

Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication

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This draft report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees. *

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Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication

Executive Summary

“Immigration removal adjudication” involves non-citizens who contest efforts by Department of Homeland Security agents to remove (deport) them.

Three DHS agencies are involved: Citizenship and Immigration Services (CIS), Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). The removal process is used both to expel people who seek admission and are ineligible for entry and to remove those who are deportable after entry. Of the roughly 11 million persons in the country without authorization to remain in the U.S., DHS can seek to remove only a limited number. Congress has authorized DHS to use forms of administrative removal that do not require individualized hearings in an immigration court; a significant number of people are removed by these administrative procedures.

When DHS does not use administrative forms of removal or the statutes preclude those methods, the removal case is presented in the immigration courts of the Executive Office for Immigration Review, an agency of the Department of Justice. Several components of the DHS refer cases to these courts. The immigration courts conduct administrative adversarial hearings to determine whether the DHS may remove an individual. The courts include over 260 judges in 58 courts around the country. In 2010, these judges completed 287,207 proceedings, 14,899 motions (mainly to reconsider closed cases), and 51,141 bond hearings for persons in removal proceedings whom DHS has placed in detention.

Non-citizens in removal proceedings (respondents) may contest the charges that they are removable by claiming, e.g., that they have lawful status; are citizens; or are not in violation of the immigration statutes. Others may concede their removability but seek some kind of statutory relief from removability, such as asylum.

The government or the respondent may appeal an IJ decision to the EOIR’s Board of Immigration Appeals, and the non-citizen may appeal most BIA decisions to the U.S. court of appeals in the circuit in which the removal proceeding was held.

Immigration removal adjudication has been the object of considerable attention and controversy over the last 10 years, involving claims of inadequate resources (including but not limited to too few judges) and inadequate procedures (including but not limited to lack of adequate legal representation). EOIR has implemented all or most of 22 measures that Attorney General Gonzales ordered in 2006 in response to criticism. Observers have also said that immigration judges’ independent decision-making is threatened by their location with the Department of Justice, a law enforcement agency. The most prominent recent analysis was the 2010 report by the American Bar Association Commission on Immigration.

In March of 2011, the Administrative Conference asked us to assess immigration removal adjudication with special attention to the origin of removal adjudication in the agencies of the DHS (without assessing DHS prosecution policies); legal representation for those in removal proceeding; immigration court and BIA case management and court management, including the use of video conferencing for conducting immigration court matters; BIA decision-making; and additional topics if possible. We reviewed existing literature; conducted interviews with DHS and DOJ personnel, including immigration judges in several cities; studied published and specially generated data; and, as we were preparing this draft report, administered a 29-item questionnaire to all immigration judges. Our draft report has 63 recommendations, but the responses to our survey may yield additional recommendations as well as modifications to some recommendations in this draft report.

Because we believe increased resources for removal adjudication agencies, or restructuring those agencies or relocating them, are unlikely, we have focused our attention on “doing better with existing resources.”

We analyze the immigration removal adjudications in terms of three basic approaches to improving court effectiveness.

More Resources: Because of the unlikelihood of additional resources for immigration removal adjudication, we make only modest recommendations on this point. We endorse EOIR’s plans to implement regulations allowing the appointment from within EOIR and perhaps DOJ of temporary immigration judges (akin to regulations in place for temporary BIA members). We recommend that EOIR, to have a more accurate picture of its resource needs, consider developing a case weighting system to provide more accurate assessments of the relative time demands of different types of cases. We also recommend that EOIR, to facilitate analysis of its incoming caseload and relative workload needs, include in its data base the DHS agency that originated the “Notice to Appear” (NTA), the document that transfers cases to immigration court jurisdiction.

Shifting some adjudications to other forums: We make several recommendations to shift work currently performed by EOIR agencies to DHS agencies that can perform it as well or better. A principal form of relief from removal is asylum and related protections for aliens who can establish that they will likely suffer persecution if returned to their home country. DHS’s Citizenship and Immigration Services reviews and may grant such applications in some cases but in others the non-citizen must assert his or her claims in immigration court. We make several recommendations to provide the CIS asylum office a greater role in considering such applications, subject to immigration court review if CIS cannot grant the application. In a related vein, we make several recommendations to streamline the asylum application procedure within immigration court and to make greater use of a particular form of removal, known as stipulated removals.

As noted the Board of Immigration Appeals hears not only appeals from immigration judge decisions in removal matters but also appeals from some DHS agency decisions, most particularly CIS denials of petitions for family-based visas. We recommend that these non-immigration court appeals be resolved within CIS because there is no particular reason why they need BIA adjudication.

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Subject to further revision based on availability of additional data, including survey responses.

We also make several recommendations to shift administrative work from immigration court administrators or judges to DHS, namely maintenance of ICE trial attorney dockets and in tracking time on the “clock” that determines when asylum seekers may seek work authorization permits.

Process Modification:

We describe current DHS efforts to make its exercise of prosecutorial discretion more sophisticated, but we note findings from our interviews that judges see NTAs that seem inconsistent with DHS policy or that are legally insufficient. We endorse the ABA recommendation that, at least on a pilot basis, a DHS lawyer review all NTAs before they are filed with the immigration court.

The bulk of our recommendations involve different ways in which immigration courts (and to a much lesser degree, the BIA) handle their work.

Representation--Congress has provided that respondents are entitled to legal representation but at no cost to the government. About half of all respondents have lawyers or other representatives; a much smaller percentage of respondents held in detention have representation. Having representation and having adequate representation are two different things. We describe the cost to the government of this lack of adequate representation, such as dollars spent on months of detention for non-citizens whom a competent attorney would advise has no chance of success in removal proceedings.

EOIR has a highly acclaimed Legal Orientation Program that provides funds to local entities to deliver group presentations to detained respondents in order to familiarize them with immigration court procedures so they may better navigate the process without representation. We make several recommendations to enhance the availability of these presentations.

Several other recommendations promote the use of technology to enhance the availability of legal advice for respondents in remote detention centers, and encourage “limited appearances” by lawyers, especially pro bono counsel who may be able to represent respondents in some but not all phases of their removal proceedings.

Case management--We recommend several steps to enhance the availability of written or other advice to those in removal proceedings about proper and expected procedures, including but not limited to a pro se version of the Chief Immigration Judge’s generally well-received Practice Manual.

Pre-hearing or status conferences to narrow issues in dispute and have parties stipulate to certain matters have long been used in state and federal trial courts and have been recognized as legitimate tools in the immigration courts since EOIR’s creation in 1983. It is unclear how much immigration judges use such procedures, although our interviews suggest not much. We also suggest that the EOIR study how to encourage informal production of non-confidential records within the litigation file. Because they may in the long run save time for both judges and parties, we recommend, at the least, a pilot project to test their efficacy, and several related measures.

We also recommend EOIR receptivity to any plans that ICE may have for greater use of “vertical prosecution,” in which teams of prosecutors are assigned to the same judge and are responsible, collectively, for all prosecution related matters. Other recommendations suggest that immigration judge assert greater authority and demand more accountability by treating all ICE attorneys as responsible for the actions and omissions of other ICE attorneys in the same case.

We assessed adjournments (continuances) ordered by immigration judges in completed proceedings in three separate years. EOIR officials cautioned that the reasons judges assign for the adjournments may be misleading because a judge may order an adjournment for several reasons (e.g., both the respondent and the government asked for it for further preparation) but the judges may assign only one code to it (e.g., respondent or government requested). Nevertheless, we found a fair degree of consistency in the adjournment classifications in the three years, and found they called into question some of the conventional wisdom expressed to us in interviews (e.g., that a major cause of delay is the ICE attorney’s not having the file for the case). On the other hand in a few courts it appears that DHS delay was a significant factor. We thus recommend that EOIR explore whether the adjournment data might be a more valuable resource than currently assumed for assessing case management patterns nationwide and in particular courts.

Immigration judges have limited authority to sanction both private and government attorneys. We recommend that their authority be expanded in both situations and we suggest methods of expanding general discipline for attorneys and accredited representatives that direct greater education and training to improve the performance of these individuals.

The immigration courts make growing use of video conferencing (VTC) to hold hearings. Despite resistance by some attorneys who represent respondents, VTC is clearly here to stay, and its use will increase. We used data we requested from EOIR to analyze the use of VTC, including whether it appears to affect outcomes in cases involving asylum seekers. We make several recommendations about VTC, including revising the Practice Manual to provide more guidance about VTC proceedings, and more formal evaluations of its use in order to develop more systematic, fair, and effective use of VTC.

BIA procedures--We did not have the time to study BIA procedures to the same extent as we did immigration court procedures. After presenting data on rates of appeal to and from the BIA, we offer a single recommendation, that EOIR work actively to secure final approval of a 2008 proposed regulation to provide the BIA more flexibility in determining when to decide cases by single members or in three-judge panels. (Recall also that earlier we recommended diverting some cases from the BIA to DHS resolution.)

Immigration court management--Some of the most serious criticism of immigration courts over the last decade or so involves what some observers regard as inadequate procedures for judges’ selection, discipline, and performance monitoring. We were unable to study these matters in great detail, but we did learn enough to make several modest recommendations concerning the transparency of these processes. We also recommend that EOIR develop immigration court (as opposed to judge) performance measures, patterned after measures used in state and federal courts.

We assessed EOIR's management system for immigration courts nationwide, namely the use of 11 "Assistant Chief Immigration Judges," some based in the courts, some based in EOIR's Falls Church headquarters, to manage from four to nine courts across the country.

Provisional analysis and recommendations: Our analysis and recommendations await, not only the comments of the ACUS Adjudication Committee and ACUS's Immigration Court Working Group, but also, as noted above, the results of our survey of immigration judges. Those results may produce additional recommendations and modifications to current recommendations. We asked for responses by January 20.

I. Preamble

This draft report responds to a September 2010 Administrative Conference of the United States (ACUS) request for a study of immigration removal adjudication within the Executive Office for Immigration Review (EOIR). EOIR is a division within the Department of Justice (DOJ) that contains the immigration courts and the Board of Immigration Appeals (BIA). This draft report concerns EOIR's removal adjudication of non-citizens charged by the Department of Homeland Security (DHS) with violating immigration laws.

Based on proposals that we submitted, independently of one another, and follow-up discussion with Administrative Conference staff, we signed a joint research contract in March 2011 (modified slightly in August 2011). In this contract we agreed to submit an interim draft report by December 19 and a final draft report by February 1, 2012.

We agreed to formulate recommendations for the Conference's consideration about:

- the origin of removal cases in the DHS (without assessing DHS prosecution policies per se);
- legal representation for those in removal proceedings;
- immigration court and BIA case management and court management practices, including the immigration courts' use of video hearings;
- BIA decision-making; and
- additional topics if possible.

We agreed to base our report on reviews of the immigration removal adjudication literature, interviews with public and private individuals, and "within the time limits and resource constraints of the project, other types of analyses of immigration adjudication."

II. Framework for Analysis and Methods

A. *Framework*

The EOIR (and thus the immigration courts) is part of the executive branch, not the federal judicial system authorized by Article III of the Constitution. Nevertheless, given the importance of the immigration courts—to the nation and to those the government seeks to remove from the country (and their families, employers, and employees)—as well as the courts' size, geographic dispersion, and adversary procedures, we have sometimes looked to the nation's federal and state judicial systems for comparative analysis.

In general, three broad approaches are available to a court system that may not be meeting some elements of the three-pronged standard of just, speedy, and inexpensive determination of matters submitted to it. Those three approaches—hardly mutually exclusive—are to increase the system's resources; to reduce demand for the system's services; and to change how it does its work, which may include structural

reorganization. We operated on the basic assumption that given fiscal realities, Congress would be extremely unlikely to increase significantly the resources for immigration removal adjudication agencies. Thus, this report is designed on the principal of “doing better” with existing resources. We also worked with the assumption that the current statutory and regulatory framework governing EOIR’s components and the matters before those agencies were unlikely to change. Our analysis and recommendations center on forum shifting and changes in some of the ways work is managed in the removal adjudication process.

Furthermore, given the preferences of Administrative Conference staff and the limits on our time and resources, we have not examined DHS prosecution priorities or considered substantive changes in the nation’s immigration laws and policies. We have recommended some seemingly technical changes to statutes and the Code of Federal Regulations, but we have directed primary attention to practical changes that are within the authority of EOIR or individual immigration judges to implement. We have referenced, and sometimes endorsed, others’ proposals for statutory changes.

Removal adjudication is part of the civil enforcement of federal immigration laws. We do not deal with federal criminal prosecution of immigration crimes such as smuggling or unlawful reentry. In fact, though, immigration criminal prosecutions constitute a major element of all criminal filings in the U.S. district courts—28,046 filings in 2010, or 36 percent of all criminal filings. Filings alleging immigration crimes have increased 72 percent since 2006,¹ largely as a result of vigorous enforcement efforts along the southwest border. In the District of Arizona, for example, immigration offenses made up over half of the criminal filings in 2010.²

B. Methods

Assistant Chief Immigration Judge Edward Kelly was our liaison with the EOIR and with personnel of the Office of the Chief Immigration Judge (OCIJ) in particular. He is also the EOIR liaison member to ACUS. He has been uniformly helpful and cheerful in helping us with all aspects of our inquiry.

1. Literature and other information sources

Popular, academic, and government publications about immigrant removal adjudication have informed our analyses, as have sources of quantitative information about removal adjudication, namely EOIR’s Statistical Year Book; reports of the Transactional Records

¹ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS JUDICIAL BUSINESS OF THE UNITED STATES COURTS at 222-29 (2010) available at www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf.

² See *id.* at 230-41; see also Transactional Records Access Clearinghouse, *Illegal Reentry Becomes Top Criminal Charge*, SYRACUSE UNIV., (June 10, 2011), <http://trac.edu/immigration/reports/251/> (reporting that in the first six months of fiscal year 2011, the major immigration criminal offense, illegal reentry, was the “most commonly recorded lead charge brought by federal prosecutors”).

Access Clearinghouse; and data maintained by the Administrative Office of the U.S. Courts. In addition, EOIR's Office of Planning, Analysis, and Technology graciously produced two series of particularized data runs—over 20 separate data sets—for us in response to our requests.

2. Interviews

We began our research in late April with the first of a series of extensive meetings with EOIR Director Juan Osuna, complemented by interviews and discussions with other personnel at EOIR's headquarters in Falls Church, Virginia. Later we spoke with judges and support personnel in ten immigration courts around the country. The respective assistant chief immigration judge who supervises the particular court arranged the interviews and participated in them. In addition to these principal interviews, we also spoke informally with a few judges and others in EOIR. Early on, we also arranged to speak with officials in DHS agencies involved in filing and prosecuting removal cases in the immigration courts and with DOJ officials who argue cases in the courts of appeals. We met with attorneys who represent respondents in removal proceedings, both individual attorneys and members of groups providing representation pro bono in various forms.

We also spoke with officials of another high volume federal administrative adjudicative agency, the Board of Veterans' Appeals in the Department of Veterans Affairs and tried to meet with officials of the Social Security Administration's Office of Disability Adjudication and Review but were unable to do so because of scheduling conflicts. Procedures in both agencies are quite different from those in the immigration courts.

We promised those with whom we spoke that we would not quote them by name; we have indicated position or affiliation when necessary to establish context.

Our research for this report hinged on the cooperation of EOIR and DHS's immigration-related components, and, subject to certain institutional constraints and the press of time and other business, such cooperation was fully forthcoming.

Appendix 1 lists the agencies, offices, and immigration courts in which we conducted our interviews, the number of interviewees, and the dates of our meetings.

3. Survey

Our interviews, and the literature about removal adjudication, yielded an array of opinions and factual assertions. To get more reliable and systematic assessment of immigration judges' attitudes and practices, in January 2012, we distributed a 29-item online survey to all immigration judges. OCIJ personnel agreed to alert the judges to the survey and make clear they were permitted to respond to it. Those personnel insisted that they be permitted to vet the questions in draft. Pursuant to that process, we removed some of the questions we had intended to ask. We also agreed that the survey should be totally anonymous—precluding even identification of court size and time in office. As a result, however, we are somewhat limited in the analysis we can derive from the responses. We

acknowledge that the survey responses in no way reflect any official position of the DOJ, EOIR, or any other agency or organization.

We were unable to secure permission to survey the court administrators.

4. Consultation within the Administrative Conference

We consulted with the staff of the Administrative Conference and with members of two groups. One is the ACUS standing Committee on Adjudication, under whose jurisdiction we conducted the study. ACUS also assembled a 16-member Removal Adjudication Project Working Group. The group includes practitioners and scholars knowledgeable in administrative and other forms of adjudication. The members of both groups are in Appendix 2.

C. Other General Comments on this Report

We note in various places that the time constraints of this project precluded analysis we would have preferred to pursue and that are probably worthy of additional ACUS examinations.

Some of our recommendations come close to stating the obvious. Some echo ideas that others have advanced; some echo current proposals on which EOIR, or others, are working. We include them in our report to give weight and visibility to them.

III. Immigration Removal Adjudication: Overview of Organization and Processes

This report is almost entirely about removal adjudication in the EOIR. That adjudication is instigated by agencies within the DHS, and is governed principally by the Immigration and Naturalization Act of 1952, as amended (INA, codified in Title 8 of the U.S. Code), and provisions in Title 8 of the Code of Federal Regulations.

A. Department of Homeland Security

There are three principal DHS agencies involved in immigration removal adjudication.

- Citizenship and Immigration Services (CIS), which administers most benefit programs including visa petitions and naturalization applications. CIS also contains the Asylum Office;
- Customs and Border Protection (CBP), which is responsible for securing the borders from illegal entry of non-citizens through border inspection and patrol; and
- Immigration and Customs Enforcement (ICE), which is responsible through its Enforcement and Removal Operation for identifying, apprehending, detaining, and removing people who are ineligible to be here.

Prior to DHS's creation in 2003, the government's deportation prosecution and adjudication functions were both housed in the DOJ, albeit in separate agencies—the

Immigration and Naturalization Service (INS) for benefits and enforcement and EOIR for removal adjudication. When Congress created DHS, it abolished the INS and transferred its enforcement, benefits, and prosecution functions to DHS. It left EOIR within the DOJ.

B. The Executive Office for Immigration Review

In 1983, the DOJ created EOIR through a reorganization. EOIR gained statutory recognition soon thereafter.³

EOIR houses both the immigration courts and the BIA. It exercises authority delegated by the Attorney General within a framework of statutes and administrative regulations. In EOIR's words, it "primarily decides whether foreign-born individuals[] who are charged by the Department of Homeland Security . . . with violating immigration law, should be ordered removed from the United States or should be granted relief or protection from removal and be permitted to remain in this country."⁴

The Attorney General appoints the EOIR Director. The Director is assisted by a Deputy Director, who is responsible generally for the adjudication-related components of EOIR and an associate director, who is responsible generally for its management-related component. As of December 2011, the Deputy Director position had been vacant for approximately six months, although an active search was underway to fill it. EOIR's Legal Orientation and Pro Bono Program (LOP) was recently transferred from the BIA to the Director's Office; this program recruits non-profit organizations to provide basic legal briefings to detained respondents and seeks to attract pro bono legal providers to represent them. It also administers EOIR's program to certify pro bono organizations and accredit non-lawyers to assist respondents in removal proceedings.

