



U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 26, 2016

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Demore v. Kim*, S. Ct. No. 01-1491

Dear Mr. Harris:

This letter is submitted in order to correct and clarify statements the government made in its submissions in *Demore v. Kim*, 538 U.S. 510 (2002), which this Court relied upon in its opinion. *Demore* is relevant to *Jennings v. Rodriguez*, No. 15-1204 (cert. granted June 20, 2016).

In *Demore*, the government's briefs cited statistics the Executive Office for Immigration Review (EOIR) provided to this Office, in a chart, regarding its adjudication of removal proceedings for criminal aliens who had been charged with offenses triggering mandatory detention under 8 U.S.C. 1226(c) in fiscal year 2001. See Pet. Br. 39-40 & n.17; Reply Br. 16. This Office provided the statistics to respondent's counsel in *Demore*.

The government's opening brief stated that, "in cases where the alien is charged with being removable on grounds that trigger mandatory detention under Section 1226(c), its immigration judges complete removal proceedings in an average time of 47 days and a median time of 30 days." Pet. Br. 39. The government's reply brief stated that, "only about 15% of removal orders entered by IJs against criminal aliens are appealed" and that, "in the 85% of cases in which no appeal is taken," removal proceedings are completed in "47 days on average." Reply Br. 16. The government's opening brief also stated that the average and median times for the Board of Immigration Appeals to resolve an appeal were "approximately four months" and 114 days, respectively. Pet. Br. 40.¹

The Court relied upon the government's representations to support the proposition that, "in the majority of cases," detention under Section 1226(c) "lasts for less than * * * 90 days." *Demore*, 538 U.S. at 529. The Court stated that "[EOIR] has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days." *Ibid.* (citing Pet. Br. 39-40). The Court further stated that, "[i]n the remaining 15% of cases, in which the alien appeals the decision of the

¹ The quoted figures were for fiscal year 2001, and only counted aliens in immigration detention, not aliens who were still in criminal custody. *Demore*, 538 U.S. at 529; see Pet. Br. 40 n.17.

immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.” 538 U.S. at 529 (citing Pet. Br. 40).

EOIR recently reviewed the statistics it provided to this Office in *Demore*, and that the government provided to the Court and the respondent. The General Counsel of EOIR has informed me that EOIR made several significant errors in calculating those figures. The errors are explained more fully in a letter from the General Counsel to the Acting Solicitor General, enclosed here.

EOIR’s letter states that, as a result of these errors, its original query missed more than 15,000 cases that should have been counted. EOIR has performed a new statistical analysis calculating that the average and median completion times for aliens in immigration custody charged with offenses triggering mandatory detention under Section 1226(c), where there was no appeal, should have been 34 days and 15 days, respectively (not 47 and 30 days, respectively). Furthermore, according to EOIR’s new calculations, the average and median times for disposition of an appeal to the BIA should have been 141 days and 119 days, respectively (not “approximately four months” and 114 days, respectively, Pet. Br. 40).

EOIR’s letter also states that, at the time of *Demore*, it used a definition of “completion” of cases by immigration judges that it subsequently changed. EOIR’s definition of “completion” at the time included a change of venue or case transfer, as EOIR principally used its database to measure the workload of its immigration courts. See EOIR, *Statistical Yearbook 2000*, at 11 (Mar. 2001).² That definition is unsuitable, however, when measuring the duration of an individual alien’s removal proceedings (and his or her detention during that time). Both the government’s brief and this Court’s opinion accurately state that the figures indicate when the case was “completed” given that definition. See 538 U.S. at 529, Pet. Br. 39-40. But, as a result, we assume this Court labored under the misapprehension that the figures represented how long the alien was in removal proceedings (and thus detention), rather than how long an individual immigration judge was working on each case. EOIR’s has since revised its definition of “completion.” It now excludes changes of venue and transfers, and its statistics thus now represent the duration of an individual’s case. EOIR states in the attached letter that, using the new definition, the average and median completion times given above, for fiscal year 2001, would be 39 days (instead of 34) and the median would be 14 days (instead of 15).

The General Counsel’s letter apologizes for EOIR’s errors and their late discovery. The letter also states that, since 2001, EOIR has added internal controls to prevent similar errors from happening again.

