



At the Breaking Point

Rethinking the U.S. Immigration Court System

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U.S. IMMIGRATION POLICY PROGRAM

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Executive Summary

The U.S. immigration courts—and the nation’s immigration enforcement system they support—face an unprecedented crisis. With a backlog of almost 2 million cases, it often takes years to decide cases. Moreover, the recent growth in the caseload is daunting. In fiscal year (FY) 2022, immigration courts received approximately 708,000 new cases, which is 160,000 more than in any previous year. Such numbers, coupled with the courts’ resource constraints and decision-making processes, ensure that the court system will continue to lose ground.

For asylum cases, which now make up 40 percent of the caseload, the breakdown is even more dire. Noncitizens wait an average of four years for a hearing on their asylum claims to be scheduled, and longer for a final decision. Those eligible for protection are thus deprived of receiving it in a timely manner, while those denied asylum are unlikely to be returned to their countries of origin, having established family and community ties in the United States during the intervening years. The combination of years-long backlogs and unlikely returns lies at the heart of our broken asylum system. That brokenness contributes to the pull factors driving today’s migration to the U.S.-Mexico border, thereby undermining the integrity of the asylum and immigration adjudicative systems, and immigration enforcement overall.



Many of the factors contributing to the dramatic rise in the courts’ caseload have deep and wide-reaching roots, from long-standing operational challenges in administering the courts to new crises in the Americas that have intensified both humanitarian protection needs and other migration pressures. The scale of these twin challenges has made it more urgent than ever to address them together. In the aftermath of lifting the pandemic-era border expulsion policy known as Title 42 in May 2023, the Biden administration is implementing wide-ranging new border policies and strategies that establish incentives and disincentives linking how migrants enter the United States with their access to the asylum system. But timely, fair decisions are also central to the success of this new regime.

While many other studies have outlined wholesale changes in the immigration court system that only Congress can enact, such legislative action seems unlikely, at least in the near term. Thus, this report calls for changes that can be made by the Executive Office for Immigration Review (EOIR), the agency within the Department of Justice (DOJ) that houses the immigration courts, as it is presently organized. Because the immigration courts are administrative bodies, the executive branch has considerable latitude in determining their policies and procedures. The changes laid out in this report hold great potential to improve the courts’ performance and, in turn, enhance the effectiveness of the U.S. immigration system more broadly.

Some steps in this direction are already being taken. The Biden administration has streamlined certain important policies and procedures at EOIR. Nonetheless, these courts and the Board of Immigration Appeals

(BIA), which reviews appeals from immigration court decisions, fall short of meeting the hallmarks of a well-functioning adjudicatory system: that decisions be accurate, efficiently made, consistent across both judges and jurisdictions, and accepted as fair by the public and the parties in the case.

Related issues of caseload quantity and decision quality have given rise to the difficulties EOIR is confronting. Under the Trump administration, the reopening of thousands of administratively closed cases and increased interior enforcement led to rising court caseloads. And since 2016, increased border crossings have accounted for growing numbers of new cases, many of them involving asylum claims.

Cases are also taking longer to complete. While pandemic-related restrictions played a role in this slowdown, case completion rates had in fact already been declining. In FY 2009, each immigration judge completed about 1,000 cases per year. By FY 2021, the completion rate had decreased to slightly more than 200 cases per year, even as the number of immigration judges grew. Thus, more judges alone are not the answer. Slow hiring, high turnover, and a lack of support staff have resulted in overwhelmed judges whose productivity has decreased as the backlog has grown.

Concerns about the quality of decision-making by immigration courts and the BIA have existed for decades. More than one in five immigration court decisions were appealed to the BIA in FY 2020, and appeals of BIA decisions have inundated the federal courts. Federal court opinions have pointed to errors of statutory interpretation and faulty reasoning when overturning decisions. Policy changes at the BIA, ever-changing docket priorities from one administration to the next, and some recent Supreme Court directives have contributed to the diminished adjudicative quality. Wide variances in case outcomes among immigration judges at the same court and across different courts around the country further point to quality concerns; for example, the rate at which individual immigration judges denied asylum claims ranged from 1 to 100 percent in FY 2017–22.



EOIR has increasingly turned to technology to manage its dockets, primarily through video-conferencing court proceedings. The COVID-19 pandemic accelerated its use of internet-based hearings. Four important, yet at times competing, considerations are central when evaluating how technology—and particularly video-conferencing tools—are used in immigration proceedings: efficiency, the impact of technical difficulties, security issues, and concerns about due process.

The U.S. Immigration and Customs Enforcement (ICE) attorneys who prosecute removal cases also play an important role in the court system. Their use of prosecutorial discretion, along with judges’ docket management tools, help shape which cases flow through the system, and how.

Legal defense representation—or the lack of it—is a critical issue plaguing the immigration court system. Noncitizens in immigration proceedings, which are civil in nature, are not entitled to free legal counsel, as

defendants in criminal proceedings are. But they can face life-changing, and sometimes life-threatening, circumstances when subject to an order of removal from the United States. Studies have repeatedly found that representation in immigration proceedings improves due process and fair outcomes for noncitizens. It also improves efficiency, as represented noncitizens move more quickly through immigration court. Lawyers, accredited representatives, immigration help desks, and legal orientation programs aid some noncitizens through this process. But many more move through complex proceedings pro se (i.e., unrepresented).

Federal funding for representation of noncitizens in removal proceedings is effectively barred. Public funding at the state and local levels has increased the availability of representation for some noncitizens. A large share of representation is provided by nonprofit legal services organizations and pro bono law firm resources. Nonetheless, representation is fragmented and insufficient, given the scale of need.

One element of this system that has seen notable signs of change in recent years has been how border management feeds into the courts' caseload. The Biden administration began implementing a new asylum processing rule at the southwest border in June 2022 that aims to ease the growing pressures on immigration courts.¹ The rule authorizes asylum officers, who are part of U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS), to make the final decision in asylum cases instead of immigration judges. Asylum seekers whose claims are denied by an asylum officer can still appeal the decision, but on an expedited timeline. As such, the rule holds the potential to reduce the growth of the immigration court backlog and shorten adjudication times to months instead of years.

Since lifting the Title 42 expulsion policy, the Biden administration has paused implementation of the asylum rule due to competing demands for asylum officer resources. But returning to the rule, and strengthening EOIR's functioning overall, will be important for managing the flow of cases into the immigration courts and the courts' ability to keep pace with them. Doing so depends on the court system using technology better, more strategically exercising discretion in removal proceedings, and increasing access to legal representation so that courts deliver decisions that are both timely and fair.

This report's analysis of the issues facing the nation's immigration courts and its recommendations for addressing them reflect research and conversations with a diverse group of stakeholders—legal service providers, immigration lawyers and advocates, current and former immigration judges, BIA members and administrators, academics, and other experts who have administered, practiced before, and studied the immigration court system. The report urges EOIR and DHS, in its role as the agency whose decisions and referrals come before EOIR, to work together to:

Strengthen the immigration court system's management and efficiency

- ▶ Schedule new cases on a "last-in, first-decided" basis. Such a reset to the system, which has proven successful in the past, could bring processing times on new cases down to months, rather than years.

¹ This rule draws in part on proposals made in an earlier Migration Policy Institute (MPI) report: Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward* (Washington, DC: MPI, 2018).

Because this disadvantages cases that have already been waiting for a long time, it should be treated as a temporary, emergency measure alongside policy and procedural reforms that protect fairness and promote efficiency more broadly. Shifting resources back to adjudicating older cases, as timeliness is established with incoming cases, is essential for shrinking the growth and size of the backlog, which should be among the courts' highest priorities.

- ▶ Terminate cases that do not meet the administration's prosecutorial guidelines, which focus priorities on felons, security threats, and recent entrants. One approach to this would be to task ICE attorneys with triaging backlog cases to determine which could be fast-tracked for grants of relief or for removal. Such efforts would allow the courts and ICE attorneys to focus on more serious cases, especially those involving criminal charges.
- ▶ Centralize case referrals from DHS. Instead of the current practice of having all three DHS immigration agencies (ICE, USCIS, and U.S. Customs and Border Protection) refer cases separately to EOIR, ICE attorneys should initiate all cases. As de facto prosecutors, they are best positioned to determine the legal sufficiency and priority for moving cases the government has an interest in pursuing.
- ▶ Establish two tiers of immigration judges—magistrate and merits judges—modeled on existing state and federal court systems where judges and staff are assigned to different roles or dockets so that cases move through the adjudication system efficiently and expeditiously.
- ▶ Expand the use of specialized dockets or courts that handle cases involving specific groups of noncitizens or require certain subject matter expertise, such as juveniles, families, reviews of credible fear determinations, cancellation of removal, adjustment of status, and voluntary departure.

Restart the asylum officer rule and provide the support needed to implement it

- ▶ Establish a dedicated docket for the asylum officer rule's streamlined appeal proceedings. As the most far-reaching reform the Biden administration has introduced for strengthening management of the asylum and immigration court systems, implementing the rule effectively is key to reducing the pace of caseload growth in the court system and discouraging weak claims.

Upgrade how the courts use technology

- ▶ Ensure that technology is used to make immigration courts fairer for everyone involved, such as by holding hearings remotely when parties would be unable to attend an in-person hearing. Special attention should be paid to how the use of technology can affect detained noncitizens and vulnerable populations such as children.

Increase access to legal representation

- ▶ Establish a new unit within EOIR devoted to coordinating the agency's efforts to expand representation. The unit should collaborate with nongovernmental stakeholders to make representation of detained noncitizens a priority and to allow partially accredited representatives—some of whom may be non-lawyers—to appear in immigration court for limited functions.

- ▶ Develop new and innovative ways to scale up representation by coordinating with lawyers who take responsibility for specific aspects of cases or non-lawyers who are specially trained and supervised to do so. Legal service providers should build a multi-stage, collaborative online system that enables representation by lawyers or non-lawyers in specific stages of a case for which they have the requisite expertise (e.g., filing forms, attending bond or master calendar hearings, or seeking relief). This approach requires creating e-files for cases, with files moving from one representative or provider to another as cases progress, resulting in both expert representation at each stage and greater efficiency in moving cases forward overall.
- ▶ Encourage efforts by state and local governments to provide and/or increase funding to support representation, especially given current restrictions on federal funding of representation in most removal cases.

Despite efforts by successive administrations to bring the immigration court system's unwieldy caseload under control and to improve the quality of its decision-making, the courts remain mired in crisis. And while many of the most pressing problems have roots that stretch back decades, they have in recent years reached a breaking point. The measures proposed in this report hold the potential to reduce case volumes, increase the pace of decision-making, and improve the quality of adjudications. They would also mitigate migration pull factors that result from years-long waits for decisions. The deeply interconnected nature of the nation's immigration court system and its immigration enforcement and asylum systems mean that such efforts to modernize and fully resource the courts are critical to the health of the U.S. immigration system overall.

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BOX 1

About the Rethinking U.S. Immigration Policy Project

This report is part of a multiyear Migration Policy Institute (MPI) project, Rethinking U.S. Immigration Policy. At a time when U.S. immigration realities are changing rapidly, this initiative has been generating a big-picture, evidence-driven vision of the role immigration can and should play in America's future. It provides research, analysis, and policy ideas and proposals—both administrative and legislative—that reflect these new realities and needs for immigration to better align with U.S. national interests.

The research, analyses, and convenings conducted for MPI's Rethinking initiative address critical immigration issues, which include economic competitiveness, national security, and changing demographic trends, as well as issues of immigration enforcement and administering the nation's immigration system.

To learn more about the project and read other reports and policy briefs generated by the Rethinking U.S. Immigration Policy initiative, see bit.ly/RethinkingImmigration.

1 Introduction

With an unprecedented caseload of 1,979,313 as of April 2023,² the U.S. immigration court system is in crisis. The number of cases awaiting a decision has grown in the past five years at a rate that is more than six times that of the preceding five years.³ Even without new cases, immigration judges (IJs) would have to more than quintuple their output to become current on their dockets within a year.⁴

Large numbers of cases are not in themselves the problem.⁵ The failing is the inability to address those cases expeditiously and ensure timely, quality decisions.⁶ Cases in which noncitizens seek asylum have been a growing proportion of IJs' caseloads, now comprising 40 percent of the court system's pending caseload,⁷ and these cases take considerably longer to resolve than others. On average, noncitizens wait four years for their initial asylum hearing.⁸ Reaching a final decision frequently takes years after that. This is due in part to the fact that asylum cases require careful consideration in a highly complex area of federal and international law. IJs' decisions have critical implications—and sometimes life or death consequences—for the lives of countless immigrants, including family members of U.S. citizens.

Numerous past studies of the functioning and failings of the immigration court system have almost uniformly recommended relocating the system from the Department of Justice (DOJ) within the executive branch to the judicial branch of government. However, such a change would require congressional action. Although such legislation was reported out of the House Committee on the Judiciary in early 2022, it is unlikely to be enacted by Congress any time soon.⁹ Accordingly, this report examines and calls for actions that are critical to the effective performance of the immigration system in a post-Title 42 era and that can be accomplished administratively, vital changes that can be implemented by the executive branch.

- 2 U.S. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), “Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions” (fact sheet, April 21, 2023). The Transactional Records Access Clearinghouse (TRAC) reports that as of January 2023, the immigration court backlog stood at almost 2.1 million pending cases. TRAC states that its “[f]indings are based upon a detailed analysis of the millions of records covering each proceeding filed in the immigration courts. These individual case records were obtained through *Freedom of Information Act* requests by the [TRAC] from the [EOIR].” See TRAC Immigration, “Immigration Court Backlog Tool,” accessed June 20, 2023.
- 3 Nearly 58 percent of today’s caseload arose over the past five years. See TRAC Immigration, “Immigration Court.” See also Section 3.A. for more information on caseload growth.
- 4 This figure was calculated using fiscal year (FY) 2022 data, the last full year for which case completion information was available. The total backlog was divided by the case completion rate for FY 2022, then divided by the number of IJs on board at the end of FY 2022 to yield the differential. See DOJ, EOIR, “Executive Office for Immigration Review Adjudication Statistics: New Cases and Total Completions” (fact sheet, April 21, 2023); DOJ, EOIR, “Executive Office for Immigration Review Adjudication Statistics: Immigration Judge (IJ) Hiring” (fact sheet, April 2023).
- 5 See, generally, American Immigration Lawyers Association (AILA), “Featured Issue: Immigration Court Backlog and Reprioritization,” updated March 29, 2022; Marty Rosenbluth, “The Uphill Battle to Fix Immigration Courts and Immigrant Rights,” American Bar Association Human Rights Magazine, March 3, 2021; Rebecca Beitsch, “Courts Drowning in Backlog Pose Lingering Immigration Challenge,” *The Hill*, June 6, 2021.
- 6 Immigration cases now take an average of about 762 days—more than two years—to resolve. The exercise of prosecutorial discretion and issuance of in absentia removal orders for noncitizens who do not appear for immigration court proceedings, among other reasons, affects this average, and cases may take much longer. See TRAC Immigration, “Immigration Court.”
- 7 Doris Meissner, “Biden Administration Asylum Processing Revamp at the U.S. Border Could Be a Game Changer” (commentary, MPI, August 2021); TRAC Immigration, *A Sober Assessment of the Growing U.S. Asylum Backlog* (Syracuse, NY: Syracuse University, 2022); TRAC Immigration, “Immigration Court Asylum Backlog,” accessed June 20, 2023.
- 8 TRAC Immigration, “Immigration Court Asylum Backlog.”
- 9 *Real Courts, Rule of Law Act of 2022*, HR 6577, 117th Cong., 2d sess., *Congressional Record* 168, no. 22, daily ed. (February 3, 2022): H946.

In developing this report's analysis and recommendations, the Migration Policy Institute (MPI) consulted a broad array of policymakers and other stakeholders—current and former IJs, Board of Immigration Appeals (BIA) members and administrators, immigration attorneys and advocates, legal services providers, academics, and other experts who have administered, practiced before, and studied the immigration courts and the immigration court system. The research included private, off-the-record roundtables and individual, confidential interviews. MPI researchers also analyzed data and compiled and reviewed existing literature, case law, and federal regulations relevant to the administration and performance of the immigration courts, as well as administrative courts in other applicable federal agencies.