We did not study EOIR's Office of the Chief Administrative Hearing Officer (OCAHO), a small group of Administrative Procedure Act administrative law judges who hear cases (less than 100 last year)⁵ involving employer verification of work authorization violations, immigration related document fraud, and failure to comply with statutory international information dissemination requirements.

EOIR's appropriation for fiscal 2012 is currently slightly less than \$305,000,000.⁶ EOIR does not report, at least publically, the dollar allocations to its several components.

³ "There is in the Department of Justice the Executive Office of Immigration Review, which shall be subject to the direction and regulation of the Attorney General under section 1103(g) of title 8." 6 U.S.C. § 521(a)(1) (2006).

⁴ Executive Office for Immigration Review, *EOIR at a Glance*, U.S. DEP'T OF JUST. (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

⁵ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FY 2010 STATISTICAL YEAR BOOK, Z1 (2011) available at www.justice.gov/eoir/statspub/fy10syb.pdf. [Hereinafter *Statistical Year Book, 2010*].

⁶ Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552 (the figure for the subcategory of the Justice Department budget for "Administrative Review and Appeals," which includes EOIR and the Office of the Pardon Attorney, but the latter is a tiny part of the subcategory, less than one percent).

However, an estimate of the allocations for the 2010 appropriation of \$300,685,000,⁷ based on DOJ reported object class allocations and personnel figures provided by EOIR's Public Affairs Office, concluded that the immigration courts in 2010 received approximately 40 percent of the appropriation, the BIA 32 percent, EOIR's central offices 26 percent, and OCAHO 3 percent. By that same estimate, in 2010, EOIR had 1,561 full-time permanent positions, of which 500 were attorney positions. In late 2011 it had 1,533 full-time permanent positions, 1,296 of which were filled. Of the total number of positions, 508 were attorney positions, 464 of which were filled.⁸

1. Immigration Courts

As of December 2011, EOIR has established 58 immigration courts in 27 states and two territories. The courts are staffed by over 260 immigration judges and supporting staff. The number of judges per court ranges from less than one (a judge splits time between two courts) to 31. The average size is 4.8 judges. Eighteen courts have two judges (the common, or modal, size); eleven courts have three judges; and five have nine or more judges. Appendix 3 lists, among other things, the immigration courts and the number of judges in each court as reported on EOIR's website in early December 2011.

Some courts are located within or near facilities for aliens whom DHS has arrested and detained, pending disposition of their removal adjudication. According to EOIR officials, in addition to the court locations themselves, there were in 2010 about 150 additional hearing locations within the courts' jurisdiction. These principally were in DHS offices and state and local jails where DHS detains aliens.

The judges and staff are within the OCIJ. The OCIJ also includes a deputy chief immigration judge, and eleven assistant chief immigration judges (ACIJs), all appointed by the Attorney General.⁹ Each ACIJ supervises at least four immigration courts, and several supervise more (up to nine). In addition to court management duties, one of the ACIJs is responsible for managing immigration judge "conduct and professionalism" and one for managing immigration judge "training and education." Those two ACIJs and four others are based in EOIR's Falls Church, Virginia, headquarters. The others are based in one of the courts they supervise. Within each court is a "liaison judge" to the ACIJ and "pro bono liaison" judge to oversee the court's pro bono efforts.¹⁰ In consultation with the judges in the respective courts, the ACIJ designates both the liaison judge and pro

⁷ See Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1862, n.71 (2010).

⁸ EOIR PERSONNEL STATISTICS, provided by EOIR (on file with author).

⁹ For biographical information of immigration judges within OCIJ, see Executive Office for Immigration Review, *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST. (Apr. 2011) <http://www.justice.gov/eoir/fs/ocijbio.htm>.

¹⁰ David Neal, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2008), available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf> [Hereinafter *OPPM: Facilitating Pro Bono Legal Services*].

bono liaison judge. Service is sometimes on a rotational basis. Each court also has a court administrator, who is hired through standard civil service appointment procedures.

Immigration judges are not “administrative law judges” under the APA, but rather career attorneys in the excepted service.¹¹ As members of the excepted service, they are employed for indefinite terms and not subject to many of the personnel regulations that govern employees in the regular civil service. Congress defines an immigration judge as “an attorney whom the Attorney General appoints as an administrative judge” and says that immigration judges are “subject to such supervision and shall perform such duties as the Attorney General shall prescribe.”¹² The DOJ itself refers to immigration judges “as the Attorney General’s delegates in the cases that come before them,”¹³ but adds that “[i]n deciding the individual cases that come before them, and subject to applicable governing standards, [they] shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [Immigration and Nationality] Act.”¹⁴ The Chief Immigration Judge selects immigration judges through a competitive process in which the ACIJs participate. See discussion in Section V.D. below. (Hereafter in this report, unless otherwise indicated, “judge” means “immigration judge.”)

EOIR has a collective bargaining agreement with the National Association of Immigration Judges, which describes itself as “a professional association of immigration judges and also the certified representative and recognized collective bargaining unit that represents the immigration judges of the United States.”¹⁵ According to union leadership, a large majority of judges belong to the Association.

2. Board of Immigration Appeals

The BIA hears appeals from immigration court and, to a lesser extent, some DHS agencies. BIA decisions are binding unless modified or overruled by the Attorney General or a federal appellate court. The main work of the BIA is reviewing removal decisions.

The INA does not define the BIA. Instead, implementing regulations create the BIA and specify its size of 15 members (including a chair), all appointed by the Attorney General.¹⁶ Regulations also authorize the EOIR Director to designate temporary BIA members from among immigration judges, retired BIA members, retired immigration

¹¹ See 5 C.F.R. § 302; <http://www.doi.gov/hrm/pmanager/st6b.html>.

¹² INA § 101(b)(4) (2006); 8 U.S.C. § 1101(b)(4) (2006).

¹³ 8 C.F.R. § 1003.10(a) (2010).

¹⁴ 8 C.F.R. § 1003.10(b) (2010).

¹⁵ Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a “Government Attorney” or by a “Judge”?*, 16 BENDER’S IMMIGR. BULL. 1785 (2011).

¹⁶ 8 C.F.R. § 1003.1(a)(1) (2010).

judges, and certain other EOIR officials. As of early December 2011, the BIA had 14 members and four temporary members. Their biographies are available on the EOIR website.¹⁷ The Acting Chair is currently leading the search for a permanent BIA Chair.

C. Removal Adjudication Processes

Although variations abound, immigration removal adjudication generally involves one or more of four steps:

- charging decisions and some dispositions within DHS;
- immigration court adjudications;
- administrative appeals of judges' decisions to the BIA; and
- judicial appeals of BIA decisions to the federal court of appeals for the circuit in which the judge completed the immigration court proceeding.

U.S. district courts are not part of the adjudication removal process save in rare instances of habeas corpus review of some fast track removal orders. District courts are involved in litigation challenging agency procedures or providing APA review of denied visa petitions where the petition is not a part of a removal case.

1. Forms of Removal

Most estimates are that roughly 11,000,000 people in the United States are not citizens or in valid immigrant status.¹⁸ That number dwarfs the number of non-citizens whom DHS can realistically prosecute, given limits on resources such as field agents and detention space. As described later, periodic policy directives from ICE (and before it INS, starting at least as early as 1976) set prosecution priorities for field officers.

There are many reasons why a person is removable from the U.S. Some never had a legal entry and are residing in the U.S. without authorization. Many entered lawfully with valid documents but have remained beyond any authorized stay. Others have legal status but have committed an offense that renders them subject to removal, such as smuggling a person into the country, overstaying a period or violating a condition of an authorized stay.¹⁹ Removal proceedings also include some people who are seeking entry into the U.S. and whom the government believes are statutorily inadmissible; they are removable because the statute bars their admission.²⁰ As is discussed below, some people can be

¹⁷ See *Board of Immigration Appeals*, U.S. DEP'T JUST. (Nov. 2011) <http://www.justice.gov/eoir/fs/biabios.htm>.

¹⁸ RUTH ELLEN WASEM, CONG. RESEARCH SERV. RL 33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986 (2011) available at <http://fpc.state.gov/documents/organization/174245.pdf>.

¹⁹ See generally INA § 237(a) (2010); 8 U.S.C. § 1227(a) (2006) for grounds of removal.

²⁰ See generally INA § 237(a)(1) 8 U.S.C. § 1227(a)(1) (2006) and the grounds of inadmissibility found in INA § 212; 8 U.S.C. § 1182 (2006).

denied admission at the border under an expedited removal procedure that generally does not involve immigration court review.²¹ Prior to 1997, the INA divided these proceedings into deportation and exclusion hearings.

In general, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE), apprehend non-citizens whom they suspect are ineligible to be here—CBP at the border, ICE in the interior—including when state and local law enforcement agencies inform ICE that they have custody of non-citizens who may be removable. In some situations, officers may give an individual permission to voluntarily return to their home country.²² Alternatively, officers may put individuals in immigration court removal proceedings, or in some situations, formally remove them without immigration court intervention.²³ In 2010, DHS made almost 517,000 apprehensions, 90 percent of them by CBP. In addition, CBP returned approximately 476,000 entrants to their home country without a removal order (the great majority were from Mexico and Canada).²⁴

At various times, CBP has coordinated enforcement with the U.S. Attorney in a border state. Part of CBP's enforcement policy in southern Arizona, for example, is to use criminal enforcement for as many cases as the federal district court can accommodate and to take those cases that could not be criminally prosecuted to the immigration court under a policy known as the Consequence Delivery System.²⁵ So, at least in one part of the United States, there seems to be a direct relationship between the daily workload of the immigration courts and the ability of district courts to enforce crimes relating to illegal entry.

DHS effected 396,906 removals in FY2011,²⁶ up from 189,000 in 2001.²⁷ Congress has greatly expanded the funding and resources for border enforcement. The Bush and

²¹ See INA § 235(b); 8 U.S.C. § 1225(b) (2006).

²² The official regulations governing voluntary departure in lieu of being placed in removal proceedings are found at 8 C.F.R. § 240.25 (2010).

²³ See discussion *infra* at Section a, at 16.

²⁴ U.S. Dep't of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2010 (2011), at 3,4 available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> [hereinafter *DHS Immigration Enforcement Actions, 2010*].

²⁵ See also *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?* Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security, 112th Cong. (2011) (statement of Michael J. Fisher, Chief, U.S. Border Patrol, U.S. Customs and Border Protection) and Aguilar's Aff. at 7 United States v. Arizona, No. 2:10-CV-951 (D. Ariz. July 6, 2010) (available at <http://www.justice.gov/opa/documents/declaration-of-david-aguilar.pdf>) (describing the federal government's activity in this region).

²⁶ *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 18, 2011), <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>.

²⁷ *DHS Immigration Enforcement Actions, 2010*, *supra* note 24, at 4.

Obama administrations have also posted members of the National Guard along the southern border.²⁸

a. Administrative Removal without Immigration Court Review

Congress has authorized DHS officers to issue removal orders in some cases without immigration court review or participation. The American Bar Association Commission on Immigration said these non-judicial removals implement Congress's intention to reduce immigration court workload through administrative removal of individuals whose lack of authorization to be in the country is "indisputable." That word comes from the legislative history of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act,²⁹ but establishing "indisputability" in the removal context is hardly a simple task.

DHS officers may order the "expedited removal" of aliens whom they apprehend at ports of entry without valid documentation or who have committed fraud or misrepresentation to gain entry, as well as those apprehended within 100 miles from the border who were not properly admitted and have not persuaded an immigration officer that they have been in the country for at least two weeks. As explained in more detail later, people in expedited removal proceedings have no recourse to the immigration courts unless they claim U.S. citizenship, permanent resident status or more commonly, state that they want to seek asylum or that they fear persecution or torture if returned to the home country. Thirty seven percent of the 189,000 removals in 2001 were expedited removals. By 2010, that percent was down slightly, to 29 percent of 387,000 total removals.³⁰

DHS officers may also remove aliens who had left the country under a removal order and then illegally reentered the United States. The prior order of removal is the basis for the subsequent removal, and there is no immigration court role in these § 241 reinstatement of final removal orders. One of the few exceptions to DHS's authority to reinstate a prior order of removal is if a non-citizen makes a claim of withholding of removal due to a fear of persecution or torture. Almost 131,000 of 2010 removals (about 34 percent) were by reinstatement of final removal orders.³¹

Similarly, ICE may use a form of "hearingless" or administrative removal by serving notice of intent to remove non-citizens who have been convicted of an "aggravated felony" as defined in the INA and implementing regulations and do not have permanent

²⁸ See, e.g., National Guard Supports Border Security Efforts, CPB.GOV (Mar. 1, 2011), http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/03012011_7.xml.

²⁹ AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-49 (2010) available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report_authcheckdam.pdf, citing ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2004) [Hereinafter *ABA Comm'n on Immigr. Rept., 2010*].

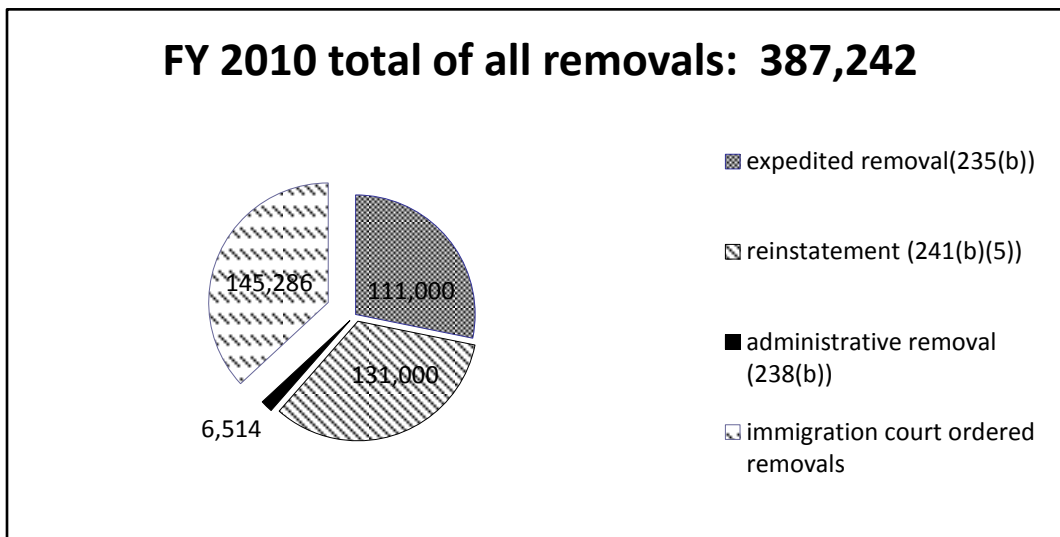
³⁰ *DHS Immigration Enforcement Actions, 2010*, *supra* note 24, at 4.

³¹ *Id.*

residency status.³² The INA has a long list of possible convictions and types of crimes that may constitute aggravated felonies. This is a very complex area of the law. A conviction, for example, can be a misdemeanor and yet qualify as a felony in immigration matters. Non-citizens can be subject to removal for criminal conduct that is not an aggravated felony.³³ Which crimes actually are included within the statutory definition is frequently the subject of immigration court litigation. The individual has a chance to rebut the allegations by written submission only and must do so within fourteen days or may waive rebuttal. There is no immigration court role in these § 238 removals. People subject to these removal orders can seek a limited petition for review in the courts of appeal.

In sum, DHS in 2010 effected over two thirds of removals without any adjudication within the immigration courts, as seen in this chart.

Chart 1: Forms of Removal, 2010*



* 2010 data except § 238(b) administrative removals data are based on 2008, the most recent year of published data. A request to ICE for current data is pending as of December 29, 2011.

b. Agency Filings in the Immigration Courts

Jurisdiction transfers from DHS to the immigration court when the DHS officer files, with the court, a “Notice to Appear” (NTA), which is essentially a charging document.

³² See INA § 101(a)(43) (2010); 8 U.S.C. § 1101(a)(43) (2006).

³³ See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 75-78 (2010) (describing INA § 238 removal procedures and the complexity of the aggravated felony definition); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in the Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (describing complex immigration issues and analysis interpreting the consequences of criminal convictions).

Total NTAs rose from over 153,000 in 2004 to over 221,000 in 2009.³⁴ The latest available data indicate that in 2008, ICE issued about 62 percent of all NTAs, CBP issued about 20 percent, and CIS about 18 percent. CPB-issued NTAs dropped from about 55 percent in 2006, and ICE's NTAs rose from about 30 percent that year.³⁵ When we asked for these data in our interviews, EOIR, DHS and DOJ personnel told us that the NTA-originating agency is not coded in statistical reports. Our interviewees' estimates of the source of NTAs varied considerably—some put CIS's share at 50 percent, for example, others put it at 20 percent.

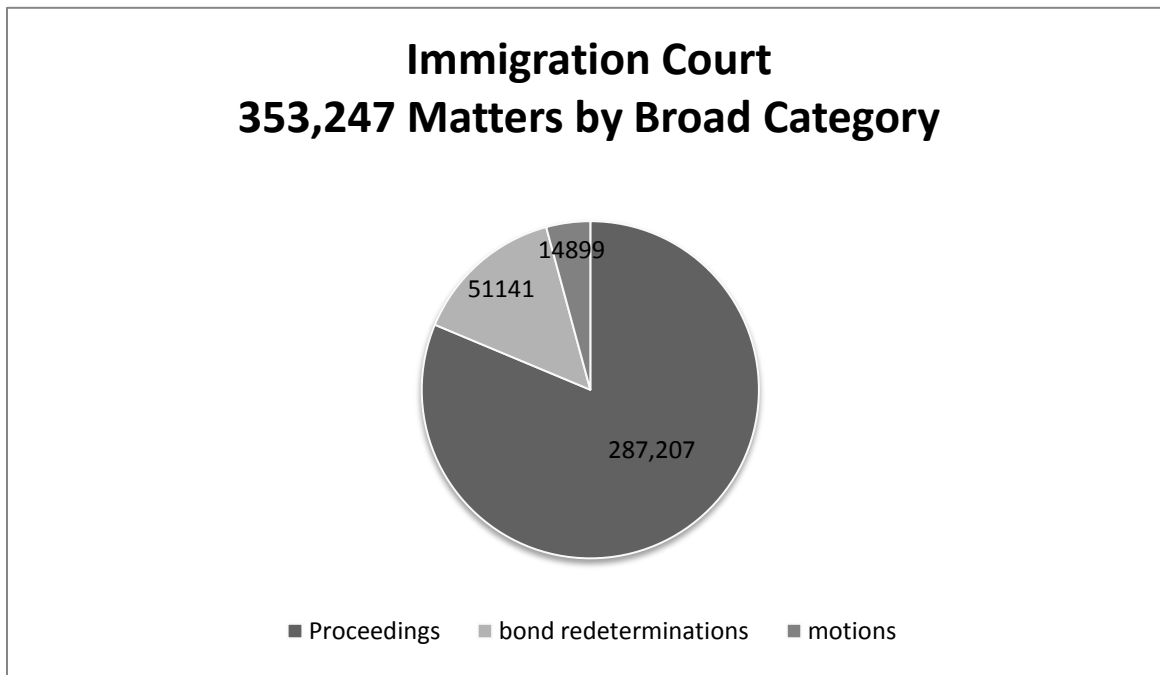
2. Immigration Courts

The immigration courts' main business is to conduct "proceedings," which determine whether to remove someone about whom a DHS officer has filed an NTA. Auxiliary to proceedings are two other types of "matters:" bond redetermination hearings (for respondents in DHS detention); and motions (principally to reopen or reconsider closed cases). The same respondent may account for several matters in the same or different fiscal years—for example, a request for bond reduction and a proceeding to seek relief from removal. In FY2010, immigration courts completed 353,247 matters—287,207 proceedings, 51,141 bond redeterminations, and 14,899 motions. The chart shows the breakdown:

³⁴ *ABA Comm'n on Immigr. Rept., 2010, supra* note 29, at 1-13.

