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Hearing on Shortfalls of the 1996 Immigration Reform Legislation

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Madam Chairman Lofgren, Ranking Member King, and members of the Subcommittee:

Thank you for the opportunity to appear before you this morning. My name is Hiroshi Motomura. I am a professor at the University of North Carolina School of Law in Chapel Hill, and I have been teaching and writing about immigration and citizenship law for the past twenty years.

Rather than go topic-by-topic through the 1996 immigration legislation, I might best contribute to the subcommittee's work by suggesting broader ways to evaluate the 1996 Act. From this perspective, I have two main points, which I'll state briefly and then elaborate.

First, enforcement is an important aspect of the rule of law, but an enforcement-*only* approach creates some real problems that actually undermine the rule of law. Second, any evaluation of the 1996 Act needs to look closely at its impact on U.S. citizens.

Enforcement and the rule of law. Proponents of the 1996 Act have explained its emphasis on enforcement as an effort to uphold the rule of law. The idea was that any noncitizen who is in the United States unlawfully undermines the rule of law simply by being here. Or that any lawfully present noncitizen who becomes deportable undermines the rule of law by contesting his removal. And so, for example, the 1996 Act limited the availability of discretionary relief, introduced mandatory detention under INA § 236(c), and severely curtailed access to the courts. It introduced new inadmissibility and deportability grounds, and it made existing grounds much harsher.

Real problems arise from thinking that the rule of law is about enforcement *only*. An immigration system that respects the rule of law needs to include not only enforcement, but also at least three other essentials of the American legal system: (1) discretion subject to legal standards, (2) decisionmaking that is based on expertise but

subject to checks and balances, and (3) due process. I'll address them roughly in that order but also show how they overlap.

Discretion subject to legal standards. Discretion historically has played a large role in immigration law.[1] In fact, the history of immigration law is one of blanket rules that are fine-tuned in practice through various types of discretionary decisions. In the 100 years up to 1996, the general trend was to move away from unreviewable exercise of discretion outside the law toward the sort of discretion that respects the rule of law.

To illustrate what I mean by discretion outside the law, consider the emergence in the early 20th century of labor migration from Mexico in patterns that persist today. Much of this migration, whether legal or not, was invited by labor recruitment with the cooperation of the U.S. government. Immigration law enforcement against Mexican immigrants was largely discretionary, but this discretion was not benign. Mexican workers were welcomed when the economy needed them, but deported when they became expendable.[2]

Gradually, discretion took a different shape that reflected the rule of law. Rather than discretion being unreviewable and arbitrary, it was channeled into formal mechanisms for case-by-case discretionary relief, including suspension of deportation and adjustment of status. At first, these forms of discretionary relief were limited to European and Canadian immigrants, but gradually they became generally available.[3] The result by 1996 was a body of law with broad categories for admission and expulsion that were tempered by discretion to reach fair results in individual circumstances.

Against this background, the 1996 Act's approach to discretion undermined the rule of law in two ways. First, it reduced opportunities to reach fair case-by-case results using the sort of discretion that was subject to legal standards and a system of review that minimized mistakes and fostered uniformity. For example, the 1996 Act curtailed eligibility for discretionary relief under the new cancellation of removal provisions in § 240A, and it provided for mandatory detention under INA § 236(c).

Because this sort of discretion within the rule was reduced, a number of problems have arisen. Some are fiscal—consider the tremendous cost of mandatory detention—but other problems directly undermine the rule of law. Detaining individuals makes it much harder for them to obtain counsel. As long as immigration law violations are civil violations, there is no constitutional right to appointed counsel, so detainees must either pay for counsel or rely on pro bono counsel. Pro bono counsel is hard to find in the

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[1] See Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 176-80 (Oxford Univ. Press 2006).

[2] See Kitty Calavita, The Immigration Policy Debate: Critical Analysis and Future Options, in Mexican Migration to the United States: Origins, Consequences, and Policy Options 151, 155–59 (W. Cornelius & J. Bustamante, eds., 1989).