The administrative reforms discussed in this report could reduce case volumes, increase the pace of decision-making, and improve the quality of adjudications.

The administrative reforms discussed in this report could reduce case volumes, increase the pace of decision-making, and improve the quality of adjudications. They are also essential for the successful implementation of a new border asylum rule that establishes a post-Title 42 system of incentives and disincentives for applying for asylum at the U.S. border. And they go hand-in-hand with a June 2022 administration reform measure (the asylum officer rule) that has been temporarily paused due to competing resource demands but that aims to reduce the growing pressures on immigration courts, more quickly grant protection to those eligible for it, and mitigate migration pull factors at the southern border that result from years-long waits for asylum decisions.

Under the current administration, the Executive Office for Immigration Review (EOIR), the subagency within DOJ that houses the immigration courts, has been introducing meaningful changes designed to streamline and strengthen the work of IJs and the court system. However, more fundamental, sweeping changes are imperative to alleviate chronic harms and to build greater efficiency, fairness, and trust in the court system, as well as to strengthen the performance of the immigration enterprise broadly.

This report begins with a broad overview of the immigration court system and the various issues of caseload quantity and decision quality that have emerged in recent decades. It then explores three areas in which recent changes and further reforms could have a significant impact: the use of technology in the courts, discretion in removal proceedings, and noncitizens' access to representation. Finally, the report sets out recommendations for EOIR, partners in other agencies, and nongovernmental stakeholders such as legal services providers that would advance the goal of ensuring the courts deliver decisions that are both timely and fair.

BOX 2**Definitions of Key Terms**

Credible fear interview – When a noncitizen states a desire to apply for asylum and/or expresses a fear of returning to their home country, a Department of Homeland Security (DHS) official conducts this type of interview to determine whether the person has a credible fear of persecution or torture upon return. The officer may then issue a notice to appear in immigration court.

Notice to appear (NTA) – Immigration court proceedings begin when DHS files an NTA with the Executive Office for Immigration Review (EOIR). This charging document, which is also given or mailed to the noncitizen, explains why the person is removable from the United States and when they must appear for their first court hearing.

Respondent – In the context of the immigration courts, a respondent is a noncitizen in removal proceedings.

Master calendar hearing – This is a respondent’s initial hearing before an immigration judge (IJ). At that or a subsequent master calendar hearing, the noncitizen may admit to or deny DHS’s charges of removability, request permission to voluntarily depart the United States, or seek and file an application for any available relief from removal, such as asylum.

Individual/merits hearing – An individual or merits hearing is one in which an IJ adjudicates and determines whether any claim by the respondent against removability or application for relief sought at the master calendar hearing has merit (that is, whether or not the application for relief should be granted).

Sources: Hillel R. Smith, “[Formal Removal Proceedings: An Introduction](#)” (In Focus brief, Congressional Research Service, Washington, DC, June 9, 2021); U.S. Citizenship and Immigration Services, “[Credible Fear Screenings](#),” updated May 11, 2023.

2 Overview of the Immigration Court System

Created in January 1983, EOIR absorbed the work of special inquiry officers—immigration judges or IJs in today’s terminology—who were previously part of the Immigration and Naturalization Service (INS), a bureau within DOJ. EOIR has three parts: the U.S. immigration court system, with some 70 immigration courts and about 650 judges located throughout the United States; the BIA, which has 23 judges and decides appeals from IJ decisions;¹⁰ and the Office of the Chief Administrative Hearing Officer, which manages administrative law judges who hear cases related to employment immigration law violations.¹¹

The INS itself has since been divided into three successor agencies that became part of the Department of Homeland Security (DHS) when it was created in 2003 in the aftermath of 9/11. They are U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).

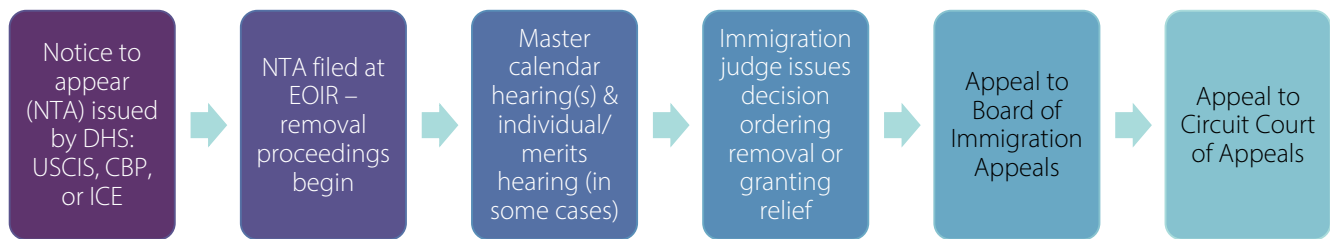
¹⁰ The Board of Immigration Appeals (BIA) existed before EOIR, having been created in 1940 when the Immigration and Naturalization Service (INS) moved from the DOJ. See DOJ, EOIR, “[Evolution of the U.S. Immigration Court System: Pre-1983](#),” updated April 30, 2015.

¹¹ DOJ, EOIR, “[About the Office](#),” updated April 25, 2023.

ICE attorneys initiate and represent the government in removal (deportation) proceedings before IJs¹² for alleged violations of immigration law that are largely civil in nature, such as entering the United States without a valid visa, overstaying a visa, or working without authorization. Only about 1 percent of removal proceedings are initiated on criminal grounds.¹³ IJs decide whether the noncitizen in a case is removable and if there is a basis for granting relief—such as eligibility for asylum or permanent residence—that permits the person to lawfully stay in the United States. EOIR does not carry out deportations; ICE’s Enforcement and Removal Operations branch executes removal orders.

FIGURE 1

Removal Proceeding Process and Appeals



Source: Visualization by the authors based on Hillel R. Smith, “Formal Removal Proceedings: An Introduction” (In Focus brief, Congressional Research Service, Washington, DC, June 9, 2021).

A. Goals of a Well-Functioning Court System

Scholars have traditionally recognized four core principles as the benchmarks for well-functioning adjudicatory systems: accuracy, efficiency, consistency, and acceptability.¹⁴

Accuracy means that decisions are supported by evidence and the application of relevant law. No court system is completely error-free. However, errors in legal reasoning should be infrequent. Accuracy can be confirmed indirectly by whether faulty reasoning is highlighted in appellate review.

Efficiency is demonstrated by careful use of resources and by resolving cases within reasonable time periods. The efficiency of a healthy adjudicatory system does not come at the expense of accuracy. Brevity is relative—a case should take as long as necessary to accurately resolve, but no longer. Duration can be assessed comparatively by examining current performance against historical trends.

Consistency calls for individual adjudicator decisions and system-wide outcomes that are internally consistent. Similar facts should produce similar decisions for a single judge, as well as across geographies and among judges and courts.

¹² Stephen H. Legomsky, “Restructuring Immigration Adjudication,” *Duke Law Journal* 59, no. 1635 (2010): 1641.

¹³ As of June 2022, 14,898 out of 1,821,440 pending immigration cases were initiated for charges related to criminal activity. See TRAC Immigration, “Immigration Court.” See also TRAC Immigration, *Immigration Enforcement Since 9/11: A Reality Check* (Syracuse, NY: Syracuse University, 2011).

¹⁴ Roger C. Cramton, “Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings,” *Administrative Law Review* 16 (1964): 111–12; David P. Currie and Frank I. Goodman, “Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,” *Columbia Law Review* 75, no. 1 (1975): 1–4; Legomsky, “Restructuring Immigration Adjudication.”

Acceptability requires both the parties to a case and the public to believe that justice was carried out. This is the basis for credibility and confidence in the court system.¹⁵

U.S. immigration courts do not meet these characteristics of a healthy adjudication system. Its weaknesses have consequences for noncitizens in removal proceedings, the courts, and society at large by eroding public confidence in the fairness and legitimacy of immigration laws and their implementation.

B. Longstanding Problems

Concerns about the immigration court system date back to at least 1978, when Congress established the Select Commission on Immigration and Refugee Policy to recommend changes to U.S. immigration laws and policies and made court reform part of its mandate.¹⁶ In its June 1980 report, the select commission concluded that the “United States immigration adjudication system is beset with crippling problems.”¹⁷ Chief among them were “long delays” and “repeated review [that] does not necessarily lead to better decisions.”¹⁸ The report concluded that the best way to safeguard individual rights in immigration proceedings would be to “upgrade the quality of adjudications.”¹⁹ More than 40 years later, these same issues persist.

This long-standing concern with immigration adjudications encompasses issues of both quantity and quality. They are independent as well as interrelated challenges, with multiple underlying causes, as this report will discuss. What is new is that the same number of cases that would have historically passed through the system over the course of two decades has now cascaded into it within four years.²⁰ Immigration court functions have not been sufficiently expanded,

modernized, or resourced to meet the challenges this surge in cases has brought. Doing so requires addressing head-on a range of factors that contribute to the dysfunctions of the immigration court system.

Immigration court functions have not been sufficiently expanded, modernized, or resourced to meet the challenges this surge in cases has brought.

3 Quantity and Quality Challenges and Their Underpinnings

Delays and inefficiencies are the overarching weaknesses in today’s immigration courts. Waiting more than two years on average for an immigration court decision means that noncitizens, referred to as respondents in removal proceedings, lack certainty in their lives.²¹ Those who are detained may experience serious

15 Legomsky, “Restructuring Immigration Adjudication”; Cramton, “Administrative Procedure Reform”; Currie and Goodman, “Judicial Review.”

16 *A Bill to Amend Section 201(a), 202(c) and 203(a) of the Immigration and Nationality Act, as Amended, and to Establish a Select Commission on Immigration and Refugee Policy*, Public Law 95-412, *U.S. Statutes at Large* 92 (1978): 907.

17 Peter J. Levinson, “Specialized Court for Immigration Hearings and Appeals,” *Notre Dame Law Review* 56, no. 4 (1981): 644. Levinson’s article is based on the unpublished June 1980 study that he originally presented to the Select Commission on Immigration and Refugee Policy.

18 Levinson, “Specialized Court,” 644, 654.

19 Levinson, “Specialized Court,” 654.

20 TRAC Immigration, “Immigration Court.”

21 TRAC Immigration, “Immigration Court.”

negative health effects, both physical and mental, and often give up valid claims for asylum or other relief due to the pressures and conditions of detention.²² For those who are not detained, frequent delays in receiving work authorization jeopardize their ability to support their families and create other hardships.²³ In the case of noncitizens crossing or arriving at the U.S.-Mexico border without authorization to enter, years-long delays create incentives to file frivolous asylum claims that further perpetuate delays for those eligible for protection, undermining the integrity of the asylum system and border enforcement.

Meanwhile, inefficiencies breed inaccurate or questionable court decisions that increase appeals, remands, and decisions that are reversed, adding to pressures on the budget and the staff resources of the immigration court system²⁴ and further challenging its ability to deliver just outcomes. High case volumes and long processing times weigh down legal proceedings: witnesses move, making it more difficult to secure their testimony; respondents are more likely to miss appearances in court; and stale proceedings cause judges to become less attuned to the factual and legal landscape of a case. As time passes, the ability of a respondent to mount an effective legal defense can decrease, compromising due process.²⁵

The frustrations generated by a drawn-out, inefficient process are reflected in high rates of appeals to the BIA and the federal courts of appeal. Delays and the repeated adjudications that result from them arise from both quantity- and quality-related problems, and they ultimately increase the fiscal costs borne by the government and by taxpayers.

A. *The Quantity Issue*

As noted above, almost 2 million cases were pending in the U.S. immigration court system as of April 2023. The number of pending cases jumped from about 328,000 in fiscal year (FY) 2012 to around 656,000 in FY 2017 and then to 1,979,000 in April 2023 (see Figure 2).²⁶ Year-on-year growth in percentage terms averaged about 12 percent for FY 2011 to FY 2014, rising to 19 percent for FY 2015 to FY 2018, and then decreasing to 17 percent for FY 2019 to FY 2022.²⁷

22 See, generally, Laura Rivera and Dan Werner, *No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases* (Montgomery, AL: Southern Poverty Law Center, 2018). The report documents numerous instances where individuals fleeing persecution or otherwise untenable conditions in their countries of origin ultimately gave up their asylum or other immigration claims, at least in part due to unacceptable conditions in U.S. immigration detention centers. Some individuals took voluntary departure or were deported despite pending appeals to the federal courts.

23 See John D. Montgomery, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (New York: NERA Economic Consulting, 2014), 5. Montgomery asserts that if respondents had higher rates of legal representation, they could more quickly secure work authorization and release from immigration detention. As a result, nondetained respondents could then work to support their families and pay taxes, thereby reducing overall costs for the federal government and lowering strains on public resources.

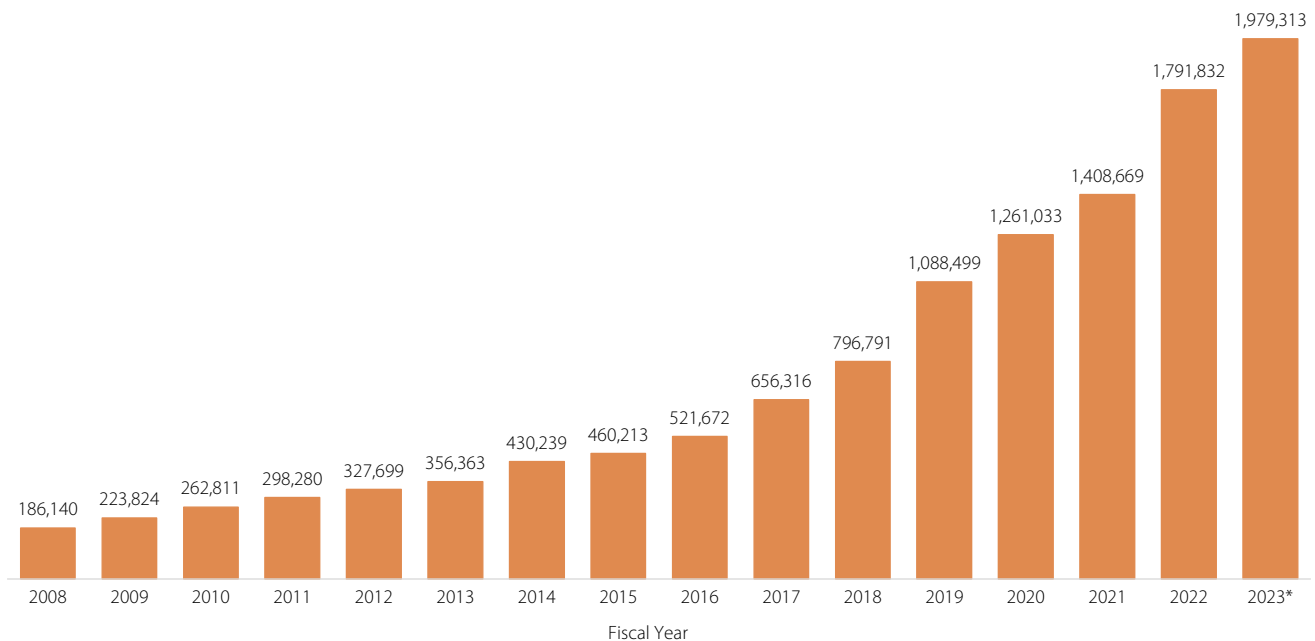
24 Testimony of Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, before the Senate Judiciary Committee, *Immigration Litigation Reduction*, 109th Cong., 2nd sess., April 3, 2006. Judge Walker testified that higher percentages of remands in immigration court cases from courts of appeal result in additional work by IJs and the BIA, increasing resource demands on the court system.

25 See U.S. Government Accountability Office (GAO), *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (Washington, DC: GAO, 2017), 28–31. By comparison, see David Hausman and Jayashri Srikantiah, “Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court,” *Fordham Law Review* 84, no. 5 (2016): 1823. Hausman and Srikantiah also assert that the inverse situation, whereby a removal proceeding is too short, also constitutes a due process violation.

