

United States Senate

WASHINGTON, DC 20510

August 05, 2020

Attorney General William Barr
The Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Barr,

Thank you for your continued strong leadership of the Department of Justice during this challenging time. I write to express my concern over the current state of the backlog of cases before our immigration courts and to offer suggestions on ways we might work together to empower them to reduce this caseload and prosecute illegal immigration more efficiently. According to statistics from the Executive Office for Immigration Review, as of July 14, 2020 the immigration case backlog now exceeds 1.2 million cases.¹ Every case in the backlog means longer delays for new cases and delayed justice for those illegal aliens who have violated our nation's immigration laws.

As you well know, some of my colleagues in the House and Senate have made every effort to stall and in some cases remove any accountability for those who violate our immigration laws. Advocates for open borders have hampered the ability of the Executive Branch to provide timely consequences for illegal immigration by limiting the capacity of Immigration and Customs Enforcement to detain illegal aliens throughout the course of their proceedings. They have also failed to fix obvious loopholes. Fortunately, the Department of Justice can provide much-needed relief to the adjudicatory process by granting immigration judges the authority to dismiss meritless challenges filed by individual aliens.² I have included suggestions that may be helpful in achieving this shared goal below.

The Department of Justice can empower its immigration judges to address this backlog by aligning pleading standards with those required for Article III courts and by the Federal Rules of Civil Procedure 12(b)(6) and 12(c). By aligning these pleading standards, Immigration Judges will be empowered to dismiss individual alien's challenges to removal proceedings when the facts don't support that challenge. Given that the majority of immigration challenges are found to be without merit, there is no better way to eliminate substantial portions of the backlog than to provide immigration judges with this authority. Dismissing these meritless challenges

¹ Executive Office for Immigration Review. (2020, August 3). Retrieved from Department of Justice: <https://www.justice.gov/eoir/page/file/1242166/download>

² Stimson, Charles and Canaparo, Charles, The Heritage Foundation (July 18, 2019), *Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases*, available at <https://www.heritage.org/immigration/report/expanding-the-toolkit-giving-immigration-judges-authority-summarily-dispose>.

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prior to consuming the limited time and resources of immigration judges will restore accountability to our immigration system and expedite the judicial process. The proposed changes could be achieved in the following manner:

First, 8 C.F.R. § 1240.11(c)(1) could be amended as follows³:

(1) If the alien expresses fear of persecution or harm *on account of a protected statutory basis under section 208 of the Act* upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum

officer in accordance with § 1208.14 of this chapter, the immigration judge shall:

- (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;
- (ii) Make available the appropriate application forms; and
- (iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

Additionally, 8 C.F.R. § 1240.11(c)(3) could be amended as follows:

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute *unless the factual matter is accepted as true*. An evidentiary hearing extending beyond issues related to the basis for a ~~mandatory~~ denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

Furthermore, 8 C.F.R. § 1208.14 should be amended as follows:

(a) By an immigration judge. Unless otherwise prohibited in § 1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations. *An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.*

Lastly, 8 C.F.R. § 1240.12(b) could be amended as follows:

³ Proposed additions to the Code of Federal Register sections are in italics, and proposed deletions are identified with strikethrough.

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(b) Summary decision. Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily, *factually, or legally* ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal. *An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.*

These updates would provide the clarifications necessary for immigration judges to effectively and efficiently process the staggering number of cases before them and prosecute any person here illegally. Our nation's immigration system is not working, and our immigration judges are saddled with an ever growing backlog that is preventing bad actors from being held accountable. I know that you will agree that such a situation is untenable and must not be allowed to continue. I request that you provide a written response to this letter including details on how the Department of Justice plans to help our immigration judges address the backlog and restore accountability, and I stand ready to work with you moving forward on this important issue.

Sincerely,



Kelly Loeffler
United States Senator



Tom Cotton
United States Senator