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Report to Congressional Requesters

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CRIMINAL ALIENS

Prison Deportation Hearings Include Opportunities to Contest Deportation

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The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate

The Honorable Strom Thurmond
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

The Honorable Hamilton Fish, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

The Anti-Drug Abuse Act of 1988 (21 U.S.C. 1501) requires us to report to your committees by May 1990 on whether aliens who are subject to deportation because they have been convicted of murder and drug or weapons trafficking (called aggravated felonies) can effectively contest deportation from prison. Neither the act nor the legislative history defined criteria for determining whether aliens are able to "effectively" contest deportation. Therefore, we drew criteria from the Immigration and Nationality Act, which affords aliens certain procedural rights, and evaluated the process which the immigration judges used to ensure that aliens were afforded these rights.

All aliens who are deportable because they have been convicted of certain crimes, including aggravated felonies, are entitled to a hearing before they can be deported. The Immigration and Naturalization Service (INS) presents its case for the aliens' deportation before an immigration judge from the Department of Justice's Executive Office for Immigration Review (EOIR). In 1987, Justice, through EOIR and INS, began the institutional hearing program in which immigration judges held deportation hearings at prisons for incarcerated aliens. To comply with the Anti-Drug Abuse Act of 1988, Justice included the hearings for aliens convicted of aggravated felonies in the institutional hearing program.

Approach

We attended either a portion or the entirety of 171 alien deportation hearings between November 1989 and January 1990 held at five state and two federal prisons. The prisons are located in states that have the largest alien populations. We selected the specific hearings to attend on the basis of when they were scheduled and our ability to attend them.

At the hearings we attended, we noted whether the immigration judges took steps, as provided by the Immigration and Nationality Act, to give aliens (1) the opportunity to be represented; (2) notice of the charges against them; (3) the opportunity to examine evidence against them, present evidence, and cross-examine witnesses; (4) an interpreter, when an interpreter was needed for the hearing; and (5) notice of their rights to apply for relief from deportation and appeal adverse decisions.

Our review had several limitations.

- First, since we attended only one hearing for each alien, we were not present for the entire proceeding when aliens required more than one hearing to determine their deportability.
- Second, we focused only on the portion of the deportation process that took place at the hearings we attended. We did not assess whether aliens, having been advised of their rights at one stage of the process, actually took advantage of them in preparation for the next hearing stage. For example, we did not attempt to determine whether aliens granted an adjournment for purposes of obtaining representation were actually able to contact and consult with representatives.
- Third, because the 1988 act has not been in effect long enough for many aliens to have committed, been apprehended for, and been convicted of aggravated felonies, which are final and not under appeal, only 15 of 171 hearings involved aliens convicted of aggravated felonies. We included the other 156 hearings to give perspective since the hearing process is the same for all aliens in prison.
- Fourth, we cannot project the results of the 171 hearings we attended to other deportation hearings at either the prisons we visited or prisons we did not.
- Fifth, while our presence at these hearings may have affected what took place, we have no way of knowing exactly how and to what extent.

We discussed the report with EOIR officials, who said the report was fair and balanced. We incorporated their views where appropriate.

Our review was done between September 1989 and April 1990 using generally accepted government auditing standards. A more detailed

description of our objectives, scope, and methodology comprises appendix I.

Results in Brief

In the 171 alien deportation hearings we attended, we found that the judges informed all the aliens of their rights as provided by the law to contest deportation. Because in some cases aliens needed to pursue these rights outside of the hearings we attended, we cannot conclude that each of the 171 aliens was actually able to take advantage of these rights and thus contest deportation.

At all 171 hearings, the immigration judges advised the aliens of their right to obtain representation, unless the alien already had representation. In 99 hearings, aliens had no representation because they waived their right to representation; were granted an adjournment to obtain representation; or, after having been given the opportunity to be represented, were not represented, and their case proceeded. Where the aliens did not have representation, the immigration judges elaborated on the aliens' rights and on the possible consequences of adverse rulings.

We also noted that the aliens were consistently informed of the charges against them, their right to present and examine evidence, their right to appeal, and, where appropriate, their right to apply for relief from deportation. When aliens were represented, the judge relied on their representatives to protect these rights.

Also, interpreters were always provided when, in the judge's opinion, they were required (i.e., the alien did not demonstrate the ability to communicate effectively in English), or when requested by the alien or the alien's representative.