26 DOJ, EOIR, “EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions.”

27 DOJ, EOIR, “EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions.”

FIGURE 2
Number of Pending Cases in Immigration Court, FY 2008–23*



* For FY 2008 through FY 2022, this figure shows the number of pending cases at the end of the fiscal year. For FY 2023, it shows the case count as of the end of the fiscal year's second quarter, the latest period for which data were available.

Source: U.S. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), "Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions" (fact sheet, April 21, 2023).

The sixfold caseload increase between FYs 2011 and 2022 has multiple causes. Since at least 2015, the rising number of asylum applications has increased the immigration courts' overall caseload and slowed down adjudication.²⁸ A number of other factors, discussed in the remainder of this section, have also contributed to this state of play.

Increased Interior and Border Enforcement

Significant changes in both border and interior enforcement policies by the Trump administration led to rising court caseloads even as the population of noncitizens who entered the United States without authorization declined.²⁹ The explanation lies in more arrests of individuals who were already in the United States, combined with the increased detention of individuals apprehended at the border. Both actions lead to the issuance of a notice to appear (NTA), a charging document that initiates a removal case in the immigration court system.

In FY 2019, about 547,000 new cases were added to the system, the highest annual growth before the COVID-19 pandemic.³⁰ This aligns with ICE having taken almost 511,000 individuals into custody in that year—about one-third coming from arrests in the country's interior and two-thirds coming from border

28 TRAC Immigration, *A Sober Assessment of the Growing U.S. Asylum Backlog*.

29 See Mark Hugo Lopez, Jeffrey S. Passel, and D'Vera Cohn, "Key Facts about the Changing U.S. Unauthorized Immigrant Population," Pew Research Center, April 13, 2021.

30 DOJ, EOIR, "EOIR Adjudication Statistics: New Cases and Total Completions."

apprehensions.³¹ Not all initial bookings ultimately result in removals; some individuals may depart the country voluntarily. However, there is a relationship between increased enforcement and caseload growth. This pattern could also be seen in FY 2017 and FY 2018, when ICE reported about 324,000 and 396,000 initial custody bookings, respectively,³² and EOIR data showed an additional 295,000 cases in FY 2017 and 316,000 in FY 2018.³³

Funding further explains the difference between case intake and case completion. Between FY 2003 and FY 2023, budgets for immigration enforcement operations at DHS—for CBP and ICE—increased from \$9.15 billion to \$30 billion. EOIR’s budget during the same time increased from \$188 million to \$860 million.³⁴ Along with steep increases in enforcement resources, cooperation between DHS immigration enforcement and local/state criminal justice systems reached new high levels through initiatives such as the 287(g), Secure Communities, and alternatives to detention surveillance programs.³⁵

Heightened cooperation between state and local law enforcement agencies and ICE led to an increase in arrests for immigration violations, adding thousands more cases to the immigration court system. ICE performed nearly 40 percent more such administrative arrests in the first quarter of 2017 compared to the same period in 2016, arresting 41,000 individuals on civil immigration charges.³⁶ The pattern of increasing administrative arrests continued through FY 2018, when removal warrants led to nearly 159,000 arrests—a 11 percent year-on-year increase.³⁷

Increases in border apprehensions since 2016 have also corresponded with growing numbers of NTAs filed with the courts.³⁸ In January 2022, the Transactional Records Access Clearinghouse reported that the main contributor to the increase in immigration court backlogs was a “deluge of new cases” at EOIR coming from border apprehensions.³⁹ In FY 2022, EOIR received approximately 708,000 new cases—160,000 more than EOIR had received in any single year before that.⁴⁰

Reopened Administratively Closed Cases

The Trump administration also established new restrictions on administrative closure, a docket management tool used by IJs and the BIA to pause individual removal proceedings under certain conditions. For example, if a person in removal proceedings had a marriage-based green-card application

31 U.S. Immigration and Customs Enforcement (ICE), *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* (Washington, DC: ICE, 2019), 5.

32 ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2019*, 5.

33 DOJ, EOIR, “EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions.”

34 DOJ, “Summary of Budget Authority by Appropriation, 2003-2005” (data tables, March 2004); DOJ, EOIR, “FY 2024 Budget Request at a Glance” (fact sheet, March 2023); DHS, *Budget in Brief: Fiscal Year 2005* (Washington, DC: DHS, 2004); DHS, *Budget in Brief: Fiscal Year 2024* (Washington, DC: DHS, 2023).

35 MPI, *Key Immigration Laws and Policy Developments Since 1986* (Washington, DC: MPI, 2013).

36 ICE, “ICE ERO Immigration Arrests Climb Nearly 40%,” updated October 7, 2021; ICE, “ERO FY18 by the Numbers,” updated October 12, 2021; Federal Law Enforcement Training Centers, “ICE Administrative Removal Warrants,” accessed July 28, 2022.

37 ICE, “ERO FY18.”

38 TRAC, “Border Patrol Arrests,” updated 2022; TRAC Immigration, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases* (Syracuse, NY: Syracuse University, 2022); Audrey Singer and William A. Kandel, *Immigration: Apprehensions and Expulsions at the Southwest Border* (Washington, DC: Congressional Research Service, 2021), 11.

39 TRAC Immigration, *Immigration Court Backlog*.

40 DOJ, EOIR, “EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions.”

pending with USCIS, an IJ would frequently administratively close the case until USCIS decided whether to approve the application. Under the revised policies put into place between 2017 and 2020, administratively closed cases that had been essentially mothballed were reopened and returned to the active court docket.⁴¹

The reopening of thousands of administratively closed cases, coupled with the surge in new cases, helps explain the scale and growth of the immigration court caseload during the Trump administration.⁴² In 2021, the Biden administration restored administrative closure and EOIR issued guidelines recognizing that it has long been a valuable docket management tool.⁴³ It is too soon to tell what effect this will have on caseloads.

The reopening of thousands of administratively closed cases, coupled with the surge in new cases, helps explain the scale and growth of the immigration court caseload during the Trump administration.

Personnel Growth Out-of-Step with Caseload Growth

As the immigration courts' caseload increased, hiring at EOIR did not keep pace. From FY 2010 to FY 2015, the number of IJs was stagnant or decreasing, in part due to a hiring freeze at DOJ from 2011 to 2014.⁴⁴ After FY 2015, IJ appointments began an upward growth trajectory,⁴⁵ and the number of IJs rose from 254 at the end of FY 2015 to 649 as of April 2023.⁴⁶ But the number of cases in the system grew by an average of about 21 percent per year for the past decade, and the number of pending cases per judge grew about 9 percent annually.⁴⁷

Hiring was chronically slow until 2018, when the Trump administration made a push to address the issue and added significant numbers of new IJs, reducing the time it took to hire an IJ from an average of 647 days between February 2014 and August 2016⁴⁸ to 195 days in FY 2019.⁴⁹ While IJ hiring subsequently increased further, turnover has also been much higher than in past decades. As a result, more judges with limited experience are on the bench. From October 2020 to April 2023, 204 new IJs were hired, which is 31 percent of the total corps of IJs.⁵⁰

41 Reuters, "Trump Seeks to Reopen Cases of Hundreds Reprieved from Deportation," *The Guardian*, June 9, 2017; TRAC Immigration, *The Life and Death of Administrative Closure* (Syracuse, NY: Syracuse University, 2020).

42 Reuters, "Trump Seeks to Reopen Cases."

43 Memorandum from David L. Neal, Director, EOIR, DOJ, *Administrative Closure*, November 22, 2021.

44 DOJ, Office of Public Affairs, "Attorney General Holder Announces Justice Department to Lift Hiring Freeze" (press release, updated September 15, 2014).

45 DOJ, EOIR, "EOIR Adjudication Statistics: IJ Hiring."

46 DOJ, EOIR, "EOIR Adjudication Statistics: IJ Hiring."

47 DOJ, EOIR, "EOIR Adjudication Statistics: New Cases and Total Completions"; DOJ, EOIR, "EOIR Adjudication Statistics: IJ Hiring." The growth rate per judge was calculated by dividing the pending case backlog at the end of the fiscal year by the number of IJs.

48 Statement of Rebecca Gambler, Director, Homeland Security and Justice, GAO, before the Senate Committee on Homeland Security and Governmental Affairs, *Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, 115th Cong., 2nd sess., September 18, 2018.

49 Statement of James McHenry, Director, EOIR, DOJ, before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Executive Office for Immigration Review*, 116th Cong., 1st sess., March 7, 2019.

50 TRAC Immigration, *More Immigration Judges Leaving the Bench* (Syracuse, NY: Syracuse University, 2020); DOJ, EOIR, "EOIR Adjudication Statistics: IJ Hiring."

Additionally, while data are not publicly available on the number of supervisory or support staff for IJs, a 2017 Government Accountability Office (GAO) report found that there was a system-wide target ratio of 3 to 1 (i.e., three support staff per IJ).⁵¹ This target ratio is lower than in other high volume administrative court systems, such as the Office of Disability Adjudication and Review within the Social Security Administration (SSA), where the target ratio is 4.5 to 1, and the Board of Veterans' Appeals, where the target ratio is 9 to 1.⁵²

Comparing immigration courts and other high volume administrative courts may not be entirely apt. For example, through internal appeals, the SSA court system filters out more cases before they appear at the circuit courts. Still, it represents the closest comparable system. IJs themselves have asserted that low levels of support staff contribute to court slowdowns, as judges face not only increased adjudicatory demands but also administrative duties as caseloads increase.⁵³ Indeed, the fact that the hiring of more IJs has not kept pace with the number of new cases, nor reduced backlogs, highlights how a shortage of judges is not the sole source of problems in the court system.

Slowdowns in Case Completions

Even if hiring had kept pace in percentage terms with caseload growth, the greater overall caseload in the system is correlated with lower productivity in terms of case completion over time. Declining case completion rates date back to FY 2009, when each judge completed about 1,000 cases per year on average.⁵⁴ By FY 2021, the number of completed cases per IJ had decreased to slightly more than 200 (see Figure 3).

In 2018, the Trump administration implemented a series of quota-based case completion requirements for judges, which may explain the increased case completion rate in FY 2019.⁵⁵ But in FY 2020 and FY 2021, the pandemic significantly hindered EOIR's operations and resulted in delays affecting hundreds of thousands of cases.⁵⁶ From mid-March

2020 to mid-June 2020, EOIR suspended hearings for nondetained respondents and took other steps to reduce the number of people in EOIR spaces.⁵⁷ While the pandemic accelerated EOIR's uptake of hearings by video teleconferencing technology, the case completion rate still plummeted. In January and February 2020, case completions were around 40,000 per month.⁵⁸ By June 2020, case completions bottomed out at 5,000. It took another year for case completions to rise above 10,000 per month, in June 2021. By the end of FY

In FY 2020 and FY 2021, the pandemic significantly hindered EOIR's operations and resulted in delays affecting hundreds of thousands of cases.

51 GAO, *Immigration Courts*, 138.

52 GAO, *Immigration Courts*, 138.

53 GAO, *Immigration Courts*, 27.

54 Holly Straut-Eppsteiner, *U.S. Immigration Courts and the Pending Cases Backlog* (Washington, DC: Congressional Research Service, 2022), 23.

55 Priscilla Alvarez, "Justice Department Eliminates Trump-Era Case Quotas for Immigration Judges," CNN, October 20, 2021.

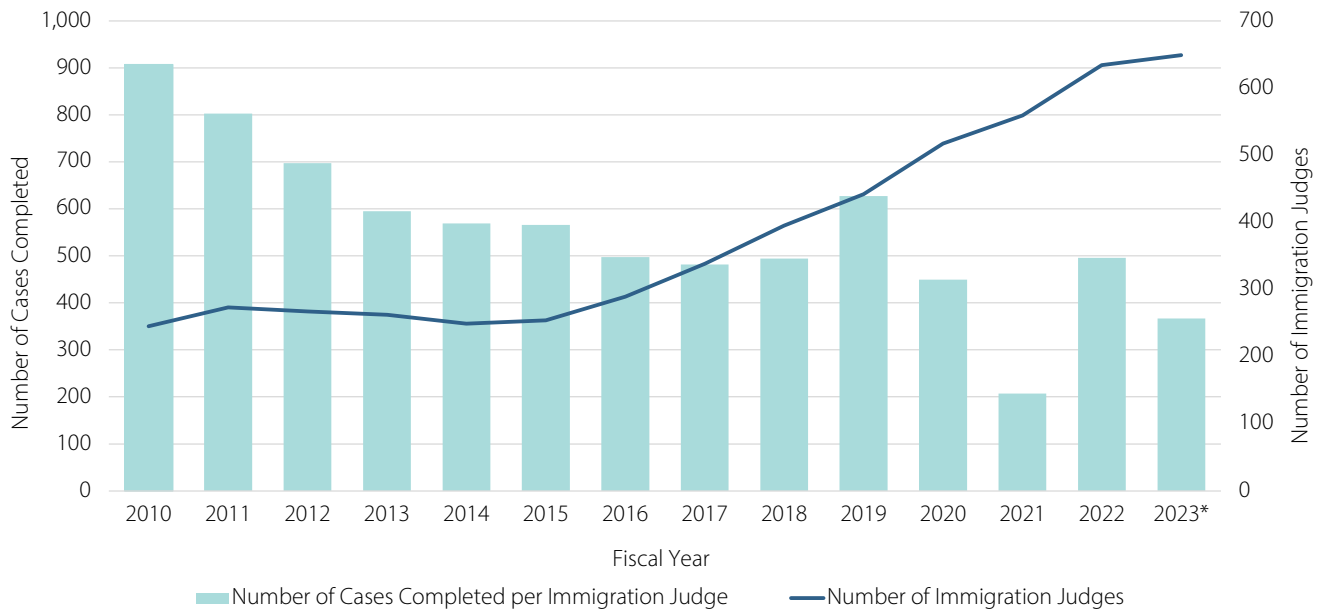
56 GAO, *COVID-19: Improvements Needed in Guidance and Stakeholder Engagement for Immigration Courts* (Washington, DC: GAO, 2021).

57 GAO, *COVID-19: Improvements Needed*.

58 TRAC Immigration, *The Continuing Impact of the Pandemic on Immigration Court Case Completions* (Syracuse, NY: Syracuse University, 2022).

2022, EOIR had increased case completions to about 26,000 per month, greater than the average monthly rate in FY 2019 overall, but still below that of the immediate pre-pandemic period in early 2020.⁵⁹

FIGURE 3
Average Number of Cases Completed per Immigration Judge and Number of Immigration Judges, FY 2010–23*



* For FY 2010 through FY 2022, this figure shows the number of case completions over the course of the full fiscal year. For FY 2023, it shows the case completions through the fiscal year’s second quarter, the latest period for which data were available. Sources: DOJ, EOIR, “*Workload and Adjudication Statistics*,” updated April 21, 2023; Holly Straut-Eppsteiner, *U.S. Immigration Courts and the Pending Cases Backlog* (Washington, DC: Congressional Research Service, 2022).

Delays in rendering decisions have also grown over time, from an average of 324 days from intake to resolution in FY 1998 to 762 days in early FY 2023.⁶⁰ This inverse relationship of caseload to productivity suggests that the more overloaded the overall immigration court system becomes, the less judges are able to effectively carry out their duties.

Problems in both the quality and pace of adjudication may be partly influenced by the impacts of an overwhelming caseload. Various commentators have examined additional causes for falling adjudicatory output and quality. They include inadequate training of IJs, inconsistent hiring standards, unsustainable case volumes that test IJs’ limits, increased legal complexity of cases, and various changes in standards imposed by DOJ and some rulings of the U.S. Supreme Court.⁶¹

59 TRAC Immigration, *The Continuing Impact*; DOJ, EOIR, “EOIR Adjudication Statistics: New Cases and Total Completions – Historical” (fact sheet, April 21, 2023).

60 TRAC Immigration, “Immigration Court.”

61 See Michele Benedetto, “Crisis on the Immigration Bench: An Ethical Perspective,” *Brooklyn Law Review* 73, no. 2 (2008): 479, 511–12. Benedetto unpacks the negative impacts of heavy workloads on IJs’ competence and conduct. Additionally, the article presents the decrease in “quality of work” over time in the EOIR as due to changing analytical requirements, lack of resources (such as shortages of reliable interpreters and support staff), inadequate training, and judge bias, among other causes.

