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For A Hearing Titled:

“Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts”

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Chairman Lofgren, Ranking Member Buck, and members of the subcommittee, I thank you for inviting me here today to discuss these issues, which are not only critical to our national security, but also to our system of justice.

The Executive Office for Immigration Review (EOIR), an office within the Department of Justice (DOJ), is headed by a Director “who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals [BIA], the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3.”¹ The current cadre of 465 Immigration Judges (IJs)² in the nation’s 63 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA.³

¹ *Office of the Director*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 11, 2019, available at: <https://www.justice.gov/eoir/office-of-the-director>.

² *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: <https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir>.

³ *See Office of the Chief Immigration Judge*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Jan. 21, 2020, available at: <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

With respect to the appointment and authority of IJs, section 101(b)(4) of the Immigration and Nationality Act (INA)⁴ states:

*The term “immigration judge” means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a [removal] hearing under section [240 of the INA]. **An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service [INS]. [Emphasis added].***

As the foregoing demonstrates, the attorney general has significant authority as it relates to the duties of the IJ corps.

The immigration courts are not the only tribunals within EOIR. That office also has jurisdiction over the Office of the Chief Administrative Hearing Officer (OCAHO).⁵ As its website⁶ explains:

[OCAHO] is headed by a Chief Administrative Hearing Officer who is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990. These acts, among others, amended the Immigration and Nationality Act of 1952 (INA).

Administrative Law Judges hear cases and adjudicate issues arising under the provisions of the INA relating to: (1) knowingly hiring, recruiting, or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (employer sanctions); (2) immigration-related unfair employment practices in violation of section 274B of the INA; and (3) immigration-related document fraud in violation of 274C of the INA. Complaints are brought by the Department of Homeland Security, the Immigrant and Employee Rights Section in the Civil Rights Division of the Department of Justice (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices), or private individuals or entities as prescribed by statute.

I am personally and professionally familiar with each of these tribunals. From June 1992 to September 1994, I served as a law clerk to the late Hon. Joseph E. McGuire, an administrative

⁴ Section 101(b)(4) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section101&num=0&edition=prelim>.

⁵ *Office of the Director*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 11, 2019, available at: <https://www.justice.gov/eoir/office-of-the-director>.

⁶ *Office of the Chief Administrative Hearing Officer*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Jan. 9, 2020, available at: <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer>.

law judge in OCAHO. From November 2006 to January 2015, I served as an IJ at the York Immigration Court in York, Pennsylvania. I also appeared before both the San Francisco and Baltimore Immigration Courts as an Assistant District Counsel for the former INS, as well as an Associate General Counsel in the INS's General Counsel's Office. At the INS, I took appeals to the BIA and on certification to the attorney general. In addition, I performed oversight of EOIR as counsel to the House Judiciary Committee's Subcommittee on Immigration and Claims from July 2001 until I was appointed to the bench in November 2006. I also performed oversight of that office as Staff Director for the National Security Subcommittee at the House Committee on Oversight and Government Reform, from January 2015 until September 2016.

As EOIR's website⁷ states:

The primary mission of [EOIR] is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.

Unfortunately, and for various reasons that I will discuss below, EOIR has failed to live up to at least one aspect of its mission as it relates to the immigration courts: the expeditious administration of the Nation's immigration laws, as the Government Accountability Office (GAO) detailed in great depth in a June 2017 report.⁸ The backlogs identified by GAO affect each of the parties appearing before the immigration courts, both the alien respondents and the government, which is represented by attorneys from U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS).

With respect to the aliens, delays of years awaiting a hearing on removability and applications for relief can mean that evidence will be lost or unavailable, and that witnesses may die or become unavailable before their cases can be heard. That said, the Supreme Court has held that "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."⁹ While this is true in many if not most cases, it is not true in the case of an alien whose due process rights have been affected by delays, or true in the case of an alien seeking relief for which the alien is eligible. In particular, aliens who are eligible for asylum must await adjudication on those applications before they are able to truly settle in the United States, and obtain status for their relatives abroad.

These delays affect the government and our system of justice, for many of the same reasons. Civil rights icon and first African-American woman to be elected to the House of

⁷ *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: <https://www.justice.gov/eoir>.

⁸ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017 available at: <https://www.gao.gov/assets/690/685022.pdf>

⁹ *INS v. Doherty*, 502 U.S. 314, 323 (1992), available at: https://scholar.google.com/scholar_case?case=8707621299668215514&hl=en&as_sdt=6&as_vis=1&oi=scholar.

Representatives from the South, Barbara Jordan, was named by President Clinton to be the Chairman of the Commission on Immigration Reform in 1993.¹⁰ She stated in February 1995 testimony before the predecessor to this subcommittee: “Credibility in immigration policy can be summed up in one sentence: those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave.”¹¹ In addition, as with alien respondents, government evidence and witnesses may be unavailable at a hearing set years in the future.

These backlogs also affect the immigration courts themselves. It is difficult as a judge to fairly adjudicate a case that is subject to multiple continuances over a period of years. The court record is known as the Record of Proceedings (ROP). As the parties file evidence, those ROPs can become quite voluminous, sometimes running hundreds of pages in length. The judges must familiarize themselves with those ROPs for each individual hearing. Multiple continuances, and massive dockets, make this a daunting proposition, particularly given the fact (as I detail below) that immigration judges have only limited case-preparation time.

To put the immigration-court backlogs into context, I will summarize and detail the findings of GAO in its June 2017 report, and offer my perspective on the reasons for those backlogs. Put simply, however, the immigration courts have suffered from neglect for years, and have also been adversely affected by past failed immigration policies and convoluted federal court decisions, issues that the present administration has been attempting to address.

Summary of Immigration Court Backlogs as identified by GAO

On June 1, 2017, GAO issued a long-awaited report on the management of the immigration-court system by EOIR.¹²

In particular, GAO found:

- The immigration courts’ “case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [(FY)] 2006 through 2015 . . . **primarily due to declining cases completed per year.**” [Emphasis added].¹³
- The courts’ backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000

¹⁰ *Honor Barbara Jordan as a fiery apostle of moderation*, Editorial Board, HOUSTON CHRONICLE, Aug. 3, 2019, available at: <https://www.houstonchronicle.com/opinion/editorials/article/Honor-Barbara-Jordan-as-a-fiery-apostle-of-14277522.php>.

¹¹ *Hearing before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims*, 104th Cong. (1995) (statement of Barbara Jordan, Chair, U.S. Commission on Immigration Reform), available at: https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1995_Feb.%202017_4-1.pdf.

¹² *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017 available at: <https://www.gao.gov/assets/690/685022.pdf>.

¹³ *Id.* “Highlights.”

pending cases at the start of FY 2015, when the median pending time was 404 days.¹⁴ As I will explain below, those were the “good old days” as relates to backlogs.

- “[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015,”¹⁵ and “[IJ]-related continuances increased by 54 percent from about 47,000 continuances issued in [FY] 2006 to approximately 72,000 continuances issued in [FY] 2015.”¹⁶ DHS attorneys and others complained that the “frequent use of continuances [by IJs] resulted in delays and increased case lengths that contributed to the backlog.”¹⁷
- The number of cases the immigration courts “completed annually declined by 31 percent between [FY] 2006 and [FY] 2015 -- from 287,000 cases completed in [FY] 2006 to about 199,000 completed in [FY] 2015”.¹⁸
- Total case completions declined, even though the number of IJs increased 17 percent.¹⁹

There are a number of reasons for the increase in the backlog:

- Resources. There were, and still are too few judges and support staff to do the job adequately, even though the number of immigration judges has increased by 85 percent over the past five years.²⁰
- Increases in benefits and leave. IJs are government employees, and as they get more seniority, they receive more leave. This limits the amount of time that is spent hearing cases.
- The “surge.” The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.²¹ EOIR responded by “prioritizing” certain “cases involving migrants who ha[d] recently crossed the Southwest border and whom DHS ha[d] placed into removal proceedings.”²² This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also

¹⁴ *Id.* at 22.

¹⁵ *Id.* “Highlights.”

¹⁶ *Id.* at 68.

¹⁷ *Id.* at 27.

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 23.

²⁰ *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: <https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir>.

²¹ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated Oct. 18, 2016, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

²² *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated Jul. 9, 2014, available at: <https://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

more complicated²³ than cases involving single adult males, requiring more courtroom time (and continuances) per case.

- Case law: Recent federal court decisions have complicated IJs' removal decisions²⁴, slowing proceedings and requiring additional continuances. In addition, until reversed by the Supreme Court²⁵, decisions from the Ninth Circuit Court of Appeals²⁶ increased the number of aliens who were eligible for bond, requiring the scheduling of bond hearings and rescheduling of cases when aliens were released from custody.
- Obama administration immigration policies. Policies instituted in the last administration led to numerous continuances, as aliens sought counsel and applied for relief or discretionary closures, release, or termination based on those policies.
- IJ burnout. A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This, in turn, results in more reversals and remands, adding even more cases to the backlog.

Policies of the current administration will, if properly implemented and supported by Congressional appropriations, ease and begin to reduce the backlogs:

- The last three attorneys general (two permanent, one acting) have hired significantly more IJs in the last three years²⁷, and streamlined the hiring of IJs.²⁸
- Changes in border enforcement policies will, if allowed to stand, limit the number of new cases that are added to the immigration courts' dockets.
- Changes to interior enforcement policies could reduce the incentives for aliens to remain in the United States and fight meritless cases.
- Rescission of policies from the previous administration could also reduce the incentives for aliens to remain in removal proceedings.

There is more that the administration can do, however:

- The attorney general must continue to use his certification authority to set bright-line standards for IJs to follow in adjudicating cases.

²³ See *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 23, available at: <https://www.gao.gov/assets/690/685022.pdf>.

²⁴ *Id.* at 27-28.

²⁵ *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (2018), available at:

https://scholar.google.com/scholar_case?case=14215050066188926450&hl=en&as_sdt=6&as_vis=1&oi=scholar.

²⁶ See *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015), *cert. granted sub nom. Jennings v.*

Rodriguez, 136 S. Ct. 2489 (2016), available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>.

²⁷ *Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Dec. 20, 2019, available at: <https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir>.

²⁸ "Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement", U.S. Department of Justice, Office of Public Affairs, dated Apr. 11, 2017, available at: <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

- DOJ must vigorously litigate cases in the federal circuit courts to provide the IJs with more workable rules to follow in deciding cases, and to limit variations in the law among the 11 circuits with jurisdiction over immigration.

Findings of the GAO Report

GAO “is an independent, nonpartisan agency that works for Congress. Often called the ‘congressional watchdog,’ GAO investigates how the federal government spends taxpayer dollars.”²⁹ The impetus for the June 2017 report was a request from Congress that GAO “review EOIR’s management and oversight of the immigration court system, as well as options for improving EOIR’s performance, including through restructuring.”³⁰

GAO determined that EOIR’s “case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [FY] 2006 through 2015 . . . primarily due to declining cases completed per year.”³¹ Specifically, GAO found that backlog rose from “about” 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.³²

Because of this backlog, GAO noted:

*[S]ome immigration courts were scheduling hearings several years in the future . . . As of February 2, 2017, half of courts [sic] had master calendar hearings scheduled as far as January 2018 or beyond and had individual merits hearings, during which immigration judges generally render case decisions, scheduled as far as June 2018 or beyond. However, the range of hearing dates varied; as of February 2, 2017, one court had master calendar hearings scheduled no further than March 2017 while another court had master calendar hearings scheduled in May 2021—more than 4 years in the future. Similarly, courts varied in the extent to which individual merits hearings were scheduled into the future. As of February 2, 2017, one court had individual hearings scheduled out no further than March 2017 while another court had scheduled individual hearings 5 years into the future—February 2022.*³³

Interestingly, however, the increase in the case backlog did not directly result from an increase in new case receipts. GAO found that:

²⁹ *About GAO*, GOVERNMENT ACCOUNTABILITY OFFICE, undated, available at: <https://www.gao.gov/about/index.html>.

³⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 3 available at: <https://www.gao.gov/assets/690/685022.pdf>.

³¹ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, Highlights, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³² See *id.* at 22.

³³ *Id.*

[T]otal case receipts remained about the same in fiscal years 2006 and 2015 but fluctuated over the 10-year period, with new case receipts generally decreasing and other case receipts generally increasing. Specifically, there were about 305,000 total case receipts in fiscal year 2006 and 310,000 in fiscal year 2015. The number of new cases filed in immigration courts decreased over the 10-year period but fluctuated within this period. New case receipts increased about four percent between fiscal year 2006 and fiscal year 2009, from about 247,000 cases to about 256,000 cases, but declined each year after fiscal year 2009, with the exception of an increase in fiscal year 2014. Overall, new case receipts declined by 20 percent after fiscal year 2009 to about 202,000 during fiscal year 2015.³⁴

While the number of new cases received fell, the number of “other” case receipts by the court, including motions to reopen, reconsider, or recalendar, and remands by the BIA, increased by 86 percent over this 10-year period, from 58,000 cases in FY 2006 to 108,000 cases in FY 2015.³⁵

As new case receipts fell, and other case receipts rose, the immigration courts were completing fewer cases annually. Incredibly, GAO found, “the number of immigration court cases completed annually declined by 31 percent from fiscal year 2006 to fiscal year 2015—from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015,” even as the number of IJs increased by 17 percent over that 10-year period.³⁶

Even those statistics do not tell the whole story, according to the GAO: During this 10-year period, the number of cases that were decided on the merits declined from 95 percent of all cases completed in FY 2006 to 77 percent completed in FY 2015, while the number of cases administratively closed increased.³⁷

A case is decided on the merits when the IJ resolves all of the outstanding matters in the case—that is, whether the alien respondent is removable (or, in some cases, is an alien at all) and whether the alien should be granted any benefit or relief from removal that he or she seeks.³⁸ “Administrative closure,” on the other hand, “is a docket management tool that is used to temporarily pause removal proceedings.”³⁹ As GAO [noted](#):

An [IJ] may grant administrative closure for various reasons, including in cases for which DHS exercises prosecutorial discretion and requests a case to be administratively closed because the respondent does not meet enforcement priorities A judge may also administratively close a case where the respondent plans to apply for certain immigration benefits under the jurisdiction of [U.S. Citizenship and Immigration Services (USCIS)], such as an

³⁴ *Id.* at 21.

³⁵ *Id.*

³⁶ *Id.* at 22.

³⁷ *Id.* at 24.

³⁸ See *Immigration Court Practice Manual*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, at 75-78, available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf>.

³⁹ See *Matter of W-Y-U-*, 27 I&N Dec. 17, at 17-18 (BIA 2017) (citations omitted), available at: <https://www.justice.gov/eoir/page/file/958526/download>. That

unaccompanied alien child's initial asylum claim, or other forms of relief due to specific circumstances such as being the victim of a severe form of trafficking in persons or certain qualifying crimes. An immigration judge can return an administratively closed case to the calendar at his or her discretion or at the request of the respondent or DHS attorney. The primary consideration for an immigration judge in evaluating whether to administratively close or recalendar proceedings is whether the party in opposition has provided a persuasive reason for the case to proceed and be resolved on the merits; and in considering administrative closure, the judge cannot review whether an alien falls within DHS's enforcement priorities.⁴⁰ [Internal citations omitted].

The major driver in the backlog appeared to have been a significant increase in the amount of time that it was taking IJs to complete cases. In particular, GAO found that “[i]nitial case completion time,” that is, “the time period between the date EOIR receives the [removal case charging document, the Notice to Appear [the “NTA” from DHS] and the date an [IJ] issued an initial ruling on the case”⁴¹ grew “more than fivefold,”⁴² between FY 2006 and FY 2015, with the “median initial completion time for cases” increasing “from 43 days in FY 2006 to 286 days in FY 2015.”⁴³

One of the main reasons why IJs were taking more time to complete cases today than they did 14 years ago is an increase in the number of continuances that IJs have granted over that period. As the GAO noted, logically: “[C]ases that experience more continuances take longer to complete.”⁴⁴ After reviewing 3.7 million continuance records from FY 2006 through FY 2015, GAO concluded that continuances increased by 23 percent⁴⁵ from FY 2006 to FY 2015 with “the percentage of completed cases which had multiple continuances”⁴⁶ also increasing during that period. Most critically, the cases with the largest number of continuances that GAO identified, those with “four or more continuances,” increased from nine percent of cases completed in FY 2006 to 20 percent of cases completed in FY 2015.⁴⁷ Those continuances made an impact, as GAO found: “[C]ases that were completed in [FY] 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete” that year.⁴⁸

⁴⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 24 n. 48, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁴¹ *Id.* at 25, n. 50.

⁴² *Id.* at 25.

⁴³ *Id.*

⁴⁴ *Id.* at 68.

⁴⁵ *Id.*, Highlights.

⁴⁶ *Id.* at 69.

⁴⁷ *Id.*

⁴⁸ *Id.*

Reasons for the Increased Backlog

Why was there such a stark increase in the backlog of cases, and decrease in the percentage of cases completed? A variety of factors, some of them susceptible to analysis, others less so, contributed to what has become a vicious circle of backlog, delay, and continuance.

Resources

The first is resources. There were, and still are, simply put, too few IJs (and complementary staff) to adequately do the job. There are currently 465 IJs, including Assistant Chief IJs in the field who hear some cases.⁴⁹ According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, through December 2019, there were 1,089,696 pending cases in the nation’s immigration courts.⁵⁰ This means that there are approximately 2,343 pending cases per IJ. In FY 2019, on average, IJs completed 708 cases each.⁵¹ Therefore, even if no new cases were filed, it would take the immigration courts more than three years to complete their pending cases. As explained below, however, the number of new cases added to the courts’ dockets increased significantly in FY 2019, largely as a result of the crisis at the border.

IJs are not the only human resource in short demand. In June 2009, TRAC reported that there were just under four IJs for each judicial law clerk (JLC).⁵² As TRAC noted, JLCs “perform many functions that can help Immigration Judges handle their caseload . . . [and] are hired each year for temporary one-to-two year positions from recent law school graduates through the Attorney General's Honors Program.”⁵³ I relied extensively on mine for case preparation, analysis of issues, and the drafting of decisions. Consequently, the fewer hours of a JLC’s time that an IJ can draw upon, the more time an IJ must spend doing research on unique issues and drafting opinions. GAO also found that a lack of “other support staff” (including clerical workers and legal technicians) was a “contributing factor” in the backlog.⁵⁴

⁴⁹Principal Deputy Associate Attorney General Claire McCusker Murray Delivers Remarks at EOIR Investiture Ceremony, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, December 20, 2019, available at: <https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-claire-mccusker-murray-delivers-remarks-eoir>.

⁵⁰ *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Court*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), December 2019, available at: https://trac.syr.edu/phptools/immigration/court_backlog/.

⁵¹ Press Release: *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Oct. 10, 2019, available at <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019>.

⁵² *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), Jun. 18, 2009, available at: <http://trac.syr.edu/immigration/reports/208/>. But

⁵³ *Id.*

⁵⁴ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 27, available at: <https://www.gao.gov/assets/690/685022.pdf>.

Increasing Seniority of Immigration Judges

Second, the number of hours that those IJs actually spend hearing cases is, on average, shrinking as the judges gain seniority. According to GAO, 39 percent of all IJs were eligible for retirement,⁵⁵ which means that many are senior government employees, at the high end of the pay and leave scale. Senior government employees, those who have 15 or more years of federal government service, are entitled to eight hours of leave each pay period, about 208 hours or 23 (nine-hour) days per year.⁵⁶ There are also 10 federal holidays per year when court is not in session.⁵⁷ Finally, many if not most IJs are on a “flex schedule,” or “alternative work schedule” (AWS), meaning that they work eight nine-hour days and one eight-hour day per pay period, and get one extra day off, for an additional 26 “working” days off per year. Assuming that there are 260 working days in a year (five days in a work week times 52 weeks in the year), any potential IJ entitled to the full rate of leave receiving each federal holiday with AWS may only be working 201 of them (260-23-10-26), or just more than 40 work weeks per year. In addition, IJs receive one-half day every two weeks for case preparation (far too little time for this purpose), another 13 “working” days per year not spent in court.