³⁵ *Id.*, at 1-12-1-15, based on data that DHS generated on request.

Chart 2: Matters by Broad Category



a. Proceedings

Proceedings are adjudications between DHS and an individual respondent. In proceedings, immigration judges principally exercise the authority granted or delegated to them in § 240 of the INA, DOJ regulations, and decisions by the BIA and the U.S. courts of appeals.

Proceedings in immigration court basically implicate two questions: is the respondent in the country illegally and, if so, is the respondent nevertheless eligible for one of the limited forms of statutory relief from removal, such as asylum. Immigration judges have no inherent or equitable authority to grant relief; they may only grant forms of relief created by Congress.

Proceedings begin and may end with an initial “master calendar” hearing. If a case does not conclude at the master calendar, it can extend to an “individual calendar” hearing to adjudicate the merits of the case. In some matters, the judge may use additional master calendar hearings or schedule some form of a pre-hearing or status conference (generally not referred to by those names. (Master calendar as used here mean something different than the term does in other court settings where the term refers to a trial court case management system in which different judges handle different stages of a case.)

[1] Master Calendar Hearing

Although removal adjudications are civil proceedings, the master calendar is frequently analogized to a criminal arraignment. At a master calendar hearing, the respondent, or often a group of respondents, appear(s) before a judge, who seeks to ascertain if the

respondents understand the charges in the NTA and notifies them of their right to be represented by counsel (or a non-lawyer accredited representative), albeit at no cost to the government. Further, at the master calendar the judge determines the need for translation services; directs the respondent or counsel to admit or deny the charges; and explains types of relief to which the respondent may be eligible and asks whether the respondent will apply for relief.

[2] Individual Calendar Hearing

In most cases, at the master calendar hearing or at some later date, the immigration judge schedules a hearing at which DHS and the respondent can present evidence about the merits of the case. As some stage in the process, the vast majority of respondents concede the allegations; however, some go on to seek relief.

[3] Pre-hearing, or Status, Conferences

Commonplace in civil litigation in state and federal courts are conferences in which the parties and the judge, or the parties on their own, meet prior to the merits hearing (in person or through document exchanges) to narrow issues and otherwise prepare for the merits hearing. Such events, although authorized by EOIR's governing regulations and policy, apparently occur infrequently in immigration court.

b. Types of Dispositions of Proceedings

[1] Merits Decisions and Other Completions

In fiscal 2010 immigration judges completed 287,207 proceedings. They rendered merits decisions in 222,909 of those completed proceedings. The other 64,298 were closed administratively or transferred to a different location or granted a change of venue.³⁶

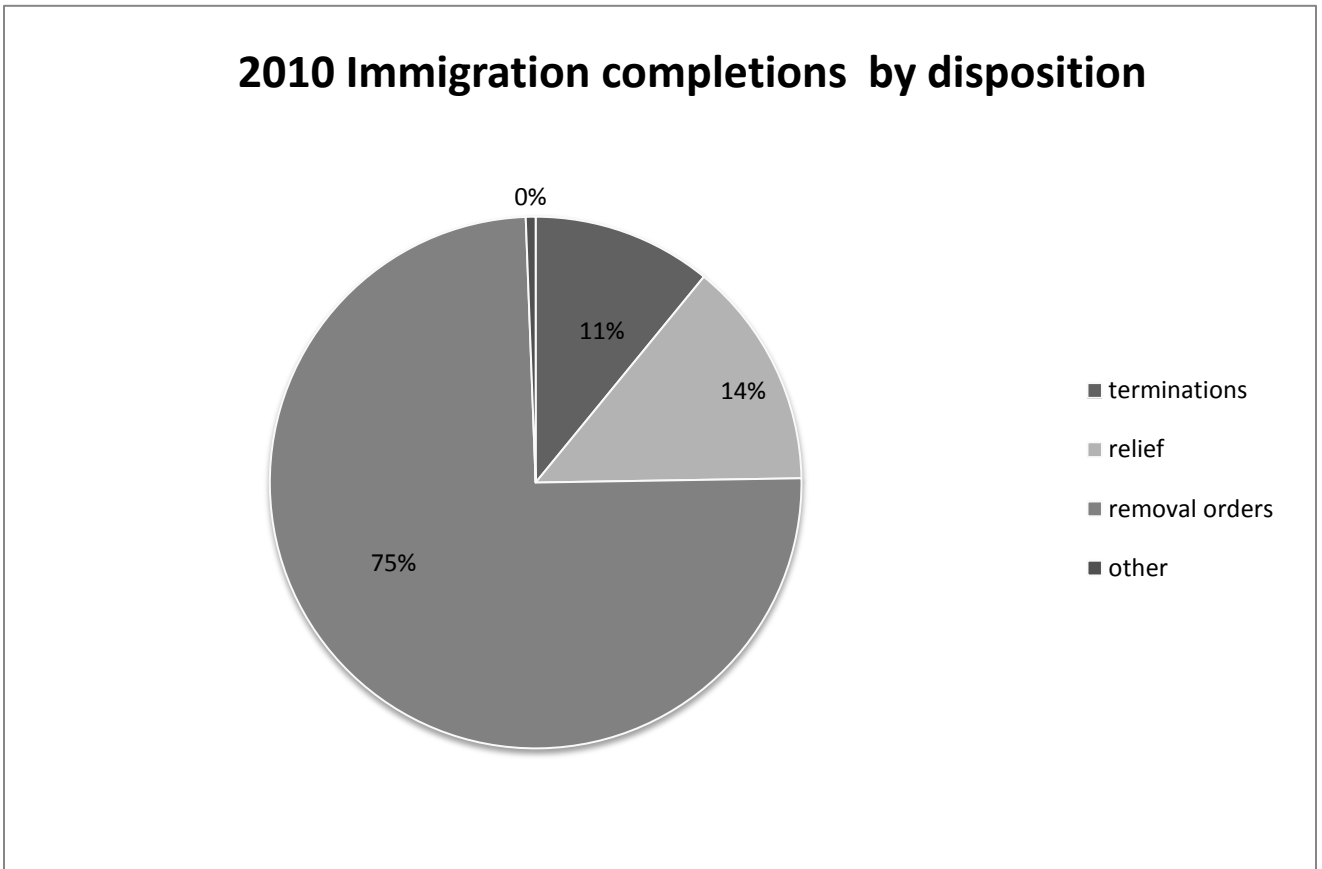
The 222,909 merits decisions comprised four types of dispositions:

- 24,317 “terminations,” in which the judge decided that the government could not sustain the charges it filed against the respondent, the respondent established eligibility for naturalization, or the government agreed to terminate the prosecution;
- 30,838 grants of “relief,” such as asylum;
- 166,424 orders of removal; and
- 1,330 decisions categorized as “other.”

The Chart 3 shows the breakdown graphically:

³⁶ *Statistical Year Book, 2010*, *supra* note 5, at D-2.

Chart 3: 2010 Immigration Completions by Disposition



As Table A and the illustrative Chart 4 below show, there has been a decrease in merits decisions over the past five years (from over 273,000 to about 223,000), and a corresponding decline in removal orders (from slightly over 222,000 to about 166,000). Orders granting relief fell from about 34,000 to about 31,000 and terminations increased from about 16,000 to 24,000.³⁷

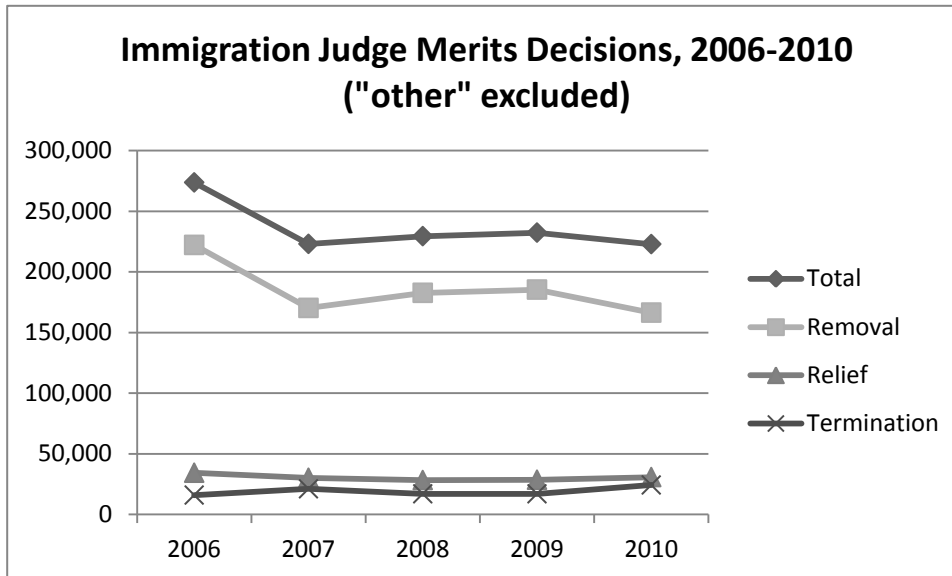
Table A: Immigration Judge Merit Decisions 2006-2010*

	2006	2007	2008	2009	2010
Total	273,761	223,085	229,463	232,385	222,909
Removal	222,211	170,291	182,720	185,410	166,424
Relief	34,411	30,264	28,369	28,664	30,838
Termination	15,985	21,146	17,033	17,035	24,317

*A small number of “other” decisions are not shown.

³⁷ *Id.*

Chart 4: Immigration Judge Merits Decisions 2006-2010



[2] Special Categories of Removal

[a] In absentia dispositions

Some of the final decisions rendered by judges involve respondents who fail to appear at a hearing. In that situation, if the judge is satisfied that the respondent or counsel received notice of the hearing and the government establishes clearly that the respondent is removable, the judge may order the respondent removed in absentia. In absentia removal orders constituted 26 percent of judges' decision in 2010 for respondents whom DHS detained at no time during the proceedings (down from 59 percent in 2006) and 21 percent, for aliens who had been released from detention (down from 32 percent in 2006). (Obviously, respondents in detention rarely fail to appear.)³⁸ We do not know the reason for the decline in the total number of in absentia orders; many factors may have contributed to the decline.

[b] Stipulated removal orders

Judges also issue a form of removal called a "stipulated removal order."³⁹ These orders are not scheduled as "hearings" either master calendar or individual hearings. In fiscal

³⁸ *Id.* at H2-3.

³⁹ See Brian M. O'Leary, Chief Judge, *Operating Procedures and Policy Memorandum 10-01: Procedures for Handling Requests for a Stipulated Removal Order*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2010) available at <http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf> [Hereinafter *OPPM: Stipulated Removals*].

year 2010, judges signed 27,943 stipulated removal orders.⁴⁰ In these removals, the DHS counsels the respondent about his or her ability to waive the removal hearing and the consequences of agreeing to the issuance of an immediate removal order. Some judges waive the respondent's appearance and sign the removal order after they have reviewed the evidence of service and a signed waiver of hearing from the respondent. Other judges interview the respondent to determine if the waiver of the hearing was "knowing and voluntary."

Critics of stipulated removal are concerned that unrepresented respondents may not understand the rights they are waiving and may be agreeing to stipulated removal solely to avoid lengthy DHS detention.⁴¹ Others believe this procedure helps the respondent complete the removal process quickly and is more efficient than requiring mass removal hearings where the judge may spend several hours to confirm each respondent's desire to accept an order of removal and depart. Not all immigration courts have seen requests from DHS for stipulated removals orders. At least one court only saw them used when the stipulation was part of a plea bargain in a criminal proceeding and criminal defense counsel represented the respondents. Appendix 4 shows the number of such orders issued by immigration courts in 2009 and 2010.

[c] Voluntary departure

Judges may permit some respondents to depart the United States voluntarily rather than subject to an order of removal. EOIR categorizes a grant of "voluntary departure" as a form of removal rather than a form of relief. While a person who receives voluntary departure is not allowed to remain indefinitely within the U.S. (the order can only grant a period of up to 120 days), the long-term consequences of departing under this order as opposed to an order of removal can be quite dramatic and much to the respondent's benefit. Not every respondent is eligible for voluntary departure and the ultimate decision to grant the privilege is within the discretion of the judge. Of the 166,424 immigration court removal orders in 2010, 27,560 were voluntary departures.⁴² DHS officials can also grant voluntary departure to individuals who are apprehended in the field including those who do not appear in removal proceedings.⁴³

⁴⁰ OFFICE OF PLANNING, ANALYSIS AND TECHNOLOGY DATA, provided by OPAT (on file with author) [Hereinafter *OPAT DATA*].

⁴¹ *SEE* JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS (2011) available at <https://nilc.org/document.html?id=6>.

⁴² *Statistical Year Book, 2010*, *supra* note 5, at Q1.

⁴³ These voluntary departures are not included in the immigration court statistics. *See* INA § 240B(d); 8 U.S.C. 1229(c) (2006) for voluntary departure post 1996. *See* 5 STEPHEN YALE-LOEHR & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 64.5 (Matthew Bender ed.).

c. Additional Aspects of Immigration Court Matters

[1] Detained Cases

DHS officers who place people in removal proceedings may, and in some cases must, detain them for all or part of the time until the case is resolved. DHS holds people in some DHS-managed facilities, some that are under the management of the Federal Bureau of Prisons, some that are run by private contracting corporations, and in many spaces rented from state and local jails.⁴⁴ Some immigration court proceedings are held within or adjacent to detention centers. DHS detention policies have been a source of considerable controversy. Although we visited a few immigration court detention sites, and met with advocates and leaders of non-profit organizations that regularly represent detained individuals, we did not have time or resources to thoroughly examine the impact detention conditions have on immigration court proceedings.

Of the completed proceedings in fiscal year 2010, 44 percent involved respondents who were detained during the adjudication, but the percentages varied by court—from one to over 90 percent.⁴⁵ Even immigration courts not located within detention facilities may have a very high detained docket, for example the immigration court in Tucson. Appendix 3 shows the percentage of detained proceedings for each court in 2010.

Congress has mandated detention for non-citizens in expedited removal and the limited form of immigration judge review that is part of a narrow subset of claims made as part of that expedited removal process. Congress has repeatedly expanded the category of non-citizens who must be detained during regular removal proceedings, primarily those with convictions, even non-felony convictions. DHS has set priorities for the detention of other non-criminal respondents, and those detained can seek immigration judge review of the custody decisions as well as bond set by DHS.⁴⁶ On any one day in 2009, about 32,000 individuals were in ICE detention facilities;⁴⁷ the number of respondents in detention at some point in 2001 was about 209,000; it rose to over 378,000 in 2008;⁴⁸ and declined to about 363,000 in 2010.⁴⁹

ICE can and does transfer detainees from one site to another, and has done so increasingly. According to one estimate, in the first six months of 2008, over half the

⁴⁴ See generally Symposium, *U.S. Immigration Detention: Policy and Procedure From A Human Rights Perspective: Intercultural Human Rights Law Review Annual Symposium*, 5 INTERCULTURAL HUM. RTS. L. REV. 1 (2010) (collection of articles addressing detention in immigration proceedings).

⁴⁵ *Statistical Year Book, 2010*, *supra* note 5, at O.

⁴⁶ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 29, at 1-12-1-15.

⁴⁷ U.S. Immigration & Customs Enforcement, *Fact Sheet: 2009 Immigration Detention Reforms*, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (last visited Dec. 30, 2011).

⁴⁸ Donald Kerwin & Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Washington, D.C.: Migration Policy Institute 2009), 6, 7 available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

⁴⁹ *DHS Immigration Enforcement Actions, 2010*, *supra* note 24, at 4.

detainees were transferred at least once, and almost a quarter were transferred multiple times. At least in 2008-09, ICE housed about 70 percent of detainees in state and local jails, particularly in the south and southwest, many of which are remote from population centers.⁵⁰ Frequent transfer of detainees, especially to remote detention centers, limits detainees' access to representation. DHS is in the process of consolidating its detention centers.

EOIR often cannot control the environment within the detention centers and has little space within the centers to operate its courts. It appears that immigration detention has grown so rapidly that it has been difficult for EOIR to meet the increased need for hearing locations that can function within the detained setting. EOIR has been flexible and at times operates in substandard conditions and even converted storerooms to create more courtrooms. The rapid growth has also meant corresponding expansion problems for the courts' administrative operations due to the demand for file space and support staff.

We did not explore in any depth the level of coordination between EOIR and DHS with respect to the planning and construction of detention facilities in which judges might conduct proceedings. It may be a matter worthy of further inquiry.

[2] Representation

By statute, respondents may be represented by counsel or other representatives but only "at no cost to the government."⁵¹ As discussed more fully below, in 2010 less than half the respondents completed proceedings had counsel, and a much lower percentage of detained respondents were represented. In a few detention centers, the rate of representation is less than ten percent.⁵²

[3] Hearings by video technology

Some hearings, particularly but not necessarily solely for detained respondents, use video technology: at least one participant is not co-located with the others. Roughly one in eight of the hearings held in proceedings that were completed in 2010 were held by video (105,901 of 852,230). In 2010, video technology was also used in roughly one in three of 2010's bond redetermination hearings (22,933 of 78,187).⁵³

3. Board of Immigration Appeals

Both the government and the respondent may seek review of immigration judges' decisions in EOIR's Board of Immigration Appeals (BIA). In 2010, 15,556 of the

⁵⁰ *ABA Comm'n on Immigr. Rept., 2010, supra* note 29, at 1-57 (citing, in part, Translational Records Clearinghouse (TRAC) and ICE data).

⁵¹ INA § 292 (2010); 8 U.S.C. § 1362 (2006).

⁵² See Appendix 3 provided data on rates of representation by court location.

⁵³ *OPAT DATA, supra* note 40.

222,909 immigration judge decisions were appealed to the BIA;⁵⁴ those cases involved 17,578 respondents.⁵⁵ EOIR reports that less than ten percent of judges' decisions result in appeals to the BIA,⁵⁶ but that base includes in absentia orders and decisions in which respondents did not apply for some sort of relief from removal, both of which are unlikely prospects for a successful appeal. We asked for data about who was filing the appeals and learned that in fiscal year 2010, of the 15,556 appeals from immigration judge decisions, 14,023 appeals were filed by respondents and 1,312 were sought by the DHS. In a small number, both parties appealed. Of the 14,023 appeals filed by the respondents, 99 were appeals from in absentia orders and 2,924 appealed without any relief in the case being sought (the respondent was likely challenging the grounds of removal).

In addition to these case appeals, the BIA has other receipts, such as the 7,529 motions to reopen BIA proceedings filed in 2010. All told, in 2010 the BIA received 27,196 appeals involving decisions by immigration judges, as well as 8,591 appeals from decisions of DHS agencies.⁵⁷ These appeals involve challenges to CIS denials of family immigrant petitions and CBP fines for international carriers who violate the regulations.

