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To the Subcommittee on Immigration and Citizenship
United States House of Representatives
Committee on the Judiciary

For A Hearing Titled:
“For the Rule of Law, An Independent Immigration Court”

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Chairman Lofgren, Ranking Member McClintock, and members of the subcommittee, I thank you for inviting me here today to discuss the immigration courts, a key institution in our system of justice.

The Executive Office for Immigration Review (EOIR), 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 1003.”¹ The current cadre of 559 Immigration Judges (IJs)² in the nation’s 66 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ)³, and appeals from those courts are taken to the BIA⁴.

With respect to the appointment and authority of IJs, section 101(b)(4) of the Immigration and Nationality Act (INA)⁵ 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).⁶ As its website⁷ 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

¹ *Office of the Director*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Sept. 27, 2021, available at: <https://www.justice.gov/eoir/office-of-the-director>.

² *Executive Office for Immigration Review, Adjudication Statistics, Immigration Judge (IJ) Hiring*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 2021, available at: <https://www.justice.gov/eoir/page/file/1242156/download>.

³ See *Office of the Chief Immigration Judge*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Aug. 2, 2021, available at: <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

⁴ See *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Sept. 14, 2021, available at: <https://www.justice.gov/eoir/board-of-immigration-appeals>.

⁵ Section 101(b)(4) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

⁶ *Office of the Director*, DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Sept. 27, 2021, available at: <https://www.justice.gov/eoir/office-of-the-director>.

⁷ *Office of the Chief Administrative Hearing Officer*, DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated July 1, 2022, available at: <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer>.

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 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 (among others) as a trial attorney and 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 BIA⁸ and on certification to the attorney general⁹. 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 website¹⁰ 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

⁸ See, e.g., *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996) ("Andrew R. Arthur, General Attorney", counsel of record for INS), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3287.pdf>.

⁹ See, e.g., *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005) ("Andrew Arthur, Associate General Counsel", counsel of record for DHS), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3515.pdf>.

¹⁰ *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Feb. 3, 2021, available at: <https://www.justice.gov/eoir/about-office>.

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 depth in a June 2017 report.¹¹

The backlogs identified by GAO affect each of the parties appearing before the immigration courts, both 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 respondents, 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.”¹²

While this is generally true, it is not true in the case of an alien whose due process rights have been affected by delays, or in the case of a respondent seeking relief for which he or she is eligible. Aliens eligible for asylum, in particular, must await adjudication on those applications before they are able to truly settle in the United States and obtain status for their relatives abroad¹³.

These delays affect our system of justice, for many of the same reasons.

Civil rights icon Barbara Jordan, the first African American woman to be elected to the House of Representatives from the south, was named by President Clinton to be the Chairman of the Commission on Immigration Reform in 1993.¹⁴

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.”¹⁵ Backlogs delay that process.

¹¹ *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>

¹² *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.

¹³ See section 208(b)(3) of the INA (2022), (“Treatment of spouse and children”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1158&num=0&edition=prelim>.

¹⁴ *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>.

¹⁵ *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),

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 for an IJ 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, often hundreds of pages in length. IJs must familiarize themselves with the ROP for each individual hearing. Multiple continuances, and massive dockets, make this a daunting proposition, particularly given the fact that IJs 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. Stated simply, however, the immigration courts suffered from neglect for years, and have also been adversely affected by past failed executive branch immigration policies and tortuous federal court decisions, issues that both the present administration and the prior one have attempted to address.

Summary of Immigration Court Backlogs as identified by GAO

On June 1, 2017, GAO issued what was then a long-awaited report on EOIR's management of the immigration court system.¹⁶

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).¹⁷
- 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 pending cases at the start of FY 2015, when the median pending time was 404 days.¹⁸ As I will explain below, those were the "good old days" when it comes to backlogs.
- "[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015,"¹⁹ 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."²⁰ ICE attorneys

available at:

https://www.numbersusa.com/sites/default/files/public/Testimony%20of%20Barbara%20Jordan_1995_Feb.%202017.pdf.

¹⁶ *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>.

¹⁷ *Id.* "Highlights."

¹⁸ *Id.* at 22.

¹⁹ *Id.* "Highlights."

²⁰ *Id.* at 68.

and others complained that the “frequent use of continuances [by IJs] resulted in delays and increased case lengths that contributed to the backlog.”²¹

- 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”.²²
- Total case completions declined, even though the number of IJs increased 17 percent.²³

There are several 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 IJs has nearly doubled over the past six fiscal years.²⁴
- The “surge.” The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.²⁵ 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.”²⁶ This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also more complicated²⁷ than cases involving single adult males, requiring more court time (and continuances) per case.
- Case law: Federal court decisions have complicated IJs’ removal decisions²⁸, slowing proceedings and requiring additional continuances. In addition, until reversed by the Supreme Court²⁹, decisions from the Court of Appeals for the Ninth Circuit³⁰ 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.

²¹ *Id.* at 27.

²² *Id.* at 22.

²³ *Id.* at 23.

²⁴ *Executive Office for Immigration Review, Adjudication Statistics, Immigration Judge (IJ) Hiring*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 2021 (289 IJs were on board in FY 2016, compared to 559 in FY 2021), available at: <https://www.justice.gov/eoir/page/file/1242156/download>.

²⁵ *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>.

²⁶ *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>.

²⁷ *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>.

²⁸ *Id.* at 27-28.

²⁹ *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.

³⁰ *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>.

- Executive-branch immigration policies. Policies instituted in the current and prior administrations have 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.

Certain policies of the current administration and the prior one will, if properly implemented and supported by Congressional appropriations, ease and begin to reduce the backlogs. Most significantly, over the past six years, DOJ has hired significantly more IJs³¹, and the department in the last administration streamlined the hiring of IJs.³²

There is much 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, while not upsetting settled law.
- DOJ must vigorously litigate cases in the federal circuit courts to provide 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.
- It is incumbent on the administration to gain operational control of illegal migration at the Southwest border, as required by statute.³³
 - In the past year, however, the situation at the Southwest border has devolved into chaos, as CBP encountered more than 1.734 million aliens there, including more than 1.659 illegal migrants apprehended by the Border Patrol.³⁴
 - More aliens were apprehended by Border Patrol in FY 2021 at the Southwest border than in any fiscal year in recorded history (records go back to FY 1960).³⁵

³¹ *Executive Office for Immigration Review, Adjudication Statistics, Immigration Judge (IJ) Hiring*, U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 2021 (289 IJs were on board in FY 2016, compared to 559 in FY 2021), available at: <https://www.justice.gov/eoir/page/file/1242156/download>.

³² *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>.

³³ See Secure Fence Act of 2006, Pub. L. 109-367 (2006), sec. 2(a) ("Not later than 18 months after the date of the enactment of this Act, the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States . . ."); see also *id.* at sec. 2(b) ("In this section, the term 'operational control' means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband."), available at: <https://www.govinfo.gov/content/pkg/STATUTE-120/pdf/STATUTE-120-Pg2638.pdf#page=1>.

³⁴ *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 11, 2022), available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

³⁵ Compare *id.* with *Total Encounters By Fiscal Year (Oct. 1st through Sept. 30th)*, U.S. BORDER PATROL, undated, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8~1.PDF>.

- This disaster continues unabated, as Border Patrol apprehended more illegal migrants at the Southwest border in both October and November than in either of those months in recorded history (records go back to FY 2000).³⁶

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.”³⁷

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.”³⁸

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.”³⁹

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.⁴⁰

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

³⁶ *Compare Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (modified Jan. 11, 2022), available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters> with *Total Illegal Alien Apprehensions By Month*, U.S. BORDER PATROL, undated, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf>.

³⁷ *About GAO*, GOVERNMENT ACCOUNTABILITY OFFICE, undated, available at: <https://www.gao.gov/about/index.html>.

³⁸ *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>.

³⁹ *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>.

⁴⁰ See *id.* at 22.

*than March 2017 while another court had scheduled individual hearings 5 years into the future—February 2022.*⁴¹

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

*[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.*⁴²

While the number of new cases received fell, the number of “other” case receipts by the courts, 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 2015.⁴³

As new case receipts fell, and other case receipts rose, IJs completed 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.⁴⁴

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.⁴⁵

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 and not a citizen) and whether the alien should be granted any benefit or relief from removal he or she seeks.⁴⁶ “Administrative closure,” on the other hand, “is a docket management tool that is used to temporarily pause removal proceedings.”⁴⁷ As GAO [noted](#):

⁴¹ *Id.*

⁴² *Id.* at 21.

⁴³ *Id.*

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 24.

⁴⁶ 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>.

⁴⁷ 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>.

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 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.⁴⁸ [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”⁴⁹ grew “more than fivefold,”⁵⁰ 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.”⁵¹

One of the main reasons why IJs were taking more time to complete cases was an increase in the number of continuances that IJs granted over that period. As the GAO noted, logically: “[C]ases that experience more continuances take longer to complete.”⁵² After reviewing 3.7 million continuance records from FY 2006 through FY 2015, GAO concluded that continuances increased by 23 percent⁵³ from FY 2006 to FY 2015 with “the percentage of completed cases which had multiple continuances”⁵⁴ 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 2015.⁵⁵ Those continuances made an impact, as GAO

⁴⁸ *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>.

⁴⁹ *Id.* at 25, n. 50.

⁵⁰ *Id.* at 25.

⁵¹ *Id.*

⁵² *Id.* at 68.

⁵³ *Id.*, Highlights.

⁵⁴ *Id.* at 69.

⁵⁵ *Id.*

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 fiscal year.⁵⁶

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, too few IJs (and complementary staff) to adequately do the job. There are currently 559 IJs, including Assistant Chief IJs in the field who hear some cases.⁵⁷ According to EOIR, however, as of October, there were nearly 1.4 million cases pending before the immigration courts.⁵⁸

This means that there are more than 2,503 pending cases per IJ. In the last pre-pandemic year, FY 2019, on average, IJs completed 708 cases each.⁵⁹ Therefore, even if Covid-19 restrictions were lifted tomorrow, and no new cases were filed, it would take the immigration courts more than three-and-a-half years to complete their pending cases.