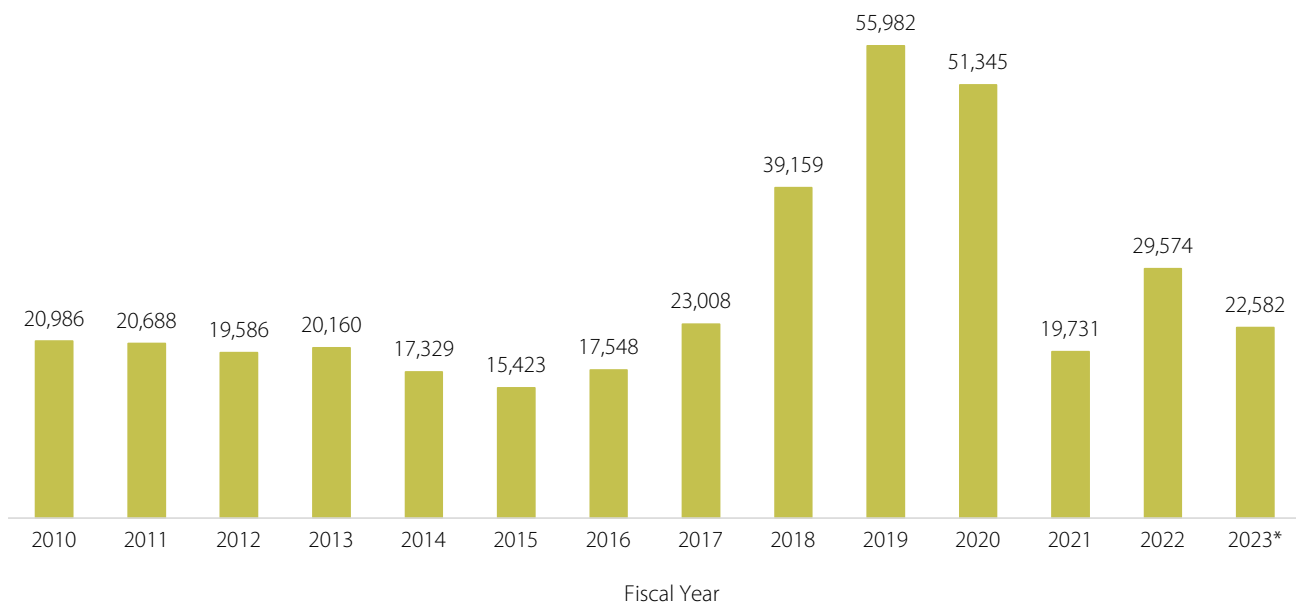
B. The Quality Issue

Concerns about the quality of adjudication in the U.S. immigration courts have persisted since at least the 1970s. Federal courts of appeal, scholarly articles, and congressional studies have strongly criticized the quality of immigration court decisions.⁶²

Quality Concerns Raised by Courts of Appeal

More than one in five immigration decisions were appealed to the BIA in FY 2020.⁶³ Rates of appeal increased from about 9.5 percent in FY 2010 to more than 22 percent in FY 2020.⁶⁴ From FY 2010 to FY 2016, the appeal rate ranged from 9 to 12 percent. In FY 2017, the rate increased to 14 percent, before spiking to more than 20 percent in FY 2018, where it remained through FY 2020. In absolute numbers, appeals peaked in FY 2019 when nearly 56,000 cases were appealed to the BIA (see Figure 4).⁶⁵ While the number of appeals filed were lower in FYs 2021 and 2022, this may have been due to the aforementioned effects of the pandemic—court closures resulted in fewer IJ decisions, which are the underlying basis for appeals.

FIGURE 4
Number of BIA Case Appeals Filed, FY 2010–23*



* For FY 2010 through FY 2022, this figure shows the number of appeals over the course of the full fiscal year. For FY 2023, it shows appeals through the fiscal year's second quarter, the latest period for which data were available.

Source: DOJ, EOIR, "Executive Office for Immigration Review Adjudication Statistics: Case Appeals Filed, Completed, and Pending" (fact sheet, April 21, 2023).

62 See American Immigration Council, "Background on Judicial Review of Immigration Decisions" (fact sheet, American Immigration Council, Washington, DC, June 2013); Fatma E. Marouf, "Implicit Bias and Immigration Courts," *New England Law Review* 45, no. 2 (2011): 419, 432.

63 DOJ, EOIR, "Executive Office for Immigration Review Adjudication Statistics: Case Appeals Filed, Completed, and Pending" (fact sheet, April 21, 2023); DOJ, EOIR, "EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions."

64 DOJ, EOIR, "EOIR Adjudication Statistics: Case Appeals"; DOJ, EOIR, "EOIR Adjudication Statistics: Pending Cases, New Cases, and Total Completions."

65 DOJ, EOIR, "EOIR Adjudication Statistics: Case Appeals."

The surge in appeals to the BIA has led to a corresponding increase in appeals to the federal courts of appeals, which are now inundated with immigration-related cases. Available data from 2013 to 2021 show that an average of 26 percent of BIA decisions were appealed to the federal circuit courts.⁶⁶ In 2020, they comprised nearly nine out of every ten administrative agency decisions and constituted the largest category of administrative agency appeals in every circuit except the D.C. Circuit.⁶⁷

The disproportionate representation of immigration court cases among administrative agency appeals to the federal circuit courts is not simply due to the higher number of immigration court cases. This is made clear by a look at another high-volume administrative court system: the SSA hearing system. In FY 2022, 1,617 SSA administrative law judges adjudicated a little more than 351,000 cases.⁶⁸ This volume is comparable to the output of the immigration court system, but it did not result in a similarly high number of appeals. This disparity lends credence to concerns about the quality of decision-making in immigration courts.

Federal appeals courts have used sharp language in criticizing the quality of BIA and IJ decisions. For example, in 2005, the Seventh U.S. Circuit Court of Appeals, noted that it had reversed a “staggering” 40 percent of BIA decisions that year.⁶⁹ The court found that EOIR’s opinions were “riddled with inappropriate and extraneous comments,” had “significant mistake[s]” suggesting the BIA was “not aware of the most basic facts” of cases, with procedural missteps that constituted “an affront to [the petitioner’s] right to be heard” and “gaping hole[s] in the reasoning” of the BIA and EOIR.⁷⁰

More recently, other federal courts have made similar criticisms.⁷¹ In 2022, the Third U.S. Circuit Court of Appeals reversed a BIA decision and noted that the “BIA stepped out of the bounds of its permissible role.”⁷² And in 2021, the Eighth U.S. Circuit Court of Appeals found that the BIA “failed to provide a rational explanation for its decision, including its treatment of this court’s binding precedent.”⁷³ These criticisms underscore how EOIR does not meet the abovementioned principles of a healthy adjudicatory system; parties to cases do not accept inaccurate decisions, which affects the efficiency of the process as appeals proliferate and take time to adjudicate.

66 These statistics cover the 12-month period ending March 31. U.S. Courts, “Federal Judicial Caseload Statistics,” accessed July 29, 2022.

67 U.S. Courts, “Federal Judicial Caseload Statistics.”

68 Social Security Administration, “ALJ Disposition Data FY 2022,” accessed June 15, 2023.

69 *Benslimane v. Gonzales*, No. 04-1339 (Ninth U.S. Circuit Court of Appeals, November 2005). The court explained in *Benslimane* that immigration adjudication had fallen “below the minimum standards of legal justice.”

70 See *Dawoud v. Gonzales*, Nos. 04-1275 and 04-2417 (Seventh U.S. Circuit Court of Appeals, September 2005); *Ssali v. Gonzales*, Nos. 03-3567 and 04-2148 (Seventh U.S. Circuit Court of Appeals, September 2005); *Sosnovskaia v. Gonzales*, No. 03-3470 (Seventh U.S. Circuit Court of Appeals, August 2005); *Kourski v. Ashcroft*, No. 03-1742 (Seventh U.S. Circuit Court of Appeals, January 2004).

71 See, for example, *De Leon Lopez v. Garland*, No. 20-71529 (Ninth Circuit U.S. Court of Appeals, October 2022), which concludes “The agency’s analysis of the probability that De Leon will be subjected to future torture disregarded several critical factors and so must be redone.” See also *Zepeda-Lopez v. Garland*, No. 19-145 (Second Circuit U.S. Court of Appeals, June 2022), which found that “In any event, the BIA’s interpretation is unreasonable . . . Such a reading is manifestly contrary to the text of the INA.”

72 *Arreaga Bravo v. Attorney General United States*, No. 20-3300 (Third Circuit U.S. Court of Appeals, March 2022).

73 *Gonzales Quecheluno v. Garland*, No. 20-2200 (Eighth Circuit U.S. Court of Appeals, August 2021).

Explaining the Decline in Decision Quality

Three factors may help explain declining adjudicatory quality: policy changes introduced by the BIA to address its mounting backlog; changing executive branch case docket priorities; and recent Supreme Court directives.

BIA Changes

Between 1999 and 2002, the BIA implemented a series of changes aimed at reducing the appeals backlog. These included:

- ▶ allowing a single BIA judge to decide appeals from IJ decisions instead of a review by panels of BIA judges;
- ▶ allowing BIA judges to affirm IJ rulings without a written decision, called an affirmance without opinion (AWO);
- ▶ expanding the categories of cases eligible for AWO;⁷⁴ and
- ▶ changing the standard of BIA review of IJs' factual findings from *de novo* (anew) to "clearly erroneous."⁷⁵

Critics of these policy changes point out that they have allowed the issuance of unsubstantiated decisions by single BIA members with no written opinions. These snap decisions have been called into question as driven by the pressure to reduce the systemic strain of overwhelming caseloads. Additionally, reducing the number of BIA members reviewing each appeal has raised concerns about the internal checks on adjudicatory quality.⁷⁶ In 2019, EOIR issued a regulation that clarified when the use of AWOs is appropriate, though it remains to be seen what effect this will have on the quality of decisions issued.⁷⁷

Changing Executive Branch Priorities

Frequently changing executive branch immigration policy priorities require judges to reshuffle cases in their dockets. For example, political attention to issues such as asylum, unaccompanied child arrivals, and criminal activity has waxed and waned in recent years. And while challenges at the border have been a priority for all recent administrations, they have responded differently. Over time, shifting priorities have affected adjudicatory quality by delaying cases ready for disposition while accelerating others that may not be ready for trial.

74 John R.B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin, "Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review," *Georgetown Immigration Law Journal* 20, no. 1 (2005): 1–100.

75 DOJ, INS, "Board of Immigration Appeals: Procedural Reforms to Improve Case Management," *Federal Register* 67, no. 165 (August 26, 2002): 54878–905.

76 AILA, "AILA's Comments on the Proposed BIA Reform Rule," updated March 20, 2002.

77 DOJ, EOIR, "Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," *Federal Register* 84, no. 127 (July 2, 2019): 31463–71. See also DOJ, EOIR, "Summary Affirmance," *BIA Practice Manual*, updated August 22, 2022.

Supreme Court Decisions

In a series of decisions since 2013, the Supreme Court has elucidated specific analytical steps that IJs must follow to determine whether a criminal conviction has immigration consequences that render an individual removable.⁷⁸ The complex and heightened analytical requirements have added to the pressures of a ballooning caseload and led to more decisions being overturned.

C. *Geographic Disparities and Other Inconsistencies in Immigration Court Decisions*

Another concern with immigration adjudication is the wide variance in case outcomes, both between IJs sitting in the same court and between courts located in different regions of the country. While the bulk of research on geographical disparities in U.S. immigration court outcomes focuses on varying rates of granting asylum applications, there are indications that geography matters for all immigration court decisions, including removal orders.⁷⁹ Such systemic inconsistencies call adjudicatory quality into question, since similar facts should result in similar outcomes across the board.

Between FY 2017 and FY 2022, data published by the Transactional Records Access Clearinghouse show the rate at which individual IJs denied asylum claims varying widely, from 1 to 100 percent of cases.⁸⁰ This variance is far from new. GAO studies in 2008 and 2016 found similarly significant differences in asylum case outcomes by IJ and by the location of the IJ, even after controlling for legal representation.⁸¹

Such systemic inconsistencies call adjudicatory quality into question, since similar facts should result in similar outcomes across the board.

Inconsistencies in case outcomes also point to other systemic factors, such as the role geography plays in access to representation, rates of detention, and the types of cases presented.

D. *The Sum of these Concerns*

Despite a long history of concerns and problems, the capacity of the immigration courts to process and complete cases has been stretched to unsustainable levels in recent years. Quantity issues have arisen as increased enforcement has led to record case referrals to EOIR, which lacks the personnel to efficiently and accurately issue decisions.

78 See *Pereida v. Wilkinson*, No. 19-438 (U.S. Supreme Court, March 2021), discussing the “categorical” approach to determining whether a criminal conviction has immigration consequences. See also *Mathis v. United States*, No. 15-6092 (U.S. Supreme Court, June 2016); *Descamps v. United States*, No. 11-9540 (U.S. Supreme Court, June 2013); *Moncrieffe v. Holder*, No. 11-702 (U.S. Supreme Court, April 2013).

79 See Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60, no. 295 (2007): 295–412.

80 TRAC Immigration, “Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022,” updated October 26, 2022.

81 See GAO, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* (Washington, DC: GAO, 2008); GAO, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* (Washington, DC: GAO, 2016).

Indirect indicators such as the continued rise in appellate review of immigration court decisions as well as significant disparities in outcomes by geography speak to issues of adjudicatory quality. The falling quality of adjudication may also partly stem from the politicization of immigration courts and their vulnerability to abrupt shifts in executive branch policies, further contributing to lack of acceptance by the adjudicating parties and the public of court decisions.⁸²

Taken together, these trends have pushed the immigration courts into the impossible position of trying to meet demand for a high volume of high-quality decisions when they lack the time and resources to meet either goal.⁸³

4 Technology in Immigration Courts

One of the ways that EOIR has tried to address the quantity issue is by increasing its use of technology in immigration courtrooms. Two of the most noteworthy developments have been the shift to an electronic filing system and the increased use of internet-based hearings.

As of February 2022, EOIR required that court staff and parties to cases use its EOIR Courts and Appeals System (ECAS) for online filing in cases started after that date and where a respondent is represented.⁸⁴ Those who are not represented (pro se respondents) may file online with ECAS but are not required to do so. In conjunction with the nationwide rollout of ECAS to all immigration courts and the BIA, EOIR began the process of digitizing physical case files. Respondents may request the creation of an electronic record of proceedings (eROP), which is then made available on ECAS.⁸⁵

EOIR's use of video conferencing (VTC) dates back much further—to the early 1990s—when the courts began holding VTC hearings initially to save on travel and administration costs. Congress endorsed the use of video technology in the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*.⁸⁶

For many years, VTC was used in a relatively small portion of total immigration hearings.⁸⁷ That has changed. By FY 2012, nearly one-third of all detained noncitizens in the United States appeared before a judge via video screen.⁸⁸ The increased use of detention during the Obama and Trump administrations, coupled with the growing backlog of immigration cases, further increased VTC's role as a tool to manage court dockets. By 2018, every U.S. immigration courtroom was equipped for VTC, and VTC could be used for any immigration court hearing.⁸⁹

82 See AILA, "Restoring Integrity and Independence to America's Immigration Courts" (policy brief, AILA, Washington, DC, January 24, 2020).

83 Katherine H. Reilly, Deputy Director, EOIR, DOJ, "Immigration Judge Performance Measures Overview" (presentation slides, June 7, 2018), made available on AILA, "EOIR Legal Training Program on IJ Performance Measures," updated June 7, 2018.

84 DOJ, EOIR, "EOIR Courts and Appeals System (ECAS) – Online Filing," updated February 11, 2022.

85 DOJ, EOIR, "Request an ROP," updated July 25, 2022.

86 Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109, no. 4 (2015): 945.