The Board hears the great majority of appeals exclusively on written submissions. It held no more than three oral arguments per year since 2006.⁵⁸ This has long been the BIA's practice.⁵⁹

To help the BIA adjudicate its cases, approximately 125 staff attorneys review files, draft opinions for BIA member review, and sometimes sit as temporary members of the BIA. The vast majority of the BIA decisions are "single member decisions" because only one member of the BIA signs them. Members of the federal judiciary and other commentators criticize this practice and urge panel decisions.⁶⁰ Defenders of the practice say that many of the appeals are easily disposed of and that, as a quality control measure, BIA attorney managers review random samples of three categories of BIA final decisions before they are mailed out to the parties.⁶¹ The three categories are: Single Board Member decisions

⁵⁴ *Statistical Year Book, 2010*, *supra* note 5, at T2.

⁵⁵ *Id.* at X1.

⁵⁶ *Id.* at X. In cases where any relief was sought (71,924 proceedings), the percentage rate of appeals is 15.3%. *Id.*

⁵⁷ *Id.* at T2.

⁵⁸ *OPAT DATA*, *supra* note 40.

⁵⁹ 8 C.F.R. § 1003.1(e)(27) (2010) the appellant must request oral argument.

⁶⁰ See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 431 (2007) (evaluating the move from three-member to single-member decisions). See also Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829 (discussing history of BIA regulations creating forms of streamlining and the reactions of federal judges in subsequent appeals to the BIA structure).

⁶¹ Interview, staff of the Board of Immigration Appeals (May 2011); E-mail from Ed Kelly, ACIJ, (Dec. 2011) (on file with authors) (reconfirming information from interview with BIA staff).

from the Screening Panel; three-Board Member decisions from any panel; and single Board Member decisions from any panel. In 2010, attorney managers reviewed 23 percent of the BIA decisions.⁶²

Rates of representation before the BIA are much higher than in the immigration courts. In detained cases, 51 percent of the respondent-appellants are represented before the BIA. Eighty-seven percent of the non-detained respondents have counsel. For the appeals from DHS denials of family based visa petitions, 31 percent of the respondents are represented before the BIA.⁶³

4. U.S. Courts of Appeal

Respondents, but not the government, may seek review of a BIA decision in the regional court of appeals in the circuit in which the immigration court concluded the proceeding. The DOJ Office of Immigration Litigation (OIL) represents the government at this stage rather than the ICE. A sharp increase in appeals from BIA decisions began in 2002, peaked in 2006, and now are about half of what they were in 2006. The volatility in appeals has been especially pronounced in the courts of appeals for the Second and Ninth Circuits. We assess the reasons for and implications for the volatility later in the report.

IV. Framework and Focus of Analysis

The immigration removal adjudication agencies and processes have been the objects of reporting and analysis, most of it critical and of decidedly uneven quality, in the popular press,⁶⁴ from organizations of various types,⁶⁵ scholars,⁶⁶ advocates,⁶⁷ U.S. courts of

⁶² *Id.*

⁶³ *OPAT DATA*, *supra* note 40.

⁶⁴ *E.g.*, Jacqueline Stevens, *Lawless Courts, Immigration Judges Who Flagrantly Disregard the Law are Sheltered by a Secretive System*, *THE NATION*, Nov. 8, 2010, at 17; Julia Preston, *Immigration Judges Found Under Strain*, *N.Y. TIMES*, July 11, 2009, at A11.

⁶⁵ *E.g.*, *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 29, at parts 2, 3, 5, and 6; Transactional Records Access Clearinghouse, *Comprehensive, independent and nonpartisan information about U.S. federal immigration enforcement*, SYRACUSE UNIV., www.trac.syr.edu/immigration (last visited Dec. 30, 2011); Donald M. Kerwin, Doris Meissner, & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better*, (Washington, D.C.: Migration Policy Institute 2011) available at <http://www.migrationpolicy.org/pubs/administrativefixes.pdf>; APPLESEED, *ASSEMBLY LINE JUSTICE—BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS* (2009) available at www.appleseednetwork.org/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf; MARK H. METCALF, *BUILT TO FAIL, DECEPTION AND DISORDER IN AMERICA'S IMMIGRATION COURTS*, (Center for Immigration Studies 2011), available at www.cis.org/articles/2011/built-to-fail-full.pdf.

⁶⁶ *See* Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 *DUKE L. J.* 1635 (2010); Wheeler, *supra* note 7; JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ, PHILIP SCHRAG & EDWARD KENNEDY, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2009) (including the lead authors' 2007 article of the same title and additional comments by others); Lenni B.

appeals judges,⁶⁸ immigration judges,⁶⁹ BIA members,⁷⁰ the DOJ,⁷¹ and the Government Accountability Office.⁷² (The footnote references are a small sample of the literature.)

Critics have:

- called for more EOIR resources to hire more immigration judges and support staff and thus ease the backlog of matters;
- criticized immigration judge hiring standards and procedures, and recommended enhanced orientation, continuing education, and performance monitoring (these comments reflected in part press and court of appeals accounts of judges' intemperate behavior and decisional disparities within and between immigration courts); and
- called for moving immigration adjudication agencies from the DOJ into one of several alternative arrangements within the executive branch, arguing that, even though DHS, not DOJ, prosecutes removal cases, law enforcement management of the immigration court threatens independent judicial decision-making.

Diagnoses underlying the many prescriptions offered over the last few years have been based largely on impressions from direct observation and comments reported by

Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006-2007); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

⁶⁷ E.g., Noel Brennan, *A View From the Immigration Bench*, 78 FORDHAM L. REV. 623 (2009), (describing the reports of the Katzmann Study Group to promote adequate representation for those in removal proceedings in the New York City area).

⁶⁸ E.g., *Immigration Litigation Reduction Hearing Before the Subcomm. On the Judiciary*, 109th Cong., at 5, 9, 182, (2006) (statement of Chief Judge John Walker (2d Cir) and Judges Carlos Bea (CA-9) and letter of Sidney Thomas (CA-9)); See, e.g. Lynne Marek, *Posner Blasts Immigration Courts As 'Inadequate' And Ill-Trained*, NAT'L L. J., April 22, 2008; J. Roemer, *Ninth Circuit Judge Criticizes Rulings On Asylum Cases* J. DAILY J. (CA) Feb. 15, 2008. See also news account Pamela MacLean, *Immigration Judges Still Under Fire*, NAT'L L. J., Jan. 30, 2006.

⁶⁹ Slavin & Marks, *supra* note 15; Brennan, *supra* note 67; Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008); Stuart Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks & Denise Slavin, *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22 (2008).

⁷⁰ Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923 (2006).

⁷¹ E.g., *Measures to Improve the Immigration Courts and Board of Immigration Appeals*, THE ATT'Y GEN. (2006) available at <http://www.justice.gov/ag/readingroom/ag-080906.pdf> and follow up reports *infra* at text accompany note 74 and note 75.

⁷² Executive Office of Immigration Review, *U.S. GAO—Executive Office For Immigration Review: Caseload Performance Reporting Needs Improvement*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 12, 2006), available at <http://www.gao.gov/products/GAO-06-771>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-935, U.S. ASYLUM SYSTEM, AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN (2008) available at <http://www.gao.gov/new.items/d08935.pdf>.

secondary observers. There has been some quantitative research, such as several analyses of decisional disparities in asylum cases.⁷³

The EOIR and the DOJ responded to some of this criticism in 2006 when Attorney General Alberto Gonzales ordered a “comprehensive review” of the immigration courts and the BIA. Based on that review, he directed implementation of 22 measures, most of which involved the immigration courts and the single largest number of which, nine, involved immigration judge and BIA selection, training, supervision, and performance evaluation.⁷⁴ In June 2009, EOIR announced that it had substantially completed implementation of the 22 measures⁷⁵ and claimed completion of other measures in subsequent press releases.⁷⁶ We discuss these measures below, although we have not built our analyses around them.

A. THE BASIC PROBLEM

A constant in the recent literature about immigration adjudication is the gap between resources—in particular the number of judges—and the workload facing the courts and to a lesser degree, the BIA. The ABA Commission on Immigration put it succinctly: “[n]umerous stakeholders and commentators have recognized what IJs also know: the EOIR is underfunded and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.”⁷⁷ EOIR and DOJ have sought vigorously and with some success, to receive additional appropriations with which to hire more judge “teams” (a judge, law clerk, and support staff) but substantial additional resources are not in the cards.

⁷³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES (2008) available at <http://www.gao.gov/new.items/d08940.pdf>, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-935, *supra* note 72; RAMJI-NOGALES ET AL, *supra* note 66; Transactional Records Access Clearinghouse, *TRAC Immigration Report: Asylum Disparities Persist, Regardless of Court Location and Nationality*, SYRACUSE Univ., (Sept. 24, 2007), <http://trac.syr.edu/immigration/reports/183/>.

⁷⁴ Executive Office of Immigration Review, *Caseload Performance Reporting Needs Improvement*, *supra* note 72.

⁷⁵ Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR’s Improvement Measures—Update*, U.S. DEP’T JUST., (2009), available at <http://www.justice.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf>.

⁷⁶ *E.g.*, Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *The Executive Office for Immigration Review Announces New Process for Filing Immigration Judge Complaints*, U.S. DEP’T JUST., (2010), available at <http://www.justice.gov/eoir/press/2010/IJConductProfComplaints05192010.pdf>, Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR Completes Digital Audio Recording Implementation*, U.S. DEP’T JUST., (Sept. 2, 2010), <http://www.justice.gov/eoir/press/2010/EOIRCompletesDAR09022010.htm>.

⁷⁷ *ABA Comm’n on Immigr. Rept.*, 2010, *supra* note 29, at 2-16.

1. Workload

In 2010, the immigration courts received 392,888 total “matters,” up by 12 percent from 352,159 in fiscal 2008. They completed 353,247 matters, up by four percent from 340,599 in fiscal 2008. Per judge, they completed 1,338 matters on average, up from up from 964 in 2008. The per judge figures is a rough one, calculated principally for comparative purposes, because we used the 264 judges on board in early December 2011 as the base number.⁷⁸

a. Completed Matters

Completed matters in 2010 included:

- 51,141 bond redetermination matters (roughly 189 on average for each of the 270 judges reported in office in April 2011),
- 14,899 motions to reopen or reconsider (roughly 55 per judge, on average); and
- 287,207 completed proceedings (roughly 1,064 per judge, on average).⁷⁹

b. Hearings

For 2010’s 287,207 completed proceedings, judges held 852,230 hearings⁸⁰ (not all of them in 2010), roughly 3,156 hearings per judge, on average. (This figure is somewhat misleading; OPAT counts a master calendar hearing for 30 respondents as 30 master calendar hearings.⁸¹ On the other hand, using the December 2011 figure of 264 judges undercounts the per judge figure, because EOIR reported in September 2010 that “more than 235” judges were in office.)⁸²

Of 2010’s 287,207 completed proceedings:

- slightly less than half—139,065—had only master calendar hearings; 127,715 of them had more than one master calendar hearing. At some point, though, the respondent either conceded removability or failed to appear for subsequently scheduled hearings.
- slightly more than half of the 287,207 completed proceedings—146,142—had at least one individual calendar hearing, and 56,519 of the completed proceedings had more than one individual calendar hearing.⁸³

⁷⁸ *Id.*, at B-4.

⁷⁹ *Statistical Year Book, 2010*, *supra* note 5.

⁸⁰ *OPAT DATA*, *supra* note 40.

⁸¹ *Id.*

⁸² Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR Swears in Omaha Immigration Judge*, U.S. DEP’T JUST., (Dec. 5, 2008), <http://www.justice.gov/eoir/press/08/DCInvest1IJ120508.htm>; *EOIR at a Glance*, *supra* note 4.

⁸³ *OPAT DATA*, *supra* note 40.

Overall, for the 287,207 proceedings completed in 2010, judges held 852,230 hearings (not all of them in 2010), roughly 3,156 hearings per judge, on average. (This figure is somewhat misleading; OPAT counts a master calendar hearing for 30 respondents as 30 master calendar hearings.⁸⁴ On the other hand, using the December 2011 figure of 264 judges undercounts the per judge figure, because EOIR reported in September 2010 that “more than 235” judges were in office.)⁸⁵

There is no separate code in the OPAT data system for pre-hearing or similar conferences.⁸⁶ Judges and court administrators typically code such conferences as master calendar or individual calendar hearings. Thus the figures above don’t represent completely accurate counts of actual master and individual calendar hearings.

c. Per Judge Workloads

The number and mix of matters varies greatly from court to court. Because EOIR has no system of “weighting cases” according to the average time different case types require of judges, it is difficult to compare the actual workload of judges in different courts around the country. Nevertheless, in ten courts (again, using the early December judge counts), the completion figure for all matters was less than 700 per judge. For 15 judges, it was over 2,000. Three courts had 4,000 or more cases per judge. Again, these per judge figures are approximations only, in part because we applied to 2010 data the number of judges listed on the EOIR website in December 2011. Moreover, judges sometimes serve temporarily in other courts, either in person or by video. Appendix 3 shows 2010 per judge figures for completed proceedings and for all matters (using the December 2011 judge counts).

d. Contesting Removability and Seeking Relief

The general view among immigration judges is that almost all respondents concede removability but seek to remain in the country by applying for some form of relief from removability, for example, by making a statutory claim of asylum pursuant to treaty obligations. In fact, though, the EOIR Statistical Year Book reports that in 2010 only 25 percent of all proceedings involved applications for relief.⁸⁷ Appendix 3 shows the percentage of completed 2010 proceedings for each court that involved an application for relief.

At first glance, that relatively low figure might be seen as an indication that immigration courts have little to do, but such a conclusion ignores the cases without relief that involved applications resulting in terminations of proceedings (six percent) or in

⁸⁴ *Id.*

⁸⁵ Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR Swears in Omaha Immigration Judge*, U.S. DEP’T JUST., (Dec. 5, 2008), <http://www.justice.gov/eoir/press/08/DCInvest1IJ120508.htm>; *EOIR at a Glance*, *supra* note 4.

⁸⁶ *OPAT DATA*, *supra* note 40.

⁸⁷ *Statistical Year Book, 2010*, *supra* note 5, at N1.

voluntary departure (seven and a half percent). Both of these case types can involve significant judicial work. Adding these types of determinations to the cases where relief is sought means that in approximately 38 percent of the docket involved the some of the most complex and from the perspective of the respondent some of the most important adjudications.

e. Comparisons to Other High-Volume Administrative Courts

Comparisons of the immigration court per judge completion rate (on average, 1,338 matters per judge in 2010) to those in other high volume adjudication agencies are stark—an average of 544 dispositive hearings per year in 2007 for Social Security Administration ALJs,⁸⁸ and 819 decisions per year in 2010 on average for Veterans Law Judges.⁸⁹ The comparison with federal district courts is even starker. In 2010, each federal district judge terminated an average 572 cases but very few of those terminations involved trials or other evidentiary hearings. On average, district judges saw about 28 proceedings at which evidence was introduced (trials but also, for example, sentencing hearings). Of the 28, about ten were trials.⁹⁰ What that points to is a different situs for the work of an immigration judge—principally in the courtroom—and the federal district judge—principally in chambers.

2. Consequences

The increase in per judge workload to date has had two main consequences: growing backlogs and overworked judges and staff.

According to EOIR, at the end of September 2010, 262,622 proceedings were pending in the immigration courts.⁹¹ The Transactional Records Clearinghouse (TRAC) said that figure rose to 275,316 by early May, 2011 and the average age for these pending cases was 482 days, up from 467 days at the end of FY2010.⁹² The recent increases in the number of immigration judges have not been sufficient to reverse the trend of growing backlogs and increased time to disposition, although without them, the pending caseload and average case age would be even higher.

The other consequence of the growing imbalance between workload and workforce is the time pressure on immigration judges to move cases, a pressure that crowds out other activities that are part of being a judge—from continuing education (formal and otherwise) to issuing reasoned opinions in contested cases that explain the judge's decision to the parties and appellate bodies. An oft-cited 2008 survey of immigration

⁸⁸ *ABA Comm'n on Immigr. Rept., 2010, supra* note 29, at 2-37.

⁸⁹ Briefing material from BVA officials (August 9, 2011) at 16 (on file with authors).

⁹⁰ *Supra* note 1, at 14, 88.

⁹¹ *Statistical Year Book, 2010, supra* note 5, at Y1.

⁹² Transactional Records Access Clearinghouse, *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, SYRACUSE UNIV. (June 7, 2011), <http://trac.syr.edu/immigration/reports/250/>.

judges using a standard cross-vocational measures, found higher levels of stress and burnout than in almost any other profession surveyed.⁹³ As of mid-2009, according to TRAC, immigration judges on average had 72 minutes to deal with each matter received, down from 102 minutes in 1999.⁹⁴ Our interviews with immigration judges enforced this perception of time pressure, in particular judges' insistence that they had no time to conduct status or issue-narrowing conferences prior to individual merits hearings.⁹⁵

3. Prospects for the Future

EOIR may be looking, not at additional appropriations, but rather at reduced funding, which would widen even more the gap between workload and workforce. Most federal agencies could face reduced appropriations due to the across-the-board spending cuts that are a likely result of the failure of the so-called "super committee" to produce a deficit reduction plan.

Such cuts would seem inevitably to mean even wide gaps between EOIR's workload and its workforce. EOIR's director told the Senate Judiciary Committee in May 2011 that he anticipates the loss of about ten judges per year due to "normal attrition."⁹⁶ When we began our study, in April 2011, the EOIR website showed 270 immigration judges; on December 6, the website showed 264 judges. (A decline in the number of judges is not unheard of: the number dropped from 218 in 2003 to 205 in 2007.)⁹⁷ Furthermore, although judges are the principal resource for processing the immigration courts caseload, they need the assistance of legal and administrative staff. In 2009, the immigration courts employed 62 law clerks, or one for every 3.7 judges.⁹⁸ As of May 2011, that number had increased to 86,⁹⁹ lowering the ration to 3.1.

The recently enacted mandate to reduce discretionary government spending in fiscal 2013 and beyond will probably mean EOIR funding at current services levels or less. And, although the spending cuts that will likely preclude additional EOIR resources may also preclude more DHS apprehension resources, the growth in DHS's controversial "Secure Communities" program may produce more NTAs regardless. Under "Secure Communities," ICE—using local law enforcement agency fingerprints of individuals

⁹³ Lustig et al., *supra* note 69.

⁹⁴ Transactional Records Access Clearinghouse, *Maximum Average Minutes Available per Matter Received*, SYRACUSE UNIV., (June 2009), <http://trac.syr.edu/immigration/reports/208/include/minutes.html>.

⁹⁵ See discussion, *infra* at V.c.1.b.[2] text accompanying note 174.

⁹⁶ *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review), at 3, available at <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf>.

⁹⁷ Transactional Records Access Clearinghouse, *Number of Immigration Judges, 1998-2008*, SYRACUSE UNIV., (July 2, 2008) <http://trac.syr.edu/immigration/reports/189/include/payroll.html>.

⁹⁸ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 29, at 2-17.

⁹⁹ *Supra* note 92, at 3-4.

booked into local jails—begins removal actions against those whom ICE finds are here illegally or are removable based on criminal convictions. ICE says it has expanded Secure Communities from 14 jurisdictions in 2008 to more than 1,300 in 2011, and plans to expand to all law enforcement jurisdictions by 2013.¹⁰⁰

EOIR officials, in fact, told us they feared that expanded use of the program could “eat up the [detention] system” by injecting into it increasing numbers of people with low level criminal convictions or traffic offenses. That in turn could add to the immigration courts’ caseload as individuals seek adjudications to contest removability or to seek one of the limited forms of relief only available once a person is in removal proceedings, such as cancellation of removal¹⁰¹ or withholding of removal. There is no mechanism to affirmatively file for these kinds of relief. Thus some people are better off in removal proceedings. As odd as it may seem, for some people the only path to lawful permanent resident status is to seek relief in removal proceedings as opposed to affirmatively filing for status with the CIS.