Background

The Immigration and Nationality Act (8 U.S.C. 1101) authorizes INS to apprehend aliens and deport them as criminal aliens if they have been (1) convicted of a crime involving moral turpitude committed within 5 years of entry and sentenced to confinement for a year or more or (2) convicted of two or more crimes involving moral turpitude, not arising from a single action, at any time after entry, regardless of whether confined. Crimes of moral turpitude include, for example, murder, manslaughter, rape, and sodomy. INS can also deport aliens if they are narcotic addicts or have been convicted of a drug offense.

The Immigration and Nationality Act sets out procedural requirements governing deportation hearings. The act (8 U.S.C. 1252(b)) provides the following procedural rights in deportation cases:

- The aliens will be given notice, reasonable under all the circumstances, of the nature of the charges against them and of the time and place at which the proceeding will be held.
- The aliens will have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as they shall choose.
- The aliens will have a reasonable opportunity to examine the evidence against them, to present evidence in their own behalf, and to cross-examine witnesses presented by the government.
- No decision of deportability will be valid unless it is based upon reasonable, substantial, and probative evidence.

The aliens' right to examine and present evidence—the opportunity to express themselves—includes the use of an interpreter when requested by them or when the judge determines one is necessary.[1]

The Immigration Judge's Bench Book provides guidance to judges on conducting deportation hearings. It includes instructions for determining if an interpreter is needed and actions to be taken when aliens have no representation. The guidance is the same for hearings conducted in prison or elsewhere.

Although the Immigration and Nationality Act states the rights of aliens during their deportation hearings, failure to afford these rights during the hearing may not affect the final resolution of the aliens' cases. Courts have held that, in order to overturn an immigration judge's decision because of a procedural error, the error must have affected the outcome of the alien's case.

At a deportation hearing, an INS trial attorney presents INS' case before an immigration judge. Once INS' allegations of deportability are established, the hearing procedures provide that aliens may then seek relief from deportation. Aliens may use numerous grounds in contesting deportation (e.g., claim that they are U.S. citizens) or seeking relief from deportation (e.g., apply for political asylum). In certain instances, aliens

[1]In El Rescate Legal Services, the court ruled that when an immigration judge concludes that an interpreter is necessary, due process requires interpretation of an entire immigration court proceeding. El Rescate Legal Services v. EOIR, 727 F. Supp. 557 (C.D. Cal. 1989). The Justice Department has appealed this decision, according to EOIR.

are not eligible for relief (e.g., aliens who entered the country illegally and were charged with crimes of moral turpitude). Aliens may appeal adverse rulings through the Department of Justice to the federal courts up to the Supreme Court.

The deportation process for criminal aliens usually begins upon conviction and sentencing for a deportable crime. Working with local law enforcement agencies, INS identifies such aliens within the federal, state, and local criminal justice systems. INS compiles the evidence deemed necessary for deportation and issues (1) detainers, which notify the applicable law enforcement agencies to turn the aliens over to INS when they are released from custody and (2) orders to show cause, which inform aliens that they must appear for deportation hearings and show cause why the deportation process should not proceed. When aliens complete their prison sentences, the prison officials may turn them over to INS. Under the Immigration and Nationality Act, aliens sentenced to imprisonment shall not be deported until released. If INS wants to initiate deportation proceedings against the aliens at the completion of their sentences, it can place them in one of its detention facilities or release them on bond or on their own recognizance.[2]

The Immigration Reform and Control Act of 1986 requires that criminal aliens shall have their deportation hearings as expeditiously as possible. According to the Chief Immigration Judge, the institutional hearing program was established to meet this requirement. Under the institutional hearing program, which began in 1987, immigration judges hold deportation hearings for criminal aliens while they are still incarcerated. If found deportable (and if any appeals are unsuccessful), aliens are deported after being released. Aliens incarcerated in state prisons that are not used for deportation hearings are transported to one that is used for hearings and returned after the hearing to their original prison. Only two federal prisons are used for deportation hearings. Aliens who commit federal crimes are transferred or sentenced to one of these prisons so they can have deportation hearings before completing their sentences.

To give added emphasis to the problems stemming from drug-related crimes and aliens involved in such crimes, the Anti-Drug Abuse Act of 1988 required, among other things, the deportation of aliens convicted of drug-related crimes. It added the term "aggravated felony" for crimes of murder and drug or weapons trafficking to the Immigration and

[2]INS must detain aliens convicted of aggravated felonies after they are released from prison.