[3] See Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (Princeton Univ. Press 2005); Mae M. Ngai, The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965, 21 Law & Hist. Rev. 69, 103 (2003); Mae M. Ngai, The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924, 86 J. Am. Hist. 67 (1999).

remote locales of many detention facilities. Paid counsel is hard to retain if the detainee can't work. Many detention facilities lack adequate access to telephones and legal materials.

When we severely impair access to counsel in this way, we don't know what errors are being made in applying immigration law to a given individual. We don't know if he would have a meritorious case for relief from removal. We don't even know if he is a U.S. citizen. A system that cannot have confidence in its accuracy is a system that undermines respect for the rule of law.

At the same time as the 1996 Act reduced the sort of discretion that can enhance the rule of law, it undermined the rule of law in a second way. The Act enlarged opportunities for the government to make discretionary decisions that are outside the rule of law, in that they aren't subject to legal standards or meaningful administrative or judicial review.[4] An example is waivers of the 3/10-year bars in INA § 212(a)(9)(B)(i)(I) and (II). The breakup of the Immigration and Naturalization Service into separate service and enforcement agencies reduced the likelihood that the agency's service orientation would temper its enforcement decisions. Moreover, the 1996 Act severely reduced judicial review in key categories of cases, including many discretionary denials of relief and discretionary decisions to commence proceedings, adjudicate, or execute removal orders.

Decisionmaking authority. The lack of meaningful review is a problem not only for discretionary decisions, but also for several types of unreviewable enforcement decisions that the 1996 Act gave to low-level officials rather than immigration judges. In other words, the general problem is that the 1996 Act damaged immigration decisionmaking. Three examples are expedited removal under § 235(b), administrative removal of noncitizens with criminal convictions under § 238, and reinstatement of removal under § 241(b)(5).

In theory, these three mechanisms apply only to persons who seem to lack defenses to removal. But often the question is whether any individual is really such a person. These provisions eliminate the procedural protections afforded in immigration court. Some essential protections would come from immigration judge supervision. Counsel for the noncitizen would provide other safeguards. As with impaired access to counsel due to mandatory detention, the problem is that these procedural protections are no longer available, so we don't know what mistakes are being made.

Similarly, the problems with lack of judicial review aren't limited to barring review of discretionary decisions. Courts were also cut out of a variety of situations. The 1996 Act tried to eliminate judicial review of removal orders for many noncitizens deportable for criminal convictions. Other provisions curbed injunctions against government agency practices, limited legal challenges to expedited removal, and eliminated automatic stays of removal. Though the U.S. Supreme Court's *St. Cyr*

[4] Even more troubling is this trend's logical extension to unreviewable decisions by state and local officials, and even by private groups.

decision in 2001[5] confirmed that habeas corpus remained available, and the REAL ID Act of 2005 restored judicial review for constitutional claims and questions of law (while purporting to eliminate jurisdiction in habeas corpus),[6] significant judicial review bars remain. All of these bars have been especially troubling because of the parallel reduction in review by the Board of Immigration Appeals.[7]

The 1996 Act pushed decisions away from the locus of expertise in immigration judges down toward lower level decisionmakers such as port of entry inspectors. Other decisions that used to be subject to meaningful judicial review in the federal courts are being pushed down toward immigration judges. Rather than a system that benefits from the synergy of having various decisionmakers apply their expertise to different stages in the process—inspectors, immigration judges, the Board of Immigration Appeals, and then federal judges—some of these actors are being asked to do too much, and others are being asked to do too little. A poor fit between decisionmaking and competence undermines the rule of law.

A related issue is uniformity, which can only be achieved with the key feature of serious administrative and judicial oversight: a body of formal decisions that are reported and accessible to private parties, government agencies, and decisionmakers in similar cases. Law that isn't uniform means unequal treatment. It is also unpredictable and therefore gives inadequate notice.

The overall effect has been a pervasive reduction in the quality of justice and an undermining of the rule of law. This isn't a matter of bad intent or incompetence on the part of inspectors or judges. The problem is a failure of systems, not of individuals. Much more after the 1996 Act than before, we have a system that tolerates a high risk of error. Any system is doomed to make mistakes if we simply hope that they come to light without providing a mechanism to discover them. The real problem is that we don't know how many mistakes are being made.

