



# Department of Justice

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**STATEMENT OF**

**JAMES MCHENRY  
DIRECTOR  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES DEPARTMENT OF JUSTICE**

**BEFORE THE**

**SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**FOR A HEARING ENTITLED**

**“STRENGTHENING AND REFORMING AMERICA’S IMMIGRATION  
COURT SYSTEM”**

**PRESENTED ON**

**APRIL 18, 2018**

**Statement of**

**James McHenry  
Director**

**Executive Office for Immigration Review  
Department of Justice**

**Before the  
Senate Committee on the Judiciary  
Subcommittee on Border Security and Immigration**

**April 18, 2018**

**Introduction**

Mr. Chairman, Senator Durbin, and other distinguished Members of the Subcommittee, thank you for the opportunity to speak with you today. As the director of the Executive Office for Immigration Review (EOIR) at the Department of Justice, I welcome this opportunity to share with you the progress that EOIR is making to strengthen the immigration court system.

The primary mission of EOIR is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. I am proud to say that EOIR's approximately 1,700 employees are firmly committed to this mission and have performed commendably over the past eleven months as we have sought to strengthen and improve the functioning of our immigration court system.

**Immigration Court Process and Structure**

Before discussing ways to further strengthen the immigration court system, it is important to first understand how that system works. EOIR's Office of the Chief Immigration Judge (OCIJ) is responsible for the management of 60 immigration courts throughout the United States, including 334 immigration judges and hundreds of essential support personnel, including judicial law clerks, attorney-advisors, court administrators, legal assistants, and interpreters. To aid its management, OCIJ has recently developed two staffing models based on court size to ensure that each court is sufficiently staffed as we move forward in strengthening and improving immigration court performance.

Most immigration court cases involve removal proceedings initiated by the Department of Homeland Security (DHS). A removal proceeding has two parts. First, an immigration judge assesses whether a respondent is removable as charged under the applicable law. If the judge sustains the charge and finds the respondent removable, the proceedings continue to the second step where the immigration judge makes a second determination as to whether the respondent is eligible for any relief or protection that would allow the respondent to remain in the United States. Importantly, a finding of removability by itself never presumptively mandates nor guarantees that an alien will be ordered removed or that the alien will actually be removed.

The immigration judges who preside over removal proceedings are selected through a rigorous, open, competitive, and merit-based process. They are afforded significant employment rights and are protected by merit systems principles from prohibited personnel practices. They perform similar functions and exercise similar authorities as other administrative judges in other federal agencies, including administrative law judges in the Department of Justice, the Social Security Administration, and the Department of Labor. The Attorney General, as the head of the agency, sets policy and provides controlling determinations regarding questions of law. In turn, immigration judges, exercising delegated authority from the Attorney General, exercise independent judgment and discretion in deciding individual cases. In doing so, they seek to resolve the questions before them in all cases in a timely and impartial manner.

Immigration judges zealously safeguard due process in removal proceedings in multiple ways, including by advising respondents of their numerous rights in immigration proceedings. Those rights include the right to representation at no expense to the government, the right to a reasonable opportunity to examine the evidence against them, the right to present evidence on their behalf, and the right to cross-examine witnesses presented by DHS. Immigration judges also advise respondents of the availability of pro bono legal services by ensuring that respondents receive a copy of the list of pro bono legal service providers maintained by EOIR, as well as a copy of their appeal rights if they are found removable at the conclusion of the proceedings. Immigration judges inform respondents of their apparent eligibility to apply for any protection or relief under the Immigration and Nationality Act (INA) and afford respondents an opportunity to file an application for such relief or protection. Additionally, for a respondent who expresses a fear of persecution or harm upon return to a country to which he or she may be subject to removal, an immigration judge will inform the respondent of his or her right to seek such protection or relief, will make available to the respondent an application for such protection or relief, and will provide other advisals.

### **Challenges to the Immigration Court System**

In recent years, the immigration courts have faced a number of challenges, including declining case completions, protracted hiring times for new immigration judges, and the continued use of paper files. All of these have contributed to the current backlog of cases. Beginning in 2017, however, EOIR has aggressively addressed each of these structural challenges in a rigorous and systematic fashion.

Immigration judge productivity declined from 1,356 case completions per judge in FY 2006 to 807 case completions per judge in FY 2015. This decrease is deeply troubling, and EOIR has moved strongly to address it. For example, some of the decrease in productivity is attributable to an increase in continuances, as overall continuances increased 23 percent between FY 2006 and FY 2015, and immigration judge-related continuances increased 54 percent over the same time period. In response, EOIR issued guidance in July 2017 to the immigration judges on the fair and efficient handling of continuance requests to ensure that they do not exacerbate the decrease in productivity nor contribute to the denial of justice for aliens and the public.

To reverse this decrease in case completions, EOIR has also developed measures for both the immigration courts and the immigration judges to assess their efficiency, ensure the quality

of operations and decision making, and to better identify and address where problem areas may lie in the overall court process. These measures are neither novel nor unique to EOIR; they have been recommended by, among others, the GAO, Congress, and the Department of Justice's Office of the Inspector General; they are in line with measures recommended by the American Bar Association and adopted as case processing time standards by many state court systems; and, they are similar to measures employed at other administrative agencies conducting adjudications, including the Social Security Administration and the Merit Systems Protection Board. Despite the uninformed and misplaced criticism that EOIR has received as we implement these critical, productivity measures, we are confident that they will help us identify and address poor-performing courts and ultimately reverse the recent downward trajectory of immigration judge productivity.