Nationality Act and required deportation proceedings for aliens convicted of these crimes to commence before their release from prison.

The 1988 act did not change the deportation hearing process. In practice the hearings for aliens convicted of aggravated felonies were incorporated into the institutional hearing program for all incarcerated aliens. According to INS and EOIR, the same procedures used for the institutional hearing program apply to hearings for aliens charged with aggravated felonies. For fiscal year 1989 and the first 6 months of fiscal year 1990, EOIR received 3,450 and 1,690 cases, respectively. These cases included 21 and 101 deportation hearings for aliens convicted of aggravated felonies, respectively.

Results of Deportation Hearings Attended

The 171 deportation hearings we attended generally were conducted in the same manner. The objective of our review was to determine whether the immigration judges informed the aliens of their rights and gave them the opportunities to exercise their rights.

Specifically, we looked for whether the aliens were (1) offered the opportunity to be represented, (2) given notice of the charges against them, (3) offered an interpreter, (4) given the opportunity to present and examine evidence, and (5) given the opportunity to apply for relief from deportation and appeal the immigration judges' decisions.

Right to Representation

In the 171 hearings we attended, we found that all the aliens, including those convicted of aggravated felonies, were (1) informed of their right to representation and (2) given the opportunity to obtain representation. In these 171 hearings, 72 aliens had representation (5 were represented by telephone), and 99 did not. In those 99 cases,

- 55 aliens waived their right to representation and represented themselves, and in 5 of these cases the aliens had their cases adjourned for reasons such as to prepare papers, gather evidence, or present witnesses in support of their claim for relief from deportation, or for EOIR to obtain an interpreter;
- 36 aliens were granted an adjournment to obtain representation (this was at least the second adjournment for 13 aliens to get representation); and
- 8 aliens had their hearings proceed without representation after having been given at least one opportunity to obtain representation at one of their prior hearings, according to the judges.

According to the Chief Immigration Judge, when aliens were not represented, the immigration judges' statutory responsibility as a special inquiry officer had more significance. We noted that the immigration judges provided explanations to the aliens of their rights and of possible consequences under the law of adverse rulings. For example, in one case, an alien, prior to his deportation hearing, chose not to be represented and did not contest his deportation. While the judge was explaining the deportation process to the alien, the judge noted that the alien might have been a legal resident. The judge suggested that the alien get representation because the alien might be eligible to obtain relief from deportation. The alien declined, and the hearing proceeded. We noted other cases in which the judges took steps to assist unrepresented aliens in understanding their rights.

To assist aliens in obtaining representation, the immigration judges gave them a list of individuals and organizations who may be willing to provide free or nominally priced legal services. Regulations require INS to maintain current and accurate lists of qualified organizations. However, when we reviewed the lists for six of the seven prisons, we found that four of the five lists contained either inaccurate or outdated information.[3] Of the 36 organizations listed in the five lists, 11 said that they would represent criminal aliens and 16 said they would not. We could not reach the other nine organizations by phone because the phone was not in service or no one answered after several attempts. We discussed these problems with the lists with an INS Deputy Assistant Commissioner for Investigations. He issued a written reminder on February 9, 1990, to the appropriate officials about providing accurate and current lists of legal services. We did not follow up on the results of his reminder.

According to the Chief Immigration Judge, his office sends its own list, which is separate from INS' list of possible providers of legal services, to aliens at the same time it notifies them of their scheduled deportation hearing. These lists are specific for each prison and EOIR updates them annually. He added that the prospective providers are contacted in advance to determine if they will be willing to represent aliens who are in prison. He pointed out that sometimes the representative (1) may initially agree but later may not be able to assist the incarcerated aliens or decide not to represent criminal aliens or (2) may decide the alien does

[3]In two prisons, the same list was used. At one prison we did not obtain the list because the aliens at the hearings waived their right to representation and thus did not need a list.

not qualify for free or low cost services. We did not try to determine if the aliens received these lists.

Location of aliens at prisons that are not near population centers could affect their ability to obtain representation. The Chief Immigration Judge recognized this potential problem and said that, where practical, selecting centrally located, larger prisons for deportation hearings may help aliens locate representatives.