Due process. Most of the problems with the 1996 Act that I have identified as matters of discretion or decisionmaking can also be considered problems of due process. That would be an accurate way to view how mandatory detention impairs access to counsel, or how cutting off access to courts eliminates the major check on mistakes by agencies and immigration judges. But those aren't the only due process problems with the 1996 Act.

Another due process problem consists of retroactive changes to immigration law. This started long before 1996, but the 1996 Act made it much worse by enacting so many retroactive provisions, especially for crime-related deportability.[8] To be sure, the Supreme Court's *St. Cyr* decision limited retroactivity by confirming that immigration

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[5] 533 U.S. 289 (2001).

[6] Pub. L. 109-13, 119 Stat. 231 (2005).

[7] See Hiroshi Motomura, Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus, 91 Corn. L. Rev. 459, 473-75, 492-93 (2006).

[8] See 1996 Act § 321(b), amending INA § 101(a)(43) (aggravated felony definition applies "regardless of whether the conviction was entered before, on, or after the date of enactment").

law is governed by the general presumption that new laws aren't retroactive unless Congress clearly says so.[9] But the Court confirmed that Congress can pass retroactive immigration laws because deportation is a civil penalty for constitutional purposes, which means that the prohibition on retroactive criminal penalties in the Constitution's Ex Post Facto clause doesn't apply.[10]

As a result, noncitizens are being deported for reasons that had no immigration consequences originally. They never had notice that deportation was possible when, for example, they pled guilty to an offense that was considered too minor to have immigration consequences, but since that time has become a deportable offense. Retroactive immigration laws fail to give the basic notice that due process implies, so that individuals can understand the consequences of their actions and lawyers can give reliable advice.[11] Such notice is a fundamental component of the rule of law.

Effects on U.S. citizens. I now get to my second major point—the effects of the 1996 Act on U.S. citizens—by asking why it is important to understand that the rule of law includes much more than enforcement alone. Perhaps it should be enough to say that our American system of justice is based on the rule of law, and anything that undermines the rule of law is fundamentally corrupting of American justice as a whole.

But there is even more at stake. When we decide how seriously we take the rule of law in the immigration context, the real question is: what mistakes are we willing to tolerate? The 1996 Act moved too far toward believing that mistakes are not being made, or that even if they are, those mistakes are acceptable.

My second major point is to draw attention to who suffers because of these rule-of-law problems. If noncitizens of the United States are the only ones who suffer, that might seem to make the outcome less troubling. It is tempting to think that justice in immigration law can be justice on the cheap. But the real world of immigration law doesn't divide neatly into citizens and aliens. An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child. When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens.

Though I use the rule of law to illustrate the need to show how immigration law decisions affect citizens, once we look through this U.S. citizen lens, further problems with the 1996 Act become clear. One is the cutback in eligibility for cancellation of removal under § 240A. Typically, the noncitizens eligible for this relief must show close connections with U.S. citizens, so severe restrictions on eligibility directly harm those citizens. The same defect is evident in limits on eligibility criteria or adjudication

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[9] See, e.g., United States v. Yacoubian, 24 F.3d 1, 9-10 (9th Cir.1994); Campos v. INS, 16 F.3d 118, 122 (6th Cir.1994).

[10] See Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 593-95 (1952).

[11] A similar problem arises when a detainee is transferred to a facility in a different federal circuit, which may apply different legal rules to the case.

standards for other forms of discretionary relief, such as the failure to consider hardship to U.S. citizen children for the 3/10-year bars in INA § 212(a)(9)(B)(i).

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My two main points today—the rule of law and the effects on U.S. citizens—have particular importance for several reasons. One is that understanding the shortcomings of the 1996 Act isn't just a matter of correcting those specific mistakes. It is also a matter of understanding that an enforcement-only approach undermines the rule of law in a broader sense. This underscores the importance of comprehensive immigration reform.

Another, deeper reason to consider the rule of law and the effects of immigration law decisions on U.S. citizens is that confidence in the immigration law system on the part of immigrants and the U.S. citizens who are closest to them is essential to foster integration of immigrants. And in turn, the integration of immigrants is essential to the long-term success of any immigration policy.

Thank you for inviting me to today's hearing. I look forward to your questions.

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