdf (describing "fundamental changes in almost every part of our court system" necessitated by budget pressures on the Utah courts); Hon. Michael L. Bender, Chief Justice, Colo. Supreme Court, State of the Judiciary (Jan. 14, 2011), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/State_of_Judiciary_2011.cfm ("We implemented hiring freezes in 2009 and in 2010, delayed newly authorized judgeships and saved the state more than 10 million dollars. This year, we had a one-time give back of 800,000 dollars and permanently cut 173 positions for an on-going savings of almost 7 million dollars per year.").

254. Hon. Christine Durham, *supra* note 253, at 2–3.

255. COLO. GEN. ASSEMBLY JOINT BUDGET COMM., FY 2011–12 STAFF BUDGET BRIEFING: JUDICIAL DEPARTMENT 13 (2010), *available at* http://www.courts

.state.co.us/userfiles/file/Administration/Financial_Services/Judicial%20Briefing%20Document%20FY2012.pdf (showing Colorado's judicial branch budget of less than one-half of $1 billion); CHIEF JUSTICE JOHN ROBERTS, 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–4 (2012), *available at* http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx (follow "2012 Year-End Report" hyperlink) (noting the federal judiciary's budget is just under $7 billion); Bob Ewegen, *Colorado Upgrades Its Justice System Despite Hard Fiscal Times*, 8 COLO. JUD. INST. 2d Quarter 2012, at 1, 1, *available at* http://www.coloradojudicialinstitute.org/index.php?s=40 (follow "2nd Quarter 2012 Newsletter" hyperlink).

256. *See, e.g.*, Nancy K. D. Lemon, *Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?*, 21 BERKELEY J. GENDER, L. & JUST. 38, 55 (2006) (describing a California study finding that a majority of judicial officers thought interpreting would improve the ability of litigants to understand and comply with orders and reduce case backlogs).

257. *See* AM. BAR ASS'N, *supra* note 19, std. 3.2 cmt. ("The failure to appoint an interpreter when one has been requested not only impairs that person's access to justice but also can result in costs and inefficiencies to the court system in the form of appeals, reversals, and remands." (footnote omitted)).

258. *See id.* std. 7.1 best practices ("Translation of documents in a specific proceeding may be necessary for the efficient administration of justice and for the enforceability of court orders.").

259. *See, e.g.*, NAT'L CTR. FOR STATE COURTS, *supra* note 154, at 126; SUPREME COURT OF OHIO, *supra* note 183, at 1.

260. *See supra* note 18 and accompanying text.

261. *See* STIENSTRA ET AL., *supra* note 193, at 11 (discussing the need for bilingual staff to assist pro se LEP individuals); *Report to the Third Circuit Task Force*, *supra* note 41, at 1741–42 (discussing need for multilingual signs in courthouses).

262. *See* Federal Interagency Working Group on LEP, *Federal Agency LEP Plans*, LIMITED ENG. PROFICIENCY (LEP), http://www.lep.gov/guidance/fed_plan_index.html (last visited Apr. 8, 2013) (providing links to the plans of the Departments of Energy, Health and Human Services, Justice, and many other federal entities); SUPREME COURT OF WIS., WISCONSIN DIRECTOR OF STATE COURTS LANGUAGE ASSISTANCE PLAN (2008), *available at* https://www.wicourts.gov/services/judge/docs/lapstate.pdf; *see also* AM. BAR ASS'N, *supra* note 19, std. 10.2 best practices (recommending that courts develop language access plans).

263. AM. BAR ASS'N, *supra* note 19, std. 1.

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