TESTIMONY OF

Matthew J. O'Brien
Former Immigration Judge

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ON

The Consequences of Catch and Release at the Border

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Chairman Grothman, Ranking Member Garcia and Members of the Committee, it is a privilege to appear before you today and I thank you for the invitation.

My name is Matthew J. O'Brien. I am a former Immigration Judge, a former head of the National Security Division at U.S. Citizenship and Immigration Services (USCIS) and a former Assistant Chief Counsel with U.S. Immigration and Customs Enforcement (ICE). I have also worked as a private bar immigration attorney, including several years at Boston's Hale & Dorr (which is now Wilmer Hale). Altogether, I have approximately three decades of experience working in immigration law and policy. And my perspective is somewhat unique, in that I have acted as counsel to aliens seeking immigration benefits, as well as to the United States.

Today, I hope to shed some light on the current immigration crisis; demonstrate just how dire the situation is; point out some of the myths about immigration enforcement being peddled to the American public; and suggest some ways in which the U.S. can restore order to its borders.

In my experience America's immigration system has been tipped in favor of foreign nationals for decades. However, the flagrant disregard for the provisions of the Immigration and Nationality Act (INA) that has currently become the norm is leading us into a public safety and national security crisis from which the United States may find itself unable to recover.

The terms of the Immigration and Nationality Act (INA) actually mandate that most people encountered by U.S. Customs and Border Protection (CBP) in or near the border zone be ejected from the United States under expedited removal procedures or detained pending further proceedings before the Immigration Court or USCIS. This is not happening and that is the crux of the problem. Accordingly, I would like to make several key points.

First and foremost, the United States needs to end the irresponsible catch and release policies that have become a common feature of border enforcement. Catching immigration violators only to immediately release them accomplishes nothing other than rewarding people who have deliberately broken our immigration laws. And there is absolutely zero reason why we should be rewarding foreign lawbreakers.

Despite consistent claims to the contrary, America's immigration system is not broken. Far from it, in fact. The problem is that too many administrations have simply ignored whatever aspects of the INA they dislike, or find politically inconvenient. And they do so wholly in order to pander to perceived political constituencies, while ignoring the safety, security and economic interests of the wider American public. The current administration has engaged in this deleterious behavior to an unprecedented extent and has essentially chosen to ignore the INA in its entirety.

Our system of immigration controls is broken only if one believes that our borders should be open and that we should actively be involved in trying to solicit foreign nationals to come to the United States. Otherwise, we have a perfectly functional set of immigration laws that are highly effective when the agencies charged with implementing them actually apply them as they were written by Congress. This was repeatedly proven by the Trump administration which employed the statutory tools available to it and reduced illegal migration to record lows, while deporting record numbers of immigration violators apprehended in the interior of the United States.

It is time for those who respect our laws to stop allowing the American people to be misled by spurious claims that our immigration system is somehow broken. Those with the power to do so must force Executive Branch officials to stop deliberately breaking the system in order to achieve their own agendas. Those who ignore America's laws should be held accountable so they know that they engage in lawless behavior at their own peril.

Just as the assertion that our immigration system is broken is a myth, so is the claim being advanced by the Biden Administration that it somehow lacks the authority to deal with the present crisis. The Supreme Court was abundantly clear in its holding in *Trump v. Hawaii,* 585 U.S. _ (2018), that 8 U.S.C. § 1182(f) confers upon the President the authority to close the border in response to a crisis and further noted that the statute, "entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions." Everything that is now happening along the border with Mexico could be stopped with the stroke of a pen if the President were at all interested in stopping it.

Equally pernicious is the notion that immigration to the United States has become a civil rights issue that somehow invokes constitutional considerations. As the Supreme Court noted in both *Matthews v. Diaz*, 426 U.S. 67 (1976), and *Demore v. Kim*, 538 U.S. 510 (2003), "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." And why is that? Because foreign nationals are not members of the American polity. The Court clearly established this, over a century ago in *Ekiu v. United States*, when it opined that, "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe." And the Court reaffirmed this position in *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), when it held that unadmitted, nonresident aliens have no constitutional right of entry into this country. In short, the U.S. is under no obligation to admit any foreigners that it does not wish to admit.