EOIR personnel told us they are skeptical of ICE claims that Secure Communities has only generated a small number of respondents. If Secure Communities generates more cases, the immigration court workload, or at least types of cases handled by judges, may also be affected. It is also unclear how Secure Communities enforcement will be affected by the apparent heightened commitment within the executive branch to exercise its discretion to prosecute aliens who are the strongest candidates for removal (discussed below).

B. Principal Policy Emphasis

The pervading theme in our analysis and recommendations is enhancing the immigration courts’ ability to dispose of their caseloads fairly and as quickly and as economically as possible. (Economic operation in this context implicates costs to the government and costs to the parties.) This broad goal implicates almost all the specific areas of comment and criticism directed in recent years at immigration adjudication and the agencies that conduct it, as well as some aspects of the removal adjudication process that have received little attention.

As we see it, this conundrum points to three principal policies that EOIR must emphasize:

- strengthen its longstanding request that DHS filter more carefully the NTAs that it files;
- experiment with efforts to reduce the need for immigration judge hearing time by use of case management methods that are authorized by rule, endorsed by the

¹⁰⁰ *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/# (last visited Dec. 31, 2011).

¹⁰¹ See INA § 240A(a) and 240A(b) (2010); 8 U.S.C. § 1229b(A)(a) and § 1229b(b) (2006).

OCIJ Practice Manual,¹⁰² and, in some cases, have been effective in other high-volume courts; and

- expand its efforts to enhance the availability of quality representation to respondents as a means of easing the burden on the system caused by non-citizens' trying to negotiate on their own a complex adjudication process that few of them understand.

We present analyses and recommendations beyond the scope of these three broad areas, but they are our principal emphases.

V. ANALYSIS AND RECOMMENDATIONS

We turn to assessing immigration removal adjudication according to three reform strategies: resource enhancement, demand reduction, and process modification.

A. Resource Enhancement

Almost all the recent reports about immigration adjudication recommend outright increase in resources—especially more judges—as well as changes that hinge on additional resources. The budget realities in 2012 and beyond make additional EOIR resources highly unlikely and justify skepticism about proposed changes that, without such resources, would require EOIR to tolerate longer times to disposition. In 2010, the ABA Immigration Commission offered 20 broad recommendations for immigration court and BIA adjudication,¹⁰³ including more judges and changes that would require more resources. For example, “[r]equir[ing immigration judges to issue] more written, reasoned decisions” would require “additional resources” including not only more immigration judges, but other changes, such as increasing judges’ administrative time, additional training (requiring “sufficient funding”) and related support; full installation of digital recording of proceedings and reduction of video hearings (with corresponding increases in travel costs); and “greater use of pre-hearing conferences.”¹⁰⁴ If implemented without more judges most of these changes would probably lengthen completion times. Increased continuing education might make the existing corps of judges so much more efficient as to shorten case completion times, but that’s speculative at best. We discuss later the potential value of more pre-hearing conferences.

¹⁰² The OFFICE OF THE CHIEF IMMIGRATION JUDGE, PRACTICE MANUAL (2008), available at www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressedPDF.pdf (finalized in 2008 by a team of immigration judges with input from DHS and the private bar) [Hereinafter OCIJ PRACTICE MANUAL].

¹⁰³ ABA Comm’n on Immigr. Rept., 2010, *supra* note 29, at 2-2, 2-3, 3-2 (summarizing the recommendations).

¹⁰⁴ *Id.* at 2-38–2-42.

1. Temporary Immigration Judges

As noted above, regulations allow for the appointment of temporary BIA members from within the EOIR and DOJ. OCIJ officials told us that EOIR is developing a proposed regulation to allow the appointment of temporary immigration judges; those officials could not provide any further information about the proposed regulations because they are in development.

Due to recent controversies over the since-corrected politicized hiring of immigration judges, it is essential that EOIR's process of hiring the temporary judges and monitoring their work be transparent.

The National Association of Immigration Judges (NAIJ) has proposed EOIR's using retired immigration judges as senior judges, citing recent statutory authority for agencies to hire retired federal employees on a part-time basis, during which time they would receive both their annuity and a salary.¹⁰⁵ We do not know the cost ramifications of such a step.

2. Weighted Caseload Analysis

In any judicial system, different types of cases generally require different amounts of judicial time. For example, in immigration court, cases where the respondent contests removability, and seeks cancellation of removal as an alternative relief are likely to require more time than cases where the respondent concedes removability.

To assist in analyzing and justifying the need for additional judgeships and support staff and for allocating or reassigning those resources, federal and state courts have developed methods for determining relative "weights" for different case types. The goal is to get more accurate measures of the work required to dispose of different types of cases—measures more accurate than raw filing data about broad categories of case types. In such a system, a case type with a relative weight of 2.00 for example, typically requires twice as much time as a case type with a relative weight of 1.00. Weighting systems recognize that not all cases of a certain type—a case type with a relative weight of, say, 1.87—present the same time demands. However, in the aggregate, the patterns that emerge from large numbers of cases of each type present an accurate relative indicator of the time required to dispose of those cases and thus the judgeships needed.

At least since the mid-1990s, the National Center for State Courts has provided guidance on the various methods courts might use to assess judicial workload.¹⁰⁶ The federal

¹⁰⁵ *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of National Association of Immigration Judges), available at <http://dl.dropbox.com/u/27924754/NAIJ%20Written%20Statement%20for%20Senate%20Judiciary%20Cmte%205-18-11%20FINAL.pdf> (citing the National Defense Authorization Act ("Act") for FY 2010, Public Law 111-84).

¹⁰⁶ See, e.g., Brian J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts, 1997: A National Perspective from the Court Statistics Project Judicial Workload Assessment*, NAT'L CENTER FOR STATE

judiciary has assigned weights to district court cases since 1946 and publishes each court's annual weighted filings. In the year ending June 2011, nationally, raw filings per judge were 549 and weighted filings only 490, but in some courts the balance was strikingly different. In the Eastern District of Texas, raw filings were 451 (34th in the nation) but weighted filings were 683 (third in the nation).¹⁰⁷ See Appendix 5.

There are a variety of methods for weighting cases. "Diary studies" is a method in which judges record the time they spend on their cases over a period of several weeks. Another method is the "Delphi" technique. In this technique, administrators and researchers use an iterative process through which judges reach consensus agreement on the relative weights to be assigned to different types of cases.¹⁰⁸ Some courts use "event-based weighting," which assesses the various events that occur typically in the different types of cases and build weights by assessing the number of events that typically occur and how long they take to complete. To be sure, conducting the studies takes judge time—especially diary studies—but they reap benefits. In any reasonable approach to the use of weighted caseloads, moreover, policy-makers in assessing resource needs consider the research-derived weights but do not apply them blindly to current caseload data. Rather they consider views of judges and administrators in individual courts who may claim that the weights derived nationally may need adjustment due to local idiosyncrasies. They assess the likelihood that current allocations of case type will change in the foreseeable future. And, of course, they balance the resource needs indicated by the case weights with the realities of what requests funding authorities will find reasonable (even if they cannot grant them).

The matter of case weights has received little attention in the popular and academic literature about immigration courts. The ABA Immigration Commission made a passing reference to one weighting approach,¹⁰⁹ and the NAIJ called in a 2011 Senate Judiciary

COURTS (1998) available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=24> and Victor E. Flango & Brian J. Ostrom, *Assessing the Need for Judges and Court Support Staff*, NAT'L CENTER FOR STATE COURTS (1996) available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=407>.

¹⁰⁷ *Supra* note 1, at 83, 167.

¹⁰⁸ See PATRICIA LOMBARD & CAROL KRAFFKA, 2003-2004 DISTRICT COURT CASE—WEIGHING STUDY, REP. TO THE SUBCOMM. ON JUDICIAL STATISTICS OF THE COMM. ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE U.S. (2005) available at [www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/\\$file/CaseWts0.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf) (describing various approaches to case weighting); *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2008) (statement of William O. Jenkins, Director of Homeland Security and Justice) available at www.gao.gov/assets/130/120386.pdf (critiquing the Lombard & Kraffka Study); Chad C. Schmucker, *How We Determine the Number of Judges We Need*, MICH. B. J., July 2011, at 18, available at <http://www.michbar.org/journal/pdf/pdf4article1877.pdf>; Letter from William A. VanNortwick, Chair, Supreme Court of Florida Committee on District Court of Appeals Performance & Accountability, to Peggy A. Quince, Chief Justice, Supreme Court of Florida (October 13, 2009) available at www.flcourts.org/gen_public/pubs/bin/2009ReviewOfRelativeCaseWeights.pdf. See also *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 29, at 308.

¹⁰⁹ See also *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 29, at 308.

Committee testimony for the use of a weighting system similar to that used in 2003-2004 in federal courts¹¹⁰ (a method using both events analysis and Delphi-like techniques). OCIJ officials told us that developing some type of a weighted system for immigration removal cases would be impossible because of the great variation among cases. We believe the matter deserves some attention, given the success of other court systems in developing and applying weights.

On a related matter as we noted earlier, there is apparently no single repository of readily available information on the proportion of NTAs filed by DHS's component agencies and no data that track NTA's prepared by state and local governments pursuant to INA § 287(g) joint enforcement agreements. The ABA Commission sought this information from DHS in May 2009 and in November received six years of data organized by which DHS component issued the NTA. (They did not have data on § 287(g) NTA's.)¹¹¹

It is hard to see how EOIR would not benefit from having timely comparative information on where its work comes from, both nationally and within the various courts. Such data might provide preliminary insight on whether NTAs from the different elements of DHS produce cases that vary in complexity and in NTA quality.

Recommendations, 1-4

1. That EOIR continue to seek appropriations beyond current services levels but that it plan for changes that will not require new resources.
2. That EOIR release and implement regulations to allow for temporary immigration judges but with rigorous plans for monitoring their performance; and consider NAIJ's proposal for senior judges.
3. That EOIR explore case weighting systems in use in other high volume court systems to determine their utility in assessing the relative need for immigration judgeships, and consider a pilot project to test one or more methods. (We do not recommend any specific method or take a position on NAIJ's proposal.)
4. That EOIR, to facilitate comparative analysis of its incoming caseload, expand its data collection field to provide a record of the sources of NTAs filed in the immigration courts. The NTA includes the name and title of the DHS officer who filed it. Court administrative staff could code the filing agency on the case docket sheet for inclusion in the OPAT data base. We encourage the EOIR to be as specific as possible about the entity preparing the NTA because estimating future work of the court may depend on anticipating the priorities of the varied enforcement operations.

¹¹⁰ *Supra* note 105.

¹¹¹ *See ABA Comm'n on Immigr. Rept., 2010, supra* note 29, at 1-10-1-25.

B. Reduce the Demand for EOIR Services

We propose two basic ways to reduce the demand for EOIR services, thus permitting judges, board members, and support staff to devote more attention to the work that would remain. One way is to direct some categories of disputes to other decision-makers; the other is to relieve judges and immigration court staff of certain case-processing related tasks. Our recommendations in this area deal with both the immigration courts and the BIA.

1. Directing Some Disputes to Other Decision-Makers

Our suggestions here concern DHS's use of its prosecutorial discretion and administrative adjudication.

a. Prosecutorial Discretion as to Notices to Appear

DHS is able, given its resources, to issue NTAs for only a small fraction of the roughly 11 million individuals in the country generally estimated to be eligible for removal. Based on that obvious fact, ICE and its predecessor agencies have issued a series of advisories to field personnel setting out prosecutorial priorities to guide ICE officers.¹¹² The most recent iteration, a June 2011 memorandum from ICE director John Morton, identified ICE's enforcement priorities as promoting national security, border security, public safety, and the integrity of the immigration system. The memo provided a non-exclusive list of 19 (mainly humanitarian) factors to consider, ranging from military service, to time in the United States (particularly time in legal status) but including as well criminal history and potential national security threats.¹¹³ The memo also said that a legitimate exercise of prosecutorial discretion includes deciding whether to issue, file, serve, or cancel an NTA.

In November 2011, CIS also issued new guidance on placing individuals in removal proceedings. In the past few years, CIS has initiated a significant number of removal orders. For example, a lawful permanent resident might apply for naturalization and CIS might both deny the naturalization request and issue a Notice to Appear charging that the individual is subject to removal. The agency's November 2011 policy memorandum appears to direct CIS officers to seek supervisory review before placing non-citizens in removal and parallels some of the prosecutorial priorities that recent ICE memoranda have articulated.¹¹⁴

¹¹² See John Morton, Director, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. DEP'T HOMELAND SECURITY, (June 17, 2011) available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> and earlier documents cited therein. See also, CIS Policy Memorandum on when to issue a Notice to Appear, *infra* note 114.

¹¹³ Morton *supra* note 112.

¹¹⁴ See U.S. CITIZENSHIP & IMMIGRATION SERVICES, U.S. DEP'T HOMELAND SECURITY, PM-602-0050, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES

Moreover, in August 2011, the Obama administration created an interagency task force to identify, from among non-citizens awaiting removal proceedings, those most appropriate for the exercise of prosecutorial discretion,¹¹⁵ and issued further instructions in November.¹¹⁶ Conceivably, if Secure Communities identifies more non-citizens who are serious criminal offenders—the evidence that it does is disputed—and ICE puts a priority on removing them. Those two factors could change the immigration court case mix, creating a higher percentage of cases with more tenuous claims for relief and thus perhaps requiring less judge time. On the other hand, non-citizens with serious criminal convictions may be motivated to fight removal because their criminal conduct may render future return to the U.S. impossible due to permanent bars on admissibility.

We offer no comment on DHS prosecution priorities. However, we note the frustration that judges expressed in our interviews about what they perceive as DHS filing NTAs that seem inconsistent with those priorities. We were unable to include in our survey a question to determine judges' perceptions of changes, if any, in DHS implementation of its recent policy guidance.

Judges also commented on what they perceive as the failure of ICE attorneys to evaluate and reject NTAs for legal insufficiency. EOIR officials told us that the common view is that CBP issues the largest proportion of legally insufficient NTAs, which, if true, may reflect the pace of work on the border and the fact that many border patrol agents are not legally trained.

ICE officials told us that ICE Trial Attorneys have the authority to reject such NTAs and that the agency encourages them to do so. Both judges and DHS prosecuting officials suggested several reasons for ICE attorneys' reluctance to reject questionable NTAs: a willingness to "let the court sort it out;" a preference not to antagonize employees of sister agencies; the lack of time and resources to consult with agents located elsewhere; and a reluctance to terminate any effort, once initiated, to remove a non-citizen because of the possibility, however slight, that the person might later commit a brutal crime that the press and others would attribute to ICE's failure to remove the individual. On the other hand, judges, while frustrated by legally insufficient NTAs, generally said they confront them rarely.

INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (2011) *available at* [http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20\(Aproved%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Aproved%20as%20final%2011-7-11).pdf).

¹¹⁵ See Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE (Aug. 18, 2011, 2:00PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>; Letter from Janet Napolitano, Secretary of Homeland Security, to Harry Reid, Senator Majority Leader (Aug. 18, 2011) *available at* http://democrats.senate.gov/uploads/2011/08/11_8949_Reid_Dream_Act_response_08.18.11.pdf.

¹¹⁶ See Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1; Peter Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, *Case-by-Case Review of Incoming and Certain Pending Cases*, U.S. DEP'T HOMELAND SECURITY, (Nov. 17, 2011) *available at* <http://www.immigrationpolicy.org/sites/default/files/docs/DHS%20PD%20Case%20Review%20Memo%20111711.pdf>.

The ABA Commission on Immigration recommended that DHS require DHS-lawyer approval for the issuance of any NTA—on a pilot basis in offices with sufficient attorney resources.¹¹⁷

Recommendation, 5

5. That DHS implement the ABA Immigration Commission recommendation to require DHS-lawyer approval for the issuance of any NTA—on a pilot basis in offices with sufficient attorney resources. Ideally, we would recommend that ICE attorneys must approve the NTA rather than an attorney within a separate component of DHS; this is because ICE is the agency that must commit the resources to prosecute and execute removal orders.

b. Preliminary Administrative Adjudication of All Asylum Applications

People seek asylum by several means: they can request it when they are subject to expedited removal, and they can apply for it outside the expedited removal context.

There have been recurring recommendations, most recently from the ABA Commission on Immigration, for greater participation by the CIS Refugee, Asylum, and International Operations Directorate (Asylum Office) in passing on asylum applications.¹¹⁸

[1] Expedited Removal

Congress created the expedited removal system to allow DHS to immediately remove, without court involvement, people apprehended at the border.¹¹⁹ This discussion concerns people seeking asylum within the expedited removal process. If a DHS officer determines that a non-citizen is subject to expedited removal and the individual expresses a fear of return, the officer will delay removal until an asylum officer can review the claim. DHS, in most situations, must detain the person until an asylum officer determines whether the person has a “credible fear” of persecution or torture if returned to the home country. (A “credible fear” determination involves a less demanding standard than an asylum determination, which requires a “well-founded fear” of persecution due to one of five protected grounds: political opinion, religion, national origin, ethnicity or membership in a social group.) If the asylum officer concludes that the individual has met the credible fear standard, the officer prepares an NTA, thus starting removal proceedings so that an immigration judge can decide the asylum claim. If the asylum officer does not find a credible fear, the person could be subject to expedited removed unless he or she initiates review by an immigration judge. If the judge rejects the individual’s claims of asylum in these expedited cases, there is no appeal to the BIA.

¹¹⁷ *ABA Comm’n on Immigr. Rept., 2010, supra* note 29, at 1-61.

¹¹⁸ *Id.* at 1-61–1-64.

¹¹⁹ As previously discussed there are other situations. *Supra* at 18.

The ABA Immigration Commission (and before it, in 2005, the U.S. Commission on International Religious Freedom) recommended expanding the asylum officer's authority from only credible fear determination to the authority to grant asylum, thus possibly keeping the case out of the immigration courts. According to data reported by the ABA Commission, in the 2000-2004 period, asylum officers made positive credible fear determinations in 5,000 cases, and immigration courts granted relief (mainly asylum but also withholding or deferral of removal) in 28 percent of them. If the asylum officers had had authority to grant asylum where the applicant met the statutory standard of well-founded fear, and if the asylum officers granted asylum at rates similar to those of the immigration courts, the courts would have seen 1,400 fewer receipts and DHS 1,400 fewer cases to litigate.¹²⁰ According to the ABA Commission, the change proposed regarding expedited removal asylum claims would require regulatory but not statutory change.¹²¹

The Asylum Office in 2008 recommended against implementation,¹²² asserting that having asylum officers conduct not only a credible fear review but also the more demanding review of an asylum claim--given the "accelerated timeframe and nature of the credible fear process"—would mean that applicants would not have the time and resources necessary to develop a well-documented asylum claim or obtain legal counsel to assist them. DHS also said it would need additional asylum officers to conduct the asylum adjudication and that the applicants would need additional time to meet identity and security check requirements, thus lengthening the time in detention. DHS also expressed a concern that the asylum interview might have to be conducted using video technology and the asylum officers were not confident that the in-depth interview could be conducted using only video.¹²³

Despite these objections, the ABA Commission said "if the goal is to streamline the adjudication of asylum claims in the immigration system *as a whole*, then the proposal deserves serious consideration."¹²⁴ We agree for three reasons. First, the Asylum Office is qualified to make these assessments in the affirmatively filing context. Second, the adjudication by the Asylum Office reduces immigration court workload. Third, this additional authority provides an expedited process to a bona fide refugee.