As explained below, however, the number of new cases added to the courts’ dockets has increased by nearly 600,000 in the past two fiscal years⁶⁰, and will likely grow even more, largely because of the ongoing crisis at the Southwest 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).⁶¹ 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.”⁶²

⁵⁶ *Id.*

⁵⁷ *Executive Office for Immigration Review, Adjudication Statistics, Immigration Judge (IJ) Hiring*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 2021, available at: <https://www.justice.gov/eoir/page/file/1242156/download>.

⁵⁸ *Executive Office for Immigration Review, Adjudications Statistics, Pending Cases, New Cases, and Total Completions*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 19, 2021, available at: <https://www.justice.gov/eoir/page/file/1242166/download>.

⁵⁹ 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>.

⁶⁰ *Executive Office for Immigration Review, Adjudications Statistics, Pending Cases, New Cases, and Total Completions*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, generated Oct. 19, 2021, available at: <https://www.justice.gov/eoir/page/file/1242166/download>.

⁶¹ *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/>.

⁶² *Id.*

I relied extensively on my JLCs 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.⁶³ That problem, if anything, has simply gotten worse in the interim.

The Border Surge

Second, the “surge” in illegal migrants, and in particular adult migrants with children in “family units” (FMUs), across the Southwestern border in FY 2019 and FY 2021 has also contributed to the backlogs and delays in completion of cases in the immigration courts.

Turning back to the period examined by GAO, however, the number of UACs apprehended along the border increased by 76 percent (to 68,541) between FY 2013 and FY 2014, while the number of migrant adults and children travelling together in FMUs increased by 360 percent (to 68,445) during the same period, according to U.S. Customs and Border Protection (CBP).⁶⁴

EOIR responded on July 9, 2014, by “prioritizing” certain “cases involving migrants who had recently crossed the southwest border and whom DHS has placed into removal proceedings” to ensure “that these cases [were] processed both quickly and fairly to enable prompt removal in appropriate cases, while ensuring the protection of asylum seekers and others.”⁶⁵

Those “new priority” cases consisted of UACs who had “recently crossed the southwest border; [FMUs] who [had] recently crossed the border and [were] held in detention; [FMUs] who [had] recently crossed the border but [were] on ‘alternatives to detention [ATD];’ and other detained cases.”⁶⁶ 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.”⁶⁷

⁶³ *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>.

⁶⁴ *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>.

⁶⁵ *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>.

⁶⁶ *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>.

⁶⁷ *Id.*

This was 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.⁶⁸

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.⁶⁹

Regrettably, the surge in aliens in FMUs has resumed since bottoming out in April 2020 (when Border Patrol apprehended just 716 migrants in family units at the Southwest border)⁷⁰, and the number of UACs apprehended at the Southwest border reached new all-time highs in FY 2021.⁷¹

Border Patrol apprehended nearly 145,000 UACs at the Southwest border in FY 2021⁷², almost twice the previous yearly record there (76,020 in FY 2019⁷³; records for UAC encounters go back to FY 2010, for reasons that I can discuss).

⁶⁸ *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>.

⁶⁹ *Id.* at 27.

⁷⁰ See *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION, modified Jan. 11, 2022, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

⁷¹ Compare *Id.* with *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*, U.S. BORDER PATROL, undated, available at: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf.

⁷² See *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION, modified Jan. 11, 2022, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

⁷³ *Total Unaccompanied Children (0-17 Years Old) Apprehensions By Month*, U.S. BORDER PATROL, undated, available at: https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Total%20Monthly%20UC%20Encounters%20by%20Sector%20%28FY%202010%20-%20FY%202020%29%20%28508%29a_0.pdf.

Similarly, in FY 2021, Border Patrol apprehended more than 461,000 migrants in FMUs at the Southwest border⁷⁴, the second highest number of FMU apprehensions there in history (records go back to FY 2013⁷⁵, again for reasons that I can discuss).

Only during the “border emergency”⁷⁶ in FY 2019 were a larger number of migrants in FMUs apprehended at the U.S.-Mexico line (473,682).

In response to this latest FMU surge, in May, Attorney General Merrick Garland and DHS Secretary Alejandro Mayorkas announced⁷⁷ the creation of a “dedicated docket” process in order to “more expeditiously and fairly make decisions in immigration cases of families who arrive between ports of entry at the Southwest Border”.

They explained:

Under this new process, certain recently arrived families may be placed on the Dedicated Docket. Families may qualify if they are apprehended between ports of entry on or after Friday, May 28, 2021, placed in removal proceedings, and enrolled in Alternatives to Detention (ATD). DHS, in partnership with [EOIR] will make available information services to help families understand the immigration system and refer families to pro bono legal service providers for possible representation.

That dedicated docket consists of 10 immigration courts (Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle).⁷⁸

The AG and DHS secretary contended that those cities were chosen, in part, because there are available IJs in each “to handle the cases”. But are there?

According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the average number of days that a case has been pending in immigration courts in the United States is 901.⁷⁹

⁷⁴ See *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION, modified Jan. 11, 2022, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

⁷⁵ See *Total Family Unit Apprehensions By Month*, U.S. BORDER PATROL, undated, available at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20Family%20Unit%20Apprehensions%20by%20Sector%20%28FY%202013%20-%20FY%202019%29_1.pdf.

⁷⁶ *Secretary Kirstjen Nielsen Statement on Border Emergency*, DEP’T OF HOMELAND SECURITY, Mar. 29, 2019, available at: <https://www.dhs.gov/news/2019/03/29/secretary-kirstjen-nielsen-statement-border-emergency>.

⁷⁷ *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings*, U.S. DEP’T OF JUSTICE, May 28, 2021, available at: <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

⁷⁸ *Id.*

⁷⁹ *Immigration Court Backlog Tool, Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, through Dec. 2021, available at: https://trac.syr.edu/phptools/immigration/court_backlog/.

The period that cases have been pending in the immigration courts in California far exceeds that national average (1,067 days), however. Such delays are even worse in the Los Angeles (1,221 days) and San Francisco immigration courts (1,145 days).⁸⁰

The same is true of the immigration courts in Colorado (1,060 days)⁸¹. The average period that cases have been pending in the Denver immigration court is 1,275 days, more than a full year over the national average.⁸²

Not surprisingly, cases at the Denver Family Unit court have “only” been pending for 796 days, and on the Denver dedicated docket for 71 days⁸³. The same is true of the dedicated dockets in San Francisco and Los Angeles (where cases are running at an average of 67 days, for each).⁸⁴

I fully support expediting cases involving recent entrants to deter future entrants, and in particular aliens in family units. My interest in reducing FMU entry goes beyond statutory mandates, national-security concerns, or questions of national sovereignty, however.

In April 2019, the bipartisan CBP Families and Children Care Panel convened by the Homeland Security Advisory Council issued what it termed an “Emergency Interim Report”⁸⁵.

That panel found in that report:

*Migrant children are traumatized during their journey to and into the U.S. The journey from Central America through Mexico to remote regions of the U.S. border is a dangerous one for the children involved, as well as for their parent. There are credible reports that female parents of minor children have been raped, that many migrants are robbed, and that they and their child are held hostage and extorted for money.*⁸⁶

Those are horrors that the United States should be working to prevent. The best way to do that in FMU cases and across the board, however, is through policies that deter illegal migrants—and in particular migrant families—from entering illegally to begin with.

The administration, however, has not announced any real plans or policies that would remove the incentives that encourage illegal migrants—either as a class or in FMUs—from entering illegally.

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ *Final Emergency Interim Report*, HOMELAND SECURITY ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL, Apr. 16, 2019, available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

⁸⁶ *Id.* at 6.

Respectfully, the majority of the blame for this most recent surge lies with the White House, as the editorial board at Bloomberg Opinion explained on January 3⁸⁷, when it stated: “Biden’s rush to undo any immigration policies associated with his predecessor has contributed to upheaval at the border and encouraged more people to risk their lives trying to reach the U.S.”

Increasing Legal Complexity

Third, federal court decisions have complicated the task facing IJs in 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 in determining whether a criminal conviction renders a respondent removable and ineligible for relief.⁸⁸

The cases highlighted⁸⁹ 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.*⁹⁰ and *Descamps v. U.S.*⁹¹), 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 INA⁹² (*Moncrieffe v. Holder*⁹³).

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*⁹⁴, both increased the number of cases on the immigration courts’ dockets in the Ninth Circuit and gave aliens in

⁸⁷ *Why ‘Remain in Mexico’ Is Worth Preserving, Instead of Fulminating Against the Trump-Era Policy, the Biden Administration Should Make It More Humane*, BLOOMBERG OPINION, Jan. 3, 2022, available at: <https://www.bloomberg.com/opinion/articles/2022-01-03/-remain-in-mexico-border-policy-is-worth-preserving>.

⁸⁸ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 27-28, available at: <https://www.gao.gov/assets/690/685022.pdf>

⁸⁹ *Id.*

⁹⁰ *Mathis v. United States*, 136 S. Ct. 2243 (2016), available at: https://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf.

⁹¹ *Descamps v. United States*, 133 S. Ct. 2276 (2013), available at: <https://www.law.cornell.edu/supremecourt/text/11-9540>.

⁹² 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>.

⁹³ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), available at: https://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

⁹⁴ *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.*

that circuit cause to continue to litigate otherwise meritless cases. There, 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.⁹⁵

Under *Rodriguez*, such detained aliens were 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.⁹⁶

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.”⁹⁷ Moreover, unlike an initial bond hearing, where the alien bears the burden⁹⁸ of showing 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 litigate them, 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 2018.⁹⁹

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 2015.¹⁰⁰

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

⁹⁴ *Id.*

⁹⁵ *Id.* at 1078-85.

⁹⁶ *Id.* at 1086-87.

⁹⁷ 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.

⁹⁸ *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016), available at:

<https://www.justice.gov/eoir/file/881776/download>.

⁹⁹ See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), available at:

https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

¹⁰⁰ *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>.

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.”¹⁰¹ Despite the permissive nature of this standard, a number of decisions have limited IJs’ discretion when it comes to denying continuances.

For example, in *Matter of Hashmi*¹⁰², 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.