As a result, as IJs work their way up the federal employment ladder, they spend fewer and fewer actual hours in court hearing cases—or should, if they take their leave, which is critical to avoiding burnout. This likely explains in part why, as GAO found, continuances for “unplanned immigration judge leave—sick or annual leave” were up by 95 percent between FY 2006 and FY 2015.⁵⁸

The Surge

Third, the “surge” in families across the Southwestern border has also contributed to the backlogs and delays in completion of cases in the immigration courts.

The number of unaccompanied alien children apprehended along the border increased by 76 percent (to 68,541) between FY 2013 and FY 2014, while the number of “family units” increased by 360 percent (to 68,445) during the same period, according to U.S. Customs and Border Protection (CBP).⁵⁹ EOIR responded on July 9, 2014 by “prioritizing” certain “cases involving migrants who have recently crossed the southwest border and whom DHS has placed into removal proceedings” in order to ensure “that these cases [were] processed both quickly and fairly to enable prompt removal in appropriate cases, while ensuring the protection of asylum

⁵⁵ *Id.* at 34.

⁵⁶ See *Fact Sheet: Annual Leave (General Information), Annual Leave Entitlement*, U.S. OFFICE OF PERSONNEL MANAGEMENT, undated, available at: <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/>.

⁵⁷ *2020 Holiday Schedule*, U.S. OFFICE OF PERSONNEL MANAGEMENT, undated, available at: <https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=2020>.

⁵⁸ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁵⁹ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated Oct. 18, 2016, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

seekers and others.”⁶⁰ Those “new priority” cases consisted of “unaccompanied children who [had] recently crossed the southwest border; families who [had] recently crossed the border and [were] held in detention; families who [had] recently crossed the border but [were] on ‘alternatives to detention [ATD];’ and other detained cases.”⁶¹ Specifically, “[t]o allocate resources with these priorities, EOIR [] reassign[ed IJs] in immigration courts around the country from their current dockets to hear the cases of individuals falling in these four groups,” and “rescheduled [c]ases not falling into one of these groups . . . to accommodate higher priority cases.”⁶²

This is likely a major contributing factor for the 112 percent increase between FY 2006 (3,296 cases) and FY 2015 (6,983 cases) in continuances for “[u]nplanned immigration judge leave — detail or other assignment” identified by GAO.⁶³

In addition, as “experts and shareholders” told GAO:

*[T]he nature of cases resulting from the surge exacerbated the effects of the backlog. Specifically, many of the surge cases were cases of unaccompanied children, which may take longer to adjudicate than other types of cases because, for example, such a child in removal proceedings could apply for various forms of relief under the jurisdiction of USCIS, including asylum and Special Immigrant Juvenile Status. In such cases the immigration judge may administratively close or continue the case pending resolution of those matters. Therefore, these experts and stakeholders told us that the surge not only added volume to the immigration court’s backlog, but resulted in EOIR prioritizing the cases of unaccompanied children over cases that may be quicker for EOIR to resolve.*⁶⁴

Increasing Legal Complexity

Fourth, federal court decisions have complicated the task facing IJs of deciding issues in removal cases in recent years, slowing the issuance of decisions. For example, GAO cited “EOIR officials” and IJs who:

[H]ighlighted increasing legal complexity as a contributing factor to longer cases and a growing case backlog. In particular, EOIR officials cited Supreme Court decisions in 2013 and 2016, which define analytical steps a judge must complete

⁶⁰ Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S., U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated Jul. 9, 2014, available at: <https://www.justice.gov/opa/pr/departments-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

⁶¹ Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, undated, available at: <https://www.justice.gov/iso/opa/resources/214201479112444959.pdf>.

⁶² *Id.*

⁶³ Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁶⁴ *Id.* at 27.

*in determining whether a criminal conviction renders a respondent removable and ineligible for relief.*⁶⁵

The cases highlighted⁶⁶ by the referenced “EOIR officials” did, in fact, complicate courts’ application of the “categorical approach” that IJs are required to apply in determining removability on many criminal grounds (*Mathis v. U.S.*⁶⁷ and *Descamps v. U.S.*⁶⁸), as well as the standard for determining whether a drug offense is “illicit trafficking in a controlled substance” and therefore an “aggravated felony” under section 101(a)(43)(B) of the INA⁶⁹ (*Moncrieffe v. Holder*⁷⁰). In certain instances, those decisions would have mandated remands from the BIA and federal circuit courts, and may have rendered otherwise-ineligible aliens eligible for relief; either scenario would have extended the length of removal proceedings for IJ review and briefing by the parties.

More directly, however, the Ninth Circuit’s decision in *Rodriguez v. Robbins*⁷¹, both increased the number of cases on the immigration courts’ dockets in the Ninth Circuit, and gave aliens in that circuit cause to continue to litigate otherwise meritless cases. In that decision, the Ninth Circuit held that aliens in detention for more than six months must receive individualized bond hearings before an IJ to justify their continued detention, and be provided bond hearings every six months thereafter.⁷²

Under *Rodriguez*, an alien was entitled to a bond hearing wherein the **government** bore the burden of showing by **clear and convincing evidence** that the alien posed a risk of flight or a danger to the community.⁷³ This is a higher burden of proof than the “preponderance of the evidence” standard, “which only requires a showing that something is more likely than not to be true.”⁷⁴ Moreover, unlike an initial bond hearing, where the alien bears the burden⁷⁵ of showing

⁶⁵ *Id.* at 27-28.

⁶⁶ *Id.*

⁶⁷ *Mathis v. United States*, 136 S. Ct. 2243 (2016), available at: https://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf.

⁶⁸ *Descamps v. United States*, 133 S. Ct. 2276 (2013), available at: <https://www.law.cornell.edu/supremecourt/text/11-9540>.

⁶⁹ Section 101(a)(43)(B) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁷⁰ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), available at: https://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

⁷¹ *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015) available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>, reversed and remanded sub nom. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

⁷² *Id.*

⁷³ *Id.* at 1078-85.

⁷⁴ *Id.* at 1086-87.

⁷⁵ Michael Kaufman and Michael Tan, *Bond Hearings for Immigrants Subject to Prolonged Immigration Detention, in the Ninth Circuit*, AMERICAN CIVIL LIBERTIES UNION, Dec. 2015, at 8, available at: https://www.aclu.org/sites/default/files/field_document/2015.12.11_rodriguez_advisory.pdf.

⁷⁶ *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016), available at: <https://www.justice.gov/eoir/file/881776/download>.

that he or she is not a danger or flight risk, as noted, under *Rodriguez*, the government bore that burden for continued detention past six months. This decision logically encouraged aliens with questionable cases to continue to fight those cases, knowing that they had a greater chance to be released after six months. That decision was reversed and remanded by the Supreme Court in February 2018.⁷⁶

Continuances

In addition, as GAO noted:

[T]he percentage of completed cases which had multiple continuances increased from fiscal year 2006 to fiscal year 2015 and that, on average, cases with multiple[] continuances took longer to complete than cases with no or fewer continuances. Specifically, 9 percent of cases completed in fiscal year 2006 experienced four or more continuances compared to 20 percent of cases completed in fiscal year 2015. Additionally, cases that were completed in fiscal year 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete in fiscal year 2015.⁷⁷

There has historically been, however, significant pressure from federal courts and the BIA on IJs to grant continuances, and little downside for the IJs in doing so.

By regulation, an IJ “may grant a motion for continuance for good cause shown.”⁷⁸ Despite this permissive standard, a number of decisions limited IJs’ discretion when it comes to denying continuances.

For example, in *Matter of Hashmi*⁷⁹, the BIA held:

In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.

⁷⁶ See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

⁷⁷ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁷⁸ 8 C.F.R. § 1003.29, available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-33983.html>.

⁷⁹ *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3640.pdf>.

The BIA made clear, however, that while the IJ “may also consider any other relevant procedural factors . . . [c]ompliance with an Immigration Judge’s case completion goals . . . is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances.”⁸⁰ Nor, the BIA held, were “[t]he number and length of prior continuances . . . alone determinative.”⁸¹

Similarly, in *Simon v. Holder*⁸², the Court of Appeals for the Third Circuit held that the BIA erred in denying a motion to reconsider a case in which an alien had been granted four continuances (over a period of almost two years), including a six-month continuance to seek adjustment of status. When, at the fifth hearing, there was no visa number available to the alien, alien’s counsel “sought a further continuance or administrative closure of the removal case until a visa number was available.”⁸³ The government attorney refused to agree to these requests, and the IJ ordered the alien deported.⁸⁴ The alien’s appeal to the BIA was dismissed, and the alien filed a motion to reconsider with the BIA that was denied.⁸⁵

In his motion to reconsider, the alien “argu[ed] that the BIA committed error by failing to address *Hashmi*,” in its denial, the BIA held “that the *Hashmi* factors were not applicable because [the alien] could not establish prima facie eligibility for adjustment: i.e., he could not establish that a visa was immediately available.”⁸⁶ The Third Circuit held (more than five years after the case started) that the BIA erred in relying solely on “the remoteness of visa availability,” and remanded the case.⁸⁷

Cases involving pending visas are not the only ones in which IJs feel pressure to grant continuances. If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the IJ runs the risk of being accused of denying due process. Similarly, an IJ who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process. In such an instance, the IJ’s reputation would be besmirched, and the BIA or circuit court would simply remand the case, in essence granting the continuance requested.

If an IJ grants a continuance, on the other hand, there has traditionally been little downside for the court. Attorneys for the government (who, as noted, work for ICE) have in the past been limited by policy in the number of appeals that they were allowed to take. Moreover, an appeal from a continuance would be “interlocutory” in any case, that is, it “asks the [BIA] to review a

⁸⁰ *Id.* at 793-94.

⁸¹ *Id.* at 794.

⁸² *Simon v. Holder*, 654 F. 3d 440 (3d Cir. 2011), available at:

https://scholar.google.com/scholar_case?case=8844616972290064841&hl=en&as_sdt=6&as_vis=1&oi=scholar

⁸³ *Id.* at 441-42.

⁸⁴ *Id.* at 442.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 443.

ruling by the Immigration Judge before the Immigration Judge issues a final decision.”⁸⁸ As the BIA has often held, however: “To avoid piecemeal review of the myriad questions that may arise in the course of proceedings . . . [it does] not ordinarily entertain interlocutory appeals.”⁸⁹ For these reasons, and to conserve resources, ICE attorneys rarely appeal continuance grants, even if they do not agree with them: as GAO noted, government attorneys to whom it spoke told it “that granting multiple continuances in cases resulted in inefficiencies and wasted resources such as [those] attorneys having to continually prepare for hearings that continued multiple times.”⁹⁰

Obama Administration Policies

Sixth, Obama administration policies exacerbated the backlog and increased the number of continuances. One example of such a policy is “Deferred Action for Childhood Arrivals” (DACA).⁹¹ As USCIS explains DACA:

*On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.*⁹²

To be granted DACA, an alien has to have been born after June 14, 1981, have come to the United States before age 16, and “have continuously resided in the United States since June 15, 2007, up to the present time.”⁹³ USCIS states that even aliens in “removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA.”⁹⁴

In fact, many DACA-eligible aliens were in proceedings at the time that DACA was announced, and many sought (or were granted) continuances to apply for that relief. As one immigration practitioner put it: “Requesting prosecutorial discretion or seeking time to have a DACA

⁸⁸ *Board of Immigration Appeals Practice Manual*, § 4.14, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, dated Jul. 27, 2015, at 69, available at: <https://www.justice.gov/eoir/file/431306/download>.

⁸⁹ See *Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3561.pdf>.

⁹⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁹¹ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Feb. 14, 2018, available at: <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Mar. 8, 2018, available at: <https://www.uscis.gov/archive/frequently-asked-questions#evidence>.

application adjudicated can serve as a basis to seek a continuance. In other words, making such a request can serve as the ‘good cause’ required by the regulations.”⁹⁵

Another Obama administration policy that adversely affected the completion of removal proceedings is the aforementioned “prosecutorial discretion.” Generally, “[p]rosecutorial discretion’ is the authority of an agency or officer to decide what charges to bring and how to pursue each case.”⁹⁶ Explaining early prosecutorial actions of the Obama administration, the Immigration Policy Council stated in a May 26, 2011 fact sheet:

[M]any community groups . . . called for exercising prosecutorial discretion in individual cases by declining to put people in removal proceedings, terminating proceedings, or delaying removals in cases where people have longstanding ties to the community, U.S.-citizen family members, or other characteristics that merit a favorable exercise of discretion.

Over the course of the summer [of 2011], the Obama Administration began to address these requests [and requests from Congress], relying on its ability to exercise prosecutorial discretion in deportation decisions. On June 17, 2011, [ICE] Director John Morton issued a memorandum directing ICE staff to consider many of these same factors when deciding whether or not to exercise prosecutorial discretion. On August 18, 2011, in a response to the letter from Senator Durbin and others, DHS Secretary Janet Napolitano declined to grant deferral of removal to DREAM Act students across the board, but indicated a willingness to re-examine individual cases. She announced a two-pronged initiative to implement the June 2011 Morton memo across all DHS divisions to ensure that DHS priorities remained focused on removing persons who are most dangerous to the country.

The new initiative involve[d] the creation of a joint committee with [DOJ to] review each of the nearly 300,000 pending removal cases to assess whether each case me[t] the high priority factors set forth in the June 2011 Morton memo. In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases [were to be] administratively closed following this review – that is, they [would] be removed from the active docket of the immigration courts.⁹⁷

⁹⁵ Miley & Brown, P.C., *Removal Proceedings – Practical Tips In A Post DACA/DAPA World*, undated, available at: <https://www.mileybrown.com/Articles/Removal-Proceedings-Practical-Tips-In-A-Post-DACA-DAPA-World.shtml>.

⁹⁶ *Understanding Prosecutorial Discretion in Immigration Law*, AMERICAN IMMIGRATION COUNCIL, May 26, 2011, available at: <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law>.

⁹⁷ *Understanding Prosecutorial Discretion in Immigration Law*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, dated September 2011, available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf.

As the then-ICE Acting Principal Legal Advisor stated in a memorandum (OPLA memo) describing the agency's actions during this period: "In late 2011 and 2012, [ICE] attorneys performed a complete review of all cases pending on the [EOIR] court dockets, exercising prosecutorial discretion as appropriate."⁹⁸

Thereafter, on November 20, 2014, then-Secretary of Homeland Security Jeh Johnson issued a new memorandum on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,"⁹⁹ also known as the "Enforcement Memo." The Enforcement Memo set the following immigration priorities for DHS:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the [INA] at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

⁹⁸ Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Apr. 6, 2015, at 1-2, available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

⁹⁹ Jeh Johnson, Secretary of Homeland Security, *"Policies for the Apprehension, Detention and Removal of Undocumented Immigrants"*, Department of Homeland Security, Nov. 20, 2014, available at: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration

*system or there are factors suggesting the alien should not be an enforcement priority.*¹⁰⁰

As the Enforcement Memo stated:

*In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; **whether to settle, dismiss, appeal, or join in a motion on a case**; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.*¹⁰¹ [Emphasis added].

Providing guidance to ICE attorneys on the implementation of these policies, the OPLA memo directed ICE attorneys to:

*[C]ontinue to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of the enforcement priorities. OPLA should generally seek administrative closure or dismissal of cases it determines are not priorities. [ICE] attorneys should also review available information in incoming cases to determine whether, in a case that falls within an enforcement priority, unique factors and circumstances are present that may warrant the exercise of prosecutorial discretion. Understanding that these factors and circumstances may change as the case progresses, if further prosecutorial discretion review is requested by the respondent, the case should be reviewed again in light of any changed facts and circumstances. Keep in mind that prosecutorial discretion may encompass actions beyond offers for administrative closure or dismissal of the case, including waiving appeal, not filing Notices to Appear, and joining in motions.*¹⁰²

As a whole, these policies required IJs to consider numerous motions to continue and administratively close cases, adding to the burden on their dockets. These policies are likely the reason that, as GAO found, continuances based on a joint request to continue by both parties increased by 518 percent between FY 2006 (1,319 cases) and FY 2015 (8,615 cases).¹⁰³

These policies likely had another effect that is not quantifiable. Taken as a whole, DHS's purported "prosecutorial discretion" policies made it clear that most cases involving non-criminal aliens were not a priority for the Obama administration, and it would have been only

¹⁰⁰ *Id.* at 3-4.

¹⁰¹ *Id.* at 2.

¹⁰² Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, dated April 6, 2015, at 2, available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

¹⁰³ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 126, Appendix III, Table 13, available at: <https://www.gao.gov/assets/690/685022.pdf>.

natural for IJs to have placed a lower priority on completing those cases. It does not call the diligence of the IJ corps into question to suggest that many of the judges would have concluded that there was no reason to work overtime to complete matters that the president did not consider important, or to keep a docket of such cases on track.

This is especially true in light of the fact that the Enforcement Memo made clear that, as of November 20, 2014, final orders of removal issued before January 1, 2014 were not a priority.¹⁰⁴ Given the lack of emphasis on enforcement that memo represented, it would have been reasonable for any given IJ in a non-detained court to conclude that a removal order in today's case would soon no longer be tomorrow's priority, either.

IJ Burnout

This leads to the final factor: IJ burnout. A 2009 study found “many immigration judges adjudicating cases of asylum seekers are suffering from significant symptoms of secondary traumatic stress and job burnout, which, according to the researchers, may shape their judicial decision-making processes.”¹⁰⁵ IJs' working conditions have only gotten worse as the backlogs have grown.¹⁰⁶ A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This would, in turn, result in more reversals and remands, adding even more cases to the backlog.

Solutions to the Backlog

Although the problem of the backlog in the immigration courts may seem insurmountable, and the causes of that backlog may appear intractable, in reality, solutions to most of these problems can be found, assuming that the president has the will to enforce the immigration laws and Congress has the willingness to provide adequate resources to do the job.

More Resources

DOJ has made significant strides under the current administration to boost the number of IJs who are on the bench, as stated above. This has, to a degree, fulfilled promises that the administration has made with respect to this effort.

In [remarks](#) to CBP Officers in Nogales, Arizona on April 11, 2017, Attorney General Jeff Sessions “revealed that [DOJ] will add 50 more immigration judges to the bench this year and 75

¹⁰⁴ Jeh Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, U.S. DEPARTMENT OF HOMELAND SECURITY, Nov. 20, 2014, at 4, available at: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

¹⁰⁵ See Kirsten Michener, *Stress and burnout found among nation's immigration judges*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO, Jun. 25, 2009, available at: <https://www.ucsf.edu/news/2009/06/4258/stress-and-burnout-found-among-nations-immigration-judges>.

¹⁰⁶ See Rachel Glickhouse, *Immigration judges are burning out faster than prison wardens and hospital doctors*, QUARTZ, Aug. 3, 2015, available at: <https://qz.com/469923/there-are-only-250-immigration-judges-in-the-united-states/>. And

next year,” and “highlighted [DOJ’s] plan to streamline its hiring of judges, reflecting the dire need to reduce the backlogs in our immigration courts.”¹⁰⁷

In a public *Immigration Newsmaker* interview that I conducted with EOIR Director James McHenry on May 3, 2018, he noted that the administration had proposed increasing the size of the IJ corps to 700, but made clear that this effort would take two to three years.¹⁰⁸ And, of course, such hiring is subject to funding by Congress.

I would add, however, that simply hiring more judges is not enough. EOIR must position those judges where the need is greatest, and support those judges with enough staff, including clerks, to enable those IJs to discharge their duties efficiently. That said, more IJs are better than fewer.

As an added benefit, those judges will also (in many if not most instances) come in with less seniority than the immigration judges they join. This means that they will receive fewer hours of leave per pay period, and will therefore be available to hear more cases on an annual basis.

Change in Border Policy and Its Effect

A change in policy from the executive branch on immigration enforcement at the border and the interior could, however, likely be the biggest driver in lowering the number of incoming cases and shrinking the backlog.

Throughout the 2016 presidential campaign, then-candidate Donald Trump made it clear that he intended to enforce the immigration laws if elected.¹⁰⁹ Backing up this rhetoric as it pertained to those entering illegally, on January 25, 2017, President Trump issued Executive Order 13767, captioned “Border Security and Immigration Enforcement Improvements.”¹¹⁰ While each of the sections of that order enhance immigration enforcement, four in particular will reduce the number of aliens who are placed into removal proceedings by reducing the number of aliens entering the United States illegally.