¹²⁰ For the purposes of this estimate we are assuming that outcomes would be identical regardless of the forum—asylum officer or immigration judge.

¹²¹ *ABA Comm'n on Immigr. Rept., 2010, supra* note 29; INA § 235(b)(1)(A)(ii)(2010); regulations implementing the review are found at 8 C.F.R. § 1235.6 (2009).

¹²² Letter from Stewart Baker, Assistant Secretary for Policy, DHS, to Felice Gaer, Chair, U.S. Commission on International Religious Freedom (Nov. 28, 2008) (on file with author); *USCIRF Disappointed that DHS Action on Expedited Removal Process Falls Short*, U.S. COMM'N ON INT'L FREEDOM, (Jan. 9, 2009), http://www.uscirf.gov/index.php?option=com_content&task=view&id=2340&Itemid=126 (Gaer's response to letter from Baker).

¹²³ *Id.*

¹²⁴ *Id.*

Recommendations, 6-8

6. That CIS seek to amend 8 C.F.R. § 235.6 to authorize the asylum officer to approve qualified asylum applications in the expedited removal context. If necessary, CIS should allocate additional resources to complete the asylum adjudication in this context as there are significant cost savings for other components of DHS and for EOIR.
7. That CIS seek to amend regulations to clarify that once the asylum officer is satisfied that the individual has a well-founded fear of persecution or fear of torture, the asylum officer is authorized to grant parole admission into the U.S. and to recommend that DHS allow the individual to be released from detention on parole pending completion of the asylum process including required security and identity checks. [Existing procedures would remain in place for those cases where the asylum officer does not find the applicant met the “credible fear” standard.]¹²⁵
8. That CIS clarify that in those cases where the non-citizen meets the credible fear standard but the officer believes that the case cannot be adequately resolved based on the initial interview and the asylum application prepared in conjunction with that interview, the officer may prepare the NTA and refer the case to the immigration court as is done now. The fact that some cases could not be adequately resolved at this stage should not preclude the possibility of granting asylum as soon and as efficiently as possible in other cases.

(We recommend in the next section that all asylum cases, even those where an NTA was filed with the immigration court, be adjudicated in the first instance by the Asylum Office. We have not made this recommendation in the expedited removal context because Congress designed a streamlined procedure for expedited removal in INA § 235.)

[2] Affirmative and defensive asylum applications

Affirmative applications for asylum are those filed (with the Asylum Office) by non-citizens who are not in removal proceedings at the time of the application. If the Asylum Office cannot grant asylum and the person cannot document valid immigration status, the Asylum Office refers the matter to the immigration courts by filing an NTA. In contrast, for non-citizens already in removal proceedings, if ICE establishes that the person is subject to removal, the person may initiate a claim for asylum with the court (a defensive application). In these cases, there is no referral to the Asylum Office unless the asylum-seeker is an unaccompanied minor. Congress amended the INA to require that cases involving unaccompanied minors be referred to the Asylum Office.¹²⁶ The ABA Commission recommended that Congress authorize judges to divert defensive applications for asylum adjudication by the Asylum Office. If the Asylum Office did not grant asylum, it would refer the case back to the immigration court to consider the claim.

¹²⁵ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NO.11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE CREDIBLE FEAR OF PERSECUTION OR TORTURE (2009) available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

¹²⁶ See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. N.110-457 (2008).

(It is possible that a statutory amendment is unnecessary for this change. The immigration court adjourns cases to allow other CIS components to adjudicate visa petitions, and it may be that a similar procedure could be adopted here without any statutory change.)

How much of an immigration court workload reduction might this change accomplish? Total asylum cases received in the immigration courts declined from about 57,000 in 2006 to 32,961 in 2010.¹²⁷ Table B shows the immigration court asylum cases disposed on the merits over the last five years. Overall, both affirmative and defensive completions have declined. Grants have hovered in the 50-61 percent range for affirmative applications and in the 33-39 percent range for defensive applications.

Table B: Immigration Court Asylum Cases Decided On The Merits¹²⁸

FY	All	Asylum Applications Completions on the Merits					
		Affirmative			Defensive		
		Total	Denial	Grants	Total	Denials	Grants
06	29,751	18,550	9,020	9,530 51%	11,201	7,457	3,744 33%
07	27,727	16,380	7,953	8,427 51%	11,347	6,921	4,426 39%
08	24,043	14,407	7,051	7,356 51%	9,636	6,116	3,520 37%
09	21,626	13,202	5,940	7,262 55%	8,424	5,394	3,030 36%
10	19,413	11,596	4,508	7,088 61%	7,817	5,046	2,771 35%

The ABA Commission reported that in 2008, 77 percent of defensive asylum applications in the immigration courts were initiated after the NTA's filing (i.e., did not come after an expedited removal/credible fear review). Had the proposal been in effect in 2010, and assuming for the sake of analysis that 77 percent of 2010's defensive claims were NTA-prompted; the judges would have referred about 6,000 claims (77 percent of 7,817) to the Asylum Office. If the Asylum Office grant rate was the same as the judges' (35 percent), about 2,100 cases referred to the Asylum Office would have ended there and left the immigration court docket. The benefit to the defensive asylum seeker might include more rapid resolution of approvable cases (in the expedited removal context, because the officer would be familiar with the case from the credible fear determination), an initial assessment in a less formal setting by an asylum officer trained to conduct interviews involving sensitive issues, and access to a resource center for researching country conditions not usually available to busy immigration judges.

Overall, as Table B shows, the total number of immigration court asylum grants to defensive seekers is not great—2,771 in 2010—but asylum applications are concentrated in a relatively few courts. In 2010, five courts accounted for 62 percent of the asylum receipts, and in those courts, asylum claims were on average 30 percent of all

¹²⁷ *Statistical Year Book, 2010*, *supra* note 5, at I1.

¹²⁸ *Id.* at K.

proceedings received.¹²⁹ The Congressional Research Service reported similar data on asylum and withholding of removal applications.¹³⁰

Moreover, the ABA Commission points out a possible auxiliary benefit of having asylum officers first consider defensive claims, related to the fact that a significant portion of asylum claims never reach a merits determination, but rather are withdrawn or abandoned (in absentia), or the respondent may receive another form of relief or a change of venue. In 2010, as noted, there were 32,961 asylum receipts,¹³¹ but as seen in Table B immigration courts completed only 19,413 claims on the merits, a significant difference even recognizing that receipts in one year are not all disposed of in the same year. The ABA Commission points out that the percentage of affirmative asylum applicants who withdraw or abandon the asylum claim is greater than the comparable figure for defensive claims; it reasons that involvement of the asylum officer may explain some of the difference and if so, involving them in defensive claims might increase withdrawals and abandonments.

Immigration judges' reaction to this idea was mixed. While some recognized the workload relief, others noted that asylum cases offer an interesting respite from the daily grind of removal cases. Still the majority response in our interviews was that the work could begin with the Asylum Office as is the case with juveniles who now seek asylum as a defense to removal. [AWAITING SURVEY RESULTS.] The judges did note that under current procedure in the juvenile cases the matter is "adjourned" or continued rather than administratively closed and that the cases may appear for years on their dockets. Further, they did not have confidence that the Asylum Office notified the court when an asylum application was approved. These judges and several court administrators thought a better procedure would be for the cases to be administratively closed. Administrative closure would also allow the court administrators to relocate files and give a more accurate picture of the long range docket of the court.

CIS officials told us that, although the Asylum Office workload had been falling in recent years, the Asylum Office would need additional resources were it to assume the initial responsibility for adjudicating defensive asylum claims. (The office was able to handle juvenile cases without additional hiring, but the numbers were relatively small.)¹³² Although the Asylum Office is fee-supported, the fees come, not from asylum applicants but from surcharges imposed on other benefit applicants, creating an unpredictable source of financing. (In 2006, the CIS rejected a CIS Ombudsman recommendation that the

¹²⁹ *Id.* at I3, B4.

¹³⁰ See RUTH ELLEN WASEM, CONG. RESEARCH SERV. R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY (2011) available at <http://www.fas.org/sgp/crs/homesec/R41753.pdf>.

¹³¹ *Statistical Year Book, 2010*, *supra* note 5, at I1-3.

¹³² The AO reported the overall volume of these specific cases was small FY2010 778, FY2011 577. Further, the AO returned 247 cases in 2010 and 306 cases in 2011 because it determined it did not have jurisdiction over the asylum jurisdiction. See email from Ted Kim *infra* note 135.

agency begin to charge a fee with asylum applications.)¹³³ CIS officials also questioned whether the reduction in immigration court asylum cases would be sufficient to justify the administrative and possible legislative changes it might require.

Recommendations, 9-11

9. That EOIR seek to amend its regulations to provide that in cases where the respondent seeks asylum of withholding or removal as a defense to removal, the judge should administratively close the case to allow the respondent to file the asylum application and/or a withholding of removal application in the Asylum Office. If the Asylum Office does not grant the application for asylum or withholding, or if the respondent does not comply with Asylum Office procedures, the Asylum Office would prepare a motion to re-calendar the administratively closed NTA. [Note this recommendation is related to the recommendation below concerning the authority to adjudicate applications for withholding of removal.]
10. That EOIR seek to amend its current procedure of having judges “adjourn” asylum cases involving unaccompanied juveniles while the case is adjudicated within the Asylum Office and instead have the judge administratively close the case. If the Asylum Office cannot grant the asylum or other relief to the juvenile, the Asylum Office can initiate a motion to re-calendar the removal proceeding before the judge.
11. That CIS, to help implement these recommendations, evaluate whether a fee is appropriate for the *defensive* filing of an asylum application. There are other forms of relief sought as a defense to removal proceedings where the respondent must pay a fee for a DHS adjudication; e.g., adjustment of status applications. If the respondent is indigent, the regulations provide for fee waivers. The fee should help sustain the resources of the CIS Asylum Office. While there are many concerns about charging fees to vulnerable populations, the INA already contains statutory authority for a fee-based asylum petition.

[3] Asylum Office Adjudication of Eligibility for the Closely Related Claims of Withholding of Removal or Eligibility for Withholding Due to the Convention Against Torture (CAT)

When individuals affirmatively file for asylum, an asylum officer interviews them about whether they meet the statutory criteria of a well-founded fear of persecution on account of membership in a protected group. Some people are statutorily ineligible for asylum but qualify for a more limited type of protection known as the right not to be returned—nonrefoulement. In U.S. statutes this right is found within our concept of withholding of removal.¹³⁴ There are basically two ways to qualify for withholding of removal. The first is to establish a fear that if returned to the country of origin the individual will more

¹³³ See Emilio T. Go, Director, U.S. Citizenship & Immigration Services, *Response to Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status*, U.S. DEP'T HOMELAND SECURITY (June 20, 2006) available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_24_Asylum_Status_USCIS_Response-06-20-06.pdf.

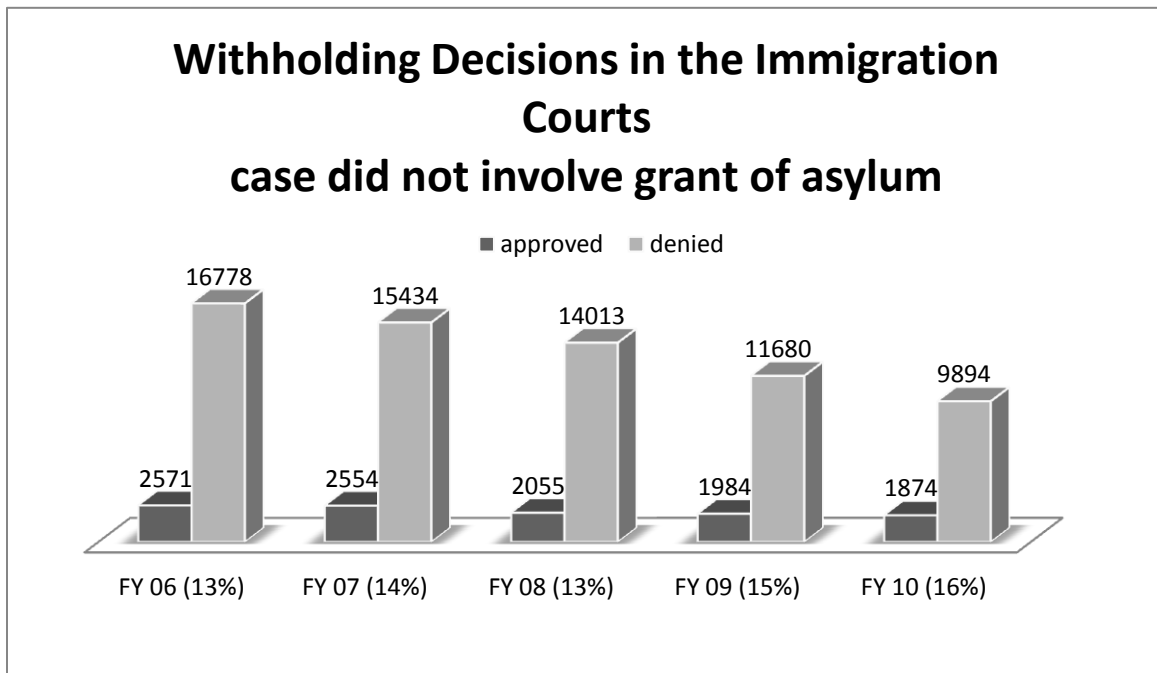
¹³⁴ INA § 241(b)(3) (2010); 8 U.S.C. §§ 1231(b)(3) (2006).

likely than not be subjected to persecution and harm. The second is to establish eligibility for protection under CAT by establishing a likelihood of torture if returned. This second form of withholding is also called “restriction on removal.” Withholding gives the individual the right to remain in the U.S. until the government is satisfied that it is safe to return the individual. People who are granted withholding may not sponsor relatives or travel internationally, but do receive identity and work authorization documents.

Just as we have recommended that the Asylum Office be the first entity to adjudicate asylum claims, we also recommend a change to prevent the piecemeal adjudication of some cases where the individual has established a likelihood of persecution or torture but is ineligible for asylum due to a statutory bar. These individuals may be eligible for withholding and their adjudication should also begin with the Asylum Office. It is difficult to know how this change might reduce the number of cases referred to the immigration court. Even if granted withholding, applicants might be motivated to seek de novo review of eligibility for asylum. Still, in 2010, the courts approved 1,874 (16 percent) of the cases where asylum was not granted (or may not have been sought) but the individual was eligible for withholding. An important distinction between asylum and withholding is that asylum relief includes a path to permanent residence and derivative benefits for immediate family.¹³⁵

¹³⁵ E-mail from Ted Kim, Deputy Chief, Refugee, Asylum, & Int’l Operations Directorate, U.S. CIS, to author (Jan 2, 2012) (on file with authors) (suggesting that most people would be incentivized to seek immigration judge review of a denied asylum application, even if granted withholding, thus negating the potential for increased efficiency in the immigration court).

Chart 5: Withholding Decisions in the Immigration Courts



Source: Year Book 2010 K-4. The Year Book explains that these cases do not include cases where asylum was also granted.

Currently, the Asylum Office is not authorized to grant withholding of removal on either of these bases. This was not always the case. The authority of the Asylum Office to adjudicate withholding in most cases was eliminated in 1995.¹³⁶ Statutorily, the authority to formally withhold removal is currently delegated to the Attorney General and therefore the immigration courts. However, it might be possible for this authority to be delegated by regulation to the Asylum Office. Alternatively, DHS currently has the authority to place individuals under supervised release and to grant work authorization and identity documents. Regulations could make clear this form of supervised release would have the same protections as a grant of withholding of removal and that no individual would be subject to removal under this procedure without an opportunity for a hearing before the immigration court.

If the asylum officer finds the individual is subject to one of the bars to asylum eligibility,¹³⁷ e.g., applied later than one year without a qualifying justifying exception¹³⁸ or has a conviction for a particularly serious crime, the asylum officer tells the applicant that the CIS cannot grant the relief sought and files an NTA.

If the Asylum Office could grant withholding of removal, some people would not seek further review of their pretermitted claim for asylum in the immigration courts. In our

¹³⁶ 59 Fed. Reg. 62284, 62301 (Dec. 5, 1994).

¹³⁷ INA § 208(b)(2) (2010); 8 U.S.C. § 1158(b)(2) (2006).

¹³⁸ See INA § 208(a)(2) (2010); 8 U.S.C. § 1158(a)(2) (2006).

interviews some judges also thought the Asylum Office should have this authority because the inquiry about eligibility for withholding is very similar to the inquiry of eligibility for asylum and the asylum officer is capable of adjudicating the legal qualifications. Some of the people we interviewed argued that the asylum applicant should continue to have the right to litigate his or her claim for asylum in the immigration courts. The Asylum Office interview is non-adversarial and the applicant is frequently unrepresented or the role of the representative is less robust in the adjudication process. The opportunity to present the claim *de novo* in the immigration court is seen a serious protection of the individual's rights.

Recommendations, 12-13

12. That DHS seek to amend 8 C.F.R. § 208.16 to authorize the Asylum Office to adjudicate eligibility for withholding, and if it grants withholding there would be no automatic referral to the immigration court. Implementation of this recommendation would contravene DHS's current reading of its organic statute as restricting withholding decisions to the Attorney General and the immigration courts.¹³⁹
13. That the Asylum Office develops a procedure to allow the applicant to seek immigration court review and upon receipt of the request, the Asylum Office would initiate a referral to the immigration court. Alternatively, where the individual is ineligible for asylum but is eligible for withholding, the Asylum Office could refer that application to a special team of senior asylum officers who might be designated as temporary immigration judges and authorized to conduct *de novo* review of eligibility for asylum in the context of a regular § 240 hearing. The advantage of this model would be to move well trained resources into a specialty hearing docket, allowing the expansion of the immigration court to handle low priority cases, yet preserving the adversarial adjudication model and allowing litigants to develop an administrative record.

[4] Streamline Procedures within the Immigration Court to Avoid Delays in Asylum Application Adjudication

Under current immigration court procedures, when a respondent indicates an intention to seek asylum, the judge sets a deadline for the submission of the application. In most instances, the judge requires an in-person application and that the respondent and any representative appear in court so that the court can confirm receipt of the application and the judge can deliver specific advisals. (Those advisals, however, are already part of the written asylum application warning of the consequences for filing fraudulent or frivolous asylum applications.) In busy immigration courts, after this brief proceeding to accept the application and provide the advisals, the judge will set the date for the individual hearing on the application. The delay to the individual hearing can be months or even a year from

¹³⁹ See *supra* note 130 (describing and explain the delegations of authority to the various components of DHS in the Homeland Security Act).

the date of the submission of the application. These delays frequently mean the application must be updated or supplemented before the individual hearing and that new biometric background checks may be needed.