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.”¹⁰³ Nor, the BIA held, were “[t]he number and length of prior continuances . . . alone determinative.”¹⁰⁴

Similarly, in *Simon v. Holder*¹⁰⁵, 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.”¹⁰⁶ The ICE attorney refused to agree to a continuance, and the IJ ordered the alien deported.¹⁰⁷ The respondent’s appeal to the BIA was dismissed, and the alien then filed a motion to reconsider with the BIA that was denied.¹⁰⁸

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

¹⁰¹ 8 C.F.R. § 1003.29 (2022), 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>.

¹⁰² *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>.

¹⁰³ *Id.* at 793-94.

¹⁰⁴ *Id.* at 794.

¹⁰⁵ *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

¹⁰⁶ *Id.* at 441-42.

¹⁰⁷ *Id.* at 442.

¹⁰⁸ *Id.*

establish that a visa was immediately available.”¹⁰⁹ The Third Circuit held (more than five years after the case started) that the BIA had erred in relying solely on “the remoteness of visa availability,” and remanded the case.¹¹⁰

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, de facto 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 they were allowed to take. Moreover, an appeal from a continuance would be “interlocutory” in any case, in that it “asks the [BIA] to review a ruling by the Immigration Judge before the Immigration Judge issues a final decision.”¹¹¹

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.”¹¹²

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 stated “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.”¹¹³

Executive Branch Policies

Fourth, executive branch policies have exacerbated the backlog and increased the number of continuances.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 443.

¹¹¹ *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>.

¹¹² 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>.

¹¹³ *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>.

One example of such a policy is “Deferred Action for Childhood Arrivals” (DACA).¹¹⁴ 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.*¹¹⁵

To be granted DACA status, an alien must 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.”¹¹⁶ 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.”¹¹⁷

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 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.”¹¹⁸

Another executive branch policy that adversely affects 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.”¹¹⁹

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

¹¹⁴ *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>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *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>.

¹¹⁸ 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>.

¹¹⁹ *Understanding Prosecutorial Discretion in Immigration Law*, AMERICAN IMMIGRATION COUNCIL, May 26, 2011, available at: <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law>.

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.¹²⁰

As the then-ICE Acting Principal Legal Advisor (the agency’s general counsel) 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.”¹²¹

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,”¹²² also known as the “Johnson Memo.” The Johnson Memo set the following immigration priorities for DHS:

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

¹²⁰ *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.

¹²¹ 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.

¹²² 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.

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. § 52 l(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.

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.¹²³

As the Johnson 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.¹²⁴ [Emphasis added].*

Providing guidance to ICE attorneys on the implementation of these policies, the then-current 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

¹²³ *Id.* at 3-4.

¹²⁴ *Id.* at 2.

*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.*¹²⁵

Taken as a whole, these policies forced IJs to consider numerous motions to continue and to 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).¹²⁶

While those policies were largely limited or revoked under the Trump administration, they have been expanded under the current administration.

The first immigration-enforcement policy document issued under the Biden administration was a memo from then-Acting DHS Secretary David Pekoske, dated January 20, 2021 and captioned “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities”¹²⁷ (the Pekoske memo).

The Pekoske memo announced a 100-day review of DHS enforcement policies, as well as a 100-day moratorium on almost all removals from the United States (the latter was blocked by a federal judge¹²⁸ and then expired).

Blaming “limited resources”, the Pekoske memo¹²⁹ narrowed immigration enforcement to three specified “priorities”: spies, terrorists, and other threats to national security; aliens who entered illegally on or after November 1, 2020; and aliens released from incarceration on or after January

¹²⁵ 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.

¹²⁶ *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>.

¹²⁷ David Pekoske, Acting Secretary of Homeland Security, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, U.S. DEP’T OF HOMELAND SECURITY, Jan. 20, 2021, available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK_Sw1uJORroFP4s7MvbBEvE8d9xF2MHyF3_fFE.

¹²⁸ See *Texas v. U.S.*, No. 6:21-cv-00003 (S.D. Tex, Feb. 23, 2021), available at: <https://casetext.com/case/texas-v-united-states-38>.

¹²⁹ David Pekoske, Acting Secretary of Homeland Security, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, DEP’T OF HOMELAND SECURITY, at 2, Jan. 20, 2021, available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf?fbclid=IwAR0-6DifCXLAYlEzR58LUK_Sw1uJORroFP4s7MvbBEvE8d9xF2MHyF3_fFE.

20 who had been convicted of aggravated felonies (as defined in section 101(a)(43) of the INA¹³⁰.

Thereafter, on February 18, Acting ICE Director Tae Johnson issued his own guidance, captioned “Interim Guidance: Civil Immigration Enforcement and Removal Priorities”¹³¹ (the Tae Johnson memo).

The Tae Johnson memo slightly expanded the class of aliens deemed enforcement priorities in Pecoske memo. Spies, terrorists, and illegal entrants on or after November 1, 2020 still made the list, but the priorities in the February 18 guidance also included non-detained aggravated felons and certain gang members, if they “pose[] a risk to public safety”¹³².

Acting Director Johnson made clear that this guidance did not simply limit the class of aliens whom ICE officers could question, apprehend, detain, and remove, but also applied to “whether to issue, reissue, serve, file, or cancel” an NTA¹³³.

The Tae Johnson memo was followed by interim guidance from ICE Principal Legal Advisor John D. Trasvina on May 27, captioned “Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities” (Trasvina memo).¹³⁴

The Trasvina memo also focuses heavily on “prosecutorial discretion”, and explained: “OPLA's policy is to exercise prosecutorial discretion in a manner that furthers the security of the United States and the faithful and just execution of the immigration laws, consistent with DHS's and ICE's enforcement and removal priorities” as set forth in the Pecoske and Tae Johnson memos.¹³⁵

The scenarios in which the Trasvina memo envisions the exercise of prosecutorial discretion include the assignment of an ICE attorney to a removal hearing¹³⁶; the non-filing of an NTA¹³⁷; agreeing to continuances; and dismissal of cases involving relatives of those in the military¹³⁸, respondents likely to be granted relief¹³⁹, in cases where there are “compelling humanitarian factors” (including where the respondent “came to the United States as a young child and has

¹³⁰ See section 101(a)(43) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim>.

¹³¹ Tae Johnson, Acting Director, *Interim Guidance, Civil Immigration Enforcement and Removal Priorities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Feb. 18, 2021, available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

¹³² *Id.* at 4-5.

¹³³ *Id.* at 3.

¹³⁴ John D. Trasvina, Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, May 27, 2021, available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

¹³⁵ *Id.* at 5.

¹³⁶ *Id.*

¹³⁷ *Id.* at 7.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.*

since lived in the United States continuously”¹⁴⁰, and where the respondent is a long-term lawful permanent resident”¹⁴¹.

While each of these may be a consideration for an IJ in the granting of relief or asylum in the exercise of discretion, Congress notably failed to include *any of them* as valid considerations in determining whether aliens are inadmissible under section 212 of the INA¹⁴², deportable under in section 237 of the INA¹⁴³, or should be placed into removal proceedings under section 240 of the INA¹⁴⁴.

Notably, sections 212 and 237 of the INA, which collectively form the grounds of removability, are written in mandatory terms.¹⁴⁵

Such starts and stops in removal proceedings as called for in the Trasvina memo, logically, unduly burden IJs in completing cases. The Trasvina memo specifically requires ICE OPLA Field Locations to “maintain email inboxes dedicated to receiving inquiries related to” that memo, “including requests for OPLA to favorably exercise its discretion”¹⁴⁶.

Thus, an IJ handling a busy docket (as most do) may have been hearing a matter for years, only to receive a joint request for termination or a continuance on the day of (or at) the final merits hearing. While the Trasvina memo contends that it “conserve[s] prosecutorial resources”, what it really does is waste the resources of ICE attorneys and the immigration court.

That is to say nothing of the fact that it all-but mandates the termination of cases in which respondents have no status in the United States, essentially leaving them in legal limbo in this country, and that it leaves the American people (both citizens and lawfully admitted aliens) vulnerable to the continued predations of dangerous criminals simply because they have been here for years.

¹⁴⁰ *Id.* at 9-10.

¹⁴¹ *Id.*

¹⁴² See section 212 of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁴³ See section 237 of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹⁴⁴ Section 240 of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1229a&num=0&edition=prelim>.

¹⁴⁵ See, e.g., section 212(a) of the INA (2022) (“Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs *are ineligible to receive visas and ineligible to be admitted to the United States*”) (emphasis added), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>; section 237(a) of the INA (“Any alien (including an alien crewman) in and admitted to the United States *shall*, upon the order of the Attorney General, *be removed* if the alien is within one or more of the following classes of deportable aliens”), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

¹⁴⁶ John D. Trasvina, Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, at 13, May 27, 2021, available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

The truly inexplicable part of the Trasvina memo relates, however, to the proposition that ICE may not assign an attorney to an ongoing removal case¹⁴⁷. That's problematic because ICE attorneys do not simply represent the interests of the United States in immigration hearings. They also assist IJs in resolving disputed issues of fact and law and have possession of and control over the respondent's alien file (A-file).

A-files often contain documents that touch upon various issues in the proceedings, including potential relief. On more than one occasion as an INS trial attorney, I discovered (and handed up to the court) documents benefitting a respondent's cause of which the respondent and the IJ would otherwise have been unaware.

Having no ICE attorney in court means that the IJ will have no lawyer to file briefs or to offer arguments. The leaves the IJ having to resolve issues—both legal and factual—with only the assistance of counsel for the respondent (if any). In essence, this proposal renders the IJ judge and prosecutor.

It is true, as Trasvina states, that the regulations do not usually require ICE to assign an attorney, except in a limited number of cases¹⁴⁸. Specifically, 8 C.F.R. § 1240.2 (2022)¹⁴⁹ states:

Assignment. In a removal proceeding, the Service shall assign an attorney to each case within the provisions of § 1240.10(d), and to each case in which an unrepresented respondent is incompetent or is under 18 years of age, and is not accompanied by a guardian, relative, or friend. In a case in which the removal proceeding would result in an order of removal, the Service shall assign an attorney to each case in which a respondent's nationality is in issue. A Service attorney shall be assigned in every case in which the Commissioner approves the submission of non-record information under § 1240.11(a)(3). In his or her discretion, whenever he or she deems such assignment necessary or advantageous, the General Counsel may assign a Service attorney to any other case at any stage of the proceeding.