87 Eagly, "Remote Adjudication in Immigration," 944.

88 Eagly, "Remote Adjudication in Immigration," 953.

89 DOJ, Office of the Inspector General, Evaluation and Inspection Division, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings* (Washington, DC: DOJ, 2022), 1.

The pandemic added to the factors driving this trend. An EOIR policy memo from March 2020 encouraged VTC hearings “to the maximum extent practicable” to help mitigate the risk of the virus spreading at in-person hearings.⁹⁰ EOIR also provided judges with 100 laptops specially equipped to facilitate and record internet-based VTC proceedings.⁹¹ In FY 2022, 324,000 VTC hearings were completed, in addition to about 339,000 internet hearings, up from 149,000 VTC and 8,000 internet hearings held in FY 2021.⁹² It is now common for noncitizens to remain in detention centers for their legal proceedings, appearing before IJs only by VTC.⁹³ This is especially true for noncitizens detained in locations far away from immigration courts and most attorneys.⁹⁴ Nondetained respondents, including children, may also have their hearings virtually.⁹⁵

It is now common for noncitizens to remain in detention centers for their legal proceedings, appearing before IJs only by VTC.

In August 2022, EOIR issued a memorandum on the use of internet VTC, now referred to as internet-based hearings.⁹⁶ The memorandum encourages IJs to accommodate respondent requests to appear either in court or remotely and clarifies that judges will not direct unrepresented respondents to appear remotely, though they may request to do so. The memorandum states that reasonable requests for remote witness appearances should be accommodated, and there is no requirement that a respondent and counsel appear from the same location. An IJ must confirm that everyone appearing remotely is clearly visible on screen and that all participants can hear everything. Points of contact have been designated at each court to support internet-based hearings and assist with any issues. Finally, the memorandum states that judges will continue to receive training on internet-based hearings.⁹⁷

Factors to Consider in Assessing VTC Hearings

The rise in VTC usage presents both challenges and opportunities. The subsections below examine four factors to consider regarding VTC proceedings: efficiency, technology’s limitations, security, and due process.

Efficiency

Proponents argue that VTC hearings are more efficient, helping reduce the case backlog and increasing access to justice by saving time and reducing costs for all parties involved. VTC hearings can help expedite procedural matters, such as scheduling hearings or accepting documents, so the respondent does not have

90 Memorandum from James R. McHenry III, Director, EOIR, DOJ, to all of EOIR, *Immigration Court Practices during the Declared National Emergency Concerning the COVID-19 Outbreak*, March 18, 2020, 4.

91 Mimi Tsankov, “Inside Immigration Court: The Pros, Cons of Remote Hearings,” *Law360*, June 2, 2023.

92 DOJ, EOIR, “Executive Office for Immigration Review Adjudication Statistics: Hearings Adjournments by Medium and Fiscal Year” (fact sheet, April 21, 2023).

93 Christina Goldbaum, “Videoconferencing in Immigration Court: High-Tech Solution or Rights Violation?,” *The New York Times*, February 12, 2019.

94 Goldbaum, “Videoconferencing in Immigration Court.”

95 DOJ, Office of Inspector General, Evaluation and Inspection Division, *Limited-Scope Inspection*.

96 Memorandum from David L. Neal, Director, EOIR, DOJ, *Internet-Based Hearings*, August 11, 2022.

97 Neal, *Internet-Based Hearings*.

to travel a long distance for a short legal proceeding, and judges can hear more cases.⁹⁸ Judges can also fill in for colleagues across the country, which improves docket management and gives respondents quicker decisions. This is especially significant for those who are detained.

Technology's Limitations

Technical difficulties hamper EOIR's efficiency in using VTC. Reports have found that malfunctions cause meaningful delays in immigration court staff's work.⁹⁹ A 2017 GAO report noted the need to collect data on technical issues associated with VTC and possible effects on case outcomes.¹⁰⁰ The American Immigration Lawyers Association has shared accounts from immigration courts in Omaha, Salt Lake City, and New York City of VTC harming the quality of communications in hearings, describing issues such as faulty connections and bad audio as "common" experiences.¹⁰¹ Such issues can lead judges to reschedule hearings, prolonging detention for noncitizens.¹⁰²

Security

Using VTC in immigration court proceedings raises security concerns, especially in a setting where parties regularly disclose sensitive information. Opponents of VTC hearings assert that third-party technology platforms are vulnerable to malicious actors, and noncitizens' personal electronic devices and internet connections are generally less secure than telecommunication technology that is used in professional settings.¹⁰³

Supporters of VTC assert that there are inherent risks involved in using any technology platform, but those risks can be mitigated.¹⁰⁴ They also claim that it is possible for platforms to successfully balance security and usability—and some such platforms already exist.¹⁰⁵

Due Process

EOIR's embrace of VTC has led critics to argue that such hearings prioritize efficiency over due process. Virtual hearings largely remove nonverbal forms of communication, including body language and eye

98 Goldbaum, "Videoconferencing in Immigration Court."

99 Booz Allen Hamilton, *Legal Case Study: Summary Report* (Washington, DC: DOJ, EOIR, 2017), 23; GAO, *Immigration Courts*, 58.

100 GAO, *Immigration Courts*.

101 AILA, "Facts about the State of Our Nation's Immigration Courts" (policy brief, AILA, Washington, DC, May 14, 2019), 3.

102 Erica Bryant, "Unaccompanied Children Suffer as Hearings Are Sped Up, Switched to Video during COVID-19 Crisis," Vera Institute of Justice, April 14, 2020.

103 Julie Marie Baldwin, John M. Eassey, and Erika J. Brooke, "Court Operations during the COVID-19 Pandemic," *American Journal of Criminal Justice* 45 (2020): 751.

104 Garret Spargo, Ashley Karr, and Carolyn L. Turvey, "Technology Options for the Provision of Mental Health Care through Videoteleconferencing," in *Telemental Health*, eds. Kathleen Myers and Carolyn L. Turvey (Waltham, MA: Elsevier, 2013).

105 For example, Immediation is a platform designed by lawyers specifically for the legal profession and is a popular choice for courts in Australia. See Tania Sourdin and John Zeleznikow, "Courts, Mediation, and COVID-19," *Australian Business Law Review* (2020): 1–32.

contact, which can be essential to a judge’s assessment.¹⁰⁶ Moreover, VTC audio often filters out low and high voice frequencies, which “are typically used to transmit emotion,” according to some studies.¹⁰⁷

Other research has concluded that detainees appearing by VTC “exhibited depressed engagement with the adversarial process” and had higher perceptions of immigration court being unfair.¹⁰⁸ Detained respondents who appeared in person were 90 percent more likely to apply for permission to remain in the United States (relief), 35 percent more likely to obtain counsel, and 6 percent more likely to seek voluntary departure than similarly situated detained respondents who appeared by VTC.¹⁰⁹ VTC has also been found to impede respondents’ ability to consult with counsel before and during proceedings, and by limiting access for trial observers it undermines accountability.¹¹⁰

Critics especially oppose VTC for substantive merits hearings (also known as individual hearings).¹¹¹ These hearings determine legal status and can last several hours, often including an in-depth look into a respondent’s personal history. Traumatic and/or sensitive information may be disclosed. VTC opponents contend that a respondent may be less willing to share sensitive information in a virtual setting, given security and confidentiality concerns, which can affect case outcomes.

The use of VTC with unaccompanied children in removal proceedings raises further concerns. EOIR expanded this practice during the Trump administration and the pandemic, particularly for unaccompanied children in U.S. government custody.¹¹² Child advocates have criticized VTC’s use for children, “who are more vulnerable and less able to comprehend complex legal proceedings and advocate for themselves,” noting it puts the children’s attorneys in the difficult position of having to choose between being in court with the judge and the government attorney to participate in critical exchanges or being with their young clients, who need support.¹¹³

Another area of concern is attorney-client communication—an essential aspect of the legal process.¹¹⁴ During a virtual hearing, the attorney and client are often not in the same physical location, especially in cases of detained noncitizens. Critics maintain that the court must offer an opportunity for private, secure communication between the two during real-time VTC proceedings.¹¹⁵ Creating a separate way

106 Liz Bradley and Hillary Farber, “Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference,” *Georgetown Immigration Law Journal* 36, no. 2 (2022): 515-70.

107 Robin Davis et al., *Research on Videoconferencing at Post-Arrest Release Hearings: Phase I Final Report* (Fairfax, VA: ICF International, 2015), 5-6.

108 Eagly, “Remote Adjudication in Immigration,” 933.

109 Eagly, “Remote Adjudication in Immigration,” 937-8.

110 Darcy Reddan, “Immigration Courts’ Video Evolution Stirs Due Process Fears,” *Law360*, November 17, 2019; Eagly, “Remote Adjudication in Immigration,” 997, 1000; Blake Candler, “Court Adaptations during COVID-19 in the World’s Two Largest Democracies” (research paper, Social Science Research Network, May 24, 2020).

111 AILA and American Immigration Council, “Use of Virtual Hearings in Removal Proceedings” (policy brief, AILA and American Immigration Council, Washington, DC, May 3, 2022); Bradley and Farber, “Virtually Incredible,” 568-9.

112 Kate Brumback and Nomaan Merchant, “More Children Face Immigration Judges through Video Screens,” *AP News*, March 11, 2020.

113 Bryant, “Unaccompanied Children Suffer.”

114 Camila DeChalus, “Immigration Attorneys Face Courtroom Challenges amid Pandemic,” *Roll Call*, June 17, 2020; Eagly, “Remote Adjudication,” 933, 985.

115 National Center for State Courts, “Virtual Courtroom Standards and Guidelines” (guidance document, National Council for State Courts, Williamsburg, VA, April 2020).

for the attorney and client to communicate is possible but presents an additional challenge in a virtual environment.

Other due process issues may also arise when conducting a VTC hearing. For instance, respondents may not be fully aware of who is present in the courtroom audience, just as judges may not know who is present with respondents and witnesses. Critics have voiced the need to ensure that witnesses are not being coached or intimidated off camera.¹¹⁶ VTC proponents argue that, with appropriate technology, this issue is resolvable, primarily by judges being attentive to privacy considerations during merits hearings that may be closed to the public.¹¹⁷

EOIR's efforts to improve its use of technology represent an important step towards modernization of the immigration court system, but on its own this will not address the system's backlog and ensure future cases are heard in a timely, fair manner.

EOIR's efforts to improve its use of technology represent an important step towards modernization of the immigration court system, but on its own this will not address the system's backlog and ensure future cases are heard in a timely, fair manner. Therefore, DHS and EOIR must work together to prioritize cases that are ripe for adjudication through the use of discretion and docket management.

5 The Role of Discretion in Removal Proceedings

The exercise of discretion is another key component of effectiveness in the immigration court system. It shapes which immigration cases come before the courts (a decision over which EOIR has no control) as well as how those cases are prioritized once they enter the court system. U.S. immigration agencies—principally, ICE and CBP—may choose whether or not to pursue, postpone, or terminate a deportation case based on discretionary factors and/or enforcement priority guidelines. Once cases reach EOIR, IJs use the docket management tools at their discretion to prioritize certain types of cases.

A. DHS's Use of Prosecutorial Discretion

DHS provides guidance on the use of prosecutorial discretion for ICE's Office of the Principal Legal Advisor (OPLA) attorneys to use in immigration proceedings. The guidance aims to make optimal use of limited government resources, achieve fair outcomes, reduce redundancies, and promote public confidence. OPLA attorneys exercise prosecutorial discretion when deciding which cases to prioritize for adjudication. Once cases are initiated, OPLA can decide whether to agree to certain elements of a noncitizen's case, a grant of relief, or the pause or closure of the immigration court case while a noncitizen pursues relief at USCIS, for example.

¹¹⁶ Kariuki Muigua, "Virtual Arbitration amidst COVID-19: Efficacy and Checklist for Best Practices" (discussion paper for the Chartered Institute of Arbitrators Kenya Branch [CI Arb-K] Webinar ADR Talk Series 8, May 28, 2020).

¹¹⁷ Administrative Conference of the United States, *Administrative Conference Recommendation 2012-3: Immigration Removal Adjudication* (Washington, DC: Administrative Conference of the United States, adopted June 15, 2012), 17.

Guidance on the exercise of prosecutorial discretion in deportation cases dates back decades. An April 2022 memorandum issued by ICE Principal Legal Advisor Kerry Doyle contains the most recent guidance on prosecutorial discretion.¹¹⁸ It follows a September 2021 memorandum issued by Homeland Security Secretary Alejandro Mayorkas.¹¹⁹ The Mayorkas memo established three priorities for immigration enforcement: threats to national security, threats to public safety, and threats to border security. Republican-led states sued to challenge the legality of the Mayorkas memo, and a circuit court vacated it, deeming it illegal.¹²⁰ In June 2023, the Supreme Court reinstated the Mayorkas memo, ruling that the states lacked standing to sue.¹²¹

Prosecutorial discretion is central to the functioning of the immigration court system.¹²² For example, by encouraging the more than 1,250 ICE attorneys to focus on high-priority deportation cases, lower priority removal cases can be terminated. This speeds final resolution of priority cases, bringing faster removal for those found deportable and quicker relief for those who qualify.

Similarly, assigning different ICE attorneys to different stages in a particular case to allow for more efficient use of attorneys' time is also a matter of prosecutorial discretion. For example, ICE attorneys could be present in only some types of proceedings, but not in all, including: master calendar hearings, wherein noncitizens respond to DHS allegations of removability and seek relief; in absentia removal hearings, which involve migrants who do not appear in court; or even some merits hearings, in which cases are adjudicated. Allowing ICE attorneys to submit their positions in writing rather than being physically present in a particular hearing is in keeping with EOIR's policy encouraging parties to cases to resolve cases through written pleadings, stipulations, and joint motions.¹²³

B. Docket Management at EOIR

IJs exercise discretion in deciding whether to release detained noncitizens on bond, whether the government has established the defendant is removable, and/or whether the individual is eligible for humanitarian protection or any other relief under the law. IJs also determine whether to allow continuances in court proceedings, whether to issue a removal order or allow a noncitizen to voluntarily depart, and whether to halt immigration court proceedings through administrative closure or termination.

Recent changes have allowed IJs greater flexibility in managing their dockets through these measures. For example, in April 2022, EOIR's Chief Immigration Judge issued a memorandum directing immigration courts

118 Memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE, DHS, to all Office of the Principal Legal Advisor (OPLA) attorneys, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, April 3, 2022. This memo took effect on April 25, 2022.

119 Memorandum from Alejandro N. Mayorkas, Homeland Security Secretary, to Tae D. Johnson, Acting Director, ICE, DHS, *Guidelines for the Enforcement of Civil Immigration Law*, September 30, 2021.

120 *Texas v. USA*, No. 22-40367 (Fifth U.S. Circuit Court of Appeals, July 2022); *Arizona v. Biden*, No. 22-3272 (Sixth U.S. Circuit Court of Appeals, June 2022).

121 *United States v. Texas*, No. 22-58 (U.S. Supreme Court, June 23, 2023).

122 Muzaffar Chishti and Julia Gelatt, "For Overwhelmed Immigration Court System, New ICE Guidelines Could Lead to Dismissal of Many Low-Priority Cases," *Migration Information Source*, April 27, 2022.

123 Memorandum from Tracy Short, Chief Immigration Judge, EOIR, DOJ, to all of the Office of the Chief Immigration Judge, *Revised Case Flow Processing Before the Immigration Courts*, April 2, 2021.

to take certain cases off the calendar, where parties do not object, in order to prioritize others.¹²⁴ As of April 2023, IJs in 60 courts may now use the “off-docketing” initiative to de-calendar cases where respondents have approved or pending applications at USCIS.¹²⁵ This initiative does not terminate cases, but it allows EOIR and OPLA to focus their attention on higher priority cases.

As mentioned before in Section 3.A., administrative closure was restored as a docket management tool in 2021.¹²⁶ In November 2022, another attorney general decision restored the authority of IJs to terminate certain cases, including where respondents have obtained lawful permanent resident status in the United States after removal proceedings were started, and for respondents who have applications pending at USCIS.¹²⁷ By administratively closing or terminating these types of cases that are already being handled by USCIS, EOIR can reduce its backlog and focus on priority cases.