Recommendation, 14

14. That OCIJ amend the Practice Manual that requires the filing of a defensive asylum application in open court to allow appropriate employees of the court (possibly judicial law clerks or senior staff trained by the court administrators) to accept the submission of the asylum application and provide the required statutory advisals. The amendments should further authorize court personnel to schedule a telephonic status conference with the judge and ICE attorney in any situation where the respondent or his/her representative expresses a lack of understanding. The Practice Manual amendments should note that court personnel may renew, at the merits hearing, the advisal of the danger of filing a frivolous application and allow an opportunity for the respondent to withdraw the application.

[This section and recommendation will move to Section V.C.b. Case Management Procedures in a later edition of this report].

[5] Evaluating the Use of Stipulated Orders of Removal

Proceedings in most civil and criminal court systems are expedited by the parties' agreeing to stipulations that reduce the number of contested matters. In the immigration courts, the practice is rare. Still, stipulated orders, where there are appropriate safeguards of the rights of the parties, could be an effective tool for both reducing hearing time and most likely significantly reducing the length of detention for some respondents. Although we are sensitive to criticisms of the use of stipulated orders, we think that for some of the courts, especially those with a large caseload of detainees with serious criminal convictions, this may be an appropriate court procedure. We suggest use of stipulated removal for this subset of cases because the criminal conviction is often, although not uniformly, also a bar to relief or limits defenses. Further, this is a subset of cases that DHS has identified as a priority.

In INA § 240(d) Congress authorized the Attorney General to develop regulations about the issuance of stipulated removal orders. EOIR has implemented this authority through a regulation and an Operating Procedures and Policy Memorandum (OPPM).¹⁴⁰ The OPPM appears to focus on using the stipulated order *before* the first master calendar hearing is scheduled; however, nothing in the OPPM or regulation precludes using this method to complete the proceeding at a later point. As noted earlier, some critics are concerned about the way that stipulated orders may be obtained during apprehensions or in detention centers, and some believe that the current system does not adequately protect individuals' due process rights. Where respondents are represented by counsel, judges may want to ask the attorneys to confer and consider whether a stipulated order of removal might be appropriate in a particular matter. In cases where the respondent is detained, if "know-your-rights" presentations could be combined with one-on-one

¹⁴⁰ 8 C.F.R. § 1003.25(b) (2010); *OPPM: Stipulated Removals*, *supra* note 39.

consultations with the presenters—assuming the availability of adequate language translation for both—there may be a number of pro se detained respondents who would wish to shorten their detention by asking for a stipulated order of removal.

Appendix 4 displays the number of stipulated removal orders entered by the 38 courts that were recorded as entering any such orders in 2009 and 2010, and shows the proportion of such orders to the courts' total completed proceedings. As noted there the percentages varied considerably, from less than one percent for some courts to about half of all completed proceedings for another court.

Recommendations, 15-17

15. That EOIR consider a pilot project to test stipulated removals' utility as a mechanism to reduce detention time, allow judges to focus on contested cases, and assess the contexts, if any in which, the use of stipulated removals might diminish due process protections.

During the pilot, most appropriately conducted in a detention center, the judges would direct attorneys for respondents and ICE counsel to confer and discuss the entry of a stipulated order of removal in cases where the NTA alleges removal on serious criminal grounds (we suggest this subset because in most criminal cases the conviction bars eligibility for relief, thus making a subset that is compatible with DHS priorities and a group likely to have limited defenses).

EOIR would encourage judges to permit attorneys to make limited appearances (as discussed in section V.C.1.a.(4)) to meet and advise detained respondents about the possibility of relief and the availability of a stipulated order of removal.

In a randomly selected subset of cases, judges would hold an in person hearing and review of the advisals and assess the understanding of the respondent about the nature of the stipulated removal order and the voluntariness of the waivers.

"Know-your-rights" presentations sponsored by the LOP program (discussed in Section III.B.) would have sufficient access to the respondents to allow them to make personal inquiries about their ability to contest removal or to establish prima facie eligibility for relief prior to the master calendar hearing. Respondents could be informed about the ability to request a stipulated order of removal after the presentation.

16. That EOIR consider designing, in jurisdictions where DHS routinely seeks stipulated removal orders and asks for a waiver of the respondent's appearance, a random selection procedure where personal appearance is not waived and the respondent is brought to the immigration court to ensure adequate warnings and the waivers were knowing and voluntary.
17. That EOIR, if it undertakes such a project, encourage one or more advocacy organizations to prepare a video recording (with subtitles or dubbing in a number of languages) explaining removal proceedings, general eligibility for relief, and the possibility of requesting a stipulated order of removal should the respondent wish to waive the hearing and any application for relief including the privilege of voluntary departure.

[This section and recommendation will move to Section V.C.b. Case Management Procedures in a later edition of this report].

c. Keeping DHS Appeals to the BIA within DHS

In addition to appeals from immigration courts, the BIA reviews three types of appeals from DHS agency decisions: waivers of inadmissibility for non-immigrants under certain provisions of the INA; fines and penalties that CBP imposes on air carriers for immigration law violations, viz., allowing aliens with no or improper documentation onto flights to the U.S.; and, most significantly, appeals from CIS denials of family-based visa petitions (I-130 forms). Table C shows all BIA receipts for 2006 through 2010 and then those from immigration court decisions and those from DHS decisions. In 2010, for example, the BIA received 35,787 appeals. Of those, 27,196 or 76 percent challenged immigration judge decisions, 24 percent challenged DHS visa petition decisions, and less than one percent each challenged other DHS decisions. Visa petition appeals as a percentage of all BIA receipts varied from in the ten to 15 percent range from 2006 to 2009, but reached 24 percent in 2010.

Table C: BIA Appeals from Immigration Courts and DHS¹⁴¹

	2006	2007	2008	2009	2010
TOTAL APPEALS	39,743	36,606	33,469	32,891	35,787
Appeals from IJ decisions	33,600 85%	32,297 88%	30,448 91%	28,578 87%	27,196 76%
Appeals from DHS Decisions					
Visa Petitions Decisions	5,918 15%	3,980 11%	2,851 8%	3,985 12%	8,569 24%
212 Waiver Decisions	75 <1%	139 <1%	117 <1%	27 <1%	21 <1%
Airline Fines and Penalties*	150 <1%	190 <1%	53 <1%	301 <1%	1 <1%

*Airline fine and penalty appeals have never been a large component of DHS workload, and they have declined since complex litigation on the matter ended in 2009.¹⁴²

Although the BIA has developed expertise in these DHS appeals, there is no particular reason why it, rather than a DHS administrative adjudication body, should continue to hear the appeals.

The actual workload savings (as opposed to caseload savings) from moving these cases out of the BIA would not be great, at least by one measure of case difficulty, namely, whether the appeal gets a single member or panel decision. As referenced earlier and discussed later, the BIA disposes of most of its cases by single-member decisions, but the percentage of immigration judge appeals so disposed is noticeably lower than the

¹⁴¹ Adapted from Table 16, *Statistical Year Book, 2010*, *supra* note 5, at T2.

¹⁴² *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009).

percentage of DHS appeals so disposed, as seen in Table D.¹⁴³ Over the last five years, immigration court appeals produced from 87.0 percent to 92.3 percent single member decisions, but 99 percent or more DHS appeals got single member decisions.

Table D: BIA Single Member Decisions (SMDs) in All Appeals, Immigration Judge Appeals, and DHS Appeals

	All Apps	ALL SMDs	IJ Apps	IJ SMDs	DHS Apps	DHS SMDs
FY 06	41,475	38,649 (93.2%)	36348	33,565 (92.3%)	5127	5,084 (99.2%)
FY 07	35,394	32,325 (91.3%)	30751	27,717 (90.1%)	4643	4,608 (99.2%)
FY 08	38,369	35,656 (92.9%)	34812	32,129 (92.3%)	3557	3,527 (99.2%)
FY 09	33,102	30,124 (91.0%)	29395	26,431 (89.9%)	3707	3,693 (99.6%)
FY 10	33,305	29,685 (89.1%)	27428	23,864 (87.0%)	5877	5,821 (99.0%)

CIS's Administrative Appeals Office (AAO) hears other appeals from CIS adjudication officer decisions and is the logical place to hear I-130 appeals. Both BIA and AAO officials to whom we spoke endorse the concept, and the new AAO leadership has expressed a determination to refine the office's adjudication functions. The AAO has been the subject of some criticism for its lack of transparency in the adjudication of appeals.¹⁴⁴

Because the AAO is a fee-supported rather than appropriations-supported operation, the cost to citizens and non-citizens filing visa petition appeals for family members would rise from the current \$110¹⁴⁵ to about \$630, according to estimates provided by AAO personnel. This is the fee currently charged for other forms of AAO appeals. While a significant increase, the EOIR fee has not changed in many years and the agency is funded by appropriations. The AAO is a fee based agency and will need to cover the expense of the adjudication.

Such a change in procedure would probably require an amendment to the provision of DHS's organic statute that directs the principal legal adviser to the CIS director to, among other things, "represent[CIS] in visa petition proceedings before the Executive Office for Immigration Review."¹⁴⁶

¹⁴³ Table 17, *Statistical Year Book, 2010*, *supra* note 5, at T2; *OPAT DATA*, *supra* note 40.

¹⁴⁴ See Prakash Khatri, Ombudsman, U.S. Citizenship & Immigration Services, *Recommendation from the CIS Ombudsman to the Director, USCIS*, U.S. DEP'T HOMELAND SECURITY (Dec. 6, 2005) available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf.

¹⁴⁵ BOARD OF IMMIGRATION APPEALS, PRACTICE MANUAL (2007) at 118, available at www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf [Hereinafter BIA PRACTICE MANUAL].

¹⁴⁶ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 § 451(d)(2)(B); 8 C.F.R. §1003.1(b)(5) (2010) (setting out the BIA's appellate jurisdiction and gives the BIA jurisdiction over these petitions). See also *id.* at 117.

Recommendations, 18-20

18. That DHS seek statutory and regulatory change to allow all appeals of denied I-130 petitions to be submitted to the CIS's Administrative Appeals Office (AAO).
19. That DHS amend regulations to send all appeals from CBP airline fines and penalties to AAO. Alternatively, CBP may want to eliminate any form of administrative appeal and airlines and other carriers would seek review in federal courts.
20. That the AAO, to ensure quality and timely adjudication of these important family-based petitions: create a special unit for the adjudication, formally segregating the unit from its other visa petition adjudications; institute a method of designating precedent decisions; and publicize clear processing time frames so that the public can anticipate the length of time it will require to adjudicate the appeal.

2. Relieving Judges and Immigration Court Staff of Certain Case-Processing Related Tasks**a. Electronic Filing and Docket System**

In several of our interviews, we learned that court administrators generate paper dockets for the ICE Trial Attorneys. While generating these materials may not seem particularly burdensome, it takes away time from other administrative operations within the court. Moreover, providing this information to the ICE Trial Attorneys, whether by hard copy or electronically, creates an asymmetry that provides greater access for the government counsel and thus impairs the appearance of neutrality and independence. (In some courts, the administrators have developed an electronic "workaround" where the court can build a bridge between the EOIR database and the ICE Trial Attorney case management system. The electronic access is limited and does not provide access to the full EOIR case management system, but does allow the ICE Attorney to see all cases docketed and some case status information.)

The lack of electronic access creates another problem where the NTA filings are faxed to the court administrator for docketing removal hearings later that day at an "off site" location. EOIR's responsiveness to DHS needs nevertheless drains the time of court administrative staff and may be interfering with the court's administrative goals.

An electronic docket and filing system will reduce these burdens on the court administrative staff. Ability to access the full docket electronically will also help attorneys who have multiple hearings on the same date, perhaps before different judges and may allow greater efficiency and coordination of appearances in courts with a large number of judges.

EOIR officials told us that providing electronic access is a long-term goal but that implementation is not in the near future. One court administrator reported that the agency might soon be able to allow private attorneys to register with the court system and have access to the public docket electronically. Another administrator reported that the system might take ten more years before it could be fully integrated.

Recommendation, 21

21. That EOIR move as quickly as possible to electronic docketing and explore interim steps to provide limited electronic access to registered private attorneys, accredited representatives, and ICE Trial Attorneys.

b. Eliminating EOIR's Role in Asylum Work Authorization Clock

In 1995, Congress overhauled the asylum application process, putting into place a number of constraints and incentives to try to deter weak or frivolous asylum applications. In particular, the changes decoupled the grant of work authorization with the filing of an application for asylum or similar protective relief and required DHS to withhold work authorization for asylum applicants until the government has had at least 150 days to adjudicate the asylum application. If a case is approved prior to that time, DHS grants work authorization. If DHS cannot approve an application for asylum or the application is presented for the first time as a defense to removal, the work authorization “clock” continues to run while the court adjudicates the asylum case. (The regulations authorize DHS to grant work authorization to individuals who seek cancellation of removal and to those who have a final order of removal but are under an order of supervision.¹⁴⁷ Asylum is the only category with an employment authorization “waiting period.” The regulations require a wait of 150 days to apply for work authorization and an additional 30 days for government objection.)¹⁴⁸

The current regulations, however, stop the clock that counts days toward work authorization eligibility where judges attribute the delay in adjudication to the respondent. While the grant of work authorization is solely within the authority of DHS, since the inception of these rules, the EOIR has used its record of proceedings to keep track of the reasons for adjournments and, as clarified recently,¹⁴⁹ the judge makes a specific finding about whether the respondent is responsible for the delay in adjudication, such as rejecting an available earlier date for a hearing or failing to process required biometric data. This is a controversial area. A lawsuit was recently filed against DHS and EOIR for their role in the management of the asylum work authorization clock.¹⁵⁰

In our interviews, court administrators consistently reported that staff (often senior staff) devoted at least 20 percent of their time to investigating queries about the “asylum clock.” Respondents or their attorneys contact court personnel, who direct them to file a written request for information about the adjournment code used to continue the hearing. In some situations, the respondent or counsel objected that the judge did not intend the

¹⁴⁷ See 8 C.F.R. § 1274a.12(c)(10) (2010).

¹⁴⁸ 8 C.F.R. § 1274a.12(c)(8)(i) (2010) and 8 C.F. R. § 208.7 (2010).

¹⁴⁹ See Brian O’Leary, Chief Judge, *Operating Policies and Procedures Memorandum 11-02: The Asylum Clock*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf>.

¹⁵⁰ A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (D. Wash. filed Dec. 15, 2011).

work authorization clock to stop and ask for an investigation of the code lodged in the record, which requires the court administrator to listen to the recording of the hearing and determine if the entered coding is consistent with the judge's findings. Even after this investigation, some objections continue, requiring a reference to the respective ACIJ.

The work authorization clock is an important tool in deterring frivolous asylum claims, but the lengthy delays in many of the immigration courts have extended the adjudication process far beyond 180 days.¹⁵¹ Diligent asylum applicants can face delays of six months or longer to work authorization eligibility simply because the court cannot docket another proceeding in the interim. Further, total applications for asylum have fallen, as shown in Table B above,¹⁵² and largely stayed well below the high rates experienced in the mid and late 1980s.

There are a series of statutory and regulatory deterrents to frivolous filings beyond the delay of work authorization. DHS can reduce unnecessary work if it changes its adjudication rules to allow a presumption of work authorization eligibility 150 days after the application has been filed. In appropriate cases, where DHS believes the respondent has frustrated the adjudication or unreasonably delayed the adjudication of the application for asylum, DHS can refuse the grant of work authorization or refuse to extend it beyond the initial authorization period. This single change would allow the judges to focus on the adjournment codes for purposes of managing their dockets and reminding the judge and the parties of the next steps in the case. This change would also regain a substantial amount of senior administrator time.

Recommendations, 22-24

22. That EOIR, until it can release its public electronic docking system with equal access to docket information for all parties, consider making a computer terminal available in the courts' pro bono rooms or at the back of a courtroom so that members of the public, attorneys and non-profit organizations can access the same limited docket as ICE Trial Attorneys.
23. That EOIR stop using adjournment codes to track the delays in asylum adjudication, informing DHS that it will no longer code adjournments or record the reasons for

¹⁵¹ While we do not have specific data about the processing of just asylum claims, the TRAC immigration reports created an online tool to track the average waiting time in the immigration courts. Using that tool, only the immigration courts within prisons and a handful of detention centers have average adjudications in under 180 days. See Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, SYRACUSE UNIV., (Sept. 30, 2011) http://trac.syr.edu/phptools/immigration/court_backlog. The average wait across the U.S. was 490 days as of the TRAC Report published December 8, 2011. Using another TRAC tool in cases involving relief from removal (a subset that includes asylum) the average time to completion across the U.S. was 723 days in fiscal year 2011. See Transactional Records Access Clearinghouse, *Immigration Court Processing Time by Outcome*, SYRACUSE UNIV., (Sept. 30, 2011) http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.

¹⁵² See Table B: Immigration Court Asylum Cases Decided On The Merits, *supra* at 43.

adjournment in the recording of proceeding for the purpose of tracking the number of days an asylum application is pending.

24. That DHS revise its regulations and procedures to allow asylum and withholding applicants to apply for work authorization in the same manner as other people within removal proceedings provided that at least 150 days have passed since the filing of an asylum application.

Note also our Recommendation 30 under “representation,” concerning LOP providers gaining electronic access to court dockets.

C. Process Modification

Another way to enable immigration courts and the BIA to function more effectively is to modify how they do their work.

1. Immigration Adjudication Case Management

As we will explain, immigration court efforts to deal with the volume of cases they carry now, and the likely increased volume in the future, can be affected by:

- the extent, type, and quality of legal representation and advice that respondents receive;
- immigration court case management procedures, including concentrated experimentation with pre-hearing, or status, conferences and the effective use of video technology for conducting some hearings; and possibly
- the management structure and administration (broadly defined) of the immigration courts.

We have given limited attention to some aspects of process-modification because the asserted problem is highly unlikely to be resolved (e.g., because of lack of resources), or has been largely resolved (e.g., improved judge recruitment), or because the attention that others have given the topic and the limited time and resources available to us counseled against our extensive involvement. We have not excluded totally any important topic.

a. Representation

Respondents in removal proceedings may be represented by lawyers who are admitted to a state bar. Respondents can also be represented by non-lawyer “accredited representatives” whom EOIR has certified as competent to provide such representation. The INA specifies that any such representation be “at no cost to the government.”¹⁵³ By

¹⁵³ INA § 240A(b)(4)(A) (2010); 8 U.S.C. § 1229b(b)(4)(A) (2006); *see also* § 292; 8 U.S.C. § 1362 (2006). “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” *Id.*

considerable margins immigration judges and ICE Trial Attorneys told us that adequate respondent representation serves adjudicative efficiency as well as fairness to respondents.

[AWAITING SURVEY RESULTS]

Table E shows that the percentage of represented respondents in completed immigration court proceedings has been generally in the 40-50 percent range for the most recent five years, and in the 70-80 percent range for completed BIA appeals from immigration judge decisions.¹⁵⁴ EOIR officials told us that a proceeding is coded as “represented” if the respondent is represented at the time the case is completed.¹⁵⁵ Thus, the representation figures probably overstated the actual level of representation because respondents in some proceedings coded as “represented” were not represented for the entire proceeding.

The percentage of represented respondents ranges considerably, from less than two percent to 81 percent (New York City). Appendix 3 lists all the immigration courts and the percentage of 2010 proceedings coded as “represented.”