Finally, this Court stated in *Demore* that, in cases in which the alien chose to appeal, the time of detention was “about five months.” 538 U.S. at 530. The Court’s opinion indicates that it drew that conclusion by adding (1) EOIR’s calculation that, “in 85% of cases in which aliens are

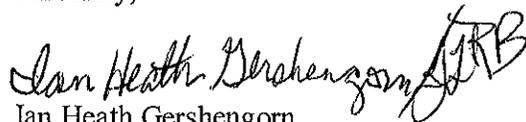
² <https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf>.

detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days”; and (2) that, “[i]n the remaining 15% of cases, in which the alien appeals the decision of the immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.” 538 U.S. at 529 (citing Pet. Br. 39-40); see Pet. Br. 40; Reply Br. 17. The conclusion the Court drew is understandable, but it is incorrect. An implicit assumption of adding the two figures together is that the immigration-judge stage of the proceedings itself typically lasted the same amount of time in cases that were later appealed as in cases where no appeal was taken. In fact, the immigration-judge stage was typically considerably longer in cases where there was later an appeal. The chart EOIR furnished to this Office at the time of *Demore* stated that the average and median times for the immigration-judge stage alone in cases where there was an appeal were 113 and 89 days, respectively, and that the total time between the filing of charges with the Immigration Court and the BIA’s completion in appealed cases was 233 and 221 days, respectively. The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal, using the definition of “completion” EOIR used at the time of *Demore*. The government’s briefs did not separately flag these statistics for this category of cases, or say that the average and median times specifically for cases where there was later an appeal were not 47 and 30 days, respectively.

This Court’s opinion cites figures that “EOIR ha[d] calculated,” 538 U.S. at 529, and those are, in fact, the figures EOIR had calculated, albeit incorrectly. The corrected calculations also do not alter the proposition that, “in the majority of cases,” detention lasts “for less than * * * 90 days.” *Ibid*. It turns out that EOIR’s corrected calculations still indicate that the vast majority of cases were not appealed, and yield average and median completion times in non-appealed cases in 2001 that were shorter than originally calculated, regardless of which definition of “completion” is used. The times to resolve administrative appeals, however, were somewhat underestimated. But the clause in the Court’s opinion stating, “, and about five months in the minority of cases in which the alien chooses to appeal,” 538 U.S. at 530, was incorrect on the basis of EOIR’s statistics at the time. The Court therefore may wish to amend its opinion to delete that clause.

The government recognizes its special obligation to provide this Court with reliable and accurate information at all times. The government sought to carry out that obligation in good faith in this case, and we greatly regret the necessity for this letter. Please circulate copies of this letter to the Members of this Court.

Sincerely,


Ian Heath Gershengorn
Acting Solicitor General

cc: See Attached Service List



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

General Counsel

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 20530

August 25, 2016

Ian Heath Gershengorn
Acting Solicitor General
Office of the Solicitor General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Statistics provided by the Executive Office for Immigration Review in
the case of *Demore v. Kim*, 538 U.S. 510 (2003)

Dear Acting Solicitor General Gershengorn,

We are writing to inform you that the Executive Office for Immigration Review (EOIR) recently discovered that it made significant errors in generating statistics that it provided to the Solicitor General's office in connection with the case of *Demore v. Kim*, 538 U.S. 510, 530–31 (2003), upon which the Solicitor General relied. As more fully explained below, EOIR overestimated the average and median length of removal proceedings before an immigration judge for aliens in immigration custody who were charged with being removable on grounds that trigger mandatory detention under Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. § 1226(c). EOIR also underestimated the time for appeals to the Board of Immigration Appeals (BIA). The original and corrected statistics are attached.

The Government's brief to the Court in *Demore* stated that "[EOIR] has calculated that, in cases where the alien is charged with being removable on grounds that trigger mandatory detention under Section 1226(c), its immigration judges complete removal proceedings in an average time of 47 days and a median time of 30 days, both far below the six-month period that this Court determined was presumptively reasonable for detention after a final order of removal" in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Brief of Petitioner at *39, *Demore v. Kim*, (No. 01-1491) 2002 WL 31016560. The Court referred to the statistics at issue in its decision in *Demore*, stating that, "in the majority of cases [detention] lasts for less than . . . 90 days," and that EOIR had calculated that, in the 85% of cases where there is no appeal and the alien is in immigration detention, "removal proceedings are completed in an average time of 47 days and a median of 30 days." *Demore, supra* at 529. The Court further stated that "[i]n the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter." *Id.* These figures reflected calculations for fiscal year 2001, and were drawn from a chart of data

from fiscal year 1999 through 2001 that EOIR provided to the Solicitor General's office at the time of *Demore*, which is attached.¹

EOIR reviewed the statistics it furnished and found serious errors in the query of its data it undertook at the time. The most significant miscalculation discovered was the inadvertent exclusion of cases in which an individual was charged with only one ground of removal that would have subjected the individual to mandatory detention under Section 1226(c); the figures inadvertently included only aliens who were charged with multiple grounds of removal. An alien charged with a single aggravated felony, for example, should have been counted but was not. In addition, although the search correctly included a charge of inadmissibility under 8 U.S.C. § 1182(a)(2), in practice aliens are actually charged under one of its many subsections, such as 1182(a)(2)(A)(i) (crimes of moral turpitude) and 1182(a)(2)(B) (multiple criminal convictions). The query, however, failed to identify and count aliens charged under a particular subsection. The result was that the individuals charged under those subsections should have been included, but were not. These errors resulted in the exclusion of more than 15,000 cases in the analysis of immigration court completions for cases of aliens detained in immigration custody who were subject to mandatory detention under Section 1226(c) and who did not file an appeal.

Upon the discovery of these errors, EOIR engaged in a new statistical analysis of the electronic data it maintains for fiscal year 1999 through 2001. This new analysis corrected the earlier data errors in order to produce accurate information for those years regarding the length of removal proceedings for aliens subject to mandatory detention under Section 1226(c). According to the new calculations, cases completed in Fiscal Year 2001 in which aliens were charged with grounds of removability and inadmissibility that subjected them to detention pursuant to 8 U.S.C. § 1226(c), and where the alien was in immigration detention and there was no appeal, were completed in an average time of 34 days and a median of 15 days. For cases in which an appeal was filed, the appeal took an average of 141 days, with a median of 119 days. Please note that the length of appeal time measures the time between when a party files a notice of appeal with the Board of Immigration Appeals (BIA) and when the BIA renders a decision on that appeal. Consequently, as a result of the error, EOIR overestimated the average and median length of time of a removal proceeding before an immigration judge involving an individual charged with removability grounds that would subject him or her to mandatory detention under Section 1226(c). EOIR underestimated the average and median length of time for disposition of appeals to the BIA.

EOIR has updated the chart provided in 2002 with the results of the corrected statistical queries. This chart includes charges that subject an alien to mandatory detention.² The data use the definition of case "completions" that was used by EOIR for all statistical queries at the time of *Demore* so that it can be compared to the original chart. That definition included change of

¹ These charts encompass only aliens in removal proceedings conducted by EOIR, and not aliens in expedited removal proceedings conducted by the Department of Homeland Security under 8 U.S.C. 1225(b) or 1228.

² The charges are listed in the updated chart. It does not include a charge under 8 U.S.C. 1227(a)(2)(A)(i). That charge triggers mandatory detention only if the alien's sentence for that offense was at least one year, 8 U.S.C. 1226(c)(1)(C), and EOIR's data do not track the length of an alien's underlying sentence.

venue and case transfers as completions, as EOIR principally used the database to measure the performance of its immigration court. In 2013, EOIR developed a new methodology for its statistical reports, which excluded change of venue and case transfers as case completions. When applied to the data for 2001, the change in the definition of “completions” decreases the number of cases by 6%, increases the average time to 39 days (from 34), and decreases the median to 14 days (from 15).

We hope that you understand the seriousness with which we take the integrity of the agency’s data and apologize for the significance of these errors and their late discovery. In the years since 2001, EOIR has added internal control mechanisms to ensure that errors of this sort do not happen again.

Sincerely,

A handwritten signature in black ink, appearing to read 'JK' followed by a flourish.