First, section 2 of that order makes it clear that it is the policy of the executive branch to:

¹⁰⁷ Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Apr. 11, 2017, available at: <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

¹⁰⁸ *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: <https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry>.

¹⁰⁹ See Miriam Valverde, *Compare the candidates: Clinton vs. Trump on immigration*, POLITIFACT, dated Jul. 15, 2016 (“Presidential candidates Donald Trump and Hillary Clinton have taken opposite roads on their quest for immigration reform. Trump calls for mass deportations, migrant bans and a wall to keep away people from coming into the country, while Clinton wants a pathway to citizenship, immigrant integration and protection from deportation.”), available at: <http://www.politifact.com/truth-o-meter/article/2016/jul/15/compare-candidates-clinton-vs-trump-immigration/>.

¹¹⁰ E.O. 13767, “Border Security and Immigration Enforcement Improvements,” THE WHITE HOUSE, Jan. 25, 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; [and]

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.¹¹¹

Section 5 of that order, captioned “Detention Facilities,” stated:

(a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.¹¹²

Section 6 of that order, captioned “Detention for Illegal Entry,” specified that the Secretary of Homeland Security:

¹¹¹ *Id.* at section 2.

¹¹² *Id.* at section 5.

*[S]hall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.*¹¹³

Section 13 of that order, captioned "Priority Enforcement," provided:

*The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.*¹¹⁴

The theory behind these provisions appears to be that, if a foreign national considering illegal entry into the United States knows that he or she will be arrested and detained (and possibly prosecuted) pending a determination of removability and relief, that foreign national will be less likely to try to enter illegally. If this is true, the order ostensibly had the intended effect, at least initially.

The number of aliens apprehended along the southwest border dropped precipitously immediately after the 2016 election and the issuance of this order. Specifically, according to CBP, the number of apprehensions along the border and of inadmissible persons at ports of entry declined from 66,712 in October 2016 to 63,364 in November 2016, 58,426 in December 2016, 42,473 in January 2017, 23,563 in February 2017, 16,600 in March 2017, and to 15,780 in April 2017.¹¹⁵ They began to increase in May 2017 (19,940), reaching a post-inauguration high of 40,511 (in December 2017) before declining again in January 2018 (35,822), with a slight uptick in February 2018 (36,695).¹¹⁶

Unfortunately, after Congress began to discuss amnesty for DACA beneficiaries (and others)¹¹⁷, and as smugglers and migrants realized that the president's rhetoric had not been matched by congressional action to plug the loopholes that encouraged migrants (and in particular, unaccompanied alien children (UACs) and family units (FMUs)-- that is adult migrants

¹¹³ *Id.* at section 6.

¹¹⁴ *Id.* at section 13.

¹¹⁵ *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION, Dec. 15, 2017, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

¹¹⁶ *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

¹¹⁷ See Dylan Scott and Tara Golshan, *The Senate's failed votes on DACA and immigration: what we know*, Vox, Feb. 18, 2018, available at: <https://www.vox.com/policy-and-politics/2018/2/12/17003552/senate-immigration-bill-floor-debate>.

travelling with children) to enter the United States illegally¹¹⁸, the number of apprehensions and inadmissible aliens skyrocketed, reaching a high of 144,116 in May 2019.¹¹⁹

These numbers directly affect the backlog in the immigration courts, because the fewer aliens apprehended along the border and placed into expedited removal proceedings, the fewer new removal cases originating with credible fear claims will be filed in the immigration courts. This is reflected in EOIR statistics, which show that of the 986,383 removal, deportation, and exclusion cases that were pending before the agency at the end of FY 2019, 219,072—22 percent—originated with a credible fear claim.¹²⁰

Some context for these numbers is in order. As I explained in an April 2017 backgrounder¹²¹ on “Fraud in the ‘Credible Fear’ Process”:

A credible fear request is a precondition to filing a defensive asylum application for an alien in expedited removal proceedings under section 235(b) of the [INA]. That section of the INA allows immigration officers — rather than judges — to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of the INA. DHS has expanded its use of expedited removal over the years.

The most common instance in which DHS uses expedited removal is when it apprehends (1) an alien seeking admission without a proper entry document at a port of entry; or (2) an alien who is attempting to enter or who has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an asylum officer for a “credible fear interview.” If the asylum officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an immigration judge, where the alien can file his or her application for asylum.

Under section 235(b)(1)(B)(v) of the INA, “the term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.”

¹¹⁸ See Andrew Arthur, *Catch and Release Escape Hatches, Loopholes that encourage illegal entry*, CENTER FOR IMMIGRATION STUDIES, May 4, 2018, available at: <https://cis.org/Report/Catch-and-Release-Escape-Hatches>.

¹¹⁹ *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

¹²⁰ *Adjudication Statistics, Pending I-862 Proceedings Originating With a Credible Fear Claim and All Pending I-862s*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated on October 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1112996/download>.

¹²¹ Andrew R. Arthur, *Fraud in the “Credible Fear” Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES, April 2017, available at: <https://cis.org/Report/Fraud-Credible-Fear-Process>.

Once a “credible fear” case is referred to the immigration court, at least four separate hearings are held: a master calendar hearing at which pleadings are taken and the alien requests an opportunity to apply for asylum, withholding of removal, and/or protection under Article 3 of the Convention Against Torture (CAT)¹²²; a request for a bond; a hearing at which the asylum application¹²³ is filed; and at least one hearing on the merits of that application.

While the first and second (or second and third) hearings are often held on the same docket, each requires at least a setting of the matter and takes up time on a docket. Moreover, there may be additional continuances, when for example an alien seeks counsel or is released (requiring the case to be reset to a non-detained docket), or when additional time is sought to complete the application or to obtain evidence or witnesses. The fewer the “credible fear” and “reasonable fear” cases, the fewer the hearings, and the lower the immigration-court backlog, or at least the lower the increase in that backlog.

In FY 2019, a total of 977,509 aliens were apprehended by CBP Border Patrol agents between the ports of entry along the southwest border or deemed inadmissible by CBP officers at those ports.¹²⁴ This was an almost 86 percent increase over FY 2018 (when there were 521,090 aliens apprehended or deemed inadmissible along the southwest border), and a 135 percent increase over FY 2017 (415,517).¹²⁵

The number of credible fear and reasonable fear claims increased, as well. In FY 2019, USCIS received 105,439 credible fear claims¹²⁶, in addition to 13,197 reasonable fear claims.¹²⁷ Credible fear was established in 75,252 of those cases¹²⁸ (almost 74 percent of all cases in which

¹²² See *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections, Relief and Protections Based on Fear of Persecution or Torture*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 15, 2019, available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>.

¹²³ *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 23, 2017, available at: <https://www.uscis.gov/i-589>.

¹²⁴ *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, available at:

<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

¹²⁵ *Id.*

¹²⁶ *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at:

https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

¹²⁷ *Reasonable Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at:

https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Reasonable_Fear_Stats_FY19.pdf.

¹²⁸ *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at:

https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

there was a decision), and reasonable fear in an additional 3,306¹²⁹ (almost 28 percent of cases in which there was a decision).

This was an increase over FY 2018, when USCIS received 99,035 credible fear claims (in which fear was established in 74,677 cases)¹³⁰, and 11,101 reasonable fear claims (in which fear was established in 3,161 cases)¹³¹. Those positive fear findings, once made, are all headed to IJ dockets, to enable those aliens to apply for asylum. It should be no surprise, given the crisis at the border, that 208,942 asylum applications were filed with EOIR¹³² in FY 2019 (alone), or that as of October 11, 2019, more than 476,000 asylum cases were pending with EOIR (48 percent of the then-immigration-court backlog of 987,198).¹³³

That is in addition to 15,433 additional cases in which aliens in expedited removal cases requested IJ review of negative credible fear or reasonable findings in FY 2019.¹³⁴ Those cases, in turn, resulted in 3,189 vacations of negative credible fear findings and 552 vacations of negative reasonable fear findings.¹³⁵ Again, each of those reviews took up time on an IJ's docket to review the negative findings of a USCIS asylum officer, and then each vacation of a negative credible fear or reasonable fear case will be sent to IJ dockets, increasing the backlog.

Of course, the reason that a respondent is placed into removal proceedings after a positive credible fear finding is to apply for asylum. But, many fail to do so. According to EOIR statistics, between FY 2008 and FY 2018, 354,356 cases were referred to the immigration courts following a credible fear claim, but, as of November 2, 2018, only 189,127 cases that were referred following a credible fear claim included a filed asylum application (the same application is used for asylum, withholding of removal, and CAT)—a 53.4 percent filing rate.¹³⁶

Given these facts, it is not surprising that the number of *in absentia* removal orders in cases originating with a credible fear claim has skyrocketed in recent years. In FY 2008, IJs issued

¹²⁹ *Reasonable Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Reasonable_Fear_Stats_FY19.pdf.

¹³⁰ *Credible Fear Workload Report Summary, FY 2018 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Nov. 16, 2018, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf.

¹³¹ *Reasonable Fear Workload Report Summary, FY 2018 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Nov. 16, 2018, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf.

¹³² *Adjudication Statistics, Total Asylum Applications*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1106366/download>.

¹³³ Andrew Arthur, *Statistics Reveal the Scope of the Asylum Backlog, A lot of asylum claims, but few asylum grants*, CENTER FOR IMMIGRATION STUDIES, Nov. 25, 2019, available at: <https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog>.

¹³⁴ *Credible Fear Review and Reasonable Fear Review Decisions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Oct. 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1104856/download>.

¹³⁵ *Id.*

¹³⁶ *Adjudication Statistics, Rates of Asylum Filings in Cases Originating with a Credible Fear Claim, Fiscal Year (FY) 2008- FY 2018*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 29, 2018 and Nov. 2, 2018, respectively, available at: <https://www.justice.gov/eoir/page/file/1062971/download>.

613 such orders, but by FY 2018, that number had increased almost 16-fold, to 10,724.¹³⁷ By FY 2019, that already unbelievable number of *in absentia* orders had increased by 60 percent over just the year before, to 17,770.¹³⁸

Moreover, few of the alien respondents apprehended at the border with credible fear claims end up getting granted asylum—the relief for which they were placed into proceedings to begin with. According to EOIR statistics, in FY 2019 there were 55,549 decisions in cases that originated with a credible fear claim.¹³⁹ Of those, only 8,457 were grants (15.25 percent), while 17,621 were denials (31.77 percent).¹⁴⁰ Significantly, in 23,161 of those cases resulting in orders in FY 2019, 23,161 had no asylum application filed at all—41.76 percent of the total.¹⁴¹ That does not even include the 6,203 cases (11.18 percent) that were abandoned, not adjudicated, withdrawn or “other.”¹⁴² There is no way to view these statistics without concluding that a significant number of migrants have gamed the credible fear process to gain entry, and release, into the United States, with a significant toll on the dockets of the immigration courts.

Unfortunately, even those statistics do not present the entire dire picture. In an April 16, 2019 “Final Emergency Interim Report,” the Homeland Security Advisory Council’s **bipartisan** CBP Families and Children Care Panel noted that FMUs who stated that they had a fear of return were simply being released from Border Patrol custody with an NTA and dropped at local bus stations.¹⁴³ As that panel stated:

*The NTA, combined with long delays in the adjudication of asylum claims, means that these migrants are guaranteed several years of living (and in most cases working) in the U.S. Even if the asylum hearing and appeals ultimately go against the migrant, he or she still has the practical option of simply remaining in the U.S. illegally, where the odds of being caught and removed remain very low. A consequence of this broken system, driven by grossly inadequate detention space for family units and a shortage of transportation resources, is a massive increase in illegal crossings of our borders, **almost entirely driven by the increase in FMU migration from Central America.**¹⁴⁴ [Emphasis added].*

¹³⁷ *Adjudication Statistics, In Absentia Removal Orders in Cases Originating with a Credible Fear Claim*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at:

<https://www.justice.gov/eoir/page/file/1116666/download>.

¹³⁸ *Id.*

¹³⁹ *Adjudication Statistics, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at:

<https://www.justice.gov/eoir/page/file/1062976/download>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 1, available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹⁴⁴ *Id.*

That increase in FMUs is borne out by CBP statistics. In FY 2019, Border Patrol apprehended 473,682 aliens travelling in family units-- almost 56 percent of the total apprehensions last fiscal year.¹⁴⁵

The release of those migrants with nothing more than an NTA encouraged many, if not most, of those migrants to come to the United States, worsened by the aforementioned loopholes. As the panel stated:

*By far, the major "pull factor" is the current practice of releasing with a NTA most illegal migrants who bring a child with them. The crisis is further exacerbated by a 2017 federal court order in Flores v. DHS expanding to FMUs a 20-day release requirement contained in a 1997 consent decree, originally applicable only to [UACs]. After being given NTAs, we estimate that 15% or less of FMU will likely be granted asylum. The current time to process an asylum claim for anyone who is not detained is over two years, not counting appeals.*¹⁴⁶

By way of background, the *Flores* settlement agreement was entered into 23 years ago, "to set immigration detention standards for [UACs], particularly regarding facility conditions and the timing and terms of the UACs' release."¹⁴⁷

In 2015, Judge Dolly Gee of the U.S. District Court for the Central District of California issued a decision that applied the agreement not only to UACs, but also to alien children travelling with their parents, and mandating that they be released within 20 days.¹⁴⁸ That decision was affirmed by the Ninth Circuit the next year, and although the circuit court determined that the parents did not have an affirmative right to release¹⁴⁹, as a practical matter (with a brief 44-day interlude known as "zero tolerance"¹⁵⁰), successive administrations have generally released the parents as well, to avoid separating families.

And, as noted above, these decisions, coupled with administration policy and a lack of family detention space¹⁵¹, has encouraged vast waves of FMUs to enter the United States illegally.

¹⁴⁵ *Southwest Border Migration FY2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

¹⁴⁶ *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 2, available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

¹⁴⁷ Matt Sussis, *The History of the Flores Settlement, How a 1997 agreement cracked open our detention laws*, CENTER FOR IMMIGRATION STUDIES, Feb. 11, 2019, available at: <https://cis.org/Report/History-Flores-Settlement>.

¹⁴⁸ *Id.*

¹⁴⁹ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), available at: https://scholar.google.com/scholar_case?case=12780774456837741811.

¹⁵⁰ See Andrew Arthur, *Trump Win in Decision on Family Separations, Judge rules government is not 'systematically separating families at the border'*, Jan. 15, 2020, available at: <https://cis.org/Arthur/Trump-Win-Decision-Family-Separations>.

¹⁵¹ See *Final Emergency Interim Report, CBP Families and Children Care Panel*, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 7, ("ICE ERO has effective capacity to detain only 2,500 FMUs, and that capacity is woefully inadequate given the surge in FMU migration over the past year."), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf

On August 23, 2019, DHS and the Department of Health and Human Services (HHS) issued a final rule¹⁵² to plug the *Flores* loophole and turn off this magnet that is encouraging parents, at great danger to themselves and danger and trauma to their children, to make the journey to enter the United States illegally¹⁵³. Unfortunately, on September 27, 2019, Judge Gee permanently enjoined that rule from taking effect.¹⁵⁴ DOJ has appealed that decision to the Ninth Circuit¹⁵⁵, and assuming that appeal (or an ultimate appeal to the Supreme Court) is successful, the number of FMUs seeking illegal entry will inevitably fall.

In the interim, however, the wave of migrants seeking illegal entry has taken its toll on the immigration courts' dockets. In FY 2019, 504,848 additional cases were added to those dockets, in addition to 315,710 in FY 2018.¹⁵⁶ At the same time, the number of cases that were completed by the immigration courts in FY 2019 hit a high of 276,523 (compared to 143,491 completions in FY 2016)¹⁵⁷, but the vast increase in the number of cases on those dockets, largely driven by new cases from the border, has increased the total backlog.

Even absent the final *Flores* regulations, however, the administration has taken steps to turn off the magnets that encourage migrants (and especially FMUs) to take advantage of our broken laws and the lack of detention resources to enter the United States illegally.

On December 20, 2018, then-Secretary of Homeland Security Kirstjen Nielsen announced that DHS would begin implementing what it called the “Migrant Protection Protocols”¹⁵⁸ (MPP, better known as “Remain in Mexico”), issuing policy guidance for that plan on January 25, 2019¹⁵⁹. The department explained that under MPP:

[C]ertain foreign individuals entering or seeking admission to the U.S. from Mexico — illegally or without proper documentation — may be returned to Mexico and wait outside of the U.S. for the duration of their immigration

¹⁵² *Final Rule, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44932–44,535, Aug. 23, 2019, available at:

<https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>.

¹⁵³ See Andrew Arthur, *A Bipartisan Panel Reports Alarming Findings on the Border Crisis, Quantifying the scope of the problem gives the president ammunition to act*, CENTER FOR IMMIGRATION STUDIES, Apr. 25, 2019, available at:

<https://cis.org/Arthur/Bipartisan-Panel-Reports-Alarming-Findings-Border-Crisis>.

¹⁵⁴ *Flores v. Barr*, Case No.: CV 85-4544 DMG (AGRx) (U.S. Dist. C.D. Cal. Sep. 27, 2019), available at:

<https://www.law360.com/articles/1203743/attachments/0>.

¹⁵⁵ Emma Cueto, *Feds Will Appeal Block Of Migrant Child Detention Regulations*, Law 360, Nov. 15, 2019, available at: <https://www.law360.com/articles/1220178/feds-will-appeal-block-of-migrant-child-detention-regulations>.

¹⁵⁶ *New Cases and Total Completions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Jan. 23, 2020, available at: <https://www.justice.gov/eoir/page/file/1238741/download>.

¹⁵⁷ *Id.*

¹⁵⁸ *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY, Jan. 24, 2019, available at:

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹⁵⁹ *Memorandum from Kirstjen Nielsen, Secretary of Homeland Security, Policy Guidance for Implementation of the Migrant Protection*, Department of Homeland Security, Jan. 25, 2019, available at:

https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

Protocols

*proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.*¹⁶⁰

News reports indicate that more than 57,000 migrants have been returned to Mexico as of early January to await their removal proceedings, even as DHS is considering changes to the policy that are aimed at speeding up the proceedings in those cases, including conducting court proceedings at or near the ports of entry.¹⁶¹ There are currently two of those so-called “tent courts” in operation, at Laredo and Brownsville.¹⁶²

I returned last week from the “tent court” in Laredo, and the name is a bit of a misnomer. Proceedings are actually conducted in air conditioned and heated trailers configured to resemble court rooms, with the IJs that I saw appearing from the San Antonio Immigration Court via video teleconference (VTC) (I watched proceedings from both ends of the process, both in Laredo and in San Antonio). The screens in the court were large and clear, the audio was likely better than it was in my court room at the York Immigration Court, and alien respondents were able to have their documents scanned in while they were in court and sent to the remote IJs.

Most importantly, however, the IJs took great pains to ensure that the aliens who were appearing in these cases received due process—and in fact, more rights than are required by law. Notably, when one unrepresented alien expressed a fear of returning to Mexico because of cardiac issues, the IJ directed the ICE attorney to have the respondent interviewed by a USCIS asylum officer before she was returned, a request to which the attorney instantly acceded.

In another development, on July 16, 2019, EOIR and USCIS issued an interim final rule (IFR) that limits asylum eligibility for aliens who have entered or attempted to enter the United States across the southwest border without first seeking asylum or protection under CAT in a third country (that is, a country that is not the one from which they are seeking asylum or CAT) that they passed through in route to the United States.¹⁶³ As I have explained:

In essence, under the IFR, an asylum applicant would be subject to a "third-country-transit bar" from eligibility for that protection if the applicant is apprehended entering or attempting to enter the United States across the Southwest border without first applying for protection in a third country that the alien passed through on the way. There are exceptions to that bar, however, for an alien who demonstrates: (1) that the alien only transited through countries that were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the CAT, or (2)

¹⁶⁰ *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY, Jan. 24, 2019, available at:

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹⁶¹ Geneva Sands, *DHS memo outlines proposed changes to Remain in Mexico program*, CNN, Jan. 24, 2020, available at:

¹⁶² Andrew Arthur, *DHS to Open 'Tent Courts' to Public, Likely less exciting than you would be led to believe*, CENTER FOR IMMIGRATION STUDIES, Jan. 1, 2020, available at: <https://cis.org/Arthur/DHS-Open-Tent-Courts-Public>.