In almost 30 years of immigration practice, however, I am unaware of *any* immigration-court matter (bond, exclusion, deportation, removal, rescission, credible fear review, or reasonable fear review) in which an attorney from INS or ICE did not represent the government. Nor as an IJ would I have allowed any such case to proceed, in much the same way that I would not allow a case to proceed without respondent's counsel of record.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ See 8 C.F.R. § 1240.2 (2022), available at: <https://www.law.cornell.edu/cfr/text/8/1240.2>.

¹⁴⁹ *Id.*

Remarkably, however, this scheme gets worse. On June 11, Acting EOIR Director Jean King issued a memo captioned “Effect of Department of Homeland Security Enforcement Priorities”¹⁵⁰ (King memo).

The King memo explains:

Through individualized review of pending cases, DHS, U.S. Immigration and Customs Enforcement (ICE), attorneys will be determining which cases are enforcement priorities and which are not. Overall, these memoranda explain that DHS will exercise discretion based on individual circumstances and pursue these priorities at all stages of the enforcement process. This includes a wide range of enforcement decisions involving proceedings before EOIR, such as deciding whether to issue, reissue, serve, file, or cancel Notices to Appear; to oppose or join respondents’ motions to continue or to reopen; to request that proceedings be terminated or dismissed; to pursue an appeal before the Board of Immigration Appeals (BIA); and to agree or stipulate to bond amounts or other conditions of release. Accordingly, these memoranda are likely to affect many cases currently pending on the immigration courts’ and BIA’s dockets.¹⁵¹

That part, which is simply a rehash of the Pekoske, Tae Johnson, and Trasvina memos is unexceptional. What is exceptional, however, is section II.A therein, which states, in pertinent part:

Immigration judges should be prepared to inquire, on the record, of the parties appearing before them at scheduled hearings as to whether the case remains a removal priority for ICE and whether ICE intends to exercise some form of prosecutorial discretion, for example by requesting that the case be terminated or dismissed, by stipulating to eligibility for relief, or, where permitted by case law, by agreeing to the administrative closure of the case. The judge should ask the respondent or his or her representative for the respondent’s position on these matters, and take that position into account, before taking any action.¹⁵²

It (of course) makes no sense for an IJ to prepare to hear a matter that will not proceed. But as I explained in a June 29 article¹⁵³ analyzing the King memo:

What does it mean to say that IJs “should be prepared to inquire ... whether a case remains a removal priority for ICE and whether ICE intends to exercise

¹⁵⁰ Jean King, Acting Director of the Executive Office for Immigration Review, *Effect of Department of Homeland Security Enforcement Priorities*, U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jun. 11, 2021, available at: <https://www.justice.gov/eoir/book/file/1403401/download>.

¹⁵¹ *Id.* at 2.

¹⁵² *Id.*

¹⁵³ Andrew Arthur, *DOJ’s Immigration Court Guidance Sets a Dangerous Precedent, Where are the demands for judicial independence?*, CENTER FOR IMMIGRATION STUDIES, Jun. 29, 2021, available at: <https://cis.org/Arthur/DOJs-Immigration-Court-Guidance-Sets-Dangerous-Precedent>.

some form of prosecutorial discretion”? Is EOIR telling me as an IJ that I must ask ICE those questions? If so, don’t beat around the bush.

Besides, why would an IJ care about ICE’s removal priorities? I was an IJ for more than eight years, through both Republican and Democratic administrations, and ICE’s priorities shifted constantly. I only cared about the case that was in front of me at that moment.

And under precedent, IJs are not even allowed to consider their own completion goals in ruling on a continuance. Now, they are supposed to consider the policies of an entirely different agency in an entirely different department on any number of issues on which the IJ has the ultimate decision?

* * * *

The June 11 memo plainly requires IJs to become involved in “prosecutorial discretion”.

* * * *

More fundamentally, however, such involvement blurs the distinctions between the prosecutor and the court. When I was an IJ, I showed up for court ready to hear the case before me, and that was it. Asking a lawyer whether they wanted to exercise discretion is (in my opinion, at least) an intrusion into that discretion.¹⁵⁴

Note that the Pecoske and Tae Johnson memos were subsequently revoked by the latest DHS immigration-enforcement directive, a September 30, 2021, memo from DHS Secretary Alejandro Mayorkas, captioned “Guidelines for the Enforcement of Civil Immigration Law” (Mayorkas memo)¹⁵⁵.

Like the Pecoske and Tae Johnson memos, Mayorkas’ listed the same three enforcement priorities: Spies and terrorists; aliens posing a threat to public safety (“typically because of serious criminal conduct”); and aliens who entered illegally after October 31, 2020.¹⁵⁶

Unlike its predecessors, however, the Mayorkas memo gave a bit more latitude to ICE officers to pursue other removable aliens — but only on paper. It requires those agents to engage in a pointless pre-enforcement process that balances the threat that aliens subject to removal pose to the public against their own personal circumstances (such as the effect of their removal on family members and any rehabilitation since their offenses).

Nonetheless, the Trasvina and King memos appear to be in effect.

¹⁵⁴ *Id.*

¹⁵⁵ Alejandro Mayorkas, Secretary of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law*, U.S. DEP’T OF HOMELAND SECURITY, Sep. 30, 2021, available at: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

¹⁵⁶ *Id.* at 3-4.

In addition to the disruption that the Johnson, Pecoske, Tae Johnson, and Mayorkas memos directly impose on removal proceedings, however, each likely has had another effect that is not quantifiable.

Taken as a whole, DHS's "prosecutorial discretion" policies make it clear that most cases involving non-criminal aliens are not a priority, and it is only natural for IJs to place a lower priority on completing those cases. It does not call the diligence of the IJ corps into question to suggest that many IJs would conclude that there is no reason to work overtime to complete matters that the current administration does not consider "priorities", or to keep a docket of such cases on track.

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."¹⁵⁷ IJs' working conditions have only gotten worse as the backlogs have grown.¹⁵⁸ 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 immigration court backlogs may seem insurmountable, and the causes of those backlogs 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 both the current administration and its predecessor to boost the number of IJs who are on the bench, as stated above. This has, to a degree, fulfilled promises that each has made with respect to this effort.

In a public *Immigration Newsmaker* interview that I conducted with then-EOIR Director James McHenry on May 3, 2018, the director noted that the Trump administration had proposed increasing the size of the IJ corps to 700 judges, but he made clear that this effort would take two

¹⁵⁷ 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>.

¹⁵⁸ 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/>.

to three years.¹⁵⁹ Of course, such hiring is subject to funding by Congress, and to the efforts of the current administration.

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.

Changes to the Administration's Border Policies

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

As the statistics on apprehensions at the Southwest border in FY 2021 and FY 2022 demonstrate, the situation there is in chaos.

The expulsion of illegal migrants under orders¹⁶⁰ issued by the Centers for Disease Control and Prevention (CDC) under Title 42 of the U.S. Code¹⁶¹ since the onset of the Covid-19 pandemic has, to a degree, limited the number of illegal migrants allowed into the United States, and consequently has pared the number of new cases added to IJs' dockets.

Of the 1,659,206 migrants apprehended by Border Patrol at the Southwest border in FY 2021, 1,040,220 (62.7 percent) were expelled under Title 42¹⁶². Conversely, however, nearly 619,000 of those migrants were processed under the INA¹⁶³, meaning that they were allowed to remain in the United States to pursue immigration relief and protection.

Despite this fact, however, the immigration courts only added 235,663 new cases to their dockets in FY 2021.¹⁶⁴ Still, and likely because of pandemic-related shutdowns at many non-detained immigration courts last fiscal year, IJ completions fell last year to 114,751, from 231,775 in FY 2020, and from 276,993 in FY 2019¹⁶⁵-- a 51 percent decline in a year, and an almost 59 percent decline from FY 2019.

¹⁵⁹ *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>.

¹⁶⁰ See *Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, 86 Fed. Reg. 42828 (Aug. 5, 2021), available at: <https://www.federalregister.gov/documents/2021/08/05/2021-16856/public-health-reassessment-and-order-suspending-the-right-to-introduce-certain-persons-from>.

¹⁶¹ See 42 U.S.C. § 265 (2022), available at: <https://www.law.cornell.edu/uscode/text/42/265>.

¹⁶² Nationwide Encounters, U.S. Customs and Border Protection, updated Jan. 11, 2022, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

¹⁶³ *Id.*

¹⁶⁴ See *Pending Cases, New Cases, and Total Completions*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, generated Oct. 19, 2021, available at: <https://www.justice.gov/eoir/page/file/1242166/download>.

¹⁶⁵ *Id.*

Because the number of new cases filed outstripped the number completed in FY 2021, the backlog grew.

That raises the question, however, of what happened to the cases of the migrants who were apprehended in FY 2021 who did not appear on the immigration courts' dockets?

DHS Failed to Place Many Recent Migrants into Proceedings

Under questioning before the Senate Judiciary in November¹⁶⁶, Secretary Mayorkas explained that DHS had released about 500,000 of migrants encountered at the Southwest border in FY 2021—125,000 UACs and 375,000 others.

Excluding the UACs, that means that the immigration courts should have received more than 375,000 new cases in FY 2021, but as the figures above reveal, just a fraction of that number of new cases were filed with the courts.

In response to an information request from Sen. Ron Johnson (Wisc.)¹⁶⁷, Secretary Mayorkas revealed¹⁶⁸ that between March 21 and August 31, 2021, DHS had released 104,171 aliens encountered at the Southwest border on “Notices to Report” (NTRs). Each was required to appear at an ICE office in the interior of the United States within 60 days of release.

Only 49,859 of those aliens showed up for their ICE check-ins, however: 37,161 within that 60-day timeframe and 12,698 later than 60 days.¹⁶⁹ The 60-day window had closed for an additional 47,705 who failed to check in, and an additional 6,607 were still with the 60 days.¹⁷⁰

Putting aside for a moment that there is no authority whatsoever for DHS to release any alien apprehended after illegal entry along the border or without proper documents at the ports of entry¹⁷¹, these statistics indicate that nearly half of all aliens released on an NTR had failed to appear as required.