Jean C. King
General Counsel

Attachment

U.S. Department of Justice
Executive Office For Immigration Review

**Immigration Court Completions
Detained IHP Cases for Specific Charges***

OCIJ COMPLETIONS (for which no appeal was filed)								
FY	Total Cases Not Appealed	Of Total, % Over Six (6) Months from Receipt to IJ Completion	Court Processing Time In Days For Total Cases				Of Total Case Not Appealed, Number Granted Relief	% of Total Cases Not Appealed
			Average		Median			
			Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion	Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion		
1999	2,848	11%	87	160	62	113	15	0.5%
2000	2,889	25%	107	203	94	159	17	0.6%
2001	2,489	25%	120	232	95	154	15	0.6%

**Immigration Court Completions
Detained Non-IHP Cases for Specific Charges***

OCIJ COMPLETIONS (for which no appeal was filed)								
FY	Total Cases Not Appealed	Of Total, % Over Six (6) Months from Receipt to IJ Completion	Court Processing Time In Days For Total Cases				Of Total Case Not Appealed, Number Granted Relief	% of Total Cases Not Appealed
			Average		Median			
			Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion	Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion		
1999	4,675	2%	31	127	20	71	214	4.6%
2000	4,148	6%	44	186	26	100	234	5.6%
2001	3,871	16%	47	210	30	98	255	6.7%

¹In some instances, there is a significant period of time between issuance of the charging document by INS, and filing the charging document with EOIR. This column measures the full length of time between issuance of the charging document and the IJ completion even though the case is not within EOIR's jurisdiction until the charging document is filed with EOIR.

U.S. Department of Justice
 Executive Office For Immigration Review
 Immigration Court Completions
 Detained IHP Cases for Specific Charges*

OCIJ COMPLETIONS (for which an appeal was subsequently filed)					
FY	Of Total, % Over Six (6) Months from Receipt to IJ Completion	Processing Time In Days For Total Cases			
		Average		Median	
		Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion	Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion
1999	23%	137	211	120	170
2000	43%	195	284	162	217
2001	42%	196	295	162	215

Immigration Court Completions
 Detained Non-IHP Cases for Specific Charges*

OCIJ COMPLETIONS (for which an appeal was subsequently filed)					
FY	Of Total, % Over Six (6) Months from Receipt to IJ Completion	Processing Time In Days For Total Cases			
		Average		Median	
		Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion	Receipt to IJ Completion	¹ Date of Charging Document to IJ Completion
1999	6%	75	176	56	119
2000	16%	103	257	77	179
2001	16%	113	313	89	210

¹In some instances, there is a significant period of time between issuance of the charging document by INS, and filing the charging document with EOIR. This column measures the full length of time between issuance of the charging document and the IJ completion even though the case is not within EOIR's jurisdiction until the charging document is filed with EOIR.

U.S. Department of Justice
 Executive Office For Immigration Review
Board of Immigration Appeals Completions
Detained IHP Cases for Specific Charges*

BIA COMPLETIONS					
FY	Of Total, % Over Six (6) Months from OCIJ Receipt to BIA Decision	Processing Time In Days For Total Cases			
		Average		Median	
		Date of Appeal to BIA Decision	OCIJ Receipt to BIA Decision	Date of Appeal to BIA Decision	OCIJ Receipt to BIA Decision
1999	91%	149	325	141	295
2000	95%	150	396	151	357
2001	85%	114	337	105	303

Board of Immigration Appeals Completions
Detained Non-IHP Cases for Specific Charges*

BIA COMPLETIONS					
FY	Of Total, % Over Six (6) Months from OCIJ Receipt to BIA Decision	Processing Time In Days For Total Cases			
		Average		Median	
		Date of Appeal to BIA Decision	OCIJ Receipt to BIA Decision	Date of Appeal to BIA Decision	OCIJ Receipt to BIA Decision
1999	75%	163	275	139	225
2000	83%	169	312	153	277
2001	68%	125	233	114	221

Executive Office for Immigration Review
Office of Planning, Analysis and Statistics
Updated *Demore v. Kim*, 538 U.S. 510 (2003) Data Query (02-28)
Database as of June, 2016

Immigration Court Completions¹ for Which No Appeal Was Filed
 Detained Institutional Hearing Program (IHP) Cases for Specific Charges²

Fiscal Year	Total Cases Not Appealed	Of Total, % Over Six (6) Months from Receipt to Initial Case Completion	Court Processing Time In Days For Total Cases				Of Total Case Not Appealed, Number Granted Relief	% of Total Cases Not Appealed
			Average		Median			
			Receipt to Initial Case Completion	Date of Charging Document to Initial Case Completion ³	Receipt to Initial Case Completion	Date of Charging Document to Initial Case Completion ³		
1999	9,181	8%	72	145	46	92	44	0.5%
2000	9,357	15%	90	175	51	108	64	0.7%
2001	7,976	15%	96	200	49	110	54	0.7%

