



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

May 7, 2013

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing on behalf of the Judicial Conference of the United States, the policy-making body for the Federal Judiciary, concerning S. 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act." It is clear that the bill, if enacted, would have serious resource implications for the federal courts. This letter addresses only the resource implications for the federal courts and takes no position on the substantive policy issues contained in S. 744. Although the legislation provides an initial federal outlay of \$6.5 billion¹ to the executive branch to implement provisions of the legislation, the bill does not address the related funding needs of the Federal Judiciary. Without increased resources, the federal courts cannot sustain the increased workload this legislation would create, particularly at sequestration funding levels. Accordingly, I ask you to ensure that the Judiciary has sufficient resources to meet its obligations created by this bill.

S. 744 will increase the workload on the federal courts in three significant ways: (1) by dramatically increasing personnel, resources, and funding for the Department of Homeland Security (DHS) and the Department of Justice (DOJ); (2) through the judicial review provisions; and (3) by adding several new federal crimes and heightening the penalties for the most frequently charged immigration offenses. These efforts will create more cases for an already over-burdened court system that is struggling with nearly \$350 million in sequestration cuts. Judicial resource needs, at a minimum, will include additional judgeships and court staff (including interpreters), probation and pretrial services officers, and federal public defenders, and additional requirements for court security, space and facilities. We therefore respectfully request

¹Section 6 of the bill creates a Comprehensive Immigration Reform Trust Fund, which provides for initial funding of \$6.5 billion transferred from the general fund of the Treasury, and ongoing sources of funding through fees, fines, and penalties deposited in the Fund for future expenditures.

that the legislation be amended to address the resource needs of the Federal Judiciary. These resources should appropriately be funded through the Comprehensive Immigration Reform (CIR) Trust Fund.

Judgeship Needs

Although this legislation provides substantial funding for enforcement of the immigration laws, including significant additional resources for border security, the legislation neglects the demands that will be placed on the federal district courts that must adjudicate these increased enforcement actions.

If left unchanged, this bill will only intensify the stress being experienced by judicial districts already dealing with high caseloads and scarce judicial resources. Since the last comprehensive judgeship legislation was passed in 1990, Article III district courts have experienced a 39 percent growth in caseloads while seeing only a four percent increase in judgeships. This problem has reached critical levels in five district courts, most of which are in states with large numbers of unauthorized immigrants,² including the Eastern District of California, the Eastern District of Texas, the Western District of Texas, and the District of Arizona. The severe workload conditions in these districts already require *immediate* attention. In order to address the dire circumstances in these districts, as well as the *additional* burdens that will be imposed by this bill, Congress must authorize new Article III judgeships.

The Judicial Conference also strongly urges the immediate conversion of the eight temporary judgeships identified in our judgeship recommendations already transmitted to Congress. These eight temporary judgeships are set to lapse before the end of fiscal year 2014. Without conversion, these on-board resources will be lost, increasing the pressure that is being felt in these districts now, many of which currently process some of the largest criminal immigration caseloads in the country.

Provisions Increasing Judicial Workload

Increased workload in the courts would result from the enhanced enforcement efforts directed against those who violate the immigration laws, provisions to provide a pathway to citizenship for unauthorized immigrants, and expanded implementation of the E-Verify system and other issues related to employment practices.

Enforcement

The legislation provides funding for the enhancement of border security operations in the Tucson Sector to be provided from the CIR Trust Fund. The legislation also

²Hoefer, Michael, Nancy Rytina and Bryan C. Baker, 2012 "Estimates of Unauthorized Immigrant Population Residing In the United States: January 2011," Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

includes enforcement provisions that will have national implications. Additional resources are needed in all federal courts affected by this bill.

- **Tucson Sector**

In section 1104 of S. 744, the Secretary of DHS is required to increase the number of border crossing prosecutions in the Tucson Sector of the Southwest Border region to up to 210 prosecutions per day by increasing funding for various law enforcement efforts in Tucson. Such funding would cover increases in personnel for court support staff and interpreters in the district court clerk's office in Tucson, as well as pretrial services and the activities of the federal public defenders office in that location.

The legislation would also authorize the chief judge of the United States District Court for the District of Arizona to appoint full-time magistrate judges, who shall have the authority to hear cases and controversies in the judicial district in which the respective judges are appointed. Pursuant to the Federal Magistrates Act, 28 U.S.C. §§ 631-639, magistrate judge positions are authorized by the Judicial Conference and magistrate judges are appointed by majority vote of the judges of the district court. Creation of magistrate judge positions should follow the current statutory regime.

Although the bill provides some funding for the court in Tucson, it does *not* address all the potential resource needs of the district. First, the legislation does not address the additional costs related to space, facilities, and court security that will result from these increased enforcement efforts.