¹⁶⁶ See Andrew Arthur, *Mayorkas Faces Senate Fire on Payments to Migrants, ICE Non-Enforcement Policy, Border DHS secretary questions whether aliens ordered removed received due process, claims more border control now that is 'consistent with our values'*, CENTER FOR IMMIGRATION STUDIES, Nov. 18, 2021, available at: <https://cis.org/Arthur/Mayorkas-Faces-Senate-Fire-Payments-Migrants-ICE-NonEnforcement-Policy-Border>.

¹⁶⁷ See Sen. Johnson Releases Immigration Data Showing Failures of the Biden Administration's Disastrous Border Policies, Press Release, Jan. 11, 2022, available at: <https://www.ronjohnson.senate.gov/2022/1/sen-johnson-releases-immigration-data-showing-failures-of-the-biden-administration-s-disastrous-border-policies>.

¹⁶⁸ Letter from Alejandro Mayorkas, Secretary of Homeland Security, to the Hon. Ron Johnson, U.S. DEP'T OF HOMELAND SECURITY, undated, available at: <https://www.ronjohnson.senate.gov/services/files/F9D5467E-EEC9-4AEC-9156-73C5957CFE57>.

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

¹⁷¹ Under section 235 of the INA, DHS is required to detain those aliens, until they are granted immigration relief or protection, or paroled under section 212(d)(5)(A) of the INA, unless they are returned across the border to await removal proceedings in accordance with section 235(b)(2)(C) of the INA. See section 235 of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>; section 212(d)(5)(A) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

The fact that tens of thousands of aliens apprehended at the Southwest border were released and failed to appear at ICE check-ins would have lessened the burden on immigration court backlogs, at the expense of the INA and border security.

Further alleviating the burden on IJs' dockets was the fact, as DHS admitted¹⁷² in its response to Sen. Johnson, that just 16,293 of those aliens released between March 21 and August 31 on NTRs who did report were issued NTAs. That means that, of more than 104,000 aliens apprehended at the border, only 15.6 percent were placed into proceedings.

That is not the way that DHS is supposed to operate, and the department offered no explanation for why so few of those aliens were placed into removal proceedings.

DHS did, however, report that between March 21 (when it began releasing aliens on NTRs) and December 5, 2021, 50,683 aliens released on NTRs had been issued NTAs¹⁷³. For reasons that are unclear, though, it could only identify the immigration courts where 10,335 of those NTAs had been filed.¹⁷⁴

DHS is not placing paroled aliens into proceedings

Sen. Johnson also asked Secretary Mayorkas how many of the 273,396 aliens encountered by DHS at the border and processed by CBP between January 1 and August 31, 2021, were paroled into the United States, and under what authority.¹⁷⁵

DHS failed to disclose how many of those aliens had been paroled¹⁷⁶, but contended that the aliens who were paroled had been paroled under section 212(d)(5) of the INA.¹⁷⁷

Interestingly, however, the department continued: "In general, a noncitizen who is paroled into the United States is not placed into removal proceedings until the parole is terminated."¹⁷⁸ That has not been the rule in the past, but there is no impediment to DHS placing an alien who has been paroled into the United States under section 212(d)(5) of the INA into removal proceedings.¹⁷⁹

¹⁷² *Letter from Alejandro Mayorkas, Secretary of Homeland Security, to the Hon. Ron Johnson, U.S. DEP'T OF HOMELAND SECURITY*, at 3, undated, available at: <https://www.ronjohnson.senate.gov/services/files/F9D5467E-EEC9-4AEC-9156-73C5957CFE57>.

¹⁷³ *Id.* at 6.

¹⁷⁴ *See id.* at 4-6.

¹⁷⁵ *See Sen. Johnson Releases Immigration Data Showing Failures of the Biden Administration's Disastrous Border Policies*, Press Release, Jan. 11, 2022, available at: <https://www.ronjohnson.senate.gov/2022/1/sen-johnson-releases-immigration-data-showing-failures-of-the-biden-administration-s-disastrous-border-policies>.

¹⁷⁶ *See Letter from Alejandro Mayorkas, Secretary of Homeland Security, to the Hon. Ron Johnson, U.S. DEP'T OF HOMELAND SECURITY*, at 3, undated, available at: <https://www.ronjohnson.senate.gov/services/files/F9D5467E-EEC9-4AEC-9156-73C5957CFE57>.

¹⁷⁷ Section 212(d)(5)(A) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

¹⁷⁸ *Id.*

¹⁷⁹ *See, e.g.*, sec. 8.3 of ICE Dir. 11002.1, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Dec. 8, 2009, at 6 (directing ICE to parole most aliens who had been subject to expedited removal and who had received a positive credible fear determination, assuming that their identities had been confirmed, that they did not pose a danger to the

The fact that they were paroled indicates that they were not otherwise admissible (otherwise they would have been admitted), and if they are inadmissible, then they should have been placed into removal proceedings, as has been the practice in the past. DHS’s failure—or refusal—to do so, however, further lightens the burden on the immigration court; however, it does so at the expense of the rule of law and the mandates in the INA.

New case filings should soar when Title 42 orders are lifted

Title 42, like the Covid-19 pandemic, will (I hope) not be around forever, or even for much longer. Nor can DHS continue to release aliens into the United States on NTRs, on parole, or in any other way indefinitely and expect to gain control of the Southwest border.

If DHS fails to gain operational control of the Southwest border before the Title 42 orders expire, and if illegal migration continues at current levels, either the immigration courts will be facing a massive increase in cases on their dockets, or the department will have to continue releasing tens of thousands of inadmissible aliens into the United States without charges.

Given the Fifth Circuit’s findings in its December 13 decision in *Texas v. Biden*¹⁸⁰, a case brought by the states of Texas and Missouri to block DHS’s attempted termination¹⁸¹ of the Migrant Protection Protocols (MPP)¹⁸², it is extremely doubtful that the courts will allow DHS to simply release aliens into the interior of the United States for long.

That means that it is incumbent on the administration to implement policies to deter migrants from entering the United States illegally, or else the placement of tens of thousands of aliens per month into removal proceedings will strain the dockets of the immigration courts. What DHS has termed the “court ordered reimplementation of” MPP¹⁸³ will help to reduce illegal migration, but alone it will not be enough.

The administration’s efforts to reduce illegal migration

Thus far, the administration’s efforts to reduce illegal migration have focused almost exclusively on addressing what it terms the “root causes of migration in Central America”, that is illegal

community, and they are not flight risks), available at: https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

¹⁸⁰ See *Texas v. Biden*, ___ F.3d ___ (5th Cir. 2021), available at: <https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV1.pdf>.

¹⁸¹ See Alejandro Mayorkas, Secretary of Homeland Security, *Termination of the Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SECURITY, Oct. 29, 2021, available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

¹⁸² See *Court Ordered Reimplementation of the Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SECURITY, updated Dec. 6, 2021, available at: <https://www.dhs.gov/migrant-protection-protocols>.

¹⁸³ *Id.*

migration from the “Northern Triangle” countries of El Salvador, Guatemala, and Honduras.¹⁸⁴ As the White House explained in a July 29, 2021 “Fact Sheet”¹⁸⁵:

Today, the Biden-Harris Administration is releasing the Root Causes Strategy—a core component of our Administration’s efforts to establish a fair, orderly, and humane immigration system. This Strategy identifies, prioritizes, and coordinates actions to improve security, governance, human rights, and economic conditions in the region. It integrates various U.S. government tools, including diplomacy, foreign assistance, public diplomacy, and sanctions.

Implementation of the Strategy will rely on the expertise of a wide range of U.S. departments and agencies, with support from governments in and outside the region, civil society, the private sector, multilateral organizations, international financial institutions, and the U.S. Congress. These partnerships will bolster the impact of the Strategy through informing programmatic interventions, leveraging political will, and mobilizing necessary resources. The U.S. government will coordinate a place-based approach, targeting those areas where migrants are most likely to come from.

The Strategy is organized into five pillars:

Pillar I: Addressing economic insecurity and inequality;

Pillar II: Combating corruption, strengthening democratic governance, and advancing the rule of law;

Pillar III: Promoting respect for human rights, labor rights, and free press;

Pillar IV: Countering and preventing violence, extortion, and other crimes perpetrated by criminal gangs, trafficking networks, and other organized criminal organizations; and

Pillar V: Combating sexual, gender-based, and domestic violence.

Each of these five “pillars” addresses real and salient problems in those Northern Triangle countries, but there are two fundamental flaws with this strategy.

The first is that the problems that the strategy seeks to address are endemic in those Northern Triangle countries, and to some extent (regrettably) institutionalized there.

¹⁸⁴ *FACT SHEET: Strategy to Address the Root Causes of Migration in Central America*, WHITE HOUSE, Jul. 29, 2021, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-strategy-to-address-the-root-causes-of-migration-in-central-america/>.

¹⁸⁵ *Id.*

It will take years—if not decades—for those problems to be resolved (if all all), and as the Washington Post¹⁸⁶ recently acknowledged: “Such efforts have shown little evidence of deterring migration in the short term.”

The second flaw in this strategy is that, increasingly, illegal migrants are coming from farther abroad than Mexico and the Northern Triangle. In FY 2021¹⁸⁷, Border Patrol agents at the Southwest border apprehended more than 367,000 illegal migrants who were not from Mexico (OTMs) and not from the Northern Triangle (ONTs), a trend that has continued into FY 2022.

In October and November 2021 alone, Border Patrol agents at the Southwest border apprehended more than 103,000 OTMs/ONTs¹⁸⁸. And DHS has largely either been unable or unwilling to expel those OTM/ONTs under CDC orders: In FY 2021 and FY 2022 (through November 2021), almost 385,000 of them were processed under the INA¹⁸⁹ (many if not most for release into the United States), while fewer than 86,000 others were expelled under Title 42.¹⁹⁰

At some point, the vast majority of those OTM/ONTs will be placed on the immigration courts’ dockets (unless of course they disappear into the interior of the United States before they are issued NTAs), which will simply add to the already crushing backlog.

Proposed regulations will increase the burdens on the immigration courts

A separate administration proposal, however, will only add to IJs’ burdens if it were to come to fruition.