In sum, there are many ways in which discretion can be effectively used to both manage and reduce immigration court backlogs and to improve the efficiency and fairness of the immigration court system.

6 Redesigning the System for Adjudicating Defensive Asylum Claims at the U.S. Border

Asylum claims are a large and growing proportion of the backlogs in immigration courts, primarily as a result of claims made at the U.S. southern border. In June 2022, DHS and DOJ began implementing an interim final rule to ensure that people who are in expedited removal proceedings and eligible for asylum are granted relief more quickly, and those who are not are more promptly removed.¹²⁸ The rule aims to build an asylum system that is both timely and fair. Litigation to halt the implementation of the rule is ongoing.¹²⁹

To date, the process at the border has involved individuals who express fear of returning to their country of origin being interviewed by asylum officers (who are part of USCIS within DHS) to establish whether they have a credible fear of persecution or torture. Those found to have a credible fear may apply for asylum before an IJ, who decides their case. This process for hearing and deciding asylum cases takes years; noncitizens wait an average of four years just for their asylum hearing to be scheduled,¹³⁰ and reaching a final decision can take years longer.

124 Guidance from Tracy Short, Chief Immigration Judge, EOIR, DOJ, to all of the Office of the Chief Immigration Judge and Courts (EOIR), made available on AILA, “Chief Immigration Judge Provides Guidance on Deferring Adjudication of Certain Cases,” updated April 26, 2022.

125 AILA, “Key Takeaways from the Spring Conference Open Forum with EOIR,” updated April 28, 2023.

126 Neal, *Administrative Closure*.

127 *Matter of Coronado Acevedo*, 28 I. & N. Dec. 648 (Attorney General, November 2022).

128 DHS and DOJ, “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” *Federal Register* 87, no. 60 (March 29, 2022): 18078 (interim final rule). The rule is “interim” because the government continues to solicit comments and may change it further. See also DHS, “Implementation of the Credible Fear and Asylum Processing Interim Final Rule” (fact sheet, DHS, Washington, DC, May 26, 2022).

129 *Arizona v. Garland*, No. 6:22-cv-01130 (Louisiana Western District Court, April 2022); *Texas v. Mayorkas*, No. 2:22-cv-00094 (Northern District of Texas U.S. District Court, April 2022).

130 TRAC Immigration, “Immigration Court Asylum Backlog.”

The asylum officer rule shortens the adjudicative process to several months, instead of several years, while also reducing the growth of the existing immigration court caseload. The rule authorizes asylum officers to hear the full merits of asylum cases, in addition to conducting credible fear screenings, and to grant those cases that are meritorious, thereby eliminating the need for IJs to rule on them. Applicants whose claims are not granted have the right to review by an IJ in streamlined removal proceedings.

The rule places primary responsibility for processing asylum cases with USCIS asylum officers, who are already specially trained to carry out asylum adjudications. It has immigration courts serve as an appeal body for applicants who are denied and seek review of the asylum officer decision. For the streamlined proceedings in which IJs review the cases of noncitizens not granted protection by an asylum officer, EOIR is to schedule a master calendar hearing within 30 to 35 days of service of an NTA on a respondent.¹³¹ IJs are to hold a status conference 30 days after the master calendar hearing. The purpose of the status conference is to take pleadings, identify and narrow the issues involved in the case, determine whether the case can be decided based on the documents presented, and prepare the case for a merits hearing, if one is necessary.

OPLA must state whether it will participate in the proceedings or rest on the existing case record.¹³² If OPLA indicates that it will participate in the proceedings before the IJ, OPLA must state its position on the respondent's case. If OPLA does not respond in a timely manner, the IJ may accept the respondent's arguments or claims unopposed.¹³³

Implementation of the rule has occurred in a phased manner, with only 6,000 noncitizens screened under the rule and about 400 referred for streamlined EOIR proceedings through March 2023.¹³⁴ New case referrals were paused as the pandemic-era Title 42 expulsions policy ended and asylum officers were redirected to conduct border screenings for a subsequent border rule, the Circumvention of Lawful Pathways Rule (see Box 3).

Nevertheless, the asylum officer rule represents the most far-reaching reform the Biden administration has introduced for better managing the immigration court system. It is intended to help reduce

BOX 3

The Circumvention of Lawful Pathways Final Rule

On May 12, 2023, the Biden administration began implementing a temporary final rule that incentivizes orderly arrivals at ports of entry by scheduling appointments for asylum seekers through use of the CBP One app, and disincentivizes crossings between ports of entry for the purpose of seeking asylum by creating a presumption of ineligibility for asylum for certain noncitizens who do so. The rule applies in border screenings, at USCIS, and in immigration court proceedings. Therefore, IJs will need to assess the applicability of the rule in individuals' cases. There is litigation challenging the implementation of the rule.

Sources: DHS, "Fact Sheet: Circumvention of Lawful Pathways Final Rule," updated May 11, 2023; *East Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810 (California Northern District Court, May 2023); *Indiana v. Mayorkas*, No. 1:23-cv-00106 (North Dakota District Court, May 2023); *Texas v. Mayorkas*, No. 2:23-cv-00024 (Texas Western District Court, May 2023).

131 DHS and DOJ, "Procedures for Credible Fear Screening," 18082; DOJ, EOIR, "7.6 Streamlined Removal Proceedings," *Immigration Court Practice Manual*, updated August 16, 2022.

132 DHS and DOJ, "Procedures for Credible Fear Screening," 18099; DOJ, EOIR, "1240.17 Removal Proceedings Where the Respondent Has a Credible Fear of Prosecution or Torture," *Code of Federal Regulations* Title 8, Chapter V, Subchapter B, Part 1240, Subpart A (updated October 5, 2022).

133 DHS and DOJ, "Procedures for Credible Fear Screening," 18099; DOJ, EOIR, "1240.17 Removal Proceedings."

134 DHS, *Asylum Processing Rule Cohort Reports – March 2023* (Washington, DC: DHS, 2023).

the overall immigration court backlog and the pace of its growth substantially. Its further goal is to reduce incentives for filing weak asylum claims, caused by a system that fails to grant protection to those in need or remove those whose claims are denied in a timely manner. Restarting the asylum officer decision system is increasingly urgent as the immigration court backlog continues to grow.

7 Representation in Immigration Proceedings

Concerns of both quantity and quality in the immigration court system are tied to the lack of representation available to respondents in immigration proceedings. Representation is important for two reasons. First, it ensures due process and fair outcomes. Second, it creates efficiency in the system by allowing court proceedings to move more effectively and quickly.

Various forms of legal assistance are available to respondents in immigration proceedings, including through lawyers, accredited representatives, immigration help desks, legal orientation programs, and “friends of the court.” Because of the many different forms it takes, representation as it exists today is fragmented and inconsistent. Further, representation overall is severely lacking compared to the scale of need. Measures to increase access to representation should take the following factors into account.

A. *Legal Representation Improves the Efficiency and Quality of Court Decisions*

Beyond the fundamental due process proposition that representation is the primary guarantor of fairness in legal proceedings of all kinds, by all measures legal representation improves efficiency, accuracy, and consistency in decision-making in immigration courts. Significant disparities between outcomes for represented and unrepresented respondents demonstrate that. Of noncitizens whose cases were started between FY 2011 and FY 2019 and granted relief, 92.8 percent were represented and 7.1 percent were not.¹³⁵ Of those who were ordered removed during the same timeframe, 18.8 percent were represented and 81.1 percent were not.

A 2015 national study of cases in the immigration court system found that legal representation is linked to higher efficiency at every stage of the court process. Represented respondents sought fewer unmeritorious claims, had a greater chance of being released from detention, and were more likely to appear at hearings following release.¹³⁶ Another study, from 2018, found that legal representatives more effectively guide cases through the adjudicative process, and that represented detainees are more likely to submit documents, present affirmative arguments for release, and offer legally relevant arguments.¹³⁷

¹³⁵ TRAC Immigration, “Details on Deportation Proceedings in Immigration Court,” accessed June 14, 2023.

¹³⁶ Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (2015): 59–75.

¹³⁷ Emily Ryo, “Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings,” *Law and Society Review* 52, no. 2 (2018): 503–31.

IJs agree that legal representation improves the efficiency of immigration courts. According to a 2012 report from the Administrative Conference of the United States, 92 percent of IJs surveyed agreed that when a respondent “has a competent lawyer,” they can conduct adjudications “more efficiently and quickly.”¹³⁸

Representation also improves adjudicative quality. A 2004 BIA report found that competent representation leads to more high-quality briefs for the Board’s review and helps to clearly communicate the key issues on a given appeal.¹³⁹ A 2014 follow-up report reaffirmed those results, adding that represented respondents were up to three times more likely to win a favorable decision before the Board.¹⁴⁰ A key takeaway from the 2014 report emphasizes how legal representation can further “the effective and efficient administration of justice,” facilitating the courts’ ability to adjudicate in a timely fashion while maintaining a guarantee of due process and fairness.¹⁴¹

IJs agree that legal representation improves the efficiency of immigration courts.

Studies have also found a clear relationship between legal representation and improvements to cost efficiency following a respondent’s release from detention. For example, IJs are more likely to grant bond to long-term detainees who are represented.¹⁴² This is important because granting bond to represented detainees can save on detention costs, while also improving the likelihood that those respondents appear in future hearings. According to one study, from FY 2008 to FY 2018, 96 percent of represented, nondetained respondents attended all their court hearings.¹⁴³

Despite the clear benefits of having representation, the levels of representation in immigration proceedings remain low and uneven across different types of custody and locations with different degrees of population density. Access to representation also varies based on respondents’ abilities to afford counsel.

B. Types of Representation

Since FY 2018, the proportion of respondents who were represented at some point in the immigration court process has generally decreased.¹⁴⁴ As of April 2023, 45 percent of respondents in pending removal proceedings were represented.¹⁴⁵ Although the private bar has engaged extensively in both formal and pro bono representation in immigration courts, federal funding for representation in removal proceedings through the Legal Services Corporation (LSC) has been prohibited for all practical purposes since 1996.¹⁴⁶ The LSC was established by Congress in 1974 to increase access to civil legal assistance for low-

138 Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (Washington, DC: Administrative Conference of the United States, 2012), 56.

139 DOJ, EOIR, BIA, *The BIA Pro Bono Project Is Successful* (Washington, DC: DOJ, 2004).

140 DOJ, EOIR, BIA, *A Ten Year Review of the BIA Pro Bono Project: 2002-2011* (Washington, DC: DOJ, 2014), 12.

141 DOJ, EOIR, BIA, *A Ten Year Review*, 3.

142 Emily Ryo, “Detained: A Study of Immigration Bond Hearings,” *Law and Society Review* 50, no. 1 (2016): 117.

143 Ingrid Eagly and Steven Shafer, *Measuring In Absentia Removal in Immigration Court* (Washington, DC: American Immigration Council, 2021), 4.

144 Holly Straut-Eppsteiner, “U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs” (In Focus brief, Congressional Research Service, Washington, DC, July 6, 2022).

145 DOJ, EOIR, “Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates” (fact sheet, April 21, 2023).

146 See, for example, Philip Gallagher, “The Restriction Barring LSC-Funded Lawyers from Assisting Certain Immigrant Groups” (fact sheet, Brennan Center for Justice, New York, April 12, 2001).

income individuals, and it funds legal service providers throughout the country, but federal legislation in the mid-1990s barred LSC from assisting most unauthorized migrants.¹⁴⁷ To narrow the gap between nongovernmental capacity and the need for representation, a range of ancillary legal services are in place and being established.

Lawyers

Lawyers provide representation in a sizeable number of immigration cases. They come both from the private bar and from nonprofit legal service providers. Law students and law graduates not yet admitted to the bar can also provide representation in immigration court proceedings if they meet certain basic requirements, such as being under the supervision of a licensed attorney or accredited representative. Legal aid bureaus and bar associations offer free legal services to indigent noncitizens in immigration court proceedings.¹⁴⁸ However, those representational resources do not come close to meeting the needs of the many noncitizens facing removal who cannot afford counsel.

Accredited Representatives

Accredited representatives are non-lawyers authorized by EOIR's Office of Legal Access Programs to represent noncitizens who are unable to afford a lawyer in deportation proceedings and other immigration matters.¹⁴⁹

Accredited representatives can either be partially accredited, which means they can only appear before DHS, or fully accredited, which allows them to appear before DHS, immigration courts, and the BIA.¹⁵⁰ In June 2023, there were 2,257 accredited representatives in total,¹⁵¹ of whom 303 were fully accredited.¹⁵² Accredited representatives must be affiliated with a nonprofit religious, charitable, social service, or similar organization.¹⁵³ Recognized organizations must have "adequate knowledge, information and experience" of U.S. immigration law and the courts system, and have been accredited as such by EOIR.¹⁵⁴

147 Legal Services Corporation, "Who We Are," accessed June 5, 2023.

148 *Siaba-Fernandez v. Rosenberg*, No. 17654 (Ninth U.S. Circuit Court of Appeals, April 1962), in which the IJ informed a noncitizen of agencies available and adjourned hearing to enable him to contact such agencies; *United States ex rel. Castro-Louzan v. Zimmerman*, No. M-1414 (Eastern District of Pennsylvania U.S. District Court, November 1950), noting availability of Philadelphia Legal Aid Society and Reference Agency of the Philadelphia Bar Association to assist those in need of counsel. On the American Bar Association's work to provide and advocate for such legal services, see Matthew S. Mulqueen, "Access to Counsel in Immigration Proceedings," American Bar Association, February 20, 2019.

149 *Matter of EAC Inc*, 24 I. & N. Dec. 556 (BIA, 2008); Brittany Benjamin, "Note, Accredited Representatives and the Non-Citizen Access to Justice Crisis: Informational Interviews with Californian Recognized Organizations to Better Understand the Work and Role of Non-Lawyer Accredited Representatives," *Stanford Law and Policy Review* 30, no. 263 (2019): 263–306.

150 DOJ, EOIR, Office of Policy, Office of Legal Access Programs, "Recognition and Accreditation Program Frequently Asked Questions," updated March 2021.

151 DOJ, EOIR, "Accredited Representatives Roster," updated June 5, 2023.

152 DOJ, EOIR, "Accredited Representatives Roster."

153 DOJ, INS, "Organizations Qualified for Recognition; Requests for Recognition; Withdrawal of Recognition; Accreditation of Representatives; Roster," *Federal Register* 40, no. 104 (May 29, 1975): 23272. As of June 2023, there were 849 recognized organizations. See DOJ, EOIR, "Recognized Organizations and Accredited Representatives Roster," updated June 19, 2023.

154 "Recognition of an Organization," 8 *Code of Federal Regulations* § 1292.11; DOJ, EOIR, "Recognition & Accreditation (R&A) Program," updated April 14, 2021.

The Obama administration introduced reforms to the accredited representative program in December 2016.¹⁵⁵ The changes included eliminating a requirement that accredited organizations demonstrate they only charge nominal fees and establishing a re-recognition requirement obligating organizations to re-apply for recognition every six years.¹⁵⁶ These changes may have increased the number of organizations willing to provide representation for noncitizens.

Experts increasingly recognize the ability of non-lawyer legal service providers to increase access to justice in many areas of civil law.¹⁵⁷ For instance, the National Qualified Representative Program provides representation to unrepresented detained noncitizens who have been deemed unable to represent themselves because of a serious mental or developmental disability and who have suffered persecution and torture in their home countries because of their disabilities.¹⁵⁸ The American Bar Association has called for the expansion of such accredited representative programs.¹⁵⁹

EOIR administers an educational program called the Model Hearing Program to increase the quality of representatives' advocacy. Model hearings, which consist of small-scale mock trial training sessions held in immigration court and partner bar associations or pro bono agencies, provide immigration court training to small groups of attorneys, law students, and potential or accredited representatives with an emphasis on practice, procedure, and advocacy skills.¹⁶⁰ Between June 2001 and mid-2016, EOIR hosted more than 100 model hearing training sessions in immigration courts nationwide.¹⁶¹ EOIR continues to hold live and virtual trainings and posts recordings online for on-demand access.¹⁶²

Self-Representation (Pro Se)

Respondents in immigration court may also represent themselves. This is referred to as pro se representation. However, there are few resources available to aid pro se litigants with complicated immigration laws and procedures, and this makes it extremely difficult for respondents to navigate the legal process by themselves. For example, a 2014 report found that immigrants who retained counsel through the BIA's Pro Bono Project were up to three times more likely than pro se respondents to win a favorable BIA decision.¹⁶³

Many challenges exist to pro se representation, including that pro se litigants are held to the same standard in court as attorneys. Ignorance of procedural requirements can result in waived claims based on untimeliness or failure to assert mistakes that could result in dismissal before the judge even hears

155 DOJ, EOIR, "Recognition of Organizations and Accreditation of Non-Attorney Representatives," *Federal Register* 81, no. 243 (December 19, 2016): 92346.