However, we have chosen to act as though people with no connection to the United States are entitled to enter and remain in our nation, solely because they wish to do so. And we have compounded the problem by permitting the limited immigration enforcement in which we engage to be processed through a specialized court that has become so mired in bureaucracy and contradictory procedures that it serves only to enable alien immigration violators who wish to remain in the United States repeated bites at the apple. A common refrain amongst Department of Homeland Security employees is, "It ain't over till the alien wins."

But the fact is, that the Immigration Court, which is now backlogged by at least three million cases need not exist at all. The Supreme Court has again made a definitive pronouncement on this issue, noting in the aforementioned *Ekiu v. United States* that, when it comes to foreign nationals, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress *are* due process of law." (Emphasis added.)

We need to stop treating immigration proceedings as if they are a criminal trial intended to protect the rights of the innocent from the potential for the state to abuse its authority.

Immigration proceedings are a civil, administrative proceeding roughly akin to a driver's license revocation proceeding. They concern the withdrawal of a privilege that can only be granted by the United States, not any right conferred by natural law, common law or statute. And what the state giveth, the state may taketh away, in accordance with the rule of law. After charges are levied by the government and it establishes alienage and removability, the burden shifts to the foreign immigration violator to establish why he/she should not be removed from the United States. And once again, the Supreme Court has been clear and unwavering on this point, noting that:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law, and the provisions of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments have no application.

If the Immigration Court is retained and expanded to deal with the large number of aliens who have been permitted to wander unimpeded into the United States, on the basis of the flimsiest of asylum claims, then the Court must be required to behave in a manner that is more court-like. Currently, there is an uncomfortably close relationship between the management of the Executive Office for Immigration Review (the Department of Justice Agency responsible for overseeing the Immigration Court and the Board of Immigration Appeals) and the American Immigration Lawyers Association (AILA) (the trade association that represents immigration attorneys). AILA is permitted to maintain a liaison at every immigration court – through which it advocates, extrajudicially, in order to influence the decisions of sitting Immigration Judges. This is unconscionable. To the extent that there are bar liaisons in Article III courts dealing with criminal or civil matters, they exist only to address procedural problems, like filings being misdirected or fees that are not properly receipted by clerks. They are not permitted to push for specific decisions in specific cases, because this would undermine the very purpose for conducting trials.

Imagine the outcry from the American taxpayer if an association representing homicide attorneys was permitted to maintain a liaison with a court that tries suspected murderers; and that liaison was actively involved in filing complaints against judges who sustain murder convictions. Nevertheless, this is standard operating procedure in the Immigration Court. AILA attorneys have a direct line of communication to the Assistant Chief Immigration Judge at each Immigration Court, where they freely and regularly attempt to secure relief for their clients outside the bounds of standard Immigration Court procedures.

Moreover, Immigration Judges lack any tools for disciplining attorneys who behave in unethical or otherwise inappropriate ways. The complaint procedure currently in place permits attorneys representing aliens to file a complaint against Immigration Judges for virtually any reason. Once

a complaint is filed Immigration Judges are required to prepare a written response, even when the complaint is bogus on its face. Meanwhile, when an Immigration Judge files a disciplinary complaint against an immigration attorney, that complaint goes into a black hole never again to see the light of day. And action is rarely, if ever, taken to sanction attorneys who have transgressed.

This situation is further complicated by the fact that Immigration Judges are not permitted to exercise the powers of contempt available to judges in other courts. Pursuant to 8 U.S.C. §1229a(b)(1), Congress gave Immigration Judges the "authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter." However, no Attorney General has bothered to prescribe the regulations required under the statue. As a result, Immigration Judges are regularly required to suffer contumelious behavior from immigration attorneys that would result in a severe fine, or temporary incarceration, in most other courts in the United States.