A June 2017 GAO Report concluded that it took the DOJ an average of 742 days—over two years—to complete each immigration judge's hiring process. Even before that Report was issued, however, in April 2017 the Attorney General issued new guidance to streamline the immigration judge hiring process. Upon receipt of the list of qualified applicants received from the Office of Personnel Management, EOIR now begins working immediately to assess the applicants and move the process forward. Further, in accordance with the Attorney General's guidance, EOIR has also set internal deadlines for the steps over which we have control, and we have generally been successful at meeting those deadlines.

EOIR has issued five advertisements for up to 84 immigration judge positions in the past nine months, and we anticipate several additional advertisements throughout the remainder of this calendar year. The first of those advertisements closed at the end of June 2017, and we anticipate bringing on the first immigration judge from that advertisement in the coming weeks, which is approximately ten months after the advertisement closed. We also anticipate bringing on the remainder from that advertisement at the beginning of July, approximately one year after the advertisement closed. Although these numbers are a significant improvement over the 742 days cited by the GAO, EOIR continues to streamline the process. Going forward, EOIR expects to complete its part of the hiring process within six to eight months and to complete the overall process within eight to ten months, resulting in an over 50 percent reduction in the time it takes to onboard future immigration judge versus just two years ago.

EOIR is also striving to modernize and digitize its critical information systems. The benefits of an electronic filing and case management system are undisputed. A fully electronic system will improve case scheduling and adjudication efficiency, reduce time spent on administrative tasks related to paper files, and free additional space to be used for additional staff or court expansion. EOIR's Office of Information Technology (OIT) has worked tirelessly in the past year to make such a system a reality for EOIR after 16 years of little to no progress. EOIR anticipates piloting an electronic system in multiple courts this summer with a phased nationwide rollout beginning in 2019.

Overall, EOIR's efforts to address these systemic challenges are beginning to bear fruit, and we are poised for even greater success in the near future. The overall number of pending cases remains significant, but the underlying numbers are beginning to move in the right direction. Perhaps most significantly, through the first half of FY 2018, our immigration judges have

completed almost 82,000 initial cases, which is the highest number of case completions since FY 2012. That number is even more impressive when one considers that 42 of our immigration judges have been on the bench for less than one year and that we have lost 14 immigration judges to separation or retirement since October 1. The overall median case completion time for a detained case is currently 56 days, and EOIR completes approximately 94% of its detained removal cases within six months. The average immigration case clearance rate—the ratio of case completions to new cases received—has increased since January 2017. Although these developments are encouraging, EOIR recognizes there is further work to be done. Moreover, we appreciate that our current home in the Department of Justice, due to its resources, support, and leadership, offers EOIR the best opportunity to build upon these numbers and to improve the immigration court system even further.

### **Further Challenge**

As a final point, I would like to note that one of the biggest challenges facing the immigration court system today is a lack of clarity in immigration law which impedes the administration of justice. For instance, circuit courts have held that armed robbery, carjacking, assault and battery on a police officer, and voluntary manslaughter are not crimes of violence, embezzlement is not a theft offense, and perjury is not a perjury offense, leaving immigration judges understandably confused as to what crimes, if any, may fit within these established categories in immigration law. Other circuit court decisions have suggested that in certain states no crime involving drugs or theft may fit within the relevant categories under the INA, even though there is no evidence that Congress intended to sweepingly exempt all such state convictions from consideration under the immigration laws. Indeed, as the law currently stands, no burglary crimes in California, Iowa, South Carolina, Oregon, Michigan, and Florida qualify as a burglary offense that would make an alien removable. Further, at least 100 state statutes involving crimes such as armed robbery, drug trafficking, child abuse, possession of child pornography, and assault have been held to not be removable offenses since 2013. As a member of the BIA recently noted regarding making criminal law determinations in immigration proceedings, the current approach may lead to absurd results that Congress could not have intended and “is an earnest call for a congressional fix to the mess we currently find ourselves in.”<sup>1</sup> Many circuit court judges share EOIR’s frustration and have called for Congress to “clarify[] whether it truly intended radically different treatment for aliens ‘convicted of identical criminal conduct in different jurisdictions’”<sup>2</sup> or to “junk” the current system “[i]nstead of of wasting more resources and interjecting more uncertainty into our sentencing (and immigration) decisions.”<sup>3</sup> To answer this challenge, EOIR and the Department of Justice stand ready to work with Congress to bring clarity and consistency to immigration law, particularly in cases involving criminal convictions.

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<sup>1</sup> *Matter of Rosa*, 27 I&N Dec. 228, 236-37 (BIA 2018) (O’Connor, concurring).

<sup>2</sup> *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211(9th Cir. 2017) (O’Scannlain, specially concurring) (quoting *Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 2258, 195 L.Ed.2d 604 (2016) (Kennedy, J., concurring)).

<sup>3</sup> *United States v. Brown*, 879 F.3d 1043, 1051 (9th Cir. 2018) (Owens, concurring).

## **Conclusion**

With the changes that EOIR has implemented, the integrity of the immigration court system is fundamentally sound, and its most appropriate location remains its home for the past 80 years, the Department of Justice. EOIR is addressing its biggest challenges by working to enhance immigration judge productivity, improving the hiring process in order to bring on new immigration judges more quickly, and moving to an electronic case and filing system. We are committed to reducing the backlog and strengthening the overall system to ensure that our immigration courts remain the preeminent administrative adjudicatory bodies in the United States. With the leadership and support of the Department of Justice, as well as ongoing congressional support, I am confident that EOIR will succeed in meeting those goals.