¹⁶³ *Interim Final Rule, Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829-33845 (Jul. 16, 2019), available at: <https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications>.

*that the alien was a victim of "a severe form of trafficking in persons," as defined by regulation.*¹⁶⁴

That IFR had been enjoined by a district court judge on September 9, 2019, an injunction that was partially lifted by the Ninth Circuit on September 10, 2019, before the injunction was stayed pending a full disposition of the government's appeal of that case by the Supreme Court on September 11, 2019.¹⁶⁵

Similarly, on November 19, 2019, EOIR and USCIS issued an IFR captioned "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act."¹⁶⁶ That IFR implements the diplomatic efforts of the administration with the Northern Triangle of Central America (NTCA) countries of El Salvador, Guatemala, and Honduras (the countries of nationality of the vast majority of FMUs and UACs who were apprehended by Border Patrol in FY 2019¹⁶⁷), to share the burden of protecting refugees with our regional partners.

The IFR modifies existing regulations to provide for the implementation of Asylum Cooperative Agreements ("ACAs"), also known as "safe-third country agreements," that the United States enters into pursuant to section 208(a)(2)(A) of the INA¹⁶⁸, and allows asylum officers and IJs to send third-country asylum applicants to a country with which the United States has an ACA to apply for asylum.¹⁶⁹

As the IFR explains:

Hundreds of thousands of migrants have reached the United States in recent years and have claimed a fear of persecution or torture. They often do not ultimately establish legal qualification for such relief or even actually apply[] for protection after being released into the United States, which has contributed to a backlog of

¹⁶⁴ Andrew Arthur, *Administration Issues Third-Country Asylum Eligibility Rule, Bars claims of aliens who failed to apply for asylum en route to the United States*, CENTER FOR IMMIGRATION STUDIES, Jul. 19, 2019, available at: <https://cis.org/Arthur/Administration-Issues-ThirdCountry-Asylum-Eligibility-Rule>.

¹⁶⁵ Andrew Arthur, *SCOTUS Hands Trump Win on Third-Country Transit Bar to Asylum, The long and winding road to the marble palace*, CENTER FOR IMMIGRATION STUDIES, Sept. 12, 2019, available at: <https://cis.org/Arthur/SCOTUS-Hands-Trump-Win-ThirdCountry-Transit-Bar-Asylum>

¹⁶⁶ *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-64011, Nov. 19, 2019, available at: <https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and>.

¹⁶⁷ See U.S. *Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROTECTION, Nov. 14, 2019, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019>.

¹⁶⁸ Section 208(a)(2)(A) of the INA, available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

¹⁶⁹ *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-64011, Nov. 19, 2019, available at: <https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and>.

987,198 cases before the Executive Office for Immigration Review (including 474,327 asylum cases), each taking an average of 816 days to complete. Asylum claims by aliens from El Salvador, Guatemala, and Honduras account for over half of the pending asylum cases.

To help alleviate those burdens and promote regional migration cooperation, the United States recently signed bilateral ACAs with El Salvador, Guatemala, and Honduras in an effort to share the distribution of asylum claims. Pending the Department of State's publication of the ACAs in the United States Treaties and Other International Agreements series in accordance with 1 U.S.C. 112a, the agreements will be published in a document in the Federal Register.¹⁷⁰

The U.S. government began to send migrants to Guatemala pursuant to the ACA with that country in November 2019¹⁷¹, and has sent some 230 Hondurans and El Salvadorans to Guatemala by late January.¹⁷²

The administration engaged in other diplomatic efforts as well to limit the tide of migrants overwhelming the border illegally. In particular, Mexico deployed units of its newly formed National Guard to secure its southern border with Guatemala in response to a tariff threat from the president in June 2019.¹⁷³ As the *Washington Post* explained:

One approach the Mexican government has taken is to dispatch security agents — including those working with the country's migration agency — to checkpoints north of the border. It is a similar approach to that of U.S. Border Patrol, which apprehends a large number of migrants at "interior" checkpoints.

Because a large number of migrants — especially those from Guatemala — are traveling by bus through Mexico, U.S. officials have suggested that Mexico should be able to easily identify and shutter smuggling operations.¹⁷⁴

As my colleague, Jason Peña, reported on November 12, 2019:

¹⁷⁰ *Interim Final Rule, Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994-95, Nov. 19, 2019, available at: <https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and->

¹⁷¹ Adam Shaw, *Trump administration begins sending migrants to Guatemala as part of 'safe third country' agreement*, FOX NEWS, Nov. 21, 2019, available at: <https://www.foxnews.com/politics/trump-administration-begins-sending-migrants-to-guatemala-as-part-of-safe-third-country-agreement>.

¹⁷² Sandra Cuffe, *New Guatemalan gov't to stick with controversial US asylum deal*, The so-call 'safe third country' agreement has drawn widespread criticism from migrant rights advocates, Al Jazeera, January 22, 2020, available at: <https://www.aljazeera.com/news/2020/01/guatemalan-gov-stick-controversial-asylum-deal-200122194628878.html>.

¹⁷³ See Kevin Sieff and Mary Beth Sheridan, *Mexico is sending its new national guard to the Guatemala border. The mission is unclear*, WASHINGTON POST, Jun. 10, 2019, available at: https://www.washingtonpost.com/world/the_americas/with-border-deployment-mexicos-new-national-guard-gets-its-first-big-mission/2019/06/10/91564d14-8ad2-11e9-b6f4-033356502dce_story.html.

¹⁷⁴ *Id.*

Through October, 62,299 people have applied for asylum in Mexico this year, nearly triple the 21,057 who applied during the same period last year. The number of applicants so far this year exceeds the previous six full years combined.¹⁷⁵

These efforts have also prompted the governments of the NTCA countries to take renewed interest in conditions for their own people—with positive results. For example, as I reported on October 3, 2019:

El Salvador, one of the three Northern Triangle countries of Central America (along with Honduras and Guatemala) has seen its crime rate drop by half, as new President Nayib Bukele has sent police to fight extortion and seal the country's border.

AP reported on August 16:

El Salvador's justice minister says the country's homicide rate has fallen to about 4.4 killings a day since June, about half of 2018 levels.

The country of 6.5 million people recorded 3,340 killings in 2018, or about nine a day. The bloodiest year of 2015 saw 6,425 homicides, or 17.6 a day.

Justice Minister Rogelio Rivas said Friday that "homicides are declining across the country."

* * * *

As President Bukele told Martha McCallum on Fox News on September 26: "Whose job is it to fix El Salvador? It's El Salvador's job, right? So, we have [taken] the problem as our own."¹⁷⁶

Similarly, as I wrote on June 11, 2019:

In an eye-opening interview with Stephanie Hamill of the Daily Caller, Guatemalan Minister of Governance Enrique Degenhart explained some of the causes and effects of the exodus of that country's nationals. He stated that the "macroeconomic numbers" in Guatemala "are very good. We have actually the lowest criminal rates in the country that we have had for the past 15 or 20 years. Which means that the [departure of Guatemalan nationals is] probably not a factor of economics or security."

Instead, he pointed to pull factors from Mexico that were encouraging the northward movement of migrants. He explained that Mexico has been granting

¹⁷⁵ Jason Peña, *Asylum Requests in Mexico Triple Compared to Last Year*, CENTER FOR IMMIGRATION STUDIES, Nov. 12, 2019, available at: <https://cis.org/Peña/Asylum-Requests-Mexico-Triple-Compared-Last-Year>.

¹⁷⁶ Andrew Arthur, *El Salvador, Battling Corruption, Sees Murder Rate Drop by Half, And other good news you don't hear*, CENTER FOR IMMIGRATION STUDIES, Oct. 3, 2019, available at: <https://cis.org/Arthur/El-Salvador-Battling-Corruption-Sees-Murder-Rate-Drop-Half>.

"visas and other kinds of work permits and situations" that "enhance the interests of our Guatemalans in using Mexico on the route to get to the U.S." He agreed that most of the Guatemalans are "economic migrants", and are coming to this country looking for jobs.

He did not want to discourage those Guatemalans who are leaving to legitimately look for asylum, but contended that there are "different processes that can be solved either in-country or in a neighboring country that does not necessarily mean that they have to come up [to the United States] in an irregular way." He asserted that the Guatemalan government is effectively adjudicating asylum claims, and that Guatemala is a better country for those seeking assistance than Mexico.

With respect to the departure of its nationals, he admitted that Guatemala would not be feeling the effects in the short term, but that in the near future and in a few years Guatemala "will be skipping a generation." "When minors are being taken on the route," he contended, "that is something that we have to worry about." He expressed a feeling that there is an "additional activity" leading to the departure of minors that "may be a criminal activity." The minister specifically referred to a case of a 50-year-old national of a Central American country who was arrested and prosecuted after purchasing a six-month-old baby to facilitate his entry into the United States. For \$100.

Transnational criminal organizations, he contended, are well-organized and have a "marketing organization" that uses various popular social media to "put out offers" to the Guatemalan population. He also complained about the disconnect between the pictures of Guatemalans who have successfully made it to the United States (which are shown in the country), and the risks along the route, which are not. [Emphasis added].¹⁷⁷

The last point could likely be made in this country, as well.

As a result of these efforts, the number of migrants apprehended by CBP entering illegally and at the ports of entry along the southwest border began to drop, falling from the aforementioned 144,116 in May 2019 to 52,546 in September 2019, to 40,620 by December 2019, an almost 72 percent decrease in seven months.¹⁷⁸ Consequently, in September 2019, then-Acting Homeland

¹⁷⁷ Andrew Arthur, *Border Apprehension Numbers Reach New Highs, And fresh insights from Guatemala*, CENTER FOR IMMIGRATION STUDIES, Jun. 11, 2019, available at: <https://cis.org/Arthur/Border-Apprehension-Numbers-Reach-New-Highs>.

¹⁷⁸ *Southwest Border Migration FY 2020*, U.S. CUSTOMS AND BORDER PROTECTION, Jan. 9, 2020, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

Security Secretary Kevin McAleenan announced that widespread “‘catch and release’ for Central American families arriving at the border” would be ended.¹⁷⁹ As he explained:

“With some humanitarian and medical exceptions, DHS will no longer be releasing family units from Border Patrol Stations into the interior. . . . This means that for family units, the largest demographic by volume arriving at the border this year, the court-mandated practice of catch and release, due to the inability of DHS to complete immigration proceedings with families detained together in custody, will have been mitigated. This is a vital step in restoring the rule of law and integrity to our immigration system.”

This decrease in illegal entries along the border has been matched by a decrease in credible fear claims. Case receipts of such claims dropped from 10,854 in June 2019 to 4,782 in September 2019, a 56-percent decrease in three months.¹⁸⁰

Such decreases will, by themselves, significantly relieve additional pressure on the immigration courts’ dockets, as explained above. And, as noted, cases involving UACs and families are generally more complex (and time-consuming), so a decline in the number of those cases will provide even more relief to the IJs.

That said, however, the reassignment of immigration judges under section 5(c) of the aforementioned order has (or is likely to have) caused delays in the short term in the courts from which they were reassigned.¹⁸¹ In the long run, however, by deterring future illegal entries of aliens who will never appear on court dockets, the result of this change in policy should be a net decrease in the immigration courts’ backlog.

Change in Interior Enforcement Policy

A change in message and policy as it relates to interior enforcement will likely have a positive effect on the backlog as well, if those policies are allowed to take effect and are not impeded.

¹⁷⁹ *Press Release: Acting Secretary McAleenan Announces End to Widespread Catch and Release*, DEPARTMENT OF HOMELAND SECURITY, Sep. 23, 2019, available at: <https://www.dhs.gov/news/2019/09/23/acting-secretary-mcaleenan-announces-end-widespread-catch-and-release>.

¹⁸⁰ *Credible Fear Workload Report Summary, FY2019 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Jan. 14, 2020, available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Credible_Fear_Stats_FY19.pdf.

¹⁸¹ See Jonathan Blitzer, “[What Will Trump Do with Half a Million Backlogged Immigration Cases?](#)”, *New Yorker*, June 20, 2017 (“Since March, New York City, for example, has had at least eight of its twenty-nine immigration judges reassigned, at least temporarily, to Texas and Louisiana, WNYC has reported. But in relocating them the federal government is exacerbating the city’s own significant backlog: roughly eighty thousand pending cases and an average delay of six hundred and twenty-five days per case.”), available at: <https://www.newyorker.com/news/news-desk/what-will-trump-do-with-half-a-million-backlogged-immigration-cases>.

On the same day the president issued the Executive Order above, January 25, 2017, he issued Executive Order 13768, “Enhancing Public Safety in the Interior of the United States.”¹⁸² Section 2 of that order, captioned “Policy,” makes clear that the policy of the executive branch is to:

- (a) *Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;*
- (b) *Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;*
- (c) *Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;*
- (d) *Ensure that aliens ordered removed from the United States are promptly removed; and*
- (e) *Support victims, and the families of victims, of crimes committed by removable aliens.*¹⁸³

That policy was echoed in statements made by then-Acting ICE Director Thomas Homan on Capitol Hill.¹⁸⁴ In his June 13, 2017 written testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, Homan stated:

*To ensure the national security and public safety of the United States, and the faithful execution of the immigration laws, our officers may take enforcement action against any removable alien encountered in the course of their duties who is present in the U.S. in violation of immigration law.*¹⁸⁵

¹⁸² *Executive Order 13768, Enhancing Public Safety in the Interior of the United States*, THE WHITE HOUSE, dated January 25, 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

¹⁸³ *Id.*

¹⁸⁴ See Paul Bedard, *ICE chief rips critics of deportations, entering illegally 'is a crime'*, WASHINGTON EXAMINER, dated June 13, 2017, available at: <https://www.washingtonexaminer.com/ice-chief-rips-critics-of-deportations-entering-illegally-is-a-crime/article/2625799>.

¹⁸⁵ *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request: Hearing Before the House Comm. on Appropriations, Subcomm. on Homeland Security testimony*, 115th Congress (2017) (statement of Thomas Homan, Acting Director of U.S. Immigration and Customs Enforcement), available at: <https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland>.

Press reports state that in his oral testimony, Homan similarly told the Subcommittee: “If you’re in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried”¹⁸⁶

Homan contrasted ICE’s current efforts in enforcing the immigration laws with those of the prior administration:

*Under prior enforcement priorities, approximately 345,000, or 65 percent, of the fugitive alien population were not subject to arrest or removal. President Trump’s EOs have changed that. As a result, ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers issued are up 75 percent. Thus far in this fiscal year, through May 15, 2017, [ICE Enforcement and Removal Operations (ERO)] has removed 144,353 aliens from the United States and repatriated them to 176 countries around the world; these are aliens who posed a danger to our national security, public safety, or the integrity of the immigration system. Of those removed, 54 percent (78,301) had criminal convictions. ERO has also issued 78,176 detainers and 63,691 charging documents; maintained an average daily population of 39,610 in detention; and monitored an average of 70,044 participants daily under the Intensive Supervision Appearance Program (ISAP) III contract or Alternatives to Detention (ATD) program.*¹⁸⁷

Unfortunately, the crisis at the border subsequently limited ICE’s efforts to enforce the immigration laws in the interior in FY 2019. In December 2019, the agency issued its “Fiscal Year 2019 Enforcement and Removal Operations Report.”¹⁸⁸ That report explained:

*Th[e] sustained increase in migration [across the southwest border] has stretched resources across the U.S. government, **requiring ERO to redirect its enforcement personnel and detention capacity to support border enforcement efforts as well as a significantly increased detained population. This has negatively impacted the number of ERO’s interior arrests, as well as the percentage of removals stemming from such arrests, and has also changed the overall composition of ICE’s detained population.** Because much of ERO’s limited detention capacity has been dedicated to housing aliens arrested by CBP, many of whom are subject to mandatory detention under U.S. immigration laws regardless of criminality,*

¹⁸⁶ Stephen Dinan, *No apologies: ICE chief says illegal immigrants should live in fear of deportation*, WASHINGTON TIMES, June 13, 2017, available at: <https://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/>.

¹⁸⁷ *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request: Hearing Before the House Comm. on Appropriations, Subcomm. on Homeland Security testimony*, 115th Congress (2017) (statement of Thomas Homan, Acting Director of U.S. Immigration and Customs Enforcement), available at: <https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland>.

¹⁸⁸ *U.S. Immigration and Customs Enforcement, Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, undated, available at: <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

the increase in border apprehensions has resulted in a lower overall percentage of ICE detainees who have a criminal history (the vast majority of those arrested by ERO in the interior have criminal convictions or pending criminal charges, while those arrested by CBP at the border often do not have any known criminal history). [Emphasis added.]¹⁸⁹

In fact, that report showed that only 27 percent of all aliens detained by ICE were arrested by the agency (73 percent had been apprehended by CBP), and that whereas 54 percent of the average daily population of aliens in FY 2018 had been detained by ICE, only 40 percent in FY 2019 were.¹⁹⁰

Most significantly, ICE reported:

*As the ICE National Docket has continued to grow over the last several years, the number of fugitive aliens [aliens under a final order of removal, deportation, or exclusion] on the non-detained docket has continued to grow as well. At the end of FY 2019, the number of fugitives stood at 595,430, an increase from 565,892 in FY 2018 and 540,836 in FY 2017. The continued growth of the fugitive backlog is a direct result of the pressures placed on the immigration system by the crisis at the Southwest Border, as well as the fact that ICE's Fugitive Operations resources have remained static for many years in the absence of additional appropriations.*¹⁹¹

Put another way, due to a failure of Congress to increase appropriations in ICE detention in the face of the surge at the border in FY 2019, more fugitives—alien respondents who have received due process and been ordered to leave-- has increased significantly.

This has significant implications for the immigration-court backlog. If alien respondents know that they will not be removed at the end of their proceedings, they will be less likely to comply with the orders of the court, and in particular orders to appear for their hearings, just as the CBP Families and Children Care Panel had warned in its April report, referenced above.

In fact, the total number of *in absentia* removal orders for non-detained respondents in removal, deportation, and exclusion proceedings has skyrocketed, going from 19,274 in FY 2012 to 89,919 in FY 2019: a 367 percent increase.¹⁹²

It also means that removal proceedings in non-detained cases are largely just for show—if the decision goes against the alien respondent. All of the court resources expended on those aliens are for naught if they know they will not be removed in the end.

The crisis at the border and Congress's failure to appropriate sufficient resources for ICE also limited the number of aliens whom ICE ERO was able to arrest in the interior of the United

¹⁸⁹ *Id.* at 3-4.

¹⁹⁰ *Id.* at 5.

¹⁹¹ *Id.* at 10.

¹⁹² *Adjudication Statistics, In Absentia Removal Orders*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1060851/download>.

States. In FY 2018, ICE ERO arrested 158,581 aliens, 105,140 of whom were convicted criminals, 32,977 of whom had pending charges, and a mere 20,464 of whom had other immigration violations¹⁹³.

By FY 2019, that had dropped to 143,099 administrative ERO arrests, 92,108 of whom had criminal convictions and 31,020 of whom had pending charges.¹⁹⁴ Only 19,971 had “other immigration violations.”¹⁹⁵ While this had a positive effect on the IJs’ dockets (because fewer aliens were arrested, and therefore placed into removal proceedings), it had dire effects for public safety:

*ERO continues to carry out its public safety mission with limited resources, and as a result, many of the criminal aliens it arrests have extensive criminal histories with multiple convictions or pending charges. Of the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal convictions and pending charges as of the date of arrest, which equates to an average of four criminal arrests/convictions per alien, highlighting the recidivist nature of the aliens that ICE arrests.*¹⁹⁶

In the long run, however, the lack of resources that ICE ERO has to perform its mission in the interior of the United States will cause more aliens to enter the United States illegally, safe in the knowledge that if they avoid CBP enforcement, they will be able to live in the United States indefinitely, or if they are apprehended, they can claim credible fear, pass the low bar therefor, and reside in the United States, again, indefinitely, while their removal proceedings plod along.

A decrease in the number of aliens who are detained entering illegally at the border will alleviate this strain on the immigration courts’ dockets, but it will also free up ICE ERO to arrest more aliens illegally present in the United States. In the short run, that will add cases to the courts’ dockets, but in the long run, it will reduce the incentives for migrants to enter illegally to begin with.