Second, the legislation does not address costs related to court-appointed representation of defendants by Criminal Justice Act (CJA) panel attorneys and their investigative, expert, and other service providers, who provide services in addition to the Federal Public Defender Organization for the District of Arizona. Sequestration has caused significant layoffs and furloughs for federal defenders and their staff. For example, the Federal Public Defender Organization for the District of Arizona has laid off 10 staff members, including four lawyers in the Tucson office. Anticipated budget constraints for fiscal year 2014 will likely result in additional layoffs of attorneys and staff support in federal defender offices nationwide.

Third, the bill does not authorize additional funding for the probation office in Tucson. Under current Operation Streamline procedures, a presentence report is not prepared by the probation office and there is no supervision that follows sentencing. It is not clear, however, that a presentence report would be waived in cases prosecuted after the bill is enacted. The legislation would increase the statutory penalties for illegal entry offenses changing the classification of these offenses from petty offenses to class A misdemeanors. Such offenses would now be covered under the Sentencing Guidelines and judges may begin requiring probation officers to prepare presentence reports. Each judge would decide the type of report required (each of varying complexity), but a conservative estimate of the probation and pretrial services staffing needed to handle the new workload in Tucson would include an increase in 367 new staff, costing over \$37 million.

The bill provides for the potential tripling of prosecutions in the Tucson Sector; however there is not sufficient court staff, federal public defenders, CJA panel attorneys, probation and pretrial services officers, or physical infrastructure and space to hear these cases or detain defendants at the proposed rate of prosecutions.

- **Nationwide Enforcement**

In addition to the increased enforcement efforts in the Tucson Sector the proposed legislation has national implications. It would add several new grounds of deportability and inadmissibility and also would expand the scope of conduct that can be considered an "aggravated felony." Further, it adds several new federal crimes and heightens the penalty for the most frequently charged immigration offenses which currently make up approximately 30 percent of all federal indictments around the country. These increased penalties and charges will result in a substantial increase in litigation and extend the duration of cases in the system as more defendants will have a right to a jury trial and to have their cases heard before a district court judge. These provisions will have a significant impact on the federal administration of justice and will require substantial additional resources for the Federal Judiciary.

Legalization Programs

Several paths to citizenship are established by the bill, but no one knows how many individuals will apply to legalize their immigration status. Even without firm numbers, the potential docket impact on the federal courts could be significant. Experts often estimate that some 10 to 12 million unauthorized immigrants reside in the United States. Many who qualify will seek to adjust their status, submitting a significant number of new applications that will require administrative review. Even if the administrative process results in a 90-percent approval rate for new applicants, the number of individuals seeking review in the federal courts would be significant. The impact on the Federal Judiciary will be substantial and will affect courts throughout the country over a period of years.³

At any stage in the legalization process, should an alien applicant be denied status, or have their status revoked, there are provisions for appellate administrative review and then subsequent judicial review in the federal courts. Specifically, section 2104 of the bill amends 8 U.S.C. § 1252 by adding a new subsection (h)(1) permitting review in federal district court of eligibility determinations for those seeking Registered Provisional Immigrant (RPI) status, those seeking to change status from RPI to lawful permanent resident (LPR) status, and those who

³We understand that it is difficult to predict with accuracy how many of those who qualify for a legalization program will file applications, and the number will depend, among other factors, on the statutory criteria of legalization, but assuming, as noted above, a ten percent denial rate for those seeking to adjust their status, that could result in a substantial number of new cases filed in the federal courts. For purposes of comparison, in fiscal year 2012, the total number of civil filings in the federal district courts was 278,442. An increase of even 100,000 new cases would have a significant impact.

qualify under the Development, Relief, and Education for Alien Minors (DREAM) Act.⁴ This route to judicial review is governed by section 706 of title 5, United States Code, (Administrative Procedure Act). As is generally true when judicial review of agency decisions is vested in a district court, final decisions of the district court presumably could be further appealed to the courts of appeals. In addition, the legislation would also create a new subsection (h)(3) which would permit aliens whose legalization applications were denied or revoked at any stage to seek judicial review of the legalization determination in the courts of appeals in conjunction with the judicial review of a removal order.

Additional Increased Resources for the Executive Branch

Although the Judiciary is supportive of efforts to enhance resources at the Executive Office for Immigration Review (EOIR), the legislation does not address the resulting increase in the operational needs of the Judiciary, at a time of severely reduced resources and shortfalls in appropriations for the entire federal court system.