**Immigration Court Completions¹ for Which No Appeal Was Filed
Detained Non- Institutional Hearing Program (IHP) Cases for Specific Charges²**

Fiscal Year	Total Cases Not Appealed	Of Total, % Over Six (6) Months from Receipt to Initial Case Completion	Court Processing Time In Days For Total Cases				Of Total Case Not Appealed, Number Granted Relief	% of Total Cases Not Appealed
			Average		Median			
			Receipt to Initial Case Completion	Date of Charging Document to Initial Case Completion ³	Receipt to Initial Case Completion	Date of Charging Document to Initial Case Completion ³		
1999	22,610	1%	26	96	11	39	914	4.0%
2000	19,940	3%	33	125	14	44	979	4.9%
2001	19,655	2%	34	137	15	43	971	4.9%

¹ Consistent with EOIR's statistical methodology in Fiscal Years 1999-2001, cases resulting in a change of venue or transfer are considered completions.

² Specific charges included in this data query: 212(a)(02)(A)(i)(I), 212(a)(02)(A)(i)(II), 212(a)(02)(B), 212(a)(02)(C), 212(a)(02)(D)(i), 212(a)(02)(D)(ii), 212(a)(02)(D)(iii), 212(a)(02)(E), 212(a)(02)(H)(i), 212(a)(02)(I)(i), 237(a)(02)(A)(ii), 237(a)(02)(A)(iii), 237(a)(02)(B)(i), 237(a)(02)(B)(ii), 237(a)(02)(C), 237(a)(02)(D)(i)

³ In some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR. This column measures the full length of time between issuance of the charging document and the Initial Case Completion even though the case is not within EOIR's jurisdiction until the charging document is filed with EOIR.

**Board of Immigration Appeals Completions
Detained Institutional Hearing Program (IHP) Cases for Specific Charges¹**

Fiscal Year	Of Total, % Over Six (6) Months from OCIJ Receipt to BIA Decision	Processing Time In Days For Total Cases			
		Average		Median	
		Date of Appeal to BIA Decision	Immigration Court Receipt to BIA Decision	Date of Appeal to BIA Decision	Immigration Court Receipt to BIA Decision
1999	92%	138	437	131	297
2000	96%	145	525	143	370
2001	92%	119	471	106	338

¹Specific charges included in this data query: 212(a)(02)(A)(i)(I), 212(a)(02)(A)(i)(II), 212(a)(02)(B), 212(a)(02)(C), 212(a)(02)(D)(i), 212(a)(02)(D)(ii), 212(a)(02)(D)(iii), 212(a)(02)(E), 212(a)(02)(H)(i), 212(a)(02)(I)(i), 237(a)(02)(A)(ii), 237(a)(02)(A)(iii), 237(a)(02)(B)(i), 237(a)(02)(B)(ii), 237(a)(02)(C), 237(a)(02)(D)(i).

**Board of Immigration Appeals Completions
Detained Non- Institutional Hearing Program (IHP) Cases for Specific Charges¹**

Fiscal Year	Of Total, % Over Six (6) Months from OCIJ Receipt to BIA Decision	Processing Time In Days For Total Cases			
		Average		Median	
		Date of Appeal to BIA Decision	Immigration Court Receipt to BIA Decision	Date of Appeal to BIA Decision	Immigration Court Receipt to BIA Decision
1999	81%	169	465	134	253
2000	87%	174	446	151	298
2001	80%	141	382	119	272

¹Specific charges included in this data query: 212(a)(02)(A)(i)(I), 212(a)(02)(A)(i)(II), 212(a)(02)(B), 212(a)(02)(C), 212(a)(02)(D)(i), 212(a)(02)(D)(ii), 212(a)(02)(D)(iii), 212(a)(02)(E), 212(a)(02)(H)(i), 212(a)(02)(I)(i), 237(a)(02)(A)(ii), 237(a)(02)(A)(iii), 237(a)(02)(B)(i), 237(a)(02)(B)(ii), 237(a)(02)(C), 237(a)(02)(D)(i).