Congress can help. Increased funding for detention will make it less likely that aliens with non-meritorious cases will remain in the court system. Logic and experience indicate that aliens enter the United States illegally to remain at large in the United States; assume for purposes of argument that they enter to work to provide for themselves and their families. The longer that the alien is able to remain at large and work, therefore, the better for that alien. If the alien is detained and cannot work, however, there is no longer an incentive to remain; instead, accepting an order of removal or a grant of the privilege of voluntary departure is therefore more advantageous to the alien than continued detention.

¹⁹³ U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, at 13, undated, available at: <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶

Rescission of DAPA

The rescission of the Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) by the Secretary of Homeland Security on June 15, 2017¹⁹⁷, ended a policy that needlessly extended removal proceedings, burdening the immigration courts. As USCIS has explained DAPA:

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

*These initiatives include: . . . Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new [DAPA] program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.*¹⁹⁸

MPI estimated that as many as 3.7 million aliens could have been covered by DAPA.¹⁹⁹ Many aliens who were in removal proceedings at the time that DAPA was announced sought, and were granted, continuances to assess their eligibility and apply for that benefit, even though federal District Court Judge Andrew Hanen blocked that program from going into effect in February 2015.²⁰⁰ The ending of the program should clear the way for the completion of those cases.

DOJ Guidance on Continuances

Significantly for purposes of the backlog, EOIR and the attorney general have taken steps to provide guidance to IJs in ruling on continuances in removal proceedings. As I explained above, there is currently little downside for an IJ who grants a continuance, but the judge may face significant problems if he or she denies one.

¹⁹⁷ *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (‘DAPA’)*, DEPARTMENT OF HOMELAND SECURITY, Jun. 15, 2017, available at: <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

¹⁹⁸ *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, dated April 15, 2015, available at: <https://www.uscis.gov/archive/2014-executive-actions-immigration>.

¹⁹⁹ *MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, MIGRATION POLICY INSTITUTE, November 19, 2014, available at: <https://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

²⁰⁰ *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), affirmed 809 F.3d 134 (5th Cir. 2015), available at: <https://www.documentcloud.org/documents/1668197-hanen-opinion.html>.

First, EOIR, on July 31, 2017, issued an operating policies and procedures memorandum (OPPM) to curb the number of continuances that immigration judges issue. That OPPM, 17-01²⁰¹, captioned “Continuances,” states:

This [OPPM] ... is intended to provide guidance to assist Immigration Judges with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.

This OPPM expands on an earlier one, OPPM 13-01²⁰², which delineated in more general terms the factors that IJs should follow in ruling on continuances.

Importantly, the OPPM states:

Overall, while administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, Immigration Judges should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.²⁰³

This OPPM provides a basis for denial of continuances where good cause is not shown, a critical protection for IJs in ruling on such motions.

Noting the “strong incentive by respondents in immigration proceedings to abuse continuances,” the OPPM directs IJs to “be equally vigilant in rooting out continuance requests that serve only

²⁰¹ *Operating Policies and Procedures Memorandum 17-01: Continuances*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jul. 31, 2017, available at: <https://www.justice.gov/eoir/file/oppm17-01/download>.

²⁰² *Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Mar. 7, 2013, available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf>. For an in-depth examination of that OPPM, see Andrew Arthur, *DOJ Moves to Curb Continuances in Immigration Court*, CENTER FOR IMMIGRATION STUDIES, Aug. 1, 2017, available at: <https://cis.org/Arthur/DOJ-Moves-Curb-Continuances-Immigration-Court>.

²⁰³ *Operating Policies and Procedures Memorandum 17-01: Continuances*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jul. 31, 2017, available at: <https://www.justice.gov/eoir/file/oppm17-01/download>.

as dilatory tactics.”²⁰⁴ The OPPM provides guidance to IJs to follow in considering requests for continuances for aliens to obtain counsel, for attorney preparation, and for continuances of merits hearings.²⁰⁵ It also addresses the “rare” requests for continuances by the government.²⁰⁶

In an additional move intended to reduce the backlog facing the immigration courts by providing additional bright-line rules for IJs to follow in adjudicating continuances, then-Attorney General Jeff Sessions, using his certification authority²⁰⁷, issued a decision on August 16, 2018, in *Matter of L-A-B-R-*.²⁰⁸

Before I continue, I believe that it is important to explain the attorney general’s certification authority, which is little understood, even by many immigration practitioners.

Under section 103(a)(1) of the INA, “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” I will discuss this provision further below, but this authority has been promulgated in one manner by regulation at 8 C.F.R. § 1003.1(h)(1)(i):

Referral of cases to the Attorney General.

(1) The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.

Alberto Gonzales, who served as attorney general in the George W. Bush administration, and Patrick Glen, senior litigation counsel DOJ’s Office of Immigration Litigation (OIL), discussed the underuse of certification by the Obama administration in a 2016 article in the *Iowa Law Review*.²⁰⁹ They noted:

“This certification power, though sparingly used, is a powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent.” This authority, which gives the Attorney General the ability “to assert control over the BIA and effect profound changes in legal doctrine,” while providing “the Department of Justice final say in adjudicated matters of immigration policy,” represents an additional avenue for the advancement of executive branch immigration policy that is already firmly embodied in practice and regulations. It thus may be a less controversial method

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See 8 C.F.R. § 1003.1(h)(1)(i) (“Referral of cases to the Attorney General”), available at:

<https://www.law.cornell.edu/cfr/text/8/1003.1>.

²⁰⁸ *Matter of L-A-B-R-*, 27 I&N Dec. 405 (2018), available at:

<https://www.justice.gov/eoir/page/file/1087781/download>.

²⁰⁹ Alberto R. Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 *Iowa L. Rev.* 841 (2016), available at: <https://ilr.law.uiowa.edu/print/volume-101-issue-3/advancing-executive-branch-immigration-policy-through-the-attorney-generals-review-authority/>.

*by which to advance immigration policy than the executive-decree style thus far utilized by the Obama Administration.*²¹⁰

Gonzales and Glen are correct in their assertions that the certification authority is “firmly embedded in practice and regulations.” It is also rooted in the INA itself.

Specifically, as noted, section 103(a)(1) of the INA²¹¹ states that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” Given the hundreds of thousands of removal cases that are currently pending, the attorney general would be overwhelmed if he had to decide each of these cases individually. For this reason, Congress has provided for the appointment of IJs to handle all of those cases as a preliminary matter in section 101(b)(4) of the INA²¹², as discussed above.

To review the decisions of the 465 IJs at the nation's 63 immigration courts, past attorneys general have delegated some of their review authority to the BIA by regulation, which is found at 8 C.F.R. § 1003.1(a)²¹³:

*There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director [of EOIR]. **The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.** [Emphasis added].*

In creating the BIA, however, attorneys general have retained review authority for themselves, as 8 C.F.R. § 1003.1(d)(7) makes clear: “The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General in accordance with” 8 C.F.R. § 1003.1(h).²¹⁴ That latter regulation²¹⁵ states:

Referral of cases to the Attorney General.

(1) The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the

²¹⁰ *Id.*

²¹¹ Section 103(a) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim>.

²¹² Section 101(b)(4) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

²¹³ 8 C.F.R. § 1003.1(a), available at: <https://www.law.cornell.edu/cfr/text/8/1003.1>.

²¹⁴ 8 C.F.R. § 1003.1(d)(7), available at: <https://www.law.cornell.edu/cfr/text/8/1003.1>.

²¹⁵ 8 C.F.R. § 1003.1(h), available at: <https://www.law.cornell.edu/cfr/text/8/1003.1>.

concurrence of the Attorney General, refers to the Attorney General for review.

(2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.

Thus, there are three categories of cases that the attorney general may review on certification: (1) cases that the attorney general directs be referred to him; (2) cases that the BIA refers to the attorney general for consideration; and (3) cases that DHS refers to the attorney general for review.

When I was an associate general counsel at the former INS, I requested (with the concurrence of the general counsel) then-Attorney General Janet Reno to review decisions of the BIA that the INS believed had been incorrectly decided. This was an important avenue for review, because there was no statutory authority for the then-INS, and is none for the current DHS, to seek review of a BIA decision by the Article III federal courts. If this authority did not exist, and the BIA erred in a decision (which happens), the government would have to live with the results, regardless of the consequences for the law, the community, and the national security.

The BIA may request attorney general review for major questions of law, or as a safeguard to ensure that a decision of importance was decided correctly. Inherent in such requests is the fact that the BIA is itself breaking new ground with respect to the immigration laws, or is interpreting a new statutory provision, or is dealing with a high-profile matter.

Finally, the attorney general may direct that a specific case be referred to him where he believes that the individual decision was in error, or to adopt a policy or legal change that would apply generally, and sometimes the attorney general does so to both correct an error in the underlying case and to change policy.

An example of the latter is *Matter of Jean*.²¹⁶ The BIA there granted a waiver of inadmissibility and adjustment of status to a Haitian national who had been admitted as a refugee. The respondent in that case had been convicted of second-degree manslaughter in connection with death of a 19-month-old child.²¹⁷

In reversing that decision and ordering the respondent removed, then-Attorney General John Ashcroft made clear his disapproval of the BIA's laxity in granting immigration relief to criminals in the exercise of discretion:

According to the respondent's signed confession, R-J- [the victim] had been left in her care that day by the boy's mother. . . . Early in the afternoon, the young child fell off a couch in the apartment and began to cry. The respondent reacted by

²¹⁶ *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3472.pdf>.

²¹⁷ *Id.* at 374.

striking the toddler's buttocks two or three times with her open hand in an attempt to quiet him. When this effort proved unsuccessful, she picked the boy up by the armpits and shook him. She then hit him two or three times on the top of his head with her fist. Finally, she picked him up again and shook him until he lost consciousness. Upon observing that the child was no longer breathing and that his eyes, although open, had stopped blinking, the respondent placed him on a bed just off the living room.

* * * *

The medical examiner's report described bruises to R-J's head, chest, and back; internal hemorrhages of the lungs, pancreas, and diaphragm; and acute subdural and spinal epidural hemorrhages. The report determined that R-J- died from bleeding and swelling inside his skull caused by blunt trauma, and that the death was a homicide.

* * * *

The [BIA] . . . held that, under its own view of the evidence, the respondent had established her eligibility for a waiver of inadmissibility and an adjustment of status from refugee to lawful permanent resident. Finally, the [BIA] concluded in a single sentence that "the equities," when weighed against the respondent's criminal conviction, warranted the grant of such discretionary relief.²¹⁸

He continued, demonstrating his disagreement with the BIA's analysis and use of discretion:

The [BIA] here cited testimony and "lengthy letters" provided by members of the respondent's family, as well as the fact that the respondent's husband and children are permanent legal residents, as evidence that her removal would cause the family "severe emotional hardship." . . . On the strength of this scant summary, the [BIA] found that she "met the standard for granting" a waiver of inadmissibility and an adjustment of status.

The [BIA]'s analysis, which makes no attempt to balance claims of hardship to the respondent's family against the gravity of her criminal offense, is grossly deficient. The opinion marginalizes the depravity of her crime, stating simply that the panel had "weighed the equities in this case against the respondent's criminal conviction" and concluded that discretionary relief was warranted. . . . Little or no significance appears to have been attached to the fact that the respondent confessed to beating and shaking a nineteen-month old child to death, or that her confession was corroborated by a coroner's report documenting a wide-ranging collection of extraordinarily severe injuries. [Emphasis added.]²¹⁹

²¹⁸ *Id.* at 374-75, 378.

²¹⁹ *Id.* at 382-83.

The attorney general then set forth a new general policy to be followed in granting asylum and adjustment of status in the exercise of discretion to violent criminal aliens:

*Aliens who have committed violent or dangerous crimes will not be granted asylum, even if they are technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.*²²⁰

Reading between the lines of this May 2002 decision, Attorney General Ashcroft used his certification authority not only to reverse an erroneous decision, but also to clarify the correct standard for the BIA to follow going forward in exercising his discretion and to signal that the then (fairly) new administration viewed such cases differently (and more harshly) than its predecessor.

Directing the IJs and BIA in the proper use of discretion is a complicated task, because the attorney general does not want to be accused of so-called “infringement on the independence of the Immigration Court,” despite the fact that the IJs in removal proceedings are actually exercising the attorney general’s discretion. Moreover, as noted above, the attorney general has only limited time and resources to correct erroneous exercises of that discretion. Again, with due respect to IJs and the BIA, the granting of discretionary relief in cases like *Matter of Jean* is strong evidence that the creation of Article I immigration courts, separate from their current structure within DOJ, are a bad idea.

Finally, I would note that Attorney General Barr, in *Matter of Thomas and Matter of Thompson*²²¹ underscored his power to establish immigration policy through certification. Specifically, he expressly rejected the argument that DOJ should proceed through “rulemaking” (that is, by promulgating a regulation in compliance with the Administrative Procedure Act or “APA”) instead of through “adjudication,” finding: “Supreme Court precedent confirms my authority as agency head to proceed by adjudication, and my authority here derives from the text of the relevant provisions in the INA.”²²²

In short, certification is a powerful tool that allows the attorney general to set immigration law and policy in accordance with statute and regulation. It is also an effective way for the attorney general to use his suasion to correct improper exercises by his delegates of the discretion that he has been given under the INA. I would expect to see it used more in the future, to ensure that the often-arcane immigration laws are applied in a commonsense manner.

²²⁰ *Id.* at 373.

²²¹ *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019), available at: <https://www.justice.gov/eoir/page/file/1213201/download>.

²²² *Id.* at 688.

Returning to *Matter of L-A-B-R*²²³, in that decision, the attorney general logically explained that:

*When a respondent requests a continuance to accommodate a collateral proceeding, the good-cause inquiry thus must focus on whether the collateral matter will make a difference in the removal proceedings — that is, “whether a continuance is likely to do any good.” . . . This will turn out to be true only if the respondent receives the collateral relief and that relief materially affects the outcome of respondent's removal proceedings.*²²⁴

On this basis, the attorney general found (consistent with BIA precedent) that continuances should not be granted where the respondent's “collateral pursuits are merely speculative.”²²⁵

In addition, he found, IJs “must also consider any other relevant factors,” although the attorney general admitted that not every good-cause factor could be identified.²²⁶ He stated, however, that “germane secondary factors may include . . . the respondent’s diligence in seeking collateral relief, DHS’s position on the motion for continuance, and concerns of administrative efficiency.”²²⁷

With respect to the position of DHS, the attorney general determined that while the department's position “will often assist the immigration judge's good-cause analysis,” it is not dispositive of whether the IJ should grant or deny the motion. He also noted, though, that IJs “must also avoid improperly shifting the burden to DHS to demonstrate the absence of good cause.”²²⁸

In explaining “administrative efficiency,” the attorney general referenced OPPM 17-01, discussed above.²²⁹ He explained that this OPPM “appropriately recognizes efficiency as a relevant factor in the good-cause analysis.”²³⁰ Significantly, the attorney general suggested, the number of prior continuances, and the impact of the continuance requested “on the efficient determination of the case, among other case-specific factors,” were relevant considerations.²³¹

In applying all the factors, Sessions held, a stronger factor may make up for weaker factors. For example: “A respondent who makes a compelling case that he will receive collateral relief and successfully adjust status may receive a continuance even if, for instance, he has already received previous continuances.”²³²

²²³ *Matter of L-A-B-R*, 27 I&N Dec. 405 (2018), available at: <https://www.justice.gov/eoir/page/file/1087781/download>.

²²⁴ *Id.* at 413.

²²⁵ *Id.* at 414.

²²⁶ *Id.* at 415.

²²⁷ *Id.*

²²⁸ *Id.* at 416.

²²⁹ MaryBeth Keller, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-01: Continuances*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, dated July 31, 2017, available at: <https://www.justice.gov/eoir/file/oppm17-01/download>.

²³⁰ *Matter of L-A-B-R*, 27 I&N Dec. at 416, available at: <https://www.justice.gov/eoir/page/file/1087781/download>.

²³¹ *Id.* at 417.

²³² *Id.*

That said, the attorney general made clear that “because the respondent's likelihood of success in the collateral matter is paramount, a truly weak showing on that front may be dispositive.”²³³ Among the examples he listed were applications that could not be granted, collateral attacks on criminal convictions, and collateral forms of relief that had already been denied where there were no changed circumstances.²³⁴

In addition:

*Even if the respondent's collateral proceeding has clear promise, it will sometimes be impossible or too uncertain that the collateral relief will affect the disposition of the removal proceedings. For example, the immigration judge must deny a continuance if he concludes that, even if USCIS approved the respondent's visa petition, he would deny adjustment of status as a discretionary matter or because the respondent is statutorily ineligible for adjustment.*²³⁵

Finally, he held, “good cause does not exist if the alien’s visa priority date is too remote to raise the prospect of adjustment of status above the speculative level.”²³⁶

The attorney general noted that in order to assess the speculative nature of the collateral matter, the IJ will generally need an evidentiary submission by the respondent, “which should include copies of relevant submissions in the collateral proceeding, supporting affidavits, and the like.”²³⁷

In addition, the attorney general held that IJs should make clear on the record or in a written decision why they are granting continuances, because “[a] record of the immigration judge's evaluation and balancing of the relevant good-cause factors does not bind the Board . . . but it does aid the Board's review of a continuance order,”²³⁸ indicating that such orders are, and should be, subject to review.

He concluded by making clear that while “the determination of good cause remains within the immigration judge's discretion,” where an alien seeks to continue removal proceedings to pursue collateral relief, the regulation “requires scrutiny of whether the respondent's collateral proceeding is likely to make a difference.”²³⁹

Other Certification Decisions

The attorney general has also used his certification authority to begin the process of addressing other issues that have slowed the completion of immigration cases.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 418.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 419.

For example, in *Matter of Castro-Tum*²⁴⁰, then-Attorney General Sessions ended the general practice of administrative closure of removal cases. As he stated:

*I hold that immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. Accordingly, immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.*²⁴¹

In his decision, the attorney general noted that while administrative closure has been an authority utilized by the immigration courts and the BIA since the 1980s, the use of this authority has “grown dramatically as the [BIA] has made administrative closure easier to obtain.”²⁴² In particular, in the 31 years from FY 1980 to FY 2011, 283,366 cases were administratively closed, while “in a mere six years, from October 1, 2011, through September 30, 2017, [IJs] and the [BIA] ordered administrative closure in 215,285 additional cases.”²⁴³

That authority had become less of a tool of administrative convenience, and more of a tool to sweep cases under the carpet and make them disappear, as is best demonstrated by the fact (which the attorney general referenced²⁴⁴) that between 1980 and the attorney general’s decision (a period of some 38 years), less than a third of those hundreds of thousands of administratively closed cases had been recalendared. Administratively closed cases had become a backlog of their own, albeit one hidden from public view.

Sessions’ decision did not automatically recalendar those cases that had been administratively closed and that were subject to that decision. Rather, he ordered “that all cases that are currently administratively closed may remain closed unless DHS or the respondent requests recalendaring,”²⁴⁵ As he stated: “I expect the recalendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets.”²⁴⁶

While *Matter of Castro-Tum* may add additional cases to the IJs’ dockets in the short term, it will allow EOIR to honestly state how large the backlog in cases before the immigration courts are, informing both Congress and the public as to whether the immigration courts have sufficient resources, and underscoring the effectiveness (or not) of other policies intended to facilitate the completion of removal proceedings, consistent with due process.

It also brings immigration policy in line with the regulations governing removal proceedings generally, and 8 C.F.R. § 1003.12 specifically. That regulation states: “These rules are

²⁴⁰ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1064086/download>.

²⁴¹ *Id.* at 272.

²⁴² *Id.* at 273.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 293.

²⁴⁶ *Id.* at 294.

promulgated to assist in the **expeditious**, fair, and proper resolution of matters coming before Immigration Judges.” [Emphasis added].²⁴⁷

Finally, it reinforces the decades-old principle, best stated in *Lopez-Telles v. INS*, which states that IJs are “without discretionary authority to terminate deportation proceedings so long as [immigration-] enforcement officials . . . choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion.”²⁴⁸ Any procedure by which hundreds of thousands of removal, deportation, and exclusion cases are effectively shelved for decades is a de facto termination.