Table E: Percentage of Represented Respondents in Completed Proceedings

	Immigration court proceedings	BIA appeals from IC decisions
FY06	35%	65%
FY07	47%	71%
FY08	40%	76%
FY09	40%	77%
FY10	43%	79%

These percentages, however, are noticeably lower for respondents in detention. Nationally, in 2010, 16 percent of respondents in detained immigration court proceedings had representation; in ten courts, the percentage was 40 percent or higher and in 13 it was ten percent or lower.¹⁵⁶ Appendix 3 also shows representation rates for detained cases for each court. (Fifty one percent of detained respondents in BIA appeals from immigration judge decisions had representation.)¹⁵⁷

Simply having a lawyer, though, does not ensure “adequate representation.” Various studies, most recently one conducted by the Katzmann Study Group in New York (described later in this section) with the assistance of the Vera Institute of Justice, have documented the levels of inadequate representation provided by lawyers. According to the recent study covering the 2010-2011 period, New York immigration judges said

¹⁵⁴ *Statistical Year Book, 2010*, *supra* note 5, at G, V.

¹⁵⁵ *OPAT DATA*, *supra* note 40.

¹⁵⁶ *Statistical Year Book, 2010*, *supra* note 5, at O3 (identifying court proceedings with detained respondents); *OPAT DATA*, *supra* note 39 (identifying the number of represented respondents).

¹⁵⁷ *OPAT DATA*, *supra* note 40.

respondents received “inadequate” legal assistance in 33 percent of the cases in their courtrooms and “grossly inadequate” assistance in 14 percent of the cases. Generally, the judges thought pro bono attorneys and those from nonprofit organizations and law school clinics performed better than private lawyers.¹⁵⁸

[1] Costs to the government and current efforts to compensate for lack of representation

We have assessed but not quantified costs to the immigration courts, government attorneys, and the U.S. Treasury, of respondents’ limited access to adequate legal representation, or even, if not representation per se, at least advice of a competent lawyer.

The lack of competent counsel means:

- respondents’ remaining in tax-supported detention based on unrealistic hopes they will receive relief; whereas a competent and responsible attorney would explain that expecting relief is unrealistic or groundless;
- lengthened removal proceedings, and thus increased detention costs in some cases, because of continuances that judges grant to allow respondents time to seek representation. Almost 14 percent of continuances granted in 2010 were to allow the respondent to try to find representation;¹⁵⁹
- judges’ needing additional time to honor their obligation to inform the respondent, affirmatively, of opportunities for relief and taking court time to build a record of adequate notice and advisals;
- poor administrative records that do not preserve important issues for further agency or judicial review;
- the lack of judicial education that the adversary process typically provides. The INA is a very complex statute, and a significant number of cases present varying statutory interpretations about which the courts of appeals are frequently in conflict. Although formal judicial education programs on such topics are essential components of any well-administered court system, the adversary system in itself can be a valuable form of judicial education. Two competent, opposing lawyers arguing a point provides a judge assurance that she has the best information she’s likely to have; and

¹⁵⁸ See Kirk Semple, *In a Study, Lawyers Present a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES, Dec. 19, 2011, at A24; New York Immigrant Representation Study, *Assessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, (2011) available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (the complete report is to be published in the Cardozo Law Review).

¹⁵⁹ See Table I, *infra*. at 78.

- the inability of ICE Trial Attorneys, when the respondent is not represented, to handle higher volumes of cases or focus on the complex or difficult cases.

Various efforts are in place to try to compensate for the lack of representation.

[a] “Know-Your-Rights” presentations

In some parts of the country non-profit organizations visit detention centers and provide “Know-Your-Rights” presentations; some are able to do some screening of cases for later referral for full representation. Many of these presentations fall within EOIR’s federally funded Legal Orientation Program (LOP), which Attorney General Holder has described as a “critical tool for saving precious taxpayer dollars.”¹⁶⁰ EOIR currently administers some programs through contracts with the Vera Institute of Justice, which in turn arranges for presentations by various groups. Vera evaluated the LOP in 2008 and found that participants moved through the courts faster, received fewer in absentia orders, and helped prepare respondents to proceed *pro se*. Vera also reported that detention facilities managers said they have observed fewer behavioral problems by participants, and that judges said the participants were better able to articulate relief to which they might be entitled and to understand the proceedings.¹⁶¹ Both the House and Senate Appropriations Committees, in commenting on their recommendations for 2012 DOJ funding, singled out the LOP as especially valuable and urged EOIR to direct whatever funds it could toward it.¹⁶²

[AWAITING SURVEY DATA]

The timing of these presentations, however, can be problematic. Several LOP providers told us that when the presentation is made the same day as an initial master calendar hearing, a significant number of detainees will request a continuance to be able to further assess the information they learned during the presentation about their potential eligibility for relief from removal.

[AWAITING SURVEY DATA]

[b] “Accredited representatives”

EOIR also allows “accredited representatives” to appear in the court to represent non-citizens. Accredited representatives are non-attorney employees of nonprofit organizations, who apply for accreditation based on their experience and training. We did

¹⁶⁰ Attorney General Eric Holder Addresses the Pro Bono Institute, U.S. DEP’T OF JUSTICE, (Mar. 19, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

¹⁶¹ NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, VERA INSTITUTE OF JUSTICE, LEGAL ORIENTATION PROGRAM, EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II (2008), available at http://www.vera.org/download?file=1778/LOP%2Bevaluation_updated%2B5-20-08.pdf.

¹⁶² See H.R. REP. NO. 112-169 (2011) available at www.gpo.gov/fdsys/pkg/CRPT-112hrpt169/pdf/CRPT-112hrpt169.pdf; S. REP. NO. 112-78 (2011) available at www.gpo.gov/fdsys/pkg/CRPT-112srpt78/pdf/CRPT-112srpt78.pdf.

not have time to assess the extent or value of these services or whether their expansion can realistically enhance the availability of representation. We did hear concerns that EOIR's list of pro bono providers often continued to list non-profit organizations even though the particular "accredited representative" had left the organization. Several public interest lawyers expressed concerns about the qualitative assessment of the accredited representative's skills and the lack of parallel disciplinary procedures for accredited representatives and attorneys.

[c] Advertising deficient providers

EOIR has recognized that there is a need to increase within immigrant communities the awareness of unscrupulous lawyers and others who offer representation to those in or headed for removal proceedings. This past year, consumer warnings were posted at the immigration court and made available on the agency website. However, while these efforts are important, there may be a need for more qualitative assessments of the accredited representatives and a more in depth monitoring of the pro bono and low cost providers list available at each immigration court.

[d] Organized pro bono efforts

Recent years have seen increased efforts to encourage pro bono representation. The ABA has projects in several cities. One of the projects is the Immigration Justice Project in San Diego that tries to ensure that every person appearing in the court has access to pro bono counsel. The project regularly hosts trainings for pro bono counsel.¹⁶³

We had the opportunity to explore some of the pro bono activities in New York. Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit has organized a multi-pronged effort to encourage the private bar, law schools, and pro bono organizations to provide increased representation to those in removal proceedings in the New York City area.¹⁶⁴ Also in New York, more than 17 members of the immigration court currently have volunteered to work on pro bono initiatives and related trainings. In 2011 and 2012, the judges there planned a series of trainings with CLE partners in the bar associations and private firms. The trainings include mock trials held at the court and have involved ICE Trial Attorneys, the private bar, and the judges.¹⁶⁵ The trainings have

¹⁶³ See *Immigration Justice Project of San Diego*, AMERICAN BAR ASSOCIATION http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/immigration_justice_project_ijp_of_san_diego.html (last visited Jan. 6, 2012).

¹⁶⁴ See, e.g., Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES, May 4, 2011, at A24; 78 FORDHAM L. REV. 2 (Nov. 2009) (describing of the groups' activities and articles addressing the needs of the unrepresented).

¹⁶⁵ See, e.g., Editorial, *Deportation without Representation*, N.Y. TIMES, Dec. 24, 2011, at SR14 (urging greater pro bono and training to improve inadequate representation) and responses by Eleanor Acer (describing how Human Rights First has tried to expand pro bono representation in New York) and Michael Rooney (describing pro bono work with the Heartland Alliance National Immigrant Justice Center and discussing the difficulty of providing representation in detention centers) N.Y. TIMES, Dec. 27, 2011, at A18. See also Lori Adams and Alida Y. Lasker, *Symposium: Innovative Approaches to Immigrant*

been fully subscribed and the New York court is looking to expand. Working with the State Bar Association, the New York court is helping to raise awareness of the need for pro bono or low cost immigration representation outside of New York City. The NY State Bar will be holding a summit on these issues at its annual meeting in January of 2012. One of the main goals of the NY State Bar Committee on Immigration is to increase representation for detained individuals who may be held in state or local jails throughout New York.

[AWAITING SURVEY RESULTS]

We also learned of a pilot project on going in the Phoenix, Arizona, immigration court. The court has entered into a Memorandum of Understanding with the Phoenix College of Law. The law school has a part time clinical instructor supervising students who attend weekly master calendar sessions of the court. The immigration judge facilitates an opportunity for any person who is unrepresented to hold a private consultation with the clinic by calling the cases involving represented persons first. While those cases are on going, the clinic students and supervisor use the court's pro bono room to consult with the unrepresented individual about potential eligibility for relief. The Arizona courts would like to expand to have similar programs in Tucson and if possible, arrange for law students to appear in one of the detention centers to help with applications for bond.

In some cities, the local bar organizations are able to staff similar screenings and opportunities to consult with the pro bono counsel on a regular basis. We did not have time to thoroughly study these programs in multiple cities. While there are many strong programs, these groups uniformly report an inability to represent all who desire pro bono representation. If the individual is detained, the obstacles to representation increase significantly.¹⁶⁶

In the courts we visited that were not located within a detention facility, all had a pro bono room available for private consultations outside of the main public lobby. However, the rooms do not have reading materials or videos providing any information, other than the list of pro bono providers.

Recommendations, 25-30

25. That EOIR, regardless of the likelihood of statutory change, continue to make the case to Congress that funding representation for those who are detained and unable to pay the cost of hiring individual counsel will work efficiencies and cost savings.

Representation: Exploring New Partnerships: The Asylum Representation Project and the Leon Levy Fellowship at Human Rights First: An innovative Partnership to Increase Pro Bono Representation for Indigent Asylum-Seekers, 33 CARDOZO L. REV. 417 (Dec. 2011).

¹⁶⁶ Margaret Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997). See also NAT'L IMMIGRATION JUST. CNTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 4-5 (2010), available at www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

26. That EOIR consider a more intensive assessment of the paraprofessional programs that provide legal representation and the accreditation process, as well as an assessment of the accuracy and usefulness of the pro bono lists provided at the courts.
27. That the EOIR develop, in consultation with groups that are encouraging pro bono representation, a national pro bono training curriculum, tailored to detained and non-detained settings and offer a systematic cycle of training in partnership with CLE and non-profit providers. The successful mock hearings and training materials developed in one location should be shared with the other courts and where possible, trainings should be recorded and those video or audio recordings made widely available to the public. With appropriate disclaimers and updates, these trainings may help to increase representation, pro bono participation, and even raise the sophistication of the respondents and their families about what to expect of their representatives.
28. That EOIR continue to give high priority for any available funds for the Legal Orientation Program.
29. That EOIR help negotiate “know-your-rights” providers’ access to detainees and to help ensure that presentations are made sufficiently in advance of the initial master calendar hearings to ensure adequate time of the detainees to consider and evaluate the presentation information.
30. That EOIR consider giving LOP providers electronic access to the court dockets in the same manner as is provided to DHS counsel. While a longer term goal of EOIR is to allow all registered representatives to electronically access the court dockets, in the intervening period if LOP providers have this access it will help them prepare for the presentations, potentially recruiting additional assistance or notifying needed translators. In detention centers it may be equally important for EOIR to negotiate with the detention officers to provide lists of new detainees, their country of origin and language requirements at the earliest possible stage to both the court and the LOP providers.

Note our recommendations below in Section V.C.1.b. concerning additional advisories to attorneys and pro se respondents about immigration court procedures.

[2] Technology to Enhance Representation

We discuss here several technology-based possibilities for enhancing access to legal advice and representation.

[a] Audio or video links for consultation

According to a 2011 Administrative Conference staff report,¹⁶⁷ video conferencing equipment is available or under installation in all immigration courts, and in 77 other facilities, including detention facilities. In general, both EOIR and DHS officials seemed

¹⁶⁷ Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, ADMIN. CONFERENCE OF THE U.S., (May 10, 2011) (draft report) available at <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Revised-Final-Draft-Report-on-Agency-Use-of-Video-Hearings-5-10-11.pdf>.

receptive to the idea of making those links available to pro bono legal service providers and law school clinics and perhaps others who would be willing to answer questions from detained respondents. Making these facilities available to enhance access to legal guidance seems consistent with EOIR-funded Legal Orientation Programs.

Creating even this simple enhanced technology in detention centers, however, faces considerable hurdles. The proposal may be doomed by realities on the ground. For one thing, some state and local jails in which DHS rents space may refuse to permit such links in their facilities. A 2010 National Immigrant Justice Center study reported that 78 percent of the over 25,000 detainees it surveyed were in facilities that prohibited attorneys from scheduling private calls with their clients.¹⁶⁸ Yet, in some state and local jails, video technology is being introduced to allow distant family members to visit with incarcerated relatives. In New York, the State Bar is seeking to explore whether immigration counsel could use the video conferencing equipment in a secure, confidential manner, to allow attorney consultation and preparation.

[b] Video “Know-Your-Rights” presentations

The “Know-Your-Rights” presentations sponsored under the aegis of EOIR’s Legal Orientation Program cannot reach all respondents who might benefit from them. Many of the detention centers are in locations that are not easily accessible by attorneys or non-profit representatives. Moreover detainees may miss a presentation because they are moved from a facility before they can attend the relevant program or meet with any potential representative. Language accessibility can also be a problem. Many “know-your-rights” presentations are only in English or Spanish, yet the detained population may have dozens of other languages. It might be possible to provide some of this information through prerecorded video with foreign language captioning. The technology to facilitate this is widely used on such websites as You Tube. If the detained population had access to these recordings, then later in-person visits or telephone consultation by non-profit organizations could spend more time on case by case assessment and counseling.

[AWAITING SURVEY RESULTS]

The ABA Commission on Immigration is preparing such a video and working to secure translation of the video into several languages.

In many of the detention facilities televisions and DVD players are available in the dormitories, recreational rooms, and law libraries. Access to the law library may be too limited for short-term detainees and because each visit is limited to thirty or sixty minutes per day depending on the rules of the detention facilities. Therefore, these “know-your-rights” videos should also be available in other areas of detained facilities.

Recommendations, 31-34

¹⁶⁸ NAT’L IMMIGRATION JUST. CNTR., *supra* note 155.

31. That DHS and EOIR provide video versions of the “Know-Your-Rights” presentations in every detention facilities available to be played in the dorms throughout the day and the law libraries on demand.
32. That DHS and/or EOIR assist in the transcription of the text of the forthcoming ABA Immigration Commission video into additional languages or provide audio translations in the major languages of the detained populations.
33. That DHS provide video technology in all detention facilities allowing private consultation and preparation visits between detainees and counsel. Similarly, this should be part of the standards required of all leased or privately controlled immigration detention facilities.
34. That DHS, to help reduce continuances granted to allow attorney preparation, have a duty officer in those facilities where video technology is not available, whom attorneys and accredited representatives can contact to schedule collect calls from the detainee.

[3] “Limited Appearances” by Counsel

By a “limited appearance,” an attorney might, for example, provide representation at the master calendar hearing but not at a merits hearing held in a distant detention facility where video conferencing technology (VCT) facilities are unavailable. The OCIJ’s Practice Manual disfavors limited appearances—advising attorneys that, once they appear in court to represent a respondent, they are obligated to continue representation unless the respondent terminates the representation or the judge grants a motion to withdraw or substitute counsel. The manual nevertheless says that the judge may “allow[] a limited appearance.”¹⁶⁹ Limited appearances are obviously subject to abuse; an attorney, for instance, might collect a fee for a master calendar appearance but leave the respondent in the lurch to navigate the rest of process alone. On the other hand, pro bono counsel and some judges to whom we spoke said that limited appearances within the representation-deprived removal adjudication system may be better than no representation, if the respondent understands the limits it entails.

Recommendation, 35

35. That EOIR consider amending the Practice Manual to explain circumstances in which judges may wish to permit limited appearances and necessary warnings and conditions they should establish.

[4] Pro Se Law Clerks

We also discussed with the judges and others the concept of pro se law clerks. Some state and federal courts, starting in 1975 on a pilot basis, employ attorneys on the staff of the clerk’s or court administrator’s office who assist both pro se litigants and the judges who

¹⁶⁹ OCIJ PRACTICE MANUAL, *supra* note 102, at Ch. 2, § 3(d).

deal with them. We provided our interviewees a job description for such a position posted by a federal district court:¹⁷⁰

- screen complaints, petitions, and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints, that have been filed by pro se litigants to determine their legal merit, the issues involved, and the basis for relief;
- screen other pro se litigation such as social security and equal opportunity complaints;
- track the progress of and works with the judges to manage all pro se cases; advising the judges on the relative status and priority needs of assigned cases;
- draft orders, reports and recommendations for the disposition of pro se cases;
- maintain contact with pro se litigants who visit and appear in court; responding orally and in writing to questions relating to legal procedure and other processes posed by pro se litigants;
- answer correspondence and telephone inquiries from pro se litigants;
- prepare and update pro se litigant forms and instructional packets designed to assist unrepresented parties in drafting complaints and avoiding time-consuming procedural errors so cases can be processed efficiently.

Our interviewees were generally intrigued by the concept although they noted quickly that implementation of such a program would require a court to adjust its staffing internally because additional funds would be unavailable to add new hires. Furthermore, some EOIR officials were skeptical that pro se law clerks could provide as much assistance as could well-designed “know-your-rights” presentations.

Recommendation, 36

36. That EOIR consider a limited multi-year pilot program in a large immigration court or a detention center with a large immigration docket to assess whether a pro se law clerk office could provide benefits that outweigh its costs, such as saving court time in explaining procedures and filing requirements and reduced need for continuances because a greater number of applications were complete upon submission.

¹⁷⁰ *Law Clerk Job Descriptions*, National Center for State Courts (May 26, 2010) [http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks\(16\).htm](http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks(16).htm) (providing the job description, as prepared the U.S. District Court, District of Utah).

b. Case Management Procedures

[1] Advice and Assistance Regarding Case Management Practices

[a] Chief Immigration Judge's Immigration Court Practice Manual

One of the 22 changes that the Attorney General directed in 2006 was development of a “Practice Manual that describes a set of best practices for the Immigration Courts.”¹⁷¹ In 2008, the Chief Immigration Judge issued an “Immigration Court Practice Manual,”¹⁷² describing it as a response to the Attorney General’s directive, which in turn “arose out of the public’s desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their ‘best practices nationwide.’”¹⁷³ The Chief Immigration Judge describes the manual as “a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice” in the courts and that are “binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case.” The Manual cites some Code of Federal Regulation provisions that authorize steps that the Manual either authorizes or encourages.

Our interviews provided conflicting evidence on the use of the Practice Manual. Some judges praised it for establishing a common procedural baseline, and most said they use it, at least as a general guide. ICE officials were mixed in their evaluation of its use, and some criticized judges either for demanding compliance when such compliance was inappropