"Improving Efficiency and Ensuring Justice in the Immigration Court System"

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Good morning, Chairman Leahy, Senator Grassley, and members of the Committee. My name is Julie Myers Wood and I thank you for the opportunity to testify before you on improving efficiency and ensuring justice in the immigration court system.

As the former Assistant Secretary of Immigration and Customs Enforcement (ICE), a key agency charged to enforce existing immigration laws, I had an insider's perspective of the challenges that face us. Since the 1986 amnesty, inconsistent enforcement, coupled with an inefficient and restrictive pathway for legal access to the country, have left us with a broken immigration system. The immigration courts are a key component of this system. Individuals charged in immigration court often face multi-year delays in adjudication, no guidance as to their legal options, and end up with removal orders that aren't enforced by the government. It is therefore of little surprise that there are so many complaints about the lack of justice provided many immigrants as well as such high levels of noncompliance with judicial orders, regrettably devaluing the immigration court system.

As this hearing recognizes, a properly functioning immigration court system is critical to ensure that current immigration enforcement efforts are working, and any future reforms are successful. This is a substantial challenge. Overall, the immigration court system continues to take in more cases than it decides each year, causing an increasing backlog of unresolved cases. In fiscal year 2010, for example, the immigration courts received over 392,000 new cases, but only resolved 353,000.[1] The Department of Justice (DOJ) reported an increase of 12% in new cases from 2006 to 2010.[2] Each immigration judge has enormous responsibilities. With little support, they

[1] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at B2.
[2] Id. at A1.

each manage an extremely large docket. In fiscal year 2010, for example, immigration judges completed an average of 1,300 proceedings per judge, many more than other administrative law judges in other fields and with far fewer law clerk resources to assist them.[3]

In addition, with the increased implementation of ICE's Secure Communities program, the court system is facing an ever-increasing number of criminal aliens that will be coming into contact with the system. In fiscal year of 2009, ICE administratively arrested 37,377 individuals through the Secure Communities program.[4] For fiscal year 2010, ICE administratively arrested more than 96,000 individuals through Secure Communities.[5] These numbers will continue to go up as ICE more fully implements the Secure Communities program. In the first quarter of 2011, ICE reported that 66% of all individuals arrested or charged in the United States will be electronically screened by SC IDENT/IAFIS interoperability, compared with only 30% in fiscal year 2009.[6] ICE is planning for 100% screening by 2013. This is likely to have a drastic affect on intakes into the immigration court. Although some individuals may go through streamlined procedures, such as administrative removals or reinstatements, not all will be eligible or appropriate for those programs. Many of these individuals will be permanent residents who have strong ties to the United States, but whose crimes have made them deportable, and who have every reason to fully challenge. This shift in the type of population coming into the court system will further tax judges and the system itself without new resources.

However, before addressing ways that the immigration court system can be improved, I would be remiss if I didn't highlight some progress that DOJ has made in improving the adjudication of immigration laws and restoring integrity in the immigration court system. Attorney General Holder has focused on providing resources and attention to the immigration court system. Since the beginning of fiscal 2010, the Executive Office of Immigration Courts (EOIR) has hired 51 immigration judges, resulting in an increase of approximately 16% more judges compared to fiscal year 2009.[7] The current administration also has taken some steps to address professionalism and ethics, areas in which immigration courts have come under substantial criticism. These items have included a recently issued "Immigration Judge Ethics and Professionalism Guide" and a mechanism to file complaints against immigration judges on-line.

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[3] Numbers were compiled from EOIR Statistical Workbook and EOIR description of number of current judges. See AILA-EOIR LIAISON MEETING AGENDA QUESTIONS, April 6, 2011, at 5, available at http://www.justice.gov/eoir/statspub/eoiraila040611.pdf.

[4] Immigration and Customs Enforcement, Secure Communities Quarterly Congressional Report for first quarter of 2011, available at http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy111stquarter.pdf.

[5] Id.

[6] Id. at 5.

[7] See AILA-EOIR LIAISON MEETING AGENDA QUESTIONS, April 6, 2011, at 5, available at http://www.justice.gov/eoir/statspub/eoiraila040611.pdf.

Unfortunately, despite the hard work of those charged with enforcing current immigration laws, there is no panacea for addressing the court's issues, and while I address a few areas of potential improvement below, they will not resolve the problems in their entirety.[8] Review and reform of the entire immigration system and incentives is necessary to obtain a properly functioning immigration court and system. Years of band-aid fixes, changes in enforcement priorities, as well as under investment while enforcement funding has grown at faster rates, has left the court system needing serious attention. Absent overall reform, I see the areas of greatest needs as follows:

I. Improving Efficiency Within the Immigration Court System

Although resources to apprehend and detain illegal immigrants have increased substantially over the past several years, resources have not increased proportionally for the immigration courts. In this budget environment, it is highly unlikely that sufficient resources are available for significant expansion of the immigration court system.

This is unfortunate because many immigrants already experience serious delays in adjudication before an immigration court. In some areas of the country it is not unusual for immigrants to wait more than a year to have their case first heard before an immigration judge.[9] These delays increase the likelihood that immigrants will develop additional ties to the United States during adjudication, and potentially abscond during the process.

A. Internal Initiatives to Improve Efficiency

To improve efficiency with existing resources, Congress and DOJ should consider creating additional incentives for docket management, looking to techniques utilized in Article III federal courts as an example.[10] There is nothing in law that encourages judges to resolve cases promptly or deny excessive continuances, unlike the federal courts, which have the Speedy Trial Act for criminal cases. In fact, some have suggested that DOJ's Office of Professional Responsibility has investigated judges or otherwise criticized them for denying excessive continuances. If true, this does not incentivize judges to resolve matters promptly. Although EOIR utilizes some metrics to encourage judges to resolve certain categories of cases within a prescribed period of time, these metrics should be revisited and revised if necessary. Performance measurements must not be limited to timeliness, of course, and must also take into account quality and transparency.

Another idea that has been previously proposed and worth considering is increasing the number of supervisory judges or chief judges in areas with more than one

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[8] My testimony will focus on cases at the initial stages of review by immigration courts, and will not address potential improvements that could be made at the Board of Immigration Appeals or immigration cases that are reviewed by federal courts.

[9] According to the Immigration Court Backlog Tool, the average length of time to resolve an immigration case in the United States is 467 days. See http://trac.syr.edu/phptools/immigration/court_backlog/

[10] Russell Wheeler from the Brookings Institute provided some useful analysis and specifics on potential analytical tools in his testimony before a House Judiciary Subcommittee in 2010, available at http://www.brookings.edu/testimony/2010/0617_immigration_review_wheeler.aspx.

judge. These judges could have some role in bringing order to the calendars, and also managing issues of professionalism in the courts.[11]

Finally, increased training, particularly in identifying credibility, identifying fraud and treatment of asylum seekers would be helpful to ensure that judges have the expertise to make reasoned decisions correctly and in a timely fashion.[12]

B. Methods to Reduce Volume of Cases that Need Immigration Court Approval or Require Full Court Proceedings.

Although generating internal efficiencies should assist in some improvements, these internal efficiencies are insufficient to fully address the existing backlog and expected influx of cases and ensure that the court system operates with some efficiency.

One way to increase court efficiency is to reduce the number of cases that must come before immigration courts for full hearings, without reducing overall removal numbers. This can be done by fully utilizing appropriate prosecutorial discretion, as well as by encouraging voluntary and mandatory mechanisms to remove appropriate cases from full immigration hearings while effectuating removal.

First, the enforcement agencies should continue to exercise appropriate prosecutorial discretion to ensure that resources are not wasted on inappropriate or ill-considered cases. As set forth in the current ICE memos on prosecutorial discretion, it is reasonable for the immigration enforcement agencies to consider whether there is a pending petition that could have a likelihood of success when determining whether initiating removal proceedings is appropriate. The active involvement of ICE attorneys early in the process can assist in ensuring the agencies make an appropriate determination, and avoid wasting court or detention resources on cases where adjustment is likely, the government is unlikely to prevail, or extenuating circumstances support discretion.

At the same time, it is important that the discretion be carefully tailored so that the agency is not creating incentives for individuals to come here illegally and break the law. A fact-based analysis must ensure that the prosecutorial discretion doesn't grant a wholesale exemption on whole categories of individuals without the approval of Congress, or make an executive branch decision to simply defer action on broad sections of immigration violators.

In addition to utilizing appropriate prosecutorial discretion, it makes sense to consider enhanced use of other methods that reduce the number of cases in immigration court. For example, the partial expansion of expedited removal should be considered. Expedited removal may be utilized for aliens who lack proper documentation or have

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[11] See, e.g., ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (prepared by the Arnold and Porter law firm) at Part 2 (2010) (discussing increasing number of supervisory judges).

[12] Id.

committed fraud or willful misrepresentation of facts to gain admission into the United States, unless the aliens indicate either an intention to apply for asylum or a fear of persecution.[13] Under expedited removal processes, administrative and judicial review are restricted to cases in which the alien claims to be a citizen, or was previously legally admitted under certain circumstances.

By statute, expedited removal may be utilized for individuals that have been in the country for up to two years.[14] However, the executive branch has not utilized the full statutory authority provided for expedited removal, but instead applied certain arbitrary limitations, including the most recent requirement that the alien be apprehended no more than 100 miles from the border and has spent less than 14 days in the country. There is no reason that the government could not take steps to administratively expand the current use of expedited removal, by, for example, focusing on certain known smuggling routes beyond 100 miles or slightly extending the current time period for eligibility (30 days vs. 14 days, for example). Another alternative would be to apply extended time and range limits for the use of expedited removal for immigrants who are convicted of a crime by state or local law enforcement.

Any extension of expedited removal would have to be managed closely to ensure that the existing credible fear process for asylum seekers continues to be strictly followed and appropriate training is provided for DHS officers. In addition, individuals processed under expedited removal procedures are subject to mandatory detention, so administrative expansion under current authorities would have to be carefully coordinated to avoid problems with ICE detention space.

Similarly, stipulated removals provide opportunities for immigrants who have voluntarily agreed to their removal to largely avoid the court process.[15] Again, it is important that the process be closely monitored to ensure that individuals are not forced into participating in the program, are fully informed about potential claims for relief, and understand the restrictions they are agreeing to in this process. However, for many individuals without valid claims to adjustment, stipulated removals allow them to resolve their situation promptly. A Ninth Circuit decision in 2010 criticized the process by which ICE had utilized stipulated removal, which significantly reduced stipulations all over the country for the rest of the fiscal year.[16] The agency purportedly has revised the process to conform to the Ninth Circuit ruling and make the notice more transparent, but there is more that could be done in this area to ensure that this tool is fully and appropriately utilized.

An additional mechanism that could be more aggressively utilized is the voluntary departure program. A voluntary departure is a mechanism by which eligible immigrants agree to leave the country and avoid many of the bars associated with stipulated removal

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[13] 8 U.S.C. § 1225.
[14] Id.
[15] 8 U.S.C. §1229a(d).
[16] United States v. Ramos, No. 09-50059, available at http://www.ca9.uscourts.gov/datastore/opinions/2010/09/24/09-50059.pdf.

or formal removal orders.[17] DOJ reports that 17% of all removals in the immigration court system are now voluntary departures, up from 10% only five years ago.[18] It is worth considering whether ICE could administratively create mechanisms to more uniformly notify individuals of the option of voluntary removal immediately, so that appropriate candidates might consider this option at the very outset of proceedings (rather than waiting till a master calendar hearing, or afterwards). For example, ICE could distribute information to individuals about the requirements and benefits of voluntary departure at the same time ICE distributes the required list of pro-bono legal providers. When statutory reforms are considered, it may be worth looking more broadly at who should be considered eligible as well.

Another voluntary program that could be expanded to reduce the burden on immigration courts is the rapid repatriation program, or Rapid REPAT program. This program supports removal efforts by enhancing the ability of ICE to remove criminal aliens from the country, and reducing the number of aliens that go through the full removal process. The Rapid REPAT program provides for conditional early release of qualifying non-violent criminal aliens on the condition that those aliens voluntarily agree to their removal, waive appeal rights associated with their state convictions and agree not to return to the United States.[19]

Arizona, Puerto Rico, Georgia, New Hampshire, New York and Rhode Island currently participate in the Rapid REPAT program, and according to ICE, as of late 2010, these localities have reported a savings of $445 million from the program. Rapid REPAT saves significant costs for federal taxpayers by reducing federal detention and court time, and leveraging limited federal detention resources. Thus, this program has the enviable result of encouraging non-violent illegal immigrants to go back to their home countries while making the immigration courts more efficient and saving taxpayers significant money.