Notification of Charges

Generally, immigration judges gave aliens the opportunity to hear the charges against them. At 81 hearings, the judges read and explained the charges INS had brought against the aliens. At 28 hearings, the aliens or their representatives waived the reading of the charges. The immigration judges did not read the charges in 62 hearings we attended. For 40 of the 62 hearings, the alien had another hearing at which time the charges could have been read, but we were not present. For 21 hearings, the aliens' cases were adjourned so that representation or an interpreter could be obtained. In one hearing, the case was closed because the alien was being released from prison.

Use of Interpreters

Interpreters were present when the aliens or their representatives requested them or when in the judges' opinion they were needed. Unless the aliens wanted their hearings in English, none of the hearings proceeded without interpreters when the aliens' native language was not English. In these instances, the judges reminded them that the interpreters were present to assist if the aliens had difficulty communicating or understanding the hearing. At two hearings in which interpreters were not present when they were needed, the hearings were adjourned so that EOIR could provide interpreters.

Right to Present and Examine Evidence

In 102 of 171 cases, the judges informed the aliens of their right to present and examine evidence (including cross-examining witnesses) during their explanation of the deportation process. In 13 additional cases, aliens presented evidence to contest their deportation. For example, aliens presented evidence of an appeal of their criminal convictions or their claim of U.S. citizenship. In 56 hearings, the judge did not inform aliens of their right to present and examine evidence when we were present. However, 43 of the 56 aliens had representation and 12 had their hearing adjourned to obtain representation or to have EOIR obtain an interpreter. The remaining alien waived the right to be represented at

the hearing. The alien had a previous hearing in which the judge may have explained this right to him.

Right to Apply for Relief From Deportation

Aliens subject to deportation may apply for relief from deportation on several grounds—political asylum, for example. The judges informed them of their right to apply for relief when the aliens appeared eligible to apply. In addition to informing aliens of their right to apply for relief, the judges usually gave unrepresented aliens guidance as to the type of relief they could request if they appeared eligible to apply. However, the judges generally did not inform aliens of their right to file for relief when none was apparently available. For example, the judges generally did not inform aliens of possible relief if they were convicted of crimes of moral turpitude, drug violations, or aggravated felonies and were in the United States illegally, because these aliens generally are not eligible for relief from deportation.

During several hearings, the immigration judges asked the aliens questions to determine if any basis existed for granting relief from deportation. For example, one immigration judge asked unrepresented aliens, just prior to rendering his decision, if they feared being deported to the country they designated. The judge told us he did this to assure himself that he was not ordering aliens sent to life-threatening situations. In response to his question, none of the aliens said that they feared going to the country they designated.

Right to Appeal

For the 76 cases in which the judges ordered the alien deported, they informed the aliens of their right to appeal the decision. Of the 76 cases, 14 aliens reserved their right to appeal, and 62 aliens waived it.

Conclusions

In our opinion, the immigration judges took the necessary steps to inform aliens of their rights provided by the law for the 171 hearings we attended. Because some of the aliens needed to pursue these rights outside of the hearings we attended, we do not know if each of the 171 aliens was able to take advantage of these rights.

We identified errors in INS' lists of possible representatives it gave to aliens. INS addressed the problem when it issued a reminder to appropriate officials to keep accurate and updated lists, which we considered to be an adequate response. Since EOIR provides its own list to aliens, they may have an additional source from which to obtain representation.

Locations of the prisons used for deportation hearings could affect some aspects of the process. For example, aliens may have more difficulty arranging for representation when imprisoned in isolated areas. Having deportation hearings at selected state and federal prisons that are near population centers is one way of facilitating aliens' access to representatives.

Copies of this report are being sent to the Attorney General; the Director, Office of Management and Budget; and other interested parties. Other major contributors to this report are listed in appendix II. If you have any questions about the contents of this report, please call me at 275-8389.

Lowell Dodge
Director, Administration
of Justice Issues

Contents

Abbreviations

EOIR	Executive Office for Immigration Review
INS	Immigration and Naturalization Service

Objectives, Scope, and Methodology

Section 7347 (e)(2) of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 1501) requires the Comptroller General to report to the Committees on the Judiciary of the House of Representatives and of the Senate concerning the extent to which deportation proceedings held in prisons for aliens convicted of aggravated felonies may adversely affect their ability to contest deportation effectively. Neither the act nor the legislative history defined criteria for determining whether aliens are able to "effectively" contest deportation. Therefore, we drew criteria from the Immigration and Nationality Act, which affords aliens certain procedural rights, and evaluated the process that the immigration judges used to ensure that aliens were afforded these rights.