Interestingly, the Court of Appeals for the Fourth Circuit has held that (despite the fact that it is a procedural tool unmoored from direct basis in statute or regulation), administrative closure is still available in the courts in that circuit, subject to prior BIA guidance.²⁴⁹

In a separate case, *Matter of E-F-H-L-*, then-Attorney General Sessions used his authority to vacate an earlier BIA decision of the same name, in which it had held that “that a respondent applying for asylum and withholding of removal was ordinarily entitled to a full evidentiary hearing.”²⁵⁰ This decision will enable immigration judges to more quickly issue decisions in non-meritorious asylum cases.

Finally, in *Matter of A-B-*²⁵¹, then-Attorney General Sessions provided bright-line rules for IJs and the BIA to follow in evaluating asylum claims related to criminal activity, and in particular gang-related activity, largely by applying and reiterating BIA precedent on the issue of “membership in a particular social group.”²⁵²

By providing immigration judges and asylum officers with better guidance on these issues, the attorney general has, logically, enabled IJs to decide those cases more quickly.

²⁴⁷ 8 C.F.R. § 1003.12, available at: <https://www.justice.gov/eoir/page/file/1064086/download>.

²⁴⁸ *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977), available at: <https://law.justia.com/cases/federal/appellate-courts/F2/564/1302/82805/>; see also *Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982) (“It has long been held that when enforcement officials of the Immigration and Naturalization Service choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged.”), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2908.pdf>.

²⁴⁹ *Zuniga Romero v. Barr*, No. 18-1850 (4th Cir. Aug. 29, 2019), available at: <http://www.ca4.uscourts.gov/opinions/181850.p.pdf>.

²⁵⁰ *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1040936/download>.

²⁵¹ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%202008.pdf.

²⁵² See section 208(b)(1)(B)(i) of the INA (“The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) of [the INA]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”), available at: https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%202008.pdf.

Improvements in EOIR's Processes

During my May 2018 *Immigration Newsmaker* interview, Director McHenry outlined three specific steps that the agency was taking to reduce the backlog.²⁵³

The first, as already mentioned, was an increase in IJ hiring.

The second was increasing EOIR's "existing capacity."²⁵⁴ Specifically, McHenry mentioned work that the agency was doing on docketing efficiencies, as well as reducing the number of unused courtrooms by utilizing video teleconference (VTC) technology.²⁵⁵ He also stated that EOIR was "shifting resources around," to enable courts that had "excess capacity" to hear cases from other courts that had less capacity to deal with its existing docket.²⁵⁶

I used VTC as an IJ to hear cases from remote locations, and in particular state and federal prisons that fell within my jurisdiction. I found that, with a few notable exceptions, the system as it worked five years ago enabled me to quickly, and consistent with due process, adjudicate cases. That technology has only improved in the last five years since I left the bench, as my recent trip to Laredo revealed. Respondents were able to have documents scanned in and sent to the court in real time, an advantage that would only have improved my ability to hear cases.

With respect to that last point, the third improvement McHenry referenced had to do with infrastructure, and in particular moving the immigration courts to an electronic-based system for the filing of motions, evidence, and applications.²⁵⁷ As the EOIR website²⁵⁸ explains:

EOIR is working to improve its court and appellate information systems.

The EOIR Courts & Appeals System (ECAS) initiative is part of an overarching information technology modernization effort at our agency. The goal of ECAS is to phase out paper filing and processing, and to retain all records and case-related documents in electronic format. In support of the EOIR mission, it will further enable the timely and fair adjudication of immigration cases.

ECAS is currently available at nine courts (San Diego, Atlanta, Denver, Baltimore, York, Aurora, the Falls Church Immigration Adjudication Center, the Fort Worth Immigration Adjudication Center, and Philadelphia), and will soon be available at the Imperial, Otay Mesa,

²⁵³ *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: <https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry>.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated January 21, 2020, available at: <https://www.justice.gov/eoir/ECAS>.

and Stewart/Lumpkin Immigration Courts.²⁵⁹ It is scheduled to be expanded to the rest of the courts and the BIA.²⁶⁰

As of November 2019, over 40,000 electronic cases had been created, and almost 16,000 attorneys had been registered to use ECAS.²⁶¹

ECAS will improve the adjudication of cases by making the documents of record available to the IJ and the parties, reducing the lag time between filing and receipt, and ensuring that documents are not lost, as occasionally happens with the existing paper ROPs. And, as McHenry noted, electronic filing:

*[M]akes it easier for the judges to look at while they're conducting a hearing. . . . easier for the law clerks later on if they need to review something to help write a decision. . . [and] easier for the public to be able to file more at their convenience than to have to go down to the actual window and file it.*²⁶²

Department of Justice Litigation

Finally, DOJ must fight vigorously for decisions that provide uniformity of law and “bright-line” rules for immigration judges to apply in real-world cases. Most people I talk to about my work as an immigration judge are surprised when I tell them that I handled more than 13,000 cases in just over eight years on the bench. Because of the volume of cases they handle, IJs must be able to decide cases quickly, or run the risk that their dockets will be uncontrollable; otherwise, justice suffers, and the job becomes overwhelming. Uniform, clear standards of law are essential to this task.

Conclusions on Immigration Court Backlogs

The backlogs in immigration courts are too large, but they are, to some degree, explained by the poor policies set by the executive branch in the past, and the recent crisis at the southwest border, which saw hundreds of thousands of migrants seek illegal entry into the United States. There is much that needs to be done to remedy the problem, but the administration has taken some crucial first steps. It must follow through on those steps and its promises on immigration enforcement to reduce those backlogs, and Congress must also do its part by providing the needed funding to support immigration enforcement and staff the immigration courts fully.

Oversight of the Immigration Courts and the BIA by DOJ

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Unprecedented Migration at the U.S. Southern Border: The Year in Review: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, at 116th Cong. (2019) (statement of James McHenry, Director of the Executive Office for Immigration Review), at 2, available at: <https://www.hsgac.senate.gov/imo/media/doc/Testimony-McHenry-2019-11-13.pdf>.

²⁶² *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: <https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry>

There has been significant attention paid by Congress and other organizations to oversight of the IJs and the BIA by DOJ generally, and EOIR in particular.

I have already addressed the issue of referral of BIA and IJ decisions by the attorney general through his certification authority, but it bears repeating that such authority is inherent in the attorney general under section 103(a)(1) of the INA.²⁶³ Again, I will also note that, as an attorney with the INS, I relied upon that specific authority to correct serious errors and conclusions of the BIA in matters touching upon the national security and foreign policy of the United States. As I will address below, because of the executive branch's primacy in those issues, it is critical that the attorney general, as a representative of the executive branch, be allowed to continue to exercise his certification authority, and authority over immigration law as a whole.

There have also been issues raised concerning oversight of the immigration courts, in particular, by the director of EOIR and the Chief IJ, in an effort to ensure efficient adjudication of immigration cases in general, and removal cases in particular.

The director of EOIR has been given authority by the attorney general to supervise EOIR and its components, pursuant to regulations set forth in 8 C.F.R. § 1003.0.²⁶⁴ That regulation states, in pertinent part:

(b) Powers of the Director -

(1) In general. The Director shall manage EOIR and its employees and shall be responsible for the direction and supervision of each EOIR component in the execution of its respective duties pursuant to the Act and the provisions of this chapter. Unless otherwise provided by the Attorney General, the Director shall report to the Deputy Attorney General and the Attorney General. The Director shall have the authority to:

(i) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(ii) Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by the Board, the immigration judges, the Chief Administrative Hearing Officer, or the administrative law judges;

²⁶³ Section 103(a)(1)(A) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1103&num=0&edition=prelim>.

²⁶⁴ 8 C.F.R. § 1003.0, available at: <https://www.law.cornell.edu/cfr/text/8/1003.0>.

* * * *

(iv) Evaluate the performance of the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, and other EOIR activities, make appropriate reports and inspections, and take corrective action where needed;

(v) Provide for performance appraisals for immigration judges and Board members while fully respecting their roles as adjudicators, including a process for reporting adjudications that reflect temperament problems or poor decisional quality;

* * * *

and

(ix) Exercise such other authorities as the Attorney General may provide.²⁶⁵ [Emphasis added].

The attorney general has also given, by regulation, authority to the Chief IJ to issue policy and direct the conduct of employees in the Office of the Chief Immigration Judge, set forth in 8 CFR § 1003.9.²⁶⁶ That regulation states, in pertinent part:

(b) Powers of the Chief Immigration Judge. Subject to the supervision of the Director, the Chief Immigration Judge shall be responsible for the supervision, direction, and scheduling of the immigration judges in the conduct of the hearings and duties assigned to them. The Chief Immigration Judge shall have the authority to:

(1) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

* * * *

(3) Direct the conduct of all employees assigned to OCIJ to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases, to direct that the adjudication of certain cases be deferred, to regulate the assignment of immigration judges to cases, and otherwise to manage the docket of matters to be decided by the immigration judges;

* * * *

²⁶⁵ *Id.*, at subsection (b).

²⁶⁶ 8 C.F.R. § 1003.9, available at: <https://www.law.cornell.edu/cfr/text/8/1003.9>.

and

(6) *Exercise such other authorities as the Director may provide.*²⁶⁷
[Emphasis added].

Case Processing Priorities

Pursuant to her powers under 8 C.F.R. § 1003.9(b)(1)(i), on January 31, 2017, then-Chief IJ Keller issued a memorandum captioned “Case Processing Priorities.”²⁶⁸ That memorandum rescinded two prior memoranda, and limited case processing priorities to just three categories: detained respondents, UACs in HHS custody who did not have an identified sponsor, and respondents who had been released from custody pursuant to *Rodriguez*²⁶⁹ (discussed above). Those priorities only applied to 10 percent of pending cases.²⁷⁰

That memorandum made clear that cases involving all other UACs, adults with children released pursuant to ATD, adults with children who had been released from custody, and recent border crossers who had been detained but were subsequently released were no longer docketing and processing priorities.²⁷¹

Thereafter, on January 17, 2018, Director McHenry issued a separate memorandum captioned “Case Priorities and Immigration Court Performance Measures”²⁷² pursuant to his authority under 8 C.F.R. § 1003.0(b)(1)(i). That memorandum, in turn, rescinded the January 31, 2017 memorandum referenced above, and laid “out EOIR’s specific priorities and goals in the adjudication of immigration court cases.”²⁷³

Significantly, Director McHenry, noting “EOIR has always designated detained cases as priorities for completion,” admitted:

*The repeated changes in case prioritization have caused confusion and created difficulty in comparing and tracking case data over time. **But, most importantly, the frequent shifting priority designations did not enhance docket efficiency.***

²⁶⁷ *Id.* at subsection (b).

²⁶⁸ MaryBeth Keller, Chief Immigration Judge, *Case Processing Priorities*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 31, 2017, at 1, available at:

<https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>.

²⁶⁹ See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), available at:

<http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>, reversed and remanded *Jennings v. Rodriguez*, 583 U.S. ___ (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

²⁷⁰ James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 2, Jan. 17, 2018, available at:

<https://www.justice.gov/eoir/page/file/1026721/download>.

²⁷¹ MaryBeth Keller, Chief Immigration Judge, *Case Processing Priorities*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 31, 2017, at 1-3, available at:

<https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>.

²⁷² James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 17, 2018, available at:

<https://www.justice.gov/eoir/page/file/1026721/download>.

²⁷³ *Id.* at 1.

*Not only were cases repeatedly moved to accommodate new priorities without a clear plan for resolving both the new and older cases, but also the designations did not adequately stress the importance of completing all cases in a timely manner.*²⁷⁴ [Emphasis added].

“Accordingly,” McHenry stated, “to address concerns and confusion, it is appropriate to clarify EOIR’s priorities and goals to ensure that the adjudication of cases serves the national interest consistent with the principles outlined by the Attorney General.”²⁷⁵

Specifically, he identified as “priorities for completion . . . cases involving individuals in detention or custody, regardless of the custodian,” as well as “cases subject to a statutory or regulatory deadline, cases subject to a federal court-ordered deadline, and cases otherwise subject to an established benchmark for completion, including” cases listed in an appendix, captioned “Immigration Court Performance Measures.”²⁷⁶

Included in that latter group of priority cases were credible fear reviews, which are subject to a seven-day deadline under subclause 235(b)(1)(B)(iii)(III) of the INA²⁷⁷; reasonable fear reviews, which are subject to a 10-day deadline under 8 C.F.R. § 1208.31(g)²⁷⁸; and expedited asylum cases, which are subject to a 180-day deadline (not including appeals) from the date of filing “in the absence of exceptional circumstances” at clause 208(d)(5)(A)(iii) of the INA²⁷⁹.

With respect to this last category of cases, on November 19, 2018, McHenry issued a Policy Memorandum captioned “Guidance Regarding the Adjudication of Asylum Applications consistent with INA 208(d)(5)(A)(iii).”²⁸⁰

Immigration Court Benchmarks and Performance Metrics

In the January 2018 memorandum, McHenry also noted the importance of benchmarks and performance metrics for IJs, and the history of such evaluative tools (and confusion surrounding them) at EOIR:

Apart from designated case priorities, EOIR’s case processing has also involved other types of evaluative measures over time, such as statutory or regulatory deadlines for the completion of certain types of cases, including under the [INA], the Government Performance and Results Act (GPRA) of 1993, and the GPRA Modernization Act of 2010. Although these case completion goals have not

²⁷⁴ *Id.* at 2.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2 and Appx. A.

²⁷⁷ Subcl. 235(b)(1)(B)(iii)(III) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²⁷⁸ 8 C.F.R. § 1208.31(g), available at: <https://www.law.cornell.edu/cfr/text/8/1208.31>.

²⁷⁹ Cl. 208(d)(5)(A)(iii) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

²⁸⁰ James McHenry, Director, *Policy Memorandum 19-05, Guidance Regarding the Adjudication of Asylum Applications consistent with INA 208(d)(5)(A)(iii)*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Nov. 19, 2018, available at: <https://www.justice.gov/eoir/page/file/1112581/download>.

previously denoted case priorities per se, they do serve as indicators of the importance of completing certain classes of cases in a timely manner.

Historically, EOIR also utilized case completion measures for non-detained cases from FY 2002 to FY 2009, but it eliminated those measures in FY 2010, leading to confusion regarding the extent to which the timely completion of non-detained cases was perceived as a priority for the agency. The abolition of non-detained case completion benchmarks was also subsequently criticized by both the [DOJ] Office of Inspector General and the [GAO], both of whom recommended that EOIR reinstate goals for the completion of non-detained cases. In 2016 and 2017, the House Committee on Appropriations also directed EOIR to establish a goal that the median length of detained cases be no longer than 60 days and the median length of non-detained cases be no longer than 365 days.²⁸¹

In November 2017, I wrote about the importance of such metrics:

If there were no accounting for the ability of a judge to issue a decision in a reasonable (or representative) period of time, absurd results would follow. [C]onsider two separate judges. . . in the same court. Each hears a case involving an identically situated alien seeking an identical form of relief. One judge disposes of the case (from master calendar to final decision) within a month, along with decisions in 60 similar cases. The other judge, however, is unable to make a decision on our hypothetical case. Multiple continuances are granted, multiple hearings are held, and other cases are bumped, but the second judge still cannot make a decision. Months go by with no determination, and the rest of the judge's calendar suffers as a result. The judge's other colleagues must take up the slack that results from the judge's indecision or inability to render a judgment. There is neither "fairness" nor efficiency nor "justice" in this scenario.

Part of the issue with measuring immigration judge performance currently has to do with the expectations and behavior of the parties and the court. I have written extensively in the past about the large number of continuances that have plagued the court system and inflated the backlog. A major issue, as I have explained before, is that "[t]here is ... significant pressure from federal courts and the BIA on IJs to grant continuances, and little downside to the IJs in doing so."

EOIR should, therefore, use metrics and goals to modify behavior of both the judges and the parties that is harmful to the immigration-court system.²⁸²

²⁸¹ James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 3, Jan. 17, 2018, available at:

<https://www.justice.gov/eoir/page/file/1026721/download>

²⁸² Andrew Arthur, *Balancing Independence and Accountability at the Immigration Courts*, A CourTools solution, Center for Immigration Studies, Nov. 8, 2017, available at: <https://cis.org/Arthur/Balancing-Independence-and-Accountability-Immigration-Courts>.

McHenry also noted the importance of such metrics in his memorandum:

Almost every trial court system utilizes performance measures or case completion metrics to ensure that it is operating efficiently and appropriately. Some of these are established by statute or regulation whereas others are set by policy; nevertheless, trial court performance measures are an essential and widely-recognized tool for ensuring healthy and effective court operations.

* * * *

In fact, over 25 years ago, the ABA recognized the importance of establishing court performance standards to ensure effective case management and to avoid undue delay; in doing so, it outlined seven essential elements for managing cases, including several that are now being implemented by EOIR such as "[p]romulgation and monitoring of time and clearance standards for the overall disposition of cases," "[a]doption of a trial-setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimizing resittings caused by overscheduling," "[c]ommencement of trials on the original date scheduled with adequate advance notice," and "[a] firm, consistent policy for minimizing continuances." In short, court performance measures and case completion goals are common, well-established, and necessary mechanisms for evaluating how well a court is functioning at performing its core role of adjudicating cases.

EOIR is no exception to the rule that court performance measures are a necessary accountability tool to ensure that a court is operating at peak efficiency, nor is there anything novel or unique about applying performance measures to EOIR's immigration courts. Rather, a review of such measures is vital to ensure that the immigration court system is performing strongly, that EOIR is adjudicating cases fairly, expeditiously, and uniformly consistent with its mission, and that it is addressing its pending caseload in support of the principles established by the Attorney General.²⁸³

McHenry then set forth "court-based performance measures" that EOIR would track and audit, which were "intended to help determine which courts are operating in a healthy and efficient manner" and on the one hand as well as those courts that "may be in need of more specialized attention in the form of additional resources, training, court management, creative thinking and planning, and/or other action as appropriate" on the other.²⁸⁴ Those measures did not address metrics to evaluate the performance of any individual IJ.

²⁸³ James McHenry, Director, *Case Priorities and Immigration Court Performance Measures*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, at 3-4, Jan. 17, 2018, available at:

<https://www.justice.gov/eoir/page/file/1026721/download>

²⁸⁴ *Id.* at 4-5, and see Appx. A.

By E-mail dated March 30, 2018, however, the director of EOIR announced new performance metrics for IJs, which would be effective October 1, 2018.²⁸⁵ Those metrics were to be added to the existing IJ Performance Work Plan under “Job Element 3: Accountability for Organizational Results.”²⁸⁶

Most significantly, under “Performance Goals” for that element, a case completion rate of “700 cases per year” was added, as well as a remand rate of less than 15 percent from the BIA and federal courts, in addition to compliance with a series of “Benchmarks,” for a finding of “Satisfactory performance.”²⁸⁷

Those benchmarks include a finding that 85 percent of detained cases were completed within three days of the merits hearing, that 85 percent of non-detained cases were completed within 10 days of the merits hearing, that 85 percent of motions were adjudicated within 20 days of receipt, that 90 percent of bond requests were completed on the date of the initial hearing where the respondent was produced by DHS, that 95 percent of all individual merits hearings were completed on the initial hearing date (unless the alien was not produced by DHS), and that 100 percent of credible-fear and reasonable-fear reviews be completed on the initial hearing date (again, unless DHS failed to produce the respondent).²⁸⁸

I specifically asked McHenry about how these performance goals were going to be applied, and whether EOIR would receive feedback on these performance goals during our May 2018 *Immigration Newsmaker* event:

MR. ARTHUR: . . . It was recently reported that EOIR plans to set a quota of 700 cases per year for immigration judges – for each immigration judge to complete. Are there performance standards for immigration judges?

MR. MCHENRY: I think at this point most people are probably aware. There was an email that went out toward the end of March and it’s been in the media. So we are – we do intend to implement performance measures – numeric performance measures. It’s important to clarify, though, that immigration judges have been subjected to performance evaluations for a number of years. I don’t know if they were in place when you were a judge, but it’s not a new concept or a new idea to evaluate the performance of judges. The new part is having sort of numeric standards. And we think, from an objective perspective, if you’re an employee and you’re being evaluated, you know, it helps you to understand sort of what you need to do to get a certain level of performance. So we’re trying to make it both more transparent and more objective to have the judges have a better understanding of what they need to do.