156 DOJ, EOIR, "Recognition of Organizations."

157 See, generally, Richard Zorza and David Udell, "New Roles for Non-Lawyers to Increase Access to Justice," *Fordham Urban Law Journal* 41, no. 4 (2016): 1259–315; Leslie C. Levin, "The Monopoly Myth and Other Tales about the Superiority of Lawyers," *Fordham Law Review* 82, no. 6 (2014): 2611–34; Cara H. Drinan, "Getting Real about Gideon: The Next Fifty Years of Enforcing the Right to Counsel," *Washington and Lee Law Review* 70, no. 2 (2013): 1335–44.

158 Michael Corradini, "National Qualified Representative Program," accessed October 4, 2022.

159 American Bar Association, "ABA Resolution 118" (resolution, American Bar Association, Chicago, IL, August 8–9, 2011).

160 DOJ, EOIR, "EOIR's Office of Legal Access Programs" (fact sheet, DOJ, Washington, DC, revised August 2016).

161 DOJ, EOIR, "EOIR's Office of Legal Access Programs," 3.

162 DOJ, EOIR, "Model Hearing Program," accessed June 5, 2023.

163 DOJ, EOIR, BIA, *A Ten Year Review*, 12.

the merits of a case. Further, the complexities of the United States' immigration laws and system, even for experienced attorneys, can lead to dire consequences.

Language accessibility is another fundamental challenge for many pro se respondents. EOIR provides written information in English and Spanish, but it is difficult for many respondents to understand technical legal information and forms, even in their primary language.

Still, pro se litigation is often the only option for respondents who cannot afford legal representation or who do not have access to pro bono or accredited representative services. There are three initiatives that partially address this need: the Immigration Court HelpDesk (ICH) program, the Legal Orientation Program (LOP), and the Friend of the Court model.

Immigration Court HelpDesk Program

EOIR funds the ICH program, which is administered by nonprofit legal service organizations that provide nondetained respondents in removal proceedings with information on the immigration court process and defenses against removal in 22 immigration courts across the country.¹⁶⁴ The program offers individual information sessions and in-person presentations at immigration courts, workshops for pro se respondents, outreach to pro bono providers, access to legal resources, and the Immigration Court Online Resource (ICOR), an online resource with centralized, plain-language information on immigration proceedings.¹⁶⁵

Legal Orientation Program

EOIR also runs LOP, which provides rights presentations to detained individuals that cover information similar to what ICH makes available in its resources. Studies have shown that LOP offers significant benefits to the immigration court system and to the noncitizens it serves. For example, IJs report that LOP participants are “more likely to be able to identify the relief for which they are statutorily eligible, to not pursue relief for which they are ineligible, and to have a better understanding of the immigration court process.”¹⁶⁶ LOP participants also move through immigration courts faster and receive fewer in absentia removal orders.¹⁶⁷

Friend of the Court

An attorney who is not formally representing a noncitizen may act as a friend of the court, which EOIR defines as “an individual or organization that participates in an immigration court proceeding . . . to facilitate the flow of information in the courtroom.”¹⁶⁸ A friend of the court is not a legal representative and cannot

¹⁶⁴ EOIR, “List of Immigration Court Helpdesks,” updated May 2, 2023. See also Bettina Rodriguez Schlegel, “Immigration Court Helpdesk,” Vera Institute of Justice, accessed October 6, 2022.

¹⁶⁵ Rodriguez Schlegel, “Immigration Court Helpdesk”; DOJ, EOIR, “Immigration Court Online Resource,” accessed October 13, 2022.

¹⁶⁶ Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II* (New York: Vera Institute of Justice, 2008), v.

¹⁶⁷ Siulc, Cheng, Son, and Byrne, *Legal Orientation Program Evaluation*, iv; American Immigration Council, “Legal Orientation Program Overview” (fact sheet, American Immigration Council, Washington, DC, September 6, 2018), 3.

¹⁶⁸ Memorandum from David L. Neal, Director, EOIR, DOJ, *Friend of the Court*, May 5, 2022, 2.

submit filings in a case, but can aid with courtroom orientation and communication, bring attention to important details of a respondent's case, and provide assistance on basic forms and efforts to secure representation. Friends of the court can be particularly helpful with vulnerable groups such as children and individuals with special needs or mental health concerns.¹⁶⁹

C. *Public Funding for Legal Representation*

Public funding of legal representation for noncitizens in removal proceedings has grown significantly since 1999, when Senator Daniel Patrick Moynihan first proposed a federally funded pilot program.¹⁷⁰ More recently, in November 2022, Representative Donald McEachin introduced the *Funding Attorneys for Indigent Removal (FAIR) Proceedings Act*, which would provide access to counsel for children and other vulnerable populations.¹⁷¹ And in April 2023, Senator Kirsten Gillibrand and Representative Norma Torres introduced bicameral legislation that would provide counsel for low-income noncitizens and establish an independent Office of Immigration Representation to set standards for representation in removal proceedings.¹⁷²

In FY 2023, federal funding for representation in immigration court includes: (1) \$750 million appropriated to the Administration for Children and Families (a division of the U.S. Department of Health and Human Services) to cover legal services, child advocates, and post-release services for unaccompanied children; and (2) \$29 million appropriated to EOIR for the LOP.¹⁷³ For the FY 2023 budget, the Biden administration sought \$4.5 billion in funding over ten years to increase legal representation, but Congress did not appropriate this funding.¹⁷⁴

There are also some efforts at the state and local level to improve noncitizens' legal representation in immigration courts. New York State's *Access to Representation Act* would, if enacted, create a statewide program guaranteeing a right to representation for people facing deportation.¹⁷⁵ States and localities are also establishing funds to pay attorneys who represent immigrants in removal proceedings.¹⁷⁶ For example, Colorado in 2021 became the first state to publicly fund immigration legal defense,¹⁷⁷ and California allocated \$35.2 million to its Immigration Services Funding program for FY 2021–22 to provide funds to nonprofit organizations that supply immigration-related legal services.¹⁷⁸ In 2020, the New York City Council

169 Neal, *Friend of the Court*.

170 *A Bill to Amend the Immigration and Nationality Act to Revise Amendments Made by the Illegal Immigration Reform and Immigrant Responsibility Act*, S 173, 106th Cong., 1st sess., *Congressional Record* 145, no. 8, daily ed. (January 19, 1999): S 342.

171 *Funding Attorneys for Indigent Removal (FAIR) Proceedings Act*, HR 9304, 117th Cong., 2nd sess., *Congressional Record* 168, no. 176, daily ed. (November 15, 2022): H8507.

172 *Fairness to Freedom Act of 2023*, S 1187, 118th Cong., 1st sess., *Congressional Record* 169, no. 64, daily ed. (April 18, 2023): S 1210; *Fairness to Freedom Act of 2023*, HR 2697, 118th Cong., 1st sess., *Congressional Record* 169, no. 64, daily ed. (April 18, 2023): H 1844-7.

173 *Consolidated Appropriations Act, 2023*, HR 2617, 117th Cong., 2nd sess. (December 19, 2022); *Explanatory Statement Submitted by Mr. Leahy, Chair of the Senate Committee on Appropriations, Regarding H.R. 2617, Consolidated Appropriations Act, 2023*, *Congressional Record* 168, no. 198, Book II (December 20, 2022): S8890, 7919.

174 Andrew Kreighbaum, "Biden Seeks Major Budget Boost for Backlogged Immigration Courts," *Bloomberg Law*, March 28, 2022.

175 State of New York, *An Act to Amend the Executive Law, in Relation to Establishing the Right to Legal Counsel in Immigration Court Proceedings and Providing for the Administration Thereof*, S81B, 2021-2022 Legislative Session (January 6, 2021).

176 National Immigration Forum, "Public Funding for Immigration Legal Services," updated April 12, 2021.

177 Avery Martinez, "Colorado Becomes First State to Publicly Fund Immigration Legal Defense," *Law Week Colorado*, June 11, 2021.

178 California Department of Social Services, "Immigration Services Funding," accessed August 1, 2022.

allocated \$16.6 million to fund public defender offices and nonprofit organizations that represent detained immigration respondents.¹⁷⁹

8 Recommendations

Addressing these many significant problems in the U.S. immigration courts is necessary to achieving a more efficient, more just system. EOIR has recently made some important inroads in improving the functioning of the courts. While acknowledging that, this section outlines a more ambitious and broad set of reforms necessary to address long-standing problems in the immigration court system. And it does so deliberately only in the context of what is achievable without congressional action, which is unlikely in the near future.

The recommendations fall into four broad, overlapping categories: (1) improving management and efficiency; (2) upgrading technology; (3) implementing the new asylum officer rule reforms; and (4) increasing representation.

A. *Improving the Management and Efficiency of the Immigration Court System*

The management and efficiency of the immigration court system have been concerns for decades. Today's large case backlog has put a spotlight on these concerns and brought the system to a breaking point that is both compromising the national interest in important realms and keeping thousands of people's lives in suspension as cases drag on for years.

The following measures could modernize and improve the functions of the immigration courts:

1. Incoming and Prospective Caseload Management

EOIR should schedule all new cases on a "last-in, first-decided" basis, as it has done with its dedicated dockets for families arriving at the southern U.S. border. Such processing has proven successful in the past as a way of resetting a system where years-long waiting times invite weak claims, misuse of the system, and ever-growing backlogs. This shift is especially important in the aftermath of lifting the pandemic-era Title 42 policy. Reverting back to Title 8 processing (the normal U.S. immigration laws) entails prompt determinations on expedited removal and other southwest border cases as essential components of establishing effective border control and deterrence.

However, because the last-in, first-decided approach disadvantages cases that have already been waiting for long periods, it should be treated as a temporary emergency measure. As progress is made toward deciding incoming border cases within an acceptable period of time, resource allocations should be continually calibrated to adjudicate larger numbers of backlogged cases. In addition, deciding

¹⁷⁹ New York City Council, "Council Speaker Corey Johnson and Committee on Immigration Chair Carlos Menchaca Announce a \$16.6 Million Allocation to Fund the New York Immigrant Family Unity Project" (press release, September 10, 2019).

these incoming cases first should be subject to the menu of policy and procedural reforms, fairness, and efficiencies outlined below for EOIR's existing caseload.

2. Backlog Reduction

Shrinking the backlog should be among EOIR's highest priorities. The following measures, which seek to more strategically prioritize among cases and better leverage docket management options, can help achieve this aim:

- ▶ EOIR should continue to implement docket management measures such as de-calendaring and termination in cases where respondents have applications pending at USCIS or have been approved for a visa as well as in other low-priority cases at all immigration courts nationwide.
- ▶ ICE's OPLA should dedicate a team of attorneys to focus on cases that have been pending for more than five years. This team would triage cases for action options. Cases containing more aggravating factors¹⁸⁰ should be seen as priorities and fast-tracked for full merits hearings, final determination, and quick removal of those whose claims fail.
- ▶ For cases containing more mitigating factors,¹⁸¹ and that are thus deemed to be of lower priority, options include: narrowing the issues to be considered in the case so it can be resolved in less than a full hearing (which will be shorter in duration); stipulating a grant of relief, if merited; offering a settlement such as voluntary departure; or moving toward administrative closure or termination.
- ▶ OPLA attorneys should only seek termination or settlement when a respondent is represented, and allow respondents and their counsel sufficient opportunity to weigh their options of a dismissal versus moving forward with their claim for relief. OPLA attorneys should attempt to connect unrepresented respondents with legal service providers.
- ▶ When triaging cases, OPLA attorneys should focus on the three most prevalent case categories in the backlog: asylum seekers, family-related relief, and criminal convictions. Cases involving noncitizens who are detained should receive priority over all other backlogged cases.
 - EOIR should establish a short-term, specialized asylum docket to hear claims in nonpriority cases where ICE attorneys do not believe relief is merited and respondents do not agree to have the case dismissed. As discussed below (see Section 8.D.), securing representation will be key to accomplishing this.
 - Nonpriority cases in which respondents are seeking family-related relief (such as those involving adjustment of status or the immediate availability of visa numbers) and cases involving applications for Special Immigrant Juvenile status (a pathway to lawful permanent residence for children who have been abused, abandoned, or neglected) should be dismissed and referred to USCIS for adjudication.

¹⁸⁰ Aggravating factors could include criminal charges.

¹⁸¹ Mitigating factors could include pending or granted applications for relief at U.S. Citizenship and Immigration Services (USCIS).

- Among cases involving respondents with a criminal conviction, more serious criminal charges should be prioritized for adjudication.

3. Master Calendar Changes

EOIR should experiment with moving away from its current model of having a single IJ adjudicate an immigration case from start to finish. Instead, EOIR should develop a new system modeled after existing state/federal court systems in which judges and staff are assigned to different roles/dockets as a case proceeds through the adjudication process. For example, master calendar courts should function like arraignment courts in federal and state criminal judicial systems. This change in workflow would help move cases at the master calendar hearing stage more efficiently.

To create efficiencies, EOIR should establish two tiers of IJs: magistrate IJs and merits IJs. Magistrate IJs should be confined to short-term roles/dockets on procedural matters, including continuances, status updates, and status conferences. In accordance with a 2021 EOIR policy memorandum on revised case flow processing, written submissions (as opposed to oral presentations) should be the rule, not the exception, for represented respondents.¹⁸² For cases where a hearing is necessary, video hearings or kiosks could easily be used for such matters.

4. Specialized Dockets

EOIR uses specialized dockets or courts to hear cases involving a particular type of respondents and/or requiring a particular kind of subject matter expertise, such as its dockets for juveniles, families, reviews of credible fear determinations, cancellation of removal,¹⁸³ adjustment of status, and voluntary departure.¹⁸⁴ Expanding the use of such dockets would lend the same efficiencies to other areas. Additional categories could include dockets for asylum cases (possibly even for cases involving respondents from certain countries or “social group” subspecialties¹⁸⁵), people facing cognitive challenges, or those with criminal convictions.

5. Staffing Ratios

EOIR should examine and take steps to improve its employee ratios for staff, managers, and administrators to judges across the court system. The current level of support for IJs is low.¹⁸⁶ Clerks or attorney advisors are key to screening cases and issuing advisals (notifying respondents of their rights

182 Short, *Revised Case Flow*. See also AILA, “EOIR Issues Guidance on Pre-Hearing Conferences in Immigration Proceedings,” updated June 3, 2022.

183 Cancellation of removal is a discretionary form of relief that an IJ can grant to noncitizens in removal proceedings if they have lived in the United States for ten years or more and can prove that their deportation would cause significant hardship for a U.S.-citizen or permanent-resident spouse, child, or parent.

184 AILA, “Key Takeaways from the Spring Conference.”

185 This refers to asylum seekers whose claim of persecution is due to their membership in a “particular social group,” a protected ground under asylum law.

186 National Association of Immigration Judges (NAIJ), *The Immigration Court- In Crisis and in Need of Reform* (Washington, DC: NAIJ, 2019).

and responsibilities), in addition to researching and preparing draft opinions. EOIR should strive for a ratio of one clerk/attorney advisor per IJ.