We attended 171 deportation hearings either in part or in their entirety between November 1989 and January 1990. These hearings were held at five state and two federal prisons. We focused on the procedures immigration judges use to afford aliens the rights to which they are legally entitled. Accordingly, we tried to determine if the judges provided aliens (1) the opportunity to be represented by counsel, (2) notice of the charges against them, (3) the opportunity to examine and present evidence, (4) an interpreter when needed, and (5) notice of their rights to apply for relief from deportation and appeal adverse decisions. Our review had several limitations:

- First, we were not present for all the hearings when more than one was required to complete the process. This occurred for 125 aliens. The deportation process can either be concluded at the aliens' first hearing, or the process can take a number of hearings to conclude. For example, hearings can be adjourned to provide the aliens time to obtain representation or evidence. However, we stayed for the entire proceeding for those hearings we attended. We did not attend all of the hearings for 125 cases because they were held before or after the period we set aside to attend hearings. While deportation hearings are recorded on audiotape, they are transcribed only if the decision is appealed to EOIR's Board of Immigration Appeals. We did not review transcripts of appealed cases or listen to tapes because of time constraints. Therefore, we were unable to determine what transpired at other hearings involving those 125 cases.
- Second, we focused on the portion of the deportation process that took place at the hearings we attended. We could not assess whether aliens, having been advised of their rights at one stage of the process, were able to actually take advantage of them in preparation for the next stage. For example, we did not attempt to determine whether aliens granted an adjournment for the purpose of obtaining representation (1) were able to and (2) did contact and consult with representatives.

- Third, at the time of our review, EOIR held relatively few deportation hearings for aliens convicted of aggravated felonies because of the newness of the Anti-Drug Abuse Act of 1988. Of the 171 hearings we attended, only 15 were for aliens convicted of aggravated felonies. As a result of the 1988 act, hearings for aggravated felons were incorporated into the institutional hearing program with no difference in procedures. Therefore, our analysis included the deportation hearings of the 156 aliens under the institutional hearing program.
- Fourth, since we did not randomly sample prisons or hearings, our results are not projectable to other hearings at the seven institutions or elsewhere.
- Fifth, while our presence at these hearings may have affected what took place, we have no way of knowing exactly how and to what extent.

We attended hearings and held discussions with immigration judges at two federal institutions—La Tuna Federal Correctional Institution (Texas) and the Federal Detention Center (Louisiana) —and at five state institutions—Richard J. Donovan Correctional Facility (California), Florida State Prison, Martin Correctional Institution and Work Camp (Florida), Stateville Correctional Center (Illinois), and Downstate Correctional Facility (New York). The two federal institutions are the only federal prisons used for deportation hearings of aliens convicted of federal crimes.

We selected the state institutions because they are located in four of the five states that have the largest alien populations. We excluded state institutions from one of the five states, Texas, because we attended deportation hearings at a federal institution located there. We selected the specific hearings to attend on the basis of when they were scheduled and our ability to attend them. In addition, EOIR provided input into our selection of institutions. According to an EOIR official, these seven institutions are not unique. EOIR also informed its field offices which hearing we would attend.

We did not question or evaluate any of the judges' specific decisions. We did not evaluate the qualifications of the interpreters or the quality and accuracy of translations. We discussed our methodology for collecting data with EOIR and groups representing aliens, and their comments were considered in its development.

In discussing the scope and methodology with the committees, they concurred with our approach. We discussed the hearing process with representatives of EOIR, including immigration judges, and INS.

We discussed the report with EOIR officials, who said that it was fair and balanced. Their views were incorporated where appropriate. Our review was done between September 1989 and April 1990 using generally accepted government auditing standards.

Major Contributors to This Report

General Government Division, Washington, D.C.	James M. Blume, Assistant Director, Administration of Justice Issues Lynda L. Hemby, Typist
New York Regional Office	Michael P. Savino, Regional Management Representative George P. Cullen, Senior Evaluator Rosemary K. Garner, Staff Evaluator
Office of General Counsel	Ann H. Finley, Senior Attorney

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