²⁸⁵ E-mail from Director of EOIR to All of Judges (EOIR), *Immigration Judge Performance Metrics*, Mar. 30, 2018, available at: <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*, *EOIR Performance Plan, Adjudicative Employees*, at 2.

²⁸⁸ *Id.*

MR. ARTHUR: *What happens if you're a judge in a court that only has 500 notices to appear filed each year? I mean, how are you going to meet 700 cases if you only get 500 NTAs?*

MR. MCHENRY: *Well, this is one reason, aside from semantics, that we don't call it a quota, or we don't consider it a quota. A quota is sort of a fixed number without any kind of deviation or without any sort of allowance or room for deviation. But when we evaluate the judges based on our measure, there are at least six discrete factors that we're going to take into consideration. And there's also a seventh sort of catch-all. So before we – before we come to a final evaluation, if for some reason, you know, a judge has not completed the number of cases that we think is appropriate, we'll look at these factors.*

We'll look at the catch-all. We'll look at sort of the overall context. And it could be something – obviously, if a judge doesn't get 700 cases, you can't expect the judge to complete 700 cases. So we're not – again, it's not an inflexible number. It's not quite as concrete or rigid as perhaps it's been portrayed. But we're going to look at factors like that, factors that may be beyond the judge's control. And that all goes into account for the evaluation.

MR. ARTHUR: *And, yes indeed – it hasn't been that long that I was an immigration judge – we did have performance standards that I had to meet. And demeanor and, you know, various other competency requirements were part of that. But with respect to the number of cases that a judge has to complete per year, or that, you know, ideally will be completed, will there be feedback on that? Will you guys, you know, take a look at those numbers, determine whether that's the right number?*

MR. MCHENRY: *Right now – and, first, the measures aren't scheduled to go into effect until the beginning of the next fiscal year, so that's October. So we've got – we've got training coming up for the judges. There'll be bargaining with the union on impact and implementation of the measures. So how it's going to be rolled out is subject to change between now and then. But we do want the judges to be aware of the numbers, to help try to make them more comfortable with them and understanding sort of where we're coming from.*

And in terms of feedback, you know, we're working on essentially an electronic dashboard system, so that the judges can call up, you know, their own caseload, their own numbers themselves in real time, you know, updated on sort of a daily basis. And they can see kind of where they stack up. You know, other agencies use similar systems. And other agencies who have similar performance measures use those types of systems. And we're going to make sure that the judges have enough feedback, have enough information so that they know kind of where they stand and where there may be some potential issues.

MR. ARTHUR: What are going to be the implications if, you know, one fails to meet these standards? I mean, do you get fired? Is there an opportunity for additional training? Do you identify, you know, people that need some – a little bit more help?

MR. MCHENRY: Again, it's really going to be fact-specific and based on the particular situation. It could be a training issue. It could be a resource issue. You know, it could be somebody who's just been out for a while for some reason. It could be going on detail. There are a number of factors that might go into it. And we don't have sort of a one-size-fits-all of how we're going to – how we're going to, you know, make a decision. You know, we're going to look at it, see what the – drill down, see what the actual underlying issue is, and then address it – whether it's training, resources, or something else.

MR. ARTHUR: But I anticipate this will be a feedback loop, where you're constantly, you know, looking at these numbers, looking at performance to, you know, see what the agency needs, correct?

MR. MCHENRY: Oh, definitely. I mean, the – one of the driving forces behind it is for us to understand better IJ – immigration judge productivity. So we're going to look at it. We're going to see, you know, where the metrics stack up. We're definitely going to get feedback. We're already getting feedback to some degree. And we'll evaluate it on sort of an ongoing basis.

MR. ARTHUR: Do you think this is a reasonable number, or that this is about right?

MR. MCHENRY: Yeah. It's a policy judgement that this is a reasonable number that a – or, that this is a number that a judge – an experienced judge with proper training can reasonably be expected to complete. It's in line with historic averages. I think the productivity numbers you quoted earlier, it's actually a little bit lower than that. So we think, yeah, it's a reasonable number that the judges should be expected – everything else being equal – should be expected to meet. [Emphasis added].²⁸⁹

I am familiar with IJ performance evaluations, having gone through several during my tenure, and can confirm that feedback from the IJ is a part of the process. They are fact-specific, and although a goal of 700 cases may seem daunting, (1) as the foregoing shows, the IJ has the opportunity to explain any reasons why he or she failed to meet the goal, and (2) according to EOIR, in FY 2019 “[o]n average, immigration judges who performed over the whole year

²⁸⁹ *Immigration Newsmaker: A Conversation with EOIR Director James McHenry, Tackling the Immigration Court Backlog*, Center for Immigration Studies, May 3, 2018, available at: <https://cis.org/Transcript/Immigration-Newsmaker-Conversation-EOIR-Director-James-McHenry>.

completed 708 cases each,”²⁹⁰ despite a five-week government shutdown between December 2018 and January 2019²⁹¹ that closed non-detained immigration courts.²⁹²

Moreover, the number of complaints about IJs has actually *dropped* over the past three years, notwithstanding the issuance of the guidance described above, going from 156 in FY 2017 to 98 in FY 2018 to 97 in FY 2019²⁹³, an almost 38 percent decrease. In fact, the 97 complaints in FY 2019 were just less than 50 percent below the number of complaints in FY 2009—192.²⁹⁴ This is likely the truest measure of how the immigration bar views the performance of the immigration court during that period, and plainly, it is improving, even as the situation at the border got worse.

And, despite complaints from “[i]mmigrant advocates” who have “warn[ed] that the quotas could lead to an increase in erroneous deportations of immigrants, forcing many to return to the violence and persecution in their home countries that led them to apply for asylum in the first place,”²⁹⁵ EOIR statistics show that the asylum grant rate was largely unchanged between FY 2018 (20.51 percent) and FY 2019 (20.25 percent), and was actually higher than it had been in FY 2016 (15.81 percent) and FY 2017 (19.58 percent).²⁹⁶ The asylum denial rate did increase between FY 2018 (41.41 percent) and FY 2019 (48.82 percent; it was 21.36 percent in FY 2016 and 32.76 percent in FY 2017), but that is at least partially explained by the decrease in the administrative closure rate (39.38 percent in FY 2016, 20.25 percent in FY 2017, 3.27 percent in FY 2018, and .14 percent in FY 2019)²⁹⁷, which suggests that most of the asylum cases that had been administratively closed were not meritorious to begin with.

Finally, it is clear that, for whatever reasons (but likely as a result of the factors discussed above, including the aforementioned performance-based metrics), the number of cases completed by EOIR has increased significantly over the past four years: from 143,491 in FY 2016, to 163,068

²⁹⁰ *Press Release: Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019*, DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Oct. 10, 2019, available at: <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019>.

²⁹¹ Nicole Ogrysko, *OMB declares end to 35-day government shutdown, instructs agencies to reopen*, FEDERAL NEWS NETWORK, Jan. 25, 2019, available at: <https://federalnewsnetwork.com/government-shutdown/2019/01/omb-declares-end-to-35-day-government-shutdown-instructs-agencies-to-reopen/>.

²⁹² Victoria Macchi, *US Immigration Courts Affected by Government Shutdown*, VOICE OF AMERICA, Jan. 2, 2019, available at: <https://www.voanews.com/usa/us-immigration-courts-affected-government-shutdown>.

²⁹³ *Adjudication Statistics, Immigration Judge (IJ) Complaints*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 2019, available at:

<https://www.justice.gov/eoir/page/file/1104851/download>.

²⁹⁴ *Id.*

²⁹⁵ Manuel Madrid, *Law Professors Denounce Sessions’s Push for Case Quotas for Immigration Judges*, THE AMERICAN PROSPECT, Aug. 16, 2018, available at: <https://prospect.org/justice/law-professors-denounce-sessions-s-push-case-quotas-immigration-judges/>.

²⁹⁶ *Adjudication Statistics, Asylum Decision Rates*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Oct. 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1163686/download>.

²⁹⁷ *Id.*

in FY 2017, to 195,088 in FY 2018, to 276,523 in FY 2019—a 92 percent increase²⁹⁸, despite, as noted, a five-week government shutdown that closed non-detained immigration courts between December 2018 and January 2019.²⁹⁹ In fact, the agency completed 99,889 cases in the first quarter of FY 2020³⁰⁰, meaning EOIR is on pace to complete just less than 400,000 cases this fiscal year. If the goal of EOIR is to complete pending cases, the agency is plainly rising to that challenge.

Or, as Director McHenry told the Senate Homeland Security and Governmental Affairs Committee in November 2019:

*These results are a testament to the professionalism and dedication of our immigration judge corps. These results unequivocally prove that immigration judges have the integrity and competence required to resolve cases in the timely and impartial manner that is required by law.*³⁰¹

Attempted Decertification of the Immigration Judges’ Union

Beginning on January 7, 2020, the Federal Labor Relations Authority (FLRA) held hearings³⁰² on a petition³⁰³ filed by DOJ in August 2019³⁰⁴ to decertify the National Association of Immigration Judges (NAIJ)³⁰⁵, which is an affiliate of the International Federation of Professional and Technical Engineers.

By way of background, under federal law³⁰⁶, “management official[s]” are excluded from bargaining units, like unions. For purposes of this statute, a “management official” is “an

²⁹⁸ *Adjudication Statistics, New Cases and Total Completions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, data generated Jan. 23, 2020, available at: <https://www.justice.gov/eoir/page/file/1238741/download>.

²⁹⁹ Dave Boyer, *Trump signs bill ending 35-day government shutdown without wall funding*, WASHINGTON TIMES, Jan. 25, 2019, available at: <https://www.washingtontimes.com/news/2019/jan/25/trump-signs-bill-ending-35-day-government-shutdown/>.

³⁰⁰ *Id.*

³⁰¹ *Unprecedented Migration at the U.S. Southern Border: The Year in Review: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, at 116th Cong. (2019) (statement of James McHenry, Director of the Executive Office for Immigration Review), at 2, available at:

<https://www.hsgac.senate.gov/imo/media/doc/Testimony-McHenry-2019-11-13.pdf>.

³⁰² Louis C. LaBrique, *Petition to Decertify Immigration Judges’ Union to Get Hearing*, BLOOMBERG LAW, Jan. 6, 2020, available at: <https://news.bloomberglaw.com/daily-labor-report/petition-to-decertify-immigration-judges-union-to-get-hearing>.

³⁰³ *Petition filed by Lee J. Loftus, Asst. Atty. Gen. for Administration, Department of Justice, with the Federal Labor Relations Authority*, Case No. WA-RP-19-67, Aug. 9, 2019, available at: <https://aboutblaw.com/NS5>.

³⁰⁴ Josh Eidelson, *Trump Administration Moves to Decertify Immigration Judges’ Union*, BLOOMBERG LAW, Aug. 12, 2019, available at: <https://news.bloomberglaw.com/daily-labor-report/trump-administration-moves-to-dissolve-immigration-judges-union>.

³⁰⁵ *National Association of Immigration Judges*, available at: <https://www.naij-usa.org/>.

³⁰⁶ See 5 U.S.C. § 7112(b)(1) (“A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes— (1) except as provided under section 7135(a)(2) of this title, any management official or supervisor”); available at: <https://www.law.cornell.edu/uscode/text/5/7112>.

individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.”³⁰⁷

The Clinton administration tried, unsuccessfully, to decertify the union (which was certified in 1979) in 2000.³⁰⁸ In the 2000 decision, the FLRA regional director held that IJs are not management officials, finding that IJs do not “make policy through the issuance of their decisions,” that their decisions are not published, and that they do not constitute precedent. The regional director also rejected DOJ's claims that IJs “are management officials by virtue of their judicial independence, professional stature and qualifications, the formal amenities of the courtroom and other similar factors.”³⁰⁹

With respect to that decision, the FLRA apparently failed to consider the fact that IJ decisions are final in all cases that are not appealed, and as such are *res judicata*³¹⁰ — that is, binding precedent with respect to the same issues of fact, as applied to the same alien. This is a fairly significant point, because in those cases, the IJ is determining the policies of the agency, at least as relates to that alien.

In addition, in certain categories of cases — including credible fear³¹¹ and reasonable fear³¹² review redeterminations, claimed status cases for respondents in expedited removal³¹³, and *in absentia* removal orders³¹⁴ — there is no appeal from the IJ's order at all. While credible fear and reasonable fear reviews were part of statute when the FLRA issued its 2000 decision, they were much rarer than they are today, as the number of credible fear and reasonable fear review cases

³⁰⁷ 5 U.S.C. § 7103(a)(11), available at: <https://www.law.cornell.edu/uscode/text/5/7103>.

³⁰⁸ U.S. Department of Justice, Executive Office of Immigration Review, Office of the Chief Immigration Judge (*Petitioner/Agency*) and National Association of Immigration Judges (*Labor Organization/Union*), 56 FLRA No. 97 (Sep. 1, 2000), available at: <https://www.aila.org/File/Related/19081303c.pdf>.

³⁰⁹ *Id.*

³¹⁰ See *Ramon-Sepulveda v. INS*, 824 F.2d 749 (1987) (IJ found that INS had failed to prove alienage in July 1979 and terminated case; BIA subsequently affirmed IJ decision reopening for new evidence that Ninth Circuit thereafter determined “was not newly discovered evidence,” and found that the BIA had abused its discretion; INS issued a new Order to Show Cause based upon the same evidence; Ninth Circuit held: “The immigration judge's initial decision at the July 1979 deportation hearing that the INS failed to prove that Ramon-Sepulveda ‘is an alien’ and ‘that he is deportable,’ is *res judicata*.”), available at:

https://scholar.google.com/scholar_case?case=16488788067711763963&hl=en&as_sdt=6&as_vis=1&oi=scholar.

³¹¹ See sections 235(b)(1)(B)(iii)(III) (“Review of Determination”) and 235(b)(1)(C) (“Limitation on Administrative Review”) of the INA, available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

³¹² 8 C.F.R. § 1208.31(g)(1) (“If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien. No appeal shall lie from the immigration judge's decision.”), available at: <https://www.law.cornell.edu/cfr/text/8/1208.31>.

³¹³ See 8 C.F.R. § 1235.3(b)(4) (“If the immigration judge determines that the alien has never been admitted as a lawful permanent resident or as a refugee, granted asylum status, or is not a U.S. citizen, the order issued by the immigration officer will be affirmed and the Service will remove the alien. There is no appeal from the decision of the immigration judge.”), available at: <https://www.law.cornell.edu/cfr/text/8/1235.3>.

³¹⁴ Section 240(b)(5)(C) of the INA (“Rescission of Order”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1229a&num=0&edition=prelim>.

has skyrocketed, from a mere 197 in FY 2000 to 15,433 in FY 2019.³¹⁵ Again, in those cases, the IJ is dispositively determining the policy of the agency in the individual case. And, while IJs have issued *in absentia* orders for years, the number of such decisions has increased significantly in the last decade — from 25,345 in FY 2008 to 89,919 in FY 2019.³¹⁶

Moreover, there have also been significant changes in procedural policies at EOIR since the 2000 FLRA decision that could affect the analysis of whether IJs are management officials. As I explained in a July 2017 post³¹⁷:

BIA decisions were issued by three-member panels up until 1999, when, as the American Bar Association has noted, a new "rule permitted a single Board member to issue decisions in a limited range of cases." That said, the Justice Department admitted that: "Over 58 [percent] of all new cases in 2001 were sent to be summarily decided by single Board member review through streamlining."

In 2002, the Justice Department issued new regulations that made single-member BIA decisions the norm. Under 8 C.F.R. § 1003.1(e), the chairman of the BIA:

[S]hall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition.

Pursuant to the referenced provision, 8 C.F.R. § 1003.1(e)(6):

Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

- (i) The need to settle inconsistencies among the rulings of different immigration judges;*
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;*
- (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;*
- (iv) The need to resolve a case or controversy of major national import;*

³¹⁵ *Adjudication Statistics, Credible Fear Review and Reasonable Fear Review Decisions*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Oct. 23, 2019, available at: <https://www.justice.gov/eoir/page/file/1104856/download>.

³¹⁶ *Adjudication Statistics, In Absentia Removal Orders*, Department of Justice, Executive Office for Immigration Review, <https://www.justice.gov/eoir/page/file/1060851/download>.

³¹⁷ Andrew Arthur, *Expand the Board of Immigration Appeals*, CENTER FOR IMMIGRATION STUDIES, Jul. 26, 2017, available at: <https://cis.org/Arthur/Expand-Board-Immigration-Appeals>.

(v) *The need to review a clearly erroneous factual determination by an immigration judge; or*

(vi) *The need to reverse the decision of an immigration judge or [DHS], other than a reversal under § 1003.1(e)(5).*

The last referenced provision, 8 C.F.R. § 1003.1(e)(5), states:

Other decisions on the merits by single Board member. If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

The practical effect of these reforms was to, in essence, make the decision of the IJ the decision of the agency (EOIR), albeit a decision blessed by a single Board member, in a significant number of cases. Thus, the IJ in those cases is formulating the policy of the agency.

While the 1999 streamlining rules went into effect before the 2000 decision of the FLRA, the expansion in 2002 occurred well after that decision was issued. And, to the degree that there is a difference between BIA decisions being published, as opposed to IJ decisions, the vast majority of BIA decisions are not published, and none of the ones subject to streamlining would be.

Whether these changes will make any difference, however, remains to be seen. On August 12, 2019, NAIJ issued a press release denying that it sets policies or manages staff, describing DOJ's efforts as "a desperate attempt by the DOJ to evade transparency and accountability, and undermine the decisional independence of the nation's [then-]440 Immigration Judges."³¹⁸

I would note, however, that DOJ could have made other arguments in its attempt to decertify the NAIJ. As Government Executive³¹⁹ reported:

³¹⁸ Press Release, *Trump Administration Seeks to Silence Federal Immigration Judges' Union, DOJ Files Legal Documents to End the Labor Rights of Judges Retribution for Speaking Out and Exposing Problems in the Courts Judges Make Bipartisan Appeal Asking Congress to Create an Independent Court Free From Political Influence*, Nat'l Assoc. of Immigration Judges, Aug. 12, 2019, available at: <https://www.aila.org/File/Related/19081303b.pdf>.

³¹⁹ Eric Katz, *Trump Administration Looks to Decertify Vocal Federal Employee Union, The Justice Department says immigration law judges operate as managers, an argument the Federal Labor Relations Authority rejected in 2000*,

The administration could have pursued another track, as federal statute allows the president to unilaterally issue an executive order stripping employees of collective bargaining rights if they work in intelligence or national security. Presidents Carter, Reagan, George W. Bush and Obama all issued orders to that effect.

That is, certainly, an argument that DOJ could have made, and it is not beyond cavil that IJs could be said to “work in intelligence or national security.” I have argued national security cases to the immigration courts in the past (and briefly served as the Chief of the National Security Law Division at the former INS), and heard cases that touched upon the national security as an IJ.

Regardless of the FLRA’s decision, either party can appeal it to the full Board of the FLRA.

Immigration Court Restructuring

In its June 2017 report³²⁰, GAO noted:

Some immigration court experts and stakeholders have recommended restructuring EOIR’s administrative review and appeals functions within the immigration court system—immigration courts and BIA—and OCAHO, with the goal of seeking to improve the effectiveness and efficiency of the system or, among other things, to increase the perceived independence of the system and professionalism and credibility of the workforce. To enhance these areas, these experts and stakeholders, such as individuals affiliated with professional legal organizations and former EOIR immigration judges, have proposed changing the immigration court system’s structure, location among the three branches of government, and aspects of its operations.

Some background is necessary in order to put the current EOIR structure into context. As the office’s website³²¹ states:

[EOIR] was created on January 9, 1983, through an internal [DOJ] reorganization which combined the [BIA] with the [IJ] function previously performed by the former [INS] (now part of [DHS]). Besides establishing EOIR as a separate agency within DOJ, this reorganization made the Immigration Courts independent of INS, the agency charged with enforcement of Federal immigration laws. [OCAHO] was added in 1987.

GOVERNMENT EXECUTIVE, (Aug. 12, 2019), available at: <https://www.govexec.com/management/2019/08/trump-administration-looks-decertify-vocal-federal-employee-union/159112/>.