Section 3501 would enhance the administrative adjudication of cases pursuant to 8 U.S.C. § 1229a (removal proceedings) within EOIR by providing substantial additional resources. The number of immigration judges would be increased by at least 75 for three consecutive fiscal years (2014, 2015, 2016), thereby nearly doubling the current number of immigration judges (260) in three years. Moreover, the bill provides for at least one staff attorney/law clerk and one legal assistant for each immigration judge, and increases the number of staff attorneys and support staff in the Board of Immigration Appeals (BIA) by at least 30 in fiscal years 2014-2016. Funding for this increase in personnel is to be appropriated from the CIR Trust Fund.

As more cases move through the immigration courts and the BIA, more appeals will be filed in the federal courts. The rate of appeal of decisions of the BIA to the courts of appeals was 25 percent in 2012. In 2005, during a previous major surge in administrative processing of removal proceedings, the rate of appeal from the BIA to the courts of appeals was 30 percent, and appeals from the BIA reached 13,000 cases. Just based on the anticipated increased decisions from the new immigration judges, if rates of appeal from the immigration judges to the BIA and from the BIA to the appellate courts remain at the current rate, the immigration caseload of the appellate courts could more than double, far-exceeding the impact from the 2005 surge.

No additional resources are provided in this bill to the federal courts to handle this increased caseload. The corresponding needs of the Judiciary should be provided from the trust fund, just as the increased resources for EOIR are.

⁴The DREAM Act provides for the adjustment of status for certain aliens who entered the United States as children and who meet other requirements under the proposed legislation, such as meeting certain educational requirements or service in the military.

E-Verify Provisions

The expanded E-Verify program not only contains substantial increases in enforcement resources for DHS, it also provides avenues for federal court review. Individuals having their work authorization verified and employers who are charged with violating the verification and other provisions are entitled to judicial review of final administrative decisions. Funding is not, however, provided to meet any of these new demands placed upon the Federal Judiciary.

Section 3301 of S. 744 establishes an "Interior Enforcement Account," and authorizes \$1 billion to be appropriated to the account. Among other priorities, the funding is to be used to increase "to a level not less than 5,000" over five years, the number of personnel in the DHS dedicated to administering the electronic employment verification (E-Verify) system. In addition, the funding will be used to monitor and enforce compliance with various sections of the Immigration and Nationality Act including compliance with the requirements of the E-Verify system. These additional resources will also likely result in an increase in the caseload of the federal courts.

Section 3101 would expand the current use of the E-Verify system and, over a period of years, mandate that all employers in the United States participate in the system to verify the work authorization status of those seeking employment. The legislation would permit employers who are facing civil penalties for violations of the employment verification provisions to seek review before an administrative law judge (ALJ) and seek review of the ALJ's final decision in an appropriate court of appeals. Although current law permits employers to seek judicial review of sanctions, the bill increases fines and penalties for employment-related violations, potentially increasing the rate of appeal.

In addition, the legislation would permit individuals who receive a nonconfirmation notice to file an administrative appeal with either the Commissioner of Social Security or the Secretary of DHS. Individuals are further permitted to seek review of a final determination by the Secretary or the Commissioner by filing a complaint with an ALJ. Any person adversely affected by a final order of the ALJ may seek review of such order in an appropriate court of appeals. The legislation also specifies that necessary appropriations are to be provided to establish a "robust process" for employees who wish to appeal contested nonconfirmations to ensure the accuracy and fairness of the E-Verify system.

Other enforcement provisions, such as increased criminal penalties related to the unlawful employment of unauthorized aliens could also increase the workload of the federal district and appellate courts.

Conclusion

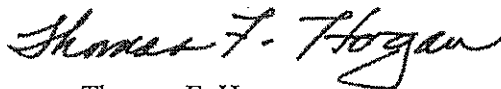
In closing, I cannot express strongly enough the current resource challenges facing the Federal Judiciary under existing caseloads and sequestration. The bill will significantly exacerbate those challenges. While the Judiciary stands ready to meet the obligations imposed

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by the legislation, and fulfill all of its constitutionally mandated responsibilities, it cannot do so without Congress providing the necessary resources. We reiterate our request that the legislation be amended to address the Judiciary's resource needs.⁵

The relevant Conference committees have been asked to review the bill in greater detail, and any additional concerns or issues that may be identified will be communicated as soon as their review is complete. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at (202) 502-1700.

Sincerely,



Thomas F. Hogan
Secretary

cc: Republican Members of the Senate Committee on the Judiciary

Identical letter sent to: Honorable Patrick J. Leahy

⁵As the bill continues to be refined through the legislative process, we also hope to work with Congress to make appropriate technical and administrative improvements. For example, the Judicial Conference has previously transmitted to Congress a proposal to help eliminate unnecessary federal bail reports. Bail reports are currently required by law even in some situations where release from custody is impossible because of an immigration detention. Elimination of this requirement would improve the administration of justice and save needed resources.