And the diesel fuel being poured incessantly on this dumpster fire is a never-ending stream of bogus asylum claims that are, on their face, utterly meritless. The asylum provisions of the INA were never intended to serve as an EZ-Pass into the United States for anyone who hails from a country where the economic and social conditions do not mirror those of the United States. Rather, they were implemented to ensure that the United States was able to provide refuge to people fleeing genuine religious or political persecution – like, for example, Jews fleeing mistreatment at the hands of the Soviet government.

Generally speaking, an alien can receive asylum or refugee status only if he/she has been subject to persecution on account of race, religion, nationality, political opinion, or membership in a particular social group that is committed at the hands of his/her government or, in very rare circumstances, at the hands of parties the government is unable or unwilling to control. Nobody knows what "membership in a particular social group" means; it is a throw-away phrase utterly bereft of significance. And "parties that a government is unwilling or unable to control" refers solely to situations where a non-governmental group has seized power and assumed the functions of government in an asylum seeker's country. Think of the FARC in Colombia.

However, most of the current crop of asylum claims winding their way through the Immigration Courts consist of assertions that the claimants are members of a particular social group consisting of some overly broad classification such as "victims of crime;" and that they hail from nations that have been taken over by gangs or that are so misogynous they deprive women of all rights. These claims are as offensive as they are absurd. None of the governments in South or Central America have been overthrown by gangs. Virtually all of them have functioning police agencies, courts and corrections systems capable of vindicating the rights of all citizens. (If they don't the United States should not be spending millions of dollars of taxpayer funds on programs like the Overseas Prosecutorial Development, Assistance and Training Program and similar schemes.) Therefore, nearly all of these claims fail to meet the criteria for asylum based on persecution on account of membership in a particular social group at the hands of parties that a foreign government is unable or unwilling to control.

In essence, what asylum seekers who advance these types of asylum requests are doing is asking the Immigration Courts of the United States to function as the district courts for Guatemala, Honduras, El Salvador, etc. This is ridiculous. It undermines the integrity of the Immigration Courts and makes a mockery of our legal system. Domestic violence and gang crime are a scourge upon all the societies where they occur. However, they are crimes that should be handled under the domestic law of the territories where they occur. Sovereign nations, such as those in Central and South America have an obligation to prosecute crimes committed within their dominions and the United States should not be responsible for providing their citizens with redress.

Farcically, however, Immigration Judges have no mechanism for dismissing inappropriate, obviously fraudulent or otherwise spurious asylum claims. In *Matter of Fefe*, 20 I&N Dec. 1126 (BIA 1989), the Board of Immigration Appeals held that Immigration Judges are obligated to hear oral testimony on all asylum applications, even when they are grossly and obviously false or legally insufficient on their face. This runs directly contrary to the principles of judicial economy, and the procedural restrictions, that apply in every other court in the United States. The Immigration Court needs a procedural rule similar to Federal Rule of Civil Procedure 12(b)(6), which permits the dismissal of a case because it fails to specify a claim or controversy upon which relief may be granted.

Finally, I must point out that the current catch and release practices being engaged in by the Department of Homeland Security are not the actions of a government that is serious about enforcing its immigration laws. As every teacher, parent or benevolent aunt/uncle knows, tolerating bad behavior simply encourages more bad behavior. The United States is currently sending a clear message that it does not take its own sovereignty, safety and national security seriously.

Misguided catch and release policies have now allowed millions of alien strangers into our communities without the slightest idea who they are or what their intentions are. Anyone with an ounce of common sense should be able to see that it is now utterly inevitable that we have admitted criminals, terrorists, foreign intelligence operatives and, quite probably, foreign troops who are still actively in the service of our enemies. It is time to stop the endless compounding of errors before it is too late for the United States and insist that order be restored at our borders and throughout our immigration system.

Thank you for permitting me to address this subcommittee.

Respectfully submitted,
Matthew J. O'Brien,
Director of Investigations,
Immigration Reform Law Institute