To improve retention of its support staff and judges, EOIR should strengthen career ladders. To address the surge in the volume of cases in the immigration court system, appropriate government employees should be detailed to serve as temporary immigration law clerks or attorney advisors. DOJ should also expand its honors program for federal attorney recruitment to hire more new law graduates as attorney advisors.¹⁸⁷

6. Case Referrals from DHS to EOIR

Instead of the current practice of having all three DHS immigration agencies (CBP, ICE, and USCIS) referring cases to EOIR, all cases should be initiated by ICE attorneys, who are in the best position to determine the legal sufficiency and priority for cases the government decides to pursue. This would lend coherence to efforts to advance DHS-wide enforcement priorities.

DHS should also file completed cases with EOIR, along with all required evidence and forms, including Form I-213 (which provides information on a noncitizen's encounter with CBP agents and alleged removability from the United States); any criminal records; and other background checks. In the absence of completed documentation, the Office of the Chief Immigration Judge should terminate the case. Incomplete cases only lead to inefficiencies in the functioning of immigration courts.¹⁸⁸

7. Diversity and Quality of Judges

The pool of IJs on the bench should reflect a cross section of life experiences and judicial philosophies in order to be institutionally healthy and produce balanced results. The IJ pool has traditionally been drawn primarily from legal professionals with a background in law enforcement, especially those with prior experience in military, immigration, or criminal law enforcement. These backgrounds are important but should be balanced with the inclusion of IJs who bring experiences from across society, including nongovernmental organizations, public legal defense, private attorneys, and academics. Recent IJ hires reflect a growing acknowledgement of the importance of having varied backgrounds in the IJ pool.¹⁸⁹

Ongoing training for IJs already on the bench is also critical for the quality of decision-making. EOIR should follow GAO's recommendation that all IJs receive regular training, such as that provided at the National Judicial College.¹⁹⁰ These opportunities are important for intellectual exchange and enable IJs to learn from each other's experiences in the courtroom. Such exchanges could also help address disparities in IJ rulings by geography, court, custody status, and other factors that have led to adjudicative differences.

¹⁸⁷ DOJ, "Entry Level Attorneys: The Attorney General's Honors Program," updated May 17, 2023.

¹⁸⁸ TRAC Immigration, *Over 63,000 DHS Cases Thrown Out of Immigration Court This Year Because No NTA Was Filed* (Syracuse, NY: Syracuse University, 2022).

¹⁸⁹ AILA, "Key Takeaways from AILA Meetings with DOJ Leadership," updated December 15, 2022.

¹⁹⁰ GAO, *Asylum: Variation Exists*, 2.

At the same time, EOIR should not establish policies that micromanage IJ decisions, especially those that establish quotas for case completion. They delegitimize the immigration courts, leading to IJ turnover and long-term negative consequences for the system.

8. BIA Procedures

The BIA should consider the following measures to improve the quality of review and decision-making:

- ▶ Instead of allowing a single BIA member to review and decide appeals of IJs' decisions, this should be done by a three-member panel in all cases.
- ▶ BIA panels should issue more written, well-reasoned opinions. The current practice of affirming IJ rulings without a written decision (AWO) is suspect and there is a perverse incentive to utilize this practice, given its more limited documentation requirements and the overwhelming size of the courts' caseload. Written opinions are important for review by federal courts and provide a better basis for respondents in preparing their appeals. Even written dissents in a panel opinion can help develop the law. However, AWOs may be appropriate when granting relief to respondents.
- ▶ De novo review of factual findings in a case should also be restored to allow the BIA to overrule outlier IJ decisions.

B. *Making Better and More Strategic Use of Technology*

Better and more efficient use of technology is long overdue in the immigration court system. Experience with remote hearings in court and administrative proceedings during the pandemic has created a new sense of familiarity, comfort, and confidence among many actors in the use of technology in areas of work where an in-person presence was once considered essential. An evolving parallel movement of "e-justice" has also brought attention to the fact that mandatory in-person hearings may be a barrier to achieving justice for many people who face economic or geographic constraints in attending hearings in physical courtrooms. The recent issuance of EOIR guidelines on internet-based hearings represents a positive development in terms of increasing flexibility and efficiency for immigration courts and the parties involved.¹⁹¹ Building on those guidelines, the following improvements should be made:

- ▶ Video options should be used to further the goal of making immigration courts fair for everyone involved. This can include, as needed, holding a fully remote hearing with all parties when some would be unable to attend an in-person hearing or status conferences, or accessing an interpreter to ensure all parties can fully engage with and understand court proceedings. To support such uses, it will be important to improve confidential communication channels between respondents, judges, attorneys, and staff as video technology solutions continue to evolve.
- ▶ As a general rule, in-person hearings are better than VTCs for merits hearings. This is especially true when IJs make credibility determinations, rule on complex competency issues, hear testimony by juveniles, or where proximity to physical evidence or appreciation of emotional distress or pain is

¹⁹¹ Neal, *Internet-Based Hearings*.

crucial to the outcome of a case. However, even in individual merits hearings, VTCs may sometimes be beneficial for some respondents, for example, those who live in remote or rural areas, where competent counsel is not easily available, or where the courtroom is too far to access easily. Nevertheless, VTCs for merits hearings should be used only in represented cases and only with the consent of the respondent and their counsel.

- ▶ A presumption should be established against the use of VTC for vulnerable populations such as children and people facing cognitive challenges. People with such vulnerabilities may not be able to understand the proceedings or adequately communicate remotely.
- ▶ A means for confidential communication between respondents and their counsel before, during, and after a hearing should be established so as to approximate this necessary element of in-person courtroom practice.
- ▶ VTCs should convey the atmosphere and sanctity of a courtroom. Hearings involving respondents in detention facilities should be treated with special sensitivity. Shackled respondents with ICE guards looking on is an unacceptable setting for a court proceeding.
- ▶ EOIR should improve its ability to facilitate quality interpretation during VTC hearings and to handle simultaneous interpretation. Currently, many immigration court hearings rely on consecutive interpretation, making hearings longer and less efficient. The use of VTC should be discouraged where relay interpretation is required, for example from English to Spanish to a Mayan language; such practice is not only time consuming but may also not communicate the original import of the testimony.
- ▶ EOIR should continue to solicit feedback on improving its online filing system (ECAS) and work to quickly digitize all existing physical files.

C. *Implementing the Asylum Officer Interim Final Rule*

It is too soon to assess whether the asylum officer rule will work as intended, delivering timely decisions on asylum cases, reducing incentives to file unmeritorious claims, and lightening the load of cases flowing into the immigration courts. However, EOIR and DHS should consider the following steps to support the rule's successful implementation:

- ▶ EOIR should establish a dedicated docket and/or judge specialization for the streamlined appeal proceedings called for under the rule.
- ▶ The rule allows ICE's OPLA to decline to participate in cases where it opts to rest on the record. Therefore, DHS should facilitate a process through which OPLA attorneys can systematically assess which cases are priorities for participation and promptly communicate those decisions to respondents and EOIR.
- ▶ EOIR should encourage OPLA, when it elects to participate in cases, to robustly prepare for the status conferences that the rule requires. This will enable both the parties and the IJ to narrow the issues involved in the case and/or to reach substantive resolutions, where appropriate.

- ▶ EOIR should continue to track how many cases are resolved at the status conference stage, as well as at subsequent steps in the review process. This information could help evaluate how the review process is unfolding under the new rule.
- ▶ EOIR and ICE should establish careful coordination, supervision, and information exchange measures to facilitate the removal of people who are denied asylum and related relief.

D. *Improving and Increasing Representation*

Experience and research have shown that all aspects of the immigration court system function more efficiently and fairly when respondents have representation. As was discussed in Section 7, representation helps move cases along effectively, increases the chances that respondents who qualify for relief will successfully receive it, and reduces the numbers of appeals from IJ decisions. Yet, most respondents cannot afford private counsel, and pro bono attorneys are too few in number and legal service providers too limited in capacity to take on the volume of cases that need representation.

The following recommendations for EOIR and other stakeholders place a high priority on addressing these concerns, with the aim of promoting increased legal support services and representation and expanding access to them:

1. EOIR

EOIR should create a new unit devoted specifically to coordinating the agency's efforts to expand representation. Having one entity within EOIR that focuses on all aspects of representation would allow for a more unified approach to the programs and policies already in place, such as those listed in the 2021 EOIR memorandum on facilitating pro bono representation.¹⁹² The new representation unit should collaborate with nongovernmental stakeholders to implement the following improvements:

- ▶ Broadly publicize the spectrum of representation options available to respondents so that they have more complete information with which to make informed decisions about where to find representation and what kind(s) of representation they need. This will increase efficiency and increase the likelihood that respondents who qualify for relief receive it. EOIR currently publishes a list of pro bono legal service providers,¹⁹³ but the agency should proactively confirm that the list is up to date, seek additional providers to include on this list, and find new ways to make it available to respondents.
- ▶ Instruct EOIR representatives who interface with the public by phone and in person at the court filing windows to proactively share information about representation options with respondents.
- ▶ Add information about how to establish contact with local legal service providers and pro bono networks to the EOIR hotline that provides automated information in English and Spanish to respondents calling in about their upcoming court dates or to check their case status.

¹⁹² Memorandum from David L. Neal, Director, EOIR, DOJ, *Encouraging and Facilitating Pro Bono Legal Services*, November 5, 2021.

¹⁹³ DOJ, EOIR, "List of Pro Bono Legal Service Providers," updated April 2023.

- ▶ Make representation of detained respondents a priority by developing a network of pro bono counsel that focuses specifically on this population. In-person representation should be the preferred option for respondents in detention facilities. Good quality remote representation should also be explored when in-person representation is not feasible. Except in rare cases, detained noncitizens should be released once counsel is secured.
- ▶ Implement more efficient case flow management that organizes and coordinates personnel and other resources. To promote the fair and timely resolution of cases, EOIR should coordinate a plan to improve case management by working closely with judges, the immigration bar, and other stakeholders and possibly working with outside case management experts.¹⁹⁴
- ▶ Establish the Immigration Court HelpDesk program in every immigration court. Immigration helpdesks are currently in place in only 22 immigration courts out of about 70 nationwide.¹⁹⁵

2. Accredited Representatives

EOIR should place a high priority on clearing the backlog of applications for certification as an accredited representative and preempt future delays through a streamlined approval process. This should be accompanied by the following additional measures:

- ▶ Partially accredited representatives, well supervised, should be allowed to appear in immigration court for limited functions. These could include appearances at bond and master calendar hearings and for seeking continuances and relief.
- ▶ A third tier of accredited representatives should be considered. These would include “community fellows” attached to a service provider. The fellows would work in communities, hold educational and counseling sessions, and screen participants for possible legal remedies. Such fellows should meet minimum educational qualifications, complete a comprehensive course in the basics of immigration law and practice, and be supervised by a lawyer or fully accredited representative. This tier of accredited representatives could be allowed to fill out forms and provide translation and interpretation services. They could also be considered for a role as friends of the court, as is currently practiced with some lawyers in some juvenile dockets.
- ▶ To respond to concerns about the standard and quality of representation they provide, all accredited representatives should be required to take ongoing courses to keep abreast of changes in law and procedures. Academic institutions could provide certification courses with a prescribed curriculum on basic elements of law and practice, research, and interview skills. Such courses could be appropriate both for new accredited representatives and as continuing training for more experienced ones. This would mirror the requirement that immigration attorneys take continuing legal education courses to maintain their eligibility to practice.

¹⁹⁴ Genevieve Citrin Ray, *Enhancing Caseflow Management to Ensure Effective Assistance of Counsel* (Washington, DC: American University, 2020), 7.

¹⁹⁵ EOIR, “List of Immigration Court Helpdesks.”

3. State and Local Governments and Bar Associations

Given current federal funding restrictions, state and local governments should provide and/or increase funding to support representation. Such funding should be directed at training lawyers and, increasingly, at training accredited representatives. A larger and a better-trained corps of accredited representatives is critical for gaining the scale and efficiency necessary to meet legal representation needs.

4. Legal Service Providers (Private and Nonprofit Attorneys)

Legal service providers and other nongovernmental organizations should develop a multistage, collaborative representation system, as some nonprofit legal aid groups have begun to.¹⁹⁶ Pro bono counsel or legal service providers could agree to represent a respondent only in a certain stage or aspect of a case that requires a limited time commitment, such as filing asylum or work permit applications, attending bond or master calendar hearings, seeking relief, reviewing potential dismissals, or filing provisional waiver or adjustment of status applications.¹⁹⁷ This approach would require an e-file to be created for each case, with the file moving to the next stage of a case for representation, possibly by a different provider. Uploading the e-file to a secure online portal could help link respondents and counsel specializing in their specific immigration matters.

In addition, EOIR and legal service providers should work together to expand the Legal Orientation Program and undertake the following improvements:

- ▶ EOIR should work with LOP providers to improve access to pro bono counsel, especially for people who are detained. LOP providers should report on pro bono development efforts, and EOIR and associated organizations such as nonprofits and state and local bar associations should document whether pro bono representatives are interested in taking cases and determine whether LOP providers have the resources to make referrals and ensure the placement of cases.
- ▶ EOIR and associated organizations should work with each LOP site to prioritize developing materials or presentations on stipulated removal procedures in those sites, particularly those in which stipulated removals account for a large percentage of immigration court cases. Similarly, EOIR should work with LOP providers to identify and develop any legal access materials that might be relevant for detainees not in removal proceedings, including those subject to expedited removal, reinstatement of removal, post-removal hearing review, or with prior orders of removal.

¹⁹⁶ This system is inspired by Innovation Law Lab's Active Case Management (ACM) system, which crowdsources counsel, accredited representatives, and researchers from across the United States in pursuing claims for detained noncitizen families based on their specialization. ACM uses a case file portal and a network of attorneys to decide when to pursue certain directions on a case and to deliver immigrant legal services efficiently. See Stephen Manning, "Active Case Management for Successful Immigration Case Outcomes" (white paper, Innovation Law Lab, Portland, OR, March 2016).

¹⁹⁷ In September 2022, EOIR issued a rule allowing practitioners to provide document assistance to pro se noncitizens by entering a limited appearance. See DOJ, EOIR, "Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances," *Federal Register* 87, no. 177 (September 14, 2022): 56247–59.

- ▶ Each LOP provider should document the reasons why some detainees do not receive LOP services and find ways to ensure that as many detainees as possible are able to participate in the program. EOIR should also share these findings with detention facility staff and encourage them to handle the logistical arrangements necessary to ensure full access to the program for anyone interested.

9 Conclusion

In administering the nation's immigration court system, successive administrations have made numerous procedural and policy changes, sometimes building on one another, at other times dramatically changing course. The current administration has streamlined and professionalized the hiring and training of significant numbers of new judges, upgraded technology and video-conferencing capabilities, and introduced a series of promising process innovations. Nevertheless, the court system remains mired in deep crisis, with a pending caseload at an all-time high, insufficient staff and technology, and productivity rates that have fallen the more the caseload grows. While these problems date back decades, they have reached a level of dysfunction during the past five years that makes the need to rethink critical elements of the court system more urgent than ever.

The recommendations in this report address many of the most pressing issues threatening the viability of the court system. The proposals are guided by the principle that the nation's immigration courts should deliver fair, timely, and quality decisions. Among many critical issues, these recommendations propose steps to leverage limited legal support and representation resources to increase the legal advice available to respondents; better manage court dockets and thus reduce the case backlog; and centralize DHS's referrals of cases to EOIR and actively exercise prosecutorial discretion in initiating cases. These measures would focus scarce judicial resources on matters of highest priority and impact, both in granting cases that lead to protection and legal status in the United States, and in denying those that should then result in removal. In addition, the report calls for implementing the asylum officer rule to slow the growth of the courts' caseloads going forward and more swiftly grant protection to those eligible for it. Importantly, these measures can be accomplished through executive branch actions—a necessity in a time when Congress may appropriate some of the funding required for strengthening the court system but has proven itself unlikely to enact more ambitious changes.

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The implementation of these measures would enable the immigration court system to reduce case volumes, increase the pace of decision-making, and improve the quality of its adjudications. As such, they are also essential for mitigating migration pull factors that have been generated by years-long waits for asylum decisions, thereby undermining the integrity of the asylum system and immigration enforcement overall. To those ends, a nationwide effort at full-scale modernization and court reform is a central imperative going forward.

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