II. Ensuring Justice is Done

One of the greatest challenges to ensuring justice in immigration courts involves the number of individuals who are unaware of their options regarding representation or who represent themselves.

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[17] 8 U.S.C. §1229c.

[18] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at Q1.

[19] Importantly, under this program, aliens are not treated differently than U.S. citizens. The state must already have (or put in place) a parole structure that permits early release for eligible U.S. citizen criminals. If an alien participates, but then comes back into the United States illegally, the individual first serves the remainder of their state sentence and is subject to additional federal prosecution.

More than half of the immigrants in removal proceedings do not have representation, and 84% of detained immigrants do not have representation.[20] Without representation, many immigrants are often unaware of whether they have legitimate claims or not, and may incorrectly choose to concede or fight proceedings.[21] Although ICE attorneys and immigration judges routinely decipher legitimate claims by immigrants who are not represented by attorneys, the system should not rely on the ability of opposing counsel or overworked judges to identify valid claims.

Given the significant budget pressure, however, appointment of counsel for all indigent aliens is not currently feasible on a widespread basis. To ensure justice is fully done, it is worth considering whether limited appointment of counsel for indigent aliens is appropriate for those most vulnerable in the system, including immigrants who are not mentally competent, certain categories of asylum seekers and unaccompanied minors. These individuals are most likely to be fully disadvantaged without counsel.

With mentally ill immigrants who are not represented, there is a significant risk that well-meaning government attorneys and immigration judges will not always be able to identity potential issues and valid claims for these individuals. Pro bono attorneys are often unwilling to take on a case for a mentally incompetent individual because they are concerned about the potential liability issues or inability to fully communicate with their clients. Making limited funding available for these individual cases could partially mitigate the concern about handling these difficult, but important cases.

In the meantime, Congress should increase support of programs that provide basic education to immigrants about their rights, so that immigrants may make informed decisions about going through the court process or participating in some sort of voluntary removal option, like voluntary departure, stipulated removal or Rapid REPAT. The funding provided by the DOJ's Legal Orientation Program (LOP) has provided critical assistance in selected detention facilities, but it is extremely limited. Currently, the LOP operates in only 27 detention facilities, even though ICE places immigrants in more than 200 facilities. The LOP also only has one limited pilot program for a non-detained docket in Miami. Immigrants detained outside the targeted detention facilities often do not have similar presentations and may remain unaware of their options. The LOP should be expanded to all aliens who are detained and are not detained (including aliens on alternatives to detention), and provided early enough in the process so that immigrants may factor the presentations into their decision-making process. With this expanded reach, DOJ should analyze the results to help show the cost-benefits of the program. Just as individuals who are represented also often end up saving the court time and resources,

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[20] See, e.g., ABA Commission on Immigration, Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (prepared by the Arnold and Porter law firm) at Part 5 (2010).

[21] Indeed, the preliminary results of the New York Immigrant Representation Study indicate that a strong predictor of whether individuals will prevail on claims is whether they are represented. However, it is not clear that this analysis takes into account the understandable strong bias of pro bono advocates and for-profit attorneys to take on cases where they believe that they have a likelihood of success. As such, although significant, these numbers could be somewhat slanted. A summary of the preliminary findings is available at http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf.

individuals that are made aware of their rights may also reduce some unnecessary burdens on the court system.

In addition to the formal programs implemented by DOJ, other NGO and private sector mechanisms to encourage education and pro bono representation should be supported. For example, the pro bono community, with the assistance of the ABA, has developed a revised video that gives a brief introduction to legal issues immigration detainees face and potential options. This video will be played in all detention facilities. ICE should ensure that this electronic presentation is played in intake/processing centers and alternative to detention locations as well.

In sum, until Congress considers overall reform to the immigration system, the immigration courts will continue to face significant challenges. The continuing influx of cases requires the immigration court system to become more efficient with its limited resources. Efforts at efficiency, however important, should not trump the needs of the immigrants who come before the courts seeking an opportunity to remain in the United States. Increased attention to the challenges immigrants face with inadequate information and representation also will help ensure that the immigration court system provides justice to those who come before it.

I appreciate the opportunity to appear before you today and welcome any questions you may have for me.