³²⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³²¹ *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Dec. 14, 2017, available at: <https://www.justice.gov/eoir/about-office>.

EOIR's website³²² also provides a useful history of the evolution of responsibility for adjudication of immigration cases prior to that office's establishment:

1891 - The Immigration Act of 1891 was the first comprehensive law that placed immigration under federal control. It established:

An Office of Immigration within the Department of Treasury (Treasury), headed by a Superintendent of Immigration;

A process for inspection officers to examine and exclude individuals seeking to enter the United States;

Authority for the Office of Immigration to deport individuals who had violated law; and

An appeals process in which the Superintendent of Immigration decided case appeals and the Secretary of the Treasury could review those decisions.

1893 - The Immigration Act of 1893 created Boards of Special Inquiry, consisting of three immigration inspectors, to review and decide cases related to the "exclusion" of individuals seeking to enter the United States, and the "deportation" of individuals who had violated the law. Boards of Special Inquiry continued to evolve for nearly 60 years. The Boards of Special Inquiry system provided for multiple levels of administrative review, but eventually raised significant concerns about due process.

1903 - Immigration responsibilities moved from Treasury to the new Department of Commerce and Labor.

1913 - Immigration responsibilities moved to the Department of Labor (DOL), as Commerce and Labor split into two separate departments.

1917 - The Immigration Act of 1917 codified and expanded exclusion and deportation provisions.

1921 - The Immigration Act of 1921 introduced the National Origins Quota System, which limited the number of immigrants to the United States by assigning a quota to each nationality. The new quota system prompted a growing workload of increasingly complex case appeals. In response, the Secretary of Labor created a Board of Review to review case appeals and make recommendations to the Secretary of Labor.

1933 – [INS] was created within DOL to handle all immigration matters.

1940 - INS moved from DOL to [DOJ] and the Attorney General reconstituted the previous Board of Review as the newly-created [BIA]. While the previous Board

³²² *Evolution of the U.S Immigration Court System: Pre-1983*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Apr. 30, 2015, available at: <https://www.justice.gov/eoir/evolution-pre-1983>.

of Review had authority to make recommendations regarding case appeals, the BIA had authority to decide case appeals. The BIA was and remains an independent adjudicatory body that is responsible solely to the Attorney General in reviewing and deciding immigration case appeals. . . .

1952 - Congress combined all previous immigration and naturalization law into one statute, the Immigration and Nationality Act (INA). The INA eliminated the Special Inquiry Boards and established special inquiry officers to review and decide deportation cases.

1973 - Special inquiry officers were authorized by regulation to use the title "immigration judge" and to wear judicial robes.

As you can see, as the nation's interest in immigration moved from revenue to labor to law enforcement and national security, the immigration adjudication function also moved from department to department.

In its report³²³, GAO stated that the experts and stakeholders to whom it had spoken supported three main scenarios for restructuring the immigration court system, each of which would require a statutory fix:

- *a court system independent (i.e., outside) of the executive branch to replace EOIR's immigration court system (immigration courts and the BIA), including both trial and appellate tribunals;*
- *a new, independent administrative agency within the executive branch to carry out EOIR's quasi-judicial functions with both trial-level immigration judges and an appellate level review board; or*
- *a hybrid approach, placing trial-level immigration judges in an independent administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.*

That report details the pros and cons of each of these proposals, as well as the costs of each, and compares each to various different current court structures.³²⁴

Among the positives it listed for restructuring the current immigration court system were: increasing the perceived independence of the court; greater judicial autonomy; improving the professionalism or credibility of the immigration court systems work force; and greater organizational capacity or accountability.³²⁵

Among the negatives identified by GAO were the fact that: "a court system independent of the executive branch may not address the immigration courts' management challenges, such as the case backlog;" "requiring presidential nomination and senate confirmation of immigration judges

³²³ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73-74, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³²⁴ *Id.* at 80-87.

³²⁵ *Id.* at 80-84.

under an independent court system could” complicate and delay the hiring of new judges “by making the appointment of additional judges more dependent on external parties;” the difficulty in establishing and administering a court system independent of the executive branch; difficulties for the court for procuring resources outside of DOJ; and (under a “hybrid system”) disconnection of the trial level court from the appellate court, particularly if the trial level court remains within the Executive branch, with the appellate court outside of the Executive branch.

With respect to independence, GAO stated:

Six of the ten experts and stakeholders we contacted stated that establishing a court system independent (i.e., outside) of the executive branch could increase the perceived independence of the system. For example, one of the experts and stakeholders explained that the public’s perception of the immigration court system’s independence might improve with a restructuring that removes the quasi-judicial functions of the immigration courts and the BIA from DOJ because DOJ is also responsible for representing the government in appeals to the U.S. Circuit Courts of Appeals by individuals seeking review of final orders of removal. This same expert and stakeholder noted that removing the immigration court system from the executive branch may help to alleviate this perception that the immigration courts are not independent tribunals in which the respondents and DHS attorneys are equal parties before the court. Another one of the experts and stakeholders explained that under the existing immigration court system, respondents may perceive, due to the number of immigration judges who are former DHS attorneys and the co-location of some immigration courts with ICE’s OPLA offices, that immigration judges and DHS attorneys are working together. Two of the ten experts and stakeholders we interviewed also proposed that an immigration court system independent of the executive branch would be less susceptible to political pressures within the executive branch. Experts and stakeholders cited similar independence-related reasons for supporting the administrative agency and hybrid scenarios.³²⁶

This raises many important points. DOJ representation of the government in immigration matters before the courts of appeal would appear to be a very soft variable, particularly given the fact that a different DOJ component (OIL, within DOJ’s Civil Division)³²⁷ provides such representation.

Further, the fact that EOIR and ICE are both within the executive branch would be a factor in any court restructuring that left a trial-level court in that branch. The location of many immigration courts and ICE attorney’s offices within close proximity to each other would likely continue, regardless of whatever restructuring plan were chosen, unless the government was willing to pay the costs of relocating each of those new courts, or alternatively the ICE offices.

³²⁶*Id.* at 81-82.

³²⁷ *Office of Immigration Litigation*, DEPARTMENT OF JUSTICE, CIVIL DIV., updated Oct. 20, 2014, available at: <https://www.justice.gov/civil/office-immigration-litigation>.

Similarly, the number of ICE attorneys who become judges in any immigration court would likely continue as well, given that immigration is a highly specialized area of the law.

The “political pressure” factor raises different issues. It is not clear if the “political pressure” in question relates to such pressure on the IJs, or whether it refers to the attorney general’s aforementioned certification authority.

If it is the former, as a former IJ under attorneys general from both parties, I can state without any hesitation that I never perceived any political interference in my decisions. To be clear: No one ever attempted to force me to issue any specific decision in any case; to the contrary, I was encouraged to apply the law evenly in all cases (a duty I took seriously). Any decision that I issued (except in credible-fear and reasonable-fear review cases) could be appealed to the BIA, and the attorney general could take any decision that I made (assuming that it was affirmed by the BIA) on certification and reverse it, but short of that, my decisions were mine and mine alone, as were the discretionary determinations that I made by statute.

If it is the latter, however, it is an issue that gets to the heart of any court restructuring that would take jurisdiction over the immigration court away from the attorney general. In *Arizona v. U.S.*³²⁸, the Supreme Court held:

*Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. **The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.** (Emphasis added).*

The supremacy of the executive branch in issues of foreign policy is well-established. In *U.S. v. Curtiss-Wright Export Corp.*³²⁹, the Supreme Court held:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm,

³²⁸ *Arizona v. U.S.*, 567 U.S. 387, 396-97 (2012), available at: <https://www.law.cornell.edu/supremecourt/text/11-182>.

³²⁹ *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), available at: <https://supreme.justia.com/cases/federal/us/299/304/case.html>.

with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’ [Emphasis added].

Moving the adjudication of immigration cases out of the executive branch, therefore, would have serious constitutional implications. Nowhere is that more clear than from the Supreme Court’s decision in *INS v. Aguirre-Aguirre*³³⁰, where the Court held:

[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials “exercise especially sensitive political functions that implicate questions of foreign relations.” . . . A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.

Not only can no stronger argument be made against moving the immigration courts out of DOJ, but frankly, such constitutional concerns should be dispositive of the issue.

With respect to “judicial economy,” GAO reported:

Four of the ten experts and stakeholders we interviewed stated that a court system independent of the executive branch might give immigration judges and BIA members more judicial autonomy over their courtrooms and dockets. For example, one of the experts and stakeholders stated that immigration judges in an independent court system would be able to file complaints against private bar attorneys directly with the state bar authority instead of filing the complaint with DOJ first, as presently required for immigration judges acting in their official capacity. EOIR officials explained that while immigration judges cannot directly file a complaint with the state bar authority, EOIR’s Disciplinary Counsel, which is charged with investigating these complaints, can file a complaint with the state bar on behalf of the immigration judge.³³¹

³³⁰ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), available at:

https://scholar.google.com/scholar_case?case=3793273925328568150&hl=en&as_sdt=6&as_vis=1&oi=scholar.

³³¹ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 82, available at:

<https://www.gao.gov/assets/690/685022.pdf>.

It is unclear how much more autonomy I would have had over my courtroom and docket if I had been an IJ in an independent court than I did as an IJ in EOIR. I had full control over my courtroom, and of the parties who appeared in it. My bailiff, who was a York County (Pennsylvania) Prison employee, was solely responsible to me when court was in session. I also had sufficient leeway to move cases around in order to accommodate my docket, consistent with due process.

As for filing bar complaints, this was a rarity for me. There was only ever one attorney whose conduct I never deemed rising to the level of a bar complaint, and that matter was handled by Disciplinary Counsel in a satisfactory manner. Any judge should generally be able to control the conduct of the parties in his or her courtroom in almost any situation without recourse to such measures. An inability to do so, respectfully, reflects more on the IJ than on EOIR generally or the location of the court within the U.S. government.

As for “workforce professionalism or credibility,” GAO stated:

Four of the ten experts and stakeholders we contacted stated reasons why a court system independent of the executive branch might also improve the professionalism or credibility of the immigration court system’s workforce. For example, one of the experts and stakeholders explained that placing judges in an independent immigration court system could elevate their stature in the eyes of stakeholders, and by extension, enhance the perceived credibility of their decisions. Additionally, one of the experts and stakeholders explained that if the judge career path was improved under a restructuring such that immigration judges were able to advance to more prestigious judgeships, this could assist in attracting candidates to the immigration bench. Regarding the hybrid scenario, one of the experts and stakeholders noted that this proposal may attract a more diverse and balanced pool of candidates for immigration judge positions.³³²

Again, this is extremely soft variable, and one that would nowhere near justify the cost and difficulty (let alone, run the constitutional difficulties) of transitioning immigration courts out of EOIR. Respectfully, the “professionalism or credibility of the immigration court system’s work force” is more a factor of that workforce rather than a factor of where they are positioned within the U.S. government.

As for elevating the stature of IJs, I never viewed the job as being beneath me, and I do not believe that any attorney who ever appeared in my court thought any less of me as a judge than that attorney did of any other judge. The fact was, I was the decision-maker with whom of those lawyers had to deal, and they acted accordingly.

Nor did I ever feel constrained in moving along in my career. I certainly could have applied for any other judgeship (state or federal) that had an opening for an attorney with my skills and experience. As practical matter, however, my skills and experience were better utilized on the immigration court than they would have been in some other tribunal.

³³² *Id.* at 82.

Finally, I was never aware of any difficulty that EOIR had with attracting a diverse pool of qualified candidates to the bench. The fact is, the job comes with many benefits -- a title, a relatively high rate of pay (up to \$181,500 currently)³³³, a pension, access to the federal Thrift Savings Plan and health benefits, generous vacation benefits, federal holidays, and the stature and dignity of being a judge. I will note that I receive a generous monthly pension from the federal government, partly on account of my years of service, but at a rate that fully reflects my pay during my time as an IJ.

Certainly, an IJ could advance to the position of Board Member at the BIA, or Assistant Chief IJ, and more than a few did. Many of my colleagues had, however, served for years as immigration judges, and intended to retire in that status.

Organizational capacity or accountability is an issue with which EOIR admittedly struggles. I believe, however, that this is largely due to the fact that many attorneys general in various administrations had neglected that office for a significant period of time. It is apparent from Attorney General Barr's statements and actions (and those of his immediate predecessors and his subordinates) that he is working on correcting these issues, and he should be given the opportunity to do so. This is especially true given the expense and difficulty of transitioning the immigration courts to a different organization, or making them independent. Simply put, there is no guarantee that an independent immigration court or BIA would be better run, and would definitely be less politically accountable to Congress, than EOIR currently is.

I concur with the "experts and stakeholders" whom GAO contacted and who asserted "that a court system independent of the executive branch may not address the immigration courts management challenges, such as the case backlog."³³⁴ The fact is, regardless of where they are placed, IJs will have a large caseload (particularly if Congress fails to address the loopholes in the law that draw migrants to enter the United States illegally³³⁵, and CBP is consequently faced with another crisis at the border similar to the one that occurred in the spring and summer of 2019), with which the courts will have to contend.

Again, Attorney General Barr and his immediate successors have attempted, and Attorney General Barr is attempting, to obtain sufficient resources to enable the courts to handle that caseload. Congress will soon be considering the budget, and I would recommend that this committee of jurisdiction over DOJ advise that more funding be appropriated for the immigration courts and BIA.

³³³ *2020 Immigration Judge Pay Rates*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, effective Jan. 5, 2020, available at: <https://www.justice.gov/eoir/page/file/1236526/download>.

³³⁴ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 84, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³³⁵ See Andrew Arthur, *Catch and Release Escape Hatches, Loopholes that encourage illegal entry*, Center for Immigration Studies, May 4, 2018, available at: <https://cis.org/Report/Catch-and-Release-Escape-Hatches>.

Moreover, absent a change to section 292 of the INA³³⁶, aliens will either have to hire their own lawyers, obtain pro bono counsel, or represent themselves. This would be true regardless of where the court is located, and would be an issue with which the court would have to contend, regardless of whether it remains in EOIR or not.

Perhaps the strongest non-constitutional reason for not moving the immigration courts out of EOIR (aside from the cost and difficulty of doing so) is the need for more judges. As GAO stated:

Two of the ten experts and stakeholders we interviewed noted that requiring the presidential nomination and senate confirmation of immigration judges under an independent court system could further complicate and delay the hiring of new judges by making the appointment of additional judges more dependent on external parties.³³⁷

The biggest issue facing the immigration courts is resources, and in particular (but not solely, as noted above) IJs. Simply put, there are too few judges to handle the immigration court caseload at the present time, notwithstanding the unprecedented increase in IJ hiring in the last three years.

Any proposal to restructure the immigration courts that would slow down the hiring of immigration judges by making the hiring of those judges dependent on any external party would do a disservice to the alien respondents, the government, and justice itself. If Congress is interested in acting on the crippling backlogs facing the immigration courts, it would be best to direct its efforts toward providing those courts with more money and resources.

Moreover, I again wholeheartedly concur with the “experts and stakeholders” who “expressed the concern that a restructured immigration court system, regardless of the scenario, would not be able to procure sufficient resources outside of DOJ.”³³⁸

It would be an understatement to say that immigration is a contentious issue, and has been for the almost 28 years I have been involved in this area of the law. Given the significant passions that immigration as a subject is heir to, I have no doubt that a future Congress would limit resources to an independent court if one or another (or both) chamber’s members did not agree with the decisions of that court. One look no further than the limitations over the past few years on the funding of ICE detention to understand this fact.

At least under the aegis of DOJ, EOIR is somewhat protected from these passing political passions when it comes to funding. On its own, an independent immigration court and/or BIA would have to fight for funding with little leverage. If members are concerned about political

³³⁶ Section 292 of the INA, available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9617.html>.

³³⁷ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 84, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³³⁸ *Id.* at 85.

interference from within the executive branch as it relates to EOIR, they should be more concerned about political interference in an independent tribunal from the branch that holds the power of the purse—particularly if the makeup of that future Congress is significantly different than it is today.

One area, however, in which Congress should act is to create an Article III Court of Appeals for Immigration. Under current law, an alien who is seeking review of a decision of the BIA or attorney general can file a petition for review “with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”³³⁹ .

Such a proposal, from then-Senate Judiciary Committee Chairman Arlen Specter, was included in section 501 of S. 2454 in the 109th Congress.³⁴⁰ With respect to that provision, CRS explained:

Section 501 of S. 2454 would consolidate appeals regarding removal of aliens in the U.S. Court of Appeals for the Federal Circuit. It would increase the authorized number of judges on the Federal Circuit from 12 to 15 and would authorize sums necessary to implement these changes and the increased case load of the Federal Circuit for fiscal years 2007 to 2011. . . .

This consolidation of appeals would remove pressure on the other federal appellate circuits from the dramatic increase in their caseload, largely resulting from immigration appeals; it would basically add the equivalent of another 3-judge panel to the Federal Circuit. This provision would also eliminate future inconsistency among appellate circuits in interpretations of immigration law, which in the past may have increased litigation as different circuits considered an issue for the first time and as the U.S. Supreme Court may have had to resolve circuit differences. Differences among circuits also may have necessitated congressional action to clarify or establish statutory standards in response to inconsistent appellate circuit interpretations.³⁴¹

Given the number of immigration cases that circuit courts handle each year, this proposal would have overwhelmed the Court of Appeals for the Federal Circuit, even if that court were assigned an additional three (or 30) judges. The creation of a new circuit court, solely dedicated to immigration, would provide the benefits suggested by CRS, and would expedite appeals because each of the judges on that court would be a subject-matter expert in immigration. Such a proposal would provide greater benefits to the interests of justice than the restructuring of the immigration courts.

³³⁹ Section 242(b)(2) of the INA, available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html>.

³⁴⁰ S. 2454, 109th Cong., § 501 (2006), available at: <https://www.congress.gov/bill/109th-congress/senate-bill/2454/text?q=%7B%22search%22%3A%5B%22S.+2454%22%5D%7D&r=49#toc-id734C06366FEF4789B17F9568312887B3>.

³⁴¹ Margaret Mikyung Lee, *Immigration Litigation Reform*, CONG. RESEARCH SERV., at CRS-4, May 8, 2006, available at: <http://trac.syr.edu/immigration/library/P582.pdf>.

Conclusion

The nation's cadre of some 465 immigration judges are, by and large, dedicated, experienced, and knowledgeable professionals dedicated to ensuring that the immigration laws are fairly and uniformly administered in each of the 63 immigration courts. Carved into the rotunda of the attorney general's office at DOJ is a quote from then-Solicitor General Frederick Lehmann: "The United States wins its case whenever justice is done one of its citizens in the courts."³⁴² The same is also true of the aliens who appear in DOJ's tribunals, and it is a fact that is known to, and taken to heart by, every IJ when he or she walks into court.

Unfortunately, for years, those immigration judges have been hobbled in performing their mission, largely as result of neglect of the agency in which they serve, EOIR, and of misguided immigration policies implemented in the past by the executive branch. Simply put, the immigration courts of the United States are failing at their primary mission of "adjudicat[ing] immigration cases by . . . expeditiously. . . interpreting and administering the Nation's immigration laws,"³⁴³ largely due to no fault of the IJs and staff who work in those courts.

The attorney general and his subordinates are actively working to remedy this problem, by providing the needed resources to the immigration courts, and by implementing bright-line rules for IJs and the BIA to follow in adjudicating the cases they consider. He should be supported in those efforts by this committee and by the Congress as a whole.

Restructuring the immigration courts and the BIA will almost certainly not address the core problems that are facing those courts. Moreover, not only would such restructuring be complicated and costly (and likely ultimately pointless), but any proposal that would move either the immigration courts or the BIA out of the executive branch would implicate serious constitutional concerns.

I thank you again for your invitation to attend today's hearing, and I look forward to your questions.

³⁴² Michael Gartner, *The President's Man at the Supreme Court*, WASHINGTON POST, (Oct. 25, 1987), available at: https://www.washingtonpost.com/archive/entertainment/books/1987/10/25/the-presidents-man-at-the-supreme-court/ed5f19e1-4f16-4222-8e87-b8569b9663fe/?utm_term=.8eb68b6861a8.

³⁴³ *Executive Office for Immigration Review*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: <https://www.justice.gov/eoir>.