On August 21, 2021, DOJ and USCIS published a Joint Notice of Proposed Rulemaking (JNPRM) titled “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers” in the Federal Register.¹⁹¹

That JNPRM¹⁹² includes amended regulations that would direct asylum officers (AOs) within USCIS to adjudicate, as an initial matter, applications for asylum under section 208 of the

¹⁸⁶ Nick Miroff and Kevin Sieff, *U.S. and Mexico reach deal to restart Trump-era ‘Remain in Mexico’ program along border*, WASHINGTON POST, Dec. 2, 2021, available at: https://www.washingtonpost.com/national/us-and-mexico-reach-deal-to-restart-trump-era-remain-in-mexico-program-along-border/2021/12/01/381a4190-5318-11ec-8ad5-b5c50c1fb4d9_story.html.

¹⁸⁷ See *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION, modified Jan. 11, 2022, available at: <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

¹⁹² *Id.* at 46909 (Aug. 20, 2021) (“[T]his rule proposes at 8 CFR 208.2(a)(1)(ii) and 208.9 to provide USCIS asylum officers the authority to adjudicate in the first instance the protection claims of individuals who receive a positive credible fear determination, and that they do so in a nonadversarial hearing.”), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

INA¹⁹³, for statutory withholding of removal (statutory withholding) under section 241(b)(3) of the INA¹⁹⁴, and for withholding and deferral of removal pursuant to the Convention Against Torture (CAT)¹⁹⁵ brought by aliens subject to expedited removal under section 235(b)(1) of the INA¹⁹⁶ and determined to have a “credible fear”¹⁹⁷ of persecution and/or torture.

In its comment on this proposed rule¹⁹⁸, the Center explained that AOs lack the statutory authority to adjudicate applications for asylum, statutory withholding, and CAT filed by aliens who have received positive credible fear determinations, and I incorporate that analysis and the Center’s comment *in toto* as if set forth herein.

DOJ and USCIS have yet to publish a final rule in response to the JNPRM, and as noted it is the Center’s contention that any attempt to grant AOs jurisdiction over those applications would be *ultra vires*. If that proposal were to become final, however, it would, in ways, ameliorate the effects of the current border crisis on the immigration court backlog.

It would do so by, as noted, directing AOs to adjudicate applications that current regulations¹⁹⁹ assign to IJs in removal proceedings. As the Center explained in its comment²⁰⁰ to the JNPRM, however, many of those applications would be granted in error, because this proposal would remove several key procedural safeguards.

¹⁹³ Section 208 of the INA (2020), available at:

https://www.dhs.gov/xlibrary/assets/training/xus/crcl/asylumseekers/crcl_asylum/pdfs/Immigration%20and%20Nationality%20Act%20208.pdf.

¹⁹⁴ Section 241(b)(3) of the INA (2020), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1231&num=0&edition=prelim>.

¹⁹⁵ See *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, U.S. DEPT OF JUSTICE (Jan. 15, 2009) (“CAT protections relate to the obligations of the United States under Article 3 of the United Nations Convention Against Torture. This is an international treaty provision designed to protect aliens from being returned to countries where they would more likely than not face torture. Torture is defined, in part, as severe pain or suffering (physical or mental) that is intentionally inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity. Under this treaty provision, the United States agrees not to “expel, return, or extradite” aliens to another country where they would be tortured.”), available at:

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

¹⁹⁶ Section 235(b)(1) of the INA (2020), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

¹⁹⁷ *Id.* at cl. (B)(v).

¹⁹⁸ See Andrew Arthur, Rob Law, and Julie Axelrod, *Comment in Response to Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, Center for Immigration Studies, at 15-32, Oct. 18, 2021, available at: [https://cis.org/sites/default/files/2021-10/JNPRM Asylum Procedures FINAL submitted 10-18-2021.pdf](https://cis.org/sites/default/files/2021-10/JNPRM%20Asylum%20Procedures%20FINAL%20submitted%2010-18-2021.pdf).

¹⁹⁹ See 8 C.F.R. § 235.6(a)(1) (2022), available at: <https://www.law.cornell.edu/cfr/text/8/235.6>.

²⁰⁰ Andrew Arthur, Rob Law, and Julie Axelrod, *Comment in Response to Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, Center for Immigration Studies, at 55-62, Oct. 18, 2021, available at: [https://cis.org/sites/default/files/2021-10/JNPRM Asylum Procedures FINAL submitted 10-18-2021.pdf](https://cis.org/sites/default/files/2021-10/JNPRM%20Asylum%20Procedures%20FINAL%20submitted%2010-18-2021.pdf).

Nonetheless, the asylum processing system proposed in the JNPRM²⁰¹ would then give aliens the right to seek de novo review of AOs' asylum, statutory withholding, and CAT denials from the immigration courts. That means that the whole process would *start all over again* — and the alien would receive from the IJ what amounts to an appeal from the AO's denial, a metaphorical “second bite at the apple”.

That would turn what is supposed to be a statutory “expedited” removal process into one that is anything but and would require IJs to adjudicate an untold number of protection applications, which would, of course, add to the immigration court backlog in and of itself.

The JNPRM would, however, make it even more difficult for IJs to adjudicate those applications on review. That's because the proposed regulations²⁰² would eliminate (not even waive) the requirement that an alien who had received a positive credible fear determination file a formal asylum application (Form I-589²⁰³) before applying for asylum, statutory withholding or CAT.

Instead:

Under this proposed rule, an individual who passes the initial credible fear screening would have his claim reviewed by an asylum officer in USCIS in the first instance, rather than by an IJ in a removal hearing under section 240 of the INA. As part of this new procedure for “further consideration,” and to eliminate delays between a positive credible fear determination and the filing of an application for asylum, the Departments propose that the written record of the credible fear determination created by USCIS during the credible fear process, and subsequently served on the individual together with the service of the credible fear decision itself, would be treated as an “application for asylum,” with the date of service on the individual considered the date of filing.²⁰⁴

²⁰¹ See *id.* at 46911 (“In cases in which a noncitizen seeks review of an asylum officer's adverse decision, the Departments propose that the IJ would make an independent de novo determination based on the record of the hearing before the Asylum Office plus any additional, non-duplicative evidence presented to the court that is necessary to reach a reasoned decision.”); *id.* at 46915 (“This opportunity will allow such individuals to present any additional evidence or arguments they may wish to make to the IJ, who will consider them in making a de novo determination about whether the individual has a credible fear of persecution or torture.”).

²⁰² Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46916 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

²⁰³ See *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Aug. 19, 2021) (“Use this form to apply for asylum in the United States and for withholding of removal (formerly called ‘withholding of deportation’). You may file for asylum if you are physically in the United States and you are not a U.S. citizen. NOTE: If you fail to file Form I-589 within one year of your arrival in the United States, you may not be eligible to apply for asylum under section 208(a)(2)(B) of the Immigration and Nationality Act (INA).”), available at: <https://www.uscis.gov/i-589>.

²⁰⁴ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46916 (Aug. 20, 2021), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

IJs would be expected to adjudicate on review those respondents' applications for protection based on the "written record" compiled by the AO, but the proposed regulations would also allow the respondent to submit additional "non-duplicative evidence" and to apply for other relief from removal.²⁰⁵

To be clear, these proposals would force IJs to adjudicate applications for asylum, statutory withholding, and CAT without the benefit of a Form I-589²⁰⁶, which for decades has been the standard application required of applicants for those protections. That will significantly increase the burdens on IJs hearing such cases, without any benefits to the court or to due process.

This is not the only burden that the proposals in the JNPRM would inevitably place on the courts.

The proposed rule²⁰⁷ would also expand DHS's parole authority section 212(d)(5)(A) of the INA²⁰⁸ for aliens in expedited removal proceedings prior to a credible fear screening.

Congress mandated that aliens in expedited removal proceedings be detained: Detained when apprehended²⁰⁹; detained pending an interview on a credible fear claim²¹⁰; and detained pending a determination on any subsequent asylum claim²¹¹.

Despite these congressional detention mandates for aliens in expedited removal proceedings, the current regulations provide for the release of aliens subject to expedited removal only in

²⁰⁵ See *id.* at 46911.

²⁰⁶ See *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (updated Aug. 19, 2021) (Use this form to apply for asylum in the United States and for withholding of removal (formerly called "withholding of deportation"). You may file for asylum if you are physically in the United States and you are not a U.S. citizen." NOTE: If you fail to file Form I-589 within one year of your arrival in the United States, you may not be eligible to apply for asylum under section 208(a)(2)(B) of the Immigration and Nationality Act (INA)."), available at: <https://www.uscis.gov/i-589>.

²⁰⁷ See *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 86 Fed. Reg. 46906, 49610 (Aug. 20, 2021) ("To ensure effective implementation of the expedited removal system, this rule also proposes to revise the parole considerations prior to a positive credible fear determination in 8 CFR 235.3. The current rule limits parole consideration before the credible fear determination to situations in which parole "is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). Under this proposed rule, DHS also would be able to consider whether parole is required "because detention is unavailable or impracticable."), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

²⁰⁸ Section 212(d)(5)(A) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1182&num=0&edition=prelim>.

²⁰⁹ Section 235(b)(1)(B)(iii)(IV) of the INA (2022) ("Mandatory Detention. Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

²¹⁰ *Id.*

²¹¹ Section 235(b)(1)(B)(ii) of the INA (2021) ("Referral of certain aliens. If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum."), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim>.

extremely limited situations, consistent with statute. Specifically, 8 CFR § 235.3(b)(2)(iii)²¹² states:

Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. (Emphasis added.)

Similarly, 8 CFR § 235.3(b)(4)(ii)²¹³ provides:

Detention pending credible fear interview. Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. (Emphasis added).

The JNPRM would amend these provisions²¹⁴ to allow DHS to parole *any* alien subject to expedited removal *at any point* during the expedited removal process in any situation where, solely in the department's opinion, "detention is unavailable or impracticable."

As the Center explained in its comment²¹⁵ in response to the JNPRM, that amendment would also be *ultra vires*, and exceed the authority granted to DHS and DOJ under section 212(a)(5)(A) of the INA.

More saliently, however, for the purposes of this hearing, the promise of quick release on parole would also significantly enhance the incentives for migrants to enter the United States illegally.

It is beyond cavil that most migrants enter the United States illegally in order to live and work in this country indefinitely²¹⁶. By essentially ensuring that aliens who enter the United States

²¹² 8 CFR § 235.3(b)(2)(iii) (2022), available at: <https://www.law.cornell.edu/cfr/text/8/235.3>.

²¹³ *Id.* at subpara.(4)(ii).

²¹⁴ See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46906, 46946 (Aug. 20, 2021) (amending 8 CFR §§ 235.3(b)(2)(iii) and (4)(ii)), available at: <https://www.federalregister.gov/documents/2021/08/20/2021-17779/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

²¹⁵ See Andrew Arthur, Rob Law, and Julie Axelrod, *Comment in Response to Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, Center for Immigration Studies, at 32-48, Oct. 18, 2021, available at: https://cis.org/sites/default/files/2021-10/JNPRM_Asylum_Procedures_FINAL_submitted_10-18-2021.pdf.

²¹⁶ See, e.g., Final Emergency Interim Report, CBP Families and Children Care Panel, HOMELAND SECURITY ADVISORY COUNCIL, Apr. 16, 2019, at 2 ("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

illegally and request asylum or claim a fear of harm would be released on parole, the proposed regulations would encourage illegal migrants to request asylum—regardless of the strength of their claims.

Under the scheme proposed in the JNPRM, that would significantly increase the workloads of AOs who would adjudicate those applications as an initial matter, but it would also consequently boost the number of respondents who request review of denials of those applications on appeal to the immigration courts.

As of the end of October, there were more than 623,500 asylum applications pending before the immigration courts²¹⁷, which itself suggests that the asylum system is subject to abuse. Note, however, that more than 197,500 of those were “affirmative asylum applications”²¹⁸.

An affirmative asylum application²¹⁹ is one filed initially with USCIS by an alien who is not in removal proceedings, where it is adjudicated by an AO. That means that almost 200,000 cases on the immigration courts’ dockets—more than 14 percent of the immigration court backlog—are cases in which an AO has already determined that the alien is not eligible for protection.

One can expect that, if the regulatory proposals in the JNPRM were to become law, hundreds of thousands of new cases would be added to the immigration courts’ dockets annually as aliens who receive positive credible fear determinations, but whose applications for protection are denied by AOs, seek to have those denials reviewed by IJs based on makeshift records.

As an IJ, I reviewed hundreds of credible fear determinations from AOs, and was often unable to determine what findings those AOs had made, or even what the aliens’ claims were. In those cases, I would require the alien to file an I-589 before proceeding. That would not be an option for IJs under the proposals in the JNPRM.

Conclusion

Over the past seven years, hundreds of thousands of migrants who have entered illegally have swelled the dockets of the immigration courts. Reducing the level of illegal immigration at the Southwest border would reduce the immigration court backlog. It does not appear, however, that

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.”), available at: https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

²¹⁷ *Executive Office for Immigration Review, Adjudication Statistics, Total Asylum Applications*, U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, generated Oct. 19, 2021, available at: <https://www.justice.gov/eoir/page/file/1106366/download>.

²¹⁸ *Executive Office for Immigration Review, Adjudication Statistics, Affirmative Asylum Applications*, U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, generated Oct. 19, 2021, available at: <https://www.justice.gov/eoir/page/file/1163611/download>.

²¹⁹ *Affirmative Asylum Applications vs. Defensive Asylum Applications: What's the Difference?*, FINDLAW, undated, available at: <https://www.findlaw.com/immigration/asylum-refugee/affirmative-asylum-applications-vs-defensive-asylum-applications.html>.

the administration has any proposals that will remove the incentives to illegal migration, either in the short-term or in the foreseeable future.

Worse, however, DOJ and USCIS have proposed changes in the processing and release of illegal migrants that will increase the incentives for illegal migration while making it more difficult for IJs to adjudicate applications for protection. Those proposals should be rejected for any number of reasons, not least of which is the effect that they would have on the immigration courts.

Change in Interior Enforcement Policy

A change in messaging and policy as it relates to interior enforcement would also likely have a positive effect on the backlog.

As explained above, the Pekoske and Tae Johnson memos significantly limited the ability of DHS—and ICE in particular—to enforce the immigration laws in the interior of the United States.

While the Mayorkas memo²²⁰ is less restrictive than its predecessors, it still severely limits the ability of ICE officers to question—let alone apprehend, detain, and remove—most aliens unlawfully present in the United States.

By “prioritizing” immigration-enforcement actions, the Mayorkas memo will – in the short run—limit the number of alien respondents who are placed into removal proceedings, and thereby provide relief to IJs’ dockets.

Such relief, however, will likely be short-lived. One district court²²¹ has already enjoined certain enforcement restrictions in the Pekoske and Tae Johnson memos as they related to certain criminal aliens. While that injunction was narrowed by a three-judge panel of the Fifth Circuit²²², the Fifth Circuit²²³ voted to review the government’s appeal *en banc* and vacated the three-judge panel’s decision.

Although the plaintiffs in that case (the states of Texas and Louisiana) consented to DOJ’s motion to dismiss its appeal following the issuance of the Mayorkas memo²²⁴, the matter is far from over or settled.

In my opinion, the Mayorkas memo exceeds DHS’s authority to exercise prosecutorial discretion when it comes to Congressional mandates in the INA, and it is just a matter of time before the

²²⁰ Alejandro Mayorkas, Secretary of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law*, U.S. DEP’T OF HOMELAND SECURITY, Sep. 30, 2021, available at: <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

²²¹ See *Texas v. U.S.*, ___ F. Supp. 3d ___ (S.D. Tex. Aug. 19, 2021), available at:

<https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.79.0.pdf>.

²²² See *Texas v. U.S.*, ___ F.3d ___ (5th Cir. 2021), available at: <https://law.justia.com/cases/federal/appellate-courts/ca5/21-40618/21-40618-2021-09-15.html>.

²²³ See *Texas v. U.S.*, ___ F.3d ___ (5th Cir. 2021) (en banc), available at:

https://www.ca5.uscourts.gov/docs/default-source/default-document-library/21-40618.pdf?sfvrsn=9fe0c82d_0.

²²⁴ See Consent Motion to Voluntarily Dismiss Appeal, U.S. Dep’t of Justice, Dec. 6, 2021, available at:

<https://www.law360.com/articles/1446664/attachments/0>.

Supreme Court settles the matter. If I am correct, thousands of new cases would be added to the immigration courts' dockets in short order.

Such eventuality, however, is not the only deleterious impact of this non-enforcement scheme. Immigration enforcement in the United States has three elements: Enforcement by State Department consular officers abroad; border enforcement by CBP; and interior enforcement by ICE.

By limiting ICE enforcement in the interior, the Mayorkas memo and its predecessors send a message that the United States is not serious about enforcing the INA. That encourages even more foreign nationals to undertake the extremely perilous journey to enter the United States illegally. As explained above, illegal migration at the Southwest border has been one of the primary drivers of the increase in the immigration courts' dockets over the past six fiscal years.

By enforcing the immigration laws in the interior, DHS would deter illegal migration at the border, alleviating any increase in inadmissible respondents on the immigration courts' dockets. Accordingly, DHS should abrogate the restrictions on ICE enforcement in the Mayorkas memo.

Improvements in EOIR's Processes

During my May 2018 *Immigration Newsmaker* interview, then-Director McHenry outlined three specific steps that the agency was taking to reduce the backlog.²²⁵

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

The second was increasing EOIR's "existing capacity."²²⁶ 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.²²⁷

²²⁵ *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>.

²²⁶ *Id.*

²²⁷ See *OPPM 21-03, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, NOV. 6, 2020, at 4 ("Recently, in response to requests from stakeholders, EOIR has begun to increase its ability to conduct hearings by VTC through the use of the Webex platform which is compatible with EOIR's existing VTC system and allows a respondent or a representative for either party to appear by VTC from a location outside an immigration court. Once Webex compatibility is available at an immigration court, for the duration of the declared national emergency related to COVID-19, either party may file a motion for the alien or the representative for either party to appear at a hearing by VTC through Webex rather than in person. Further, consistent with PM 20-09, immigration judges may issue standing orders and immigration courts may adopt local operating procedures addressing appearances by VTC. Thus, like appearances by telephone, appearances by VTC at a hearing by an alien or by a representative for either party based on a motion are generally subject to the discretion of the immigration judge, any applicable law, and any applicable requirements of the ICPM, a standing order, or a local operating procedure."), available at: <https://www.justice.gov/eoir/eoir-policy-manual/OOD2103/download>.

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, as the BIA itself has held, VTC proceedings generally “afford aliens a full and fair hearing.”²²⁸

With respect to that last point, the third improvement McHenry referenced had to do with infrastructure, and specifically moving the immigration courts to an electronic-based system for the filing of motions, evidence, and applications²²⁹, the “EOIR Courts & Appeals System” (ECAS).²³⁰

ECAS is now available in all the immigration courts²³¹, and will become mandatory on February 11, 2022.

ECAS will improve the adjudication of cases by making documents of record available to the IJs and the parties, reducing the lag time between filing and receipt, and ensuring that documents are not lost, as occasionally happens with 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.*²³²

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 IJ are surprised when I tell them that I handled more than 13,000 cases in just over eight years on the bench. I was not alone.

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.

²²⁸ *Matter of R-C-R-*, 28 I&N Dec. 74, 81 (BIA 2020), available at:

<https://www.justice.gov/eoir/page/file/1311336/download>.

²²⁹ *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>

²³⁰ *ECAS Program Overview*, U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Dec. 4, 2021, available at: <https://www.justice.gov/eoir/ecas/dhs-ecas-program-overview>.

²³¹ *EOIR Courts & Appeals System (ECAS)—Online Filing*, U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Dec. 16, 2021, available at: <https://www.justice.gov/eoir/ECAS>; see also *Executive Office for Immigration Review Electronic Case Access and Filing*, U.S. Dep’t of Justice, Executive Office for Immigration Review, 86 Fed. Reg. 70708 (Dec. 13, 2021), available at: <https://www.federalregister.gov/documents/2021/12/13/2021-26853/executive-office-for-immigration-review-electronic-case-access-and-filing>.

²³² *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>

Conclusions on Immigration Court Backlogs

The backlogs in immigration courts are too large and cases go on for too long, but those backlogs are, to some degree, explained by poor executive branch policies, and the ongoing crisis at the Southwest border. There is much that needs to be done to remedy the problem, which would begin with the enforcement of the immigration laws by DHS. Policies that hinder enforcement must be reviewed and rescinded.

At this point, the United States does not have an illegal migration problem so much as it has a problem with enforcement and deterrence.

Immigration Court Restructuring

In its June 2017 report²³³, 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 to put the current EOIR structure into context. As the office's website²³⁴ explains:

[EOIR] was created on January 9, 1983, through an internal [DOJ] reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security). 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.

EOIR's website²³⁵ also provides a useful history of the evolution of responsibility for adjudication of immigration cases prior to that office's establishment:

²³³ *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>.

²³⁴ *About the Office*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated Feb. 3, 2021, available at: <https://www.justice.gov/eoir/about-office>.

²³⁵ *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>.

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 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 report²³⁶, 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 current structures in other tribunals.²³⁷

Among the positives GAO 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.²³⁸

Among the negatives identified by GAO were 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 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")

²³⁶ *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>.

²³⁷ *Id.* at 80-87.

²³⁸ *Id.* at 80-84.

disconnecting the trial level court from the appellate court, particularly if the trial level court remained 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.²³⁹

This raises many important points. DOJ representation of the government in immigration matters before the courts of appeal does not appear to be a significant issue, particularly given that a different DOJ component (OIL, within DOJ's Civil Division)²⁴⁰ 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 or appellate court in that branch. The location of many immigration courts and ICE attorney's offices within 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.

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.

²³⁹*Id.* at 81-82.

²⁴⁰ Office of Immigration Litigation, DEPARTMENT OF JUSTICE, CIVIL DIV., updated Sep. 9, 2020, available at: <https://www.justice.gov/civil/office-immigration-litigation>.

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 authority to review BIA decisions under his certification²⁴¹ authority.

If it is the former, as an erstwhile 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.*²⁴², 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 has been well-established for decades. In *U.S. v. Curtiss-Wright Export Corp.*²⁴³, 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

²⁴¹See Andrew Arthur, *AG Certification Explained, A legal way for the AG to set immigration policy and guide IJ and BIA discretion*, CENTER FOR IMMIGRATION STUDIES, Nov. 5, 2019, available at: <https://cis.org/Arthur/AG-Certification-Explained>.

²⁴²*Arizona vs. U.S.*, 567 U.S. 387, 396-97 (2012), available at: <https://www.law.cornell.edu/supremecourt/text/11-182>.

²⁴³*U.S. vs. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), available at: <https://supreme.justia.com/cases/federal/us/299/304/case.html>.

*in the exercise of the power is significantly limited. In this vast external realm, 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 clearer than from the Supreme Court’s decision in *INS v. Aguirre-Aguirre*²⁴⁴, 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 on 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.*²⁴⁵

²⁴⁴ *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.

²⁴⁵ *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 total 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 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—regardless of the court—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 federal 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.²⁴⁶

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

As for elevating the stature of IJs, I certainly 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.

²⁴⁶ *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 prenominal, a relatively high rate of pay (up to \$181,500 currently)²⁴⁷, a pension, access to the federal Thrift Savings Plan and health benefits, generous vacation allotment, federal holidays, and the stature and dignity of being a judge. I will note that I now 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 IJs, 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 because many attorneys general in various administrations had neglected that office for a significant period of time. It is apparent from Attorney General Garland’s statements and actions (and those of his immediate predecessors and his subordinates) that he is working on correcting these issues, and 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 assuredly be less politically accountable to Congress, than EOIR currently is.

I concur with the “experts and stakeholders” GAO contacted who asserted “that a court system independent of the executive branch may not address the immigration courts management challenges, such as the case backlog.”²⁴⁸ 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 illegally²⁴⁹, the administration fails to make a course correction on its immigration policies, and the current crisis at the Southwest border continues unabated), with which the immigration courts will have to contend.

Again, Attorney General Garland and his immediate successors have attempted, and Attorney General Garland 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 the appropriators that more funding should be provided to the immigration courts and BIA.

²⁴⁷ *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>.

²⁴⁸ *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>.

²⁴⁹ 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 INA²⁵⁰, 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 to streamline new IJ hiring. 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.²⁵¹

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 IJs to handle the immigration court caseload at the present time, notwithstanding the unprecedented increase in IJ hiring over the last six years.

Any proposal to restructure the immigration courts that would slow down the hiring of IJs 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 responding to 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.”²⁵²

It would be an understatement to say that immigration is a contentious issue and has been for the almost three decades I have been involved in it. Given the significant passions surrounding immigration, I have no doubt that a future Congress would attempt to 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 restrictions placed 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 interference from within the executive branch as it relates to EOIR, they should be more

²⁵⁰ Section 292 of the INA (2022), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9617.html>.

²⁵¹ *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>.

²⁵² *Id.* at 85.

concerned about political interference in an independent tribunal from the branch that holds the power of the purse.

One area, however, in which Congress *should act* is to create a circuit court of appeals for immigration cases to review BIA decisions.

Under current law, an alien 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.”²⁵³ ICE has no recourse to federal court review.

Such a proposal, from then-Senate Judiciary Committee Chairman Arlen Specter, was included in section 501 of S. 2454 in the 109th Congress.²⁵⁴ 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.*²⁵⁵

It is important to note at this juncture just how much of the circuit courts’ workload involves review of immigration decisions.

In FY 2019²⁵⁶, reviews of BIA decisions accounted for 85 percent of administrative agency appeals before the circuit courts, and were the largest category of administrative agency appeals

²⁵³ Section 242(b)(2) of the INA (2022), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html>.

²⁵⁴ 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>.

²⁵⁵ 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>.

²⁵⁶ *Federal Judicial Caseload Statistics 2019*, UNITED STATES COURTS, undated, available at: <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019>.

filed in each circuit court except the DC Circuit (which has only limited jurisdiction over immigration).

That fiscal year²⁵⁷, the circuit courts considered 5,929 agency appeals (out of 48,486 appeals total), meaning that those courts considered somewhere around 5,040 BIA appeals.

Why are there so many immigration appeals? Again, as the Supreme Court has explained²⁵⁸, “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.” Circuit court appeals allow aliens to prolong their stays in the United States.

Thus, any federal circuit court for immigration would have to be appropriately staffed, but in FY 2019²⁵⁹, those 48,486 appeals were handled by approximately 167 judges, or about 290 cases per circuit court judge.

Extrapolating that out, such an independent immigration circuit court would require about 17 judges, or as many as the Court of Appeals for the Fifth Circuit currently has on active status²⁶⁰.

As noted by CRS, such an immigration circuit court would have other advantages over the current judicial appellate scheme, again in which cases are heard by the circuit court in which the IJ completed the case²⁶¹.

First, it would guarantee uniformity in caselaw and interpretation of the INA, regardless of where the alien’s case was heard. Immigration is the consummate federal issue, and appellants and the government would benefit from one set of rules.

Second, the judges of such a court would be subject-matter experts in immigration (or would quickly gain such expertise), which would improve the quality of decisions and limit the number of immigration cases that the Supreme Court would have to consider on certiorari (also an added benefit of uniformity).

In the 2019-2020 term²⁶², the Court considered nine separate cases involving immigration, out of 74 total cases²⁶³ it heard that term, seven of which were appeals of EOIR decisions. Thus,

²⁵⁷ *U.S. Courts of Appeals—Filed, by Type of Appeal, During the 12-Month Periods Ending June 30, 1990 and September 30, 1995 Through September 30, 2019*, UNITED STATES COURTS, undated, available at: https://www.uscourts.gov/sites/default/files/data_tables/jff_2.3_0930.2019.pdf.

²⁵⁸ *INS v. Doherty*, 502 U.S. 314, 323 (1992), available at: <https://supreme.justia.com/cases/federal/us/502/314/>.

²⁵⁹ *U.S. Courts of Appeals—Cases Filed, Terminated, and Pending (Summary), During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2019*, UNITED STATES COURTS, undated, available at: https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2019.pdf.

²⁶⁰ United States Court of Appeals for the Fifth Circuit, BALLOTPEDIA, undated, available at: https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fifth_Circuit.

²⁶¹ See section 242(b)(2) of the INA (2022), available at: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1252&num=0&edition=prelim>.

²⁶² *Review of the Supreme Court’s 2019-2020 Immigration Cases*, NATIONAL IMMIGRATION FORUM, Sep. 10, 2021, available at: <https://immigrationforum.org/article/review-of-the-supreme-courts-2019-2020-immigration-cases/>.

²⁶³ *Supreme Court cases, October term 2019-2020*, BALLOTPEDIA, undated, available at: https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020.

immigration appeals from what had initially been IJ decisions consumed more than nine percent of the High Court's docket.

Which brings me to a third benefit of an immigration circuit court: It would alleviate the burdens on the 11 circuit courts that now hear immigration appeals by reducing their dockets. Removing jurisdiction from those circuit courts to hear appeals from EOIR decisions would allow them to focus more attention and resources on other cases.

Sen. Spector's proposal would have overwhelmed the Court of Appeals for the Federal Circuit-- even if that court were assigned an additional three judges-- given the large number of appeals from BIA decisions.

The creation of a new circuit court, solely dedicated to immigration, though 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 restructuring the immigration courts.

Conclusion

The nation's cadre of some 559 IJs are, by and large, dedicated, experienced, and knowledgeable professionals dedicated to ensuring the immigration laws are fairly and uniformly administered in each of the 66 immigration courts.

Carved into the rotunda of the attorney general's office is a quote from former Solicitor General Frederick Lehmann: "The United States wins its case whenever justice is done one of its citizens in the courts."²⁶⁴ The same is also true of the aliens who appear in EOIR'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, IJs have been hobbled in performing their mission, largely as result of neglect of EOIR and of misguided immigration policies implemented 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,"²⁶⁵ 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. DOJ 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 fail to address the core problems that are facing those tribunals. Moreover, not only would such restructuring be

²⁶⁴ 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.

²⁶⁵ *Executive Office for Immigration Review*, DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: <https://www.justice.gov/eoir/about-office>.

complicated and costly (and likely ultimately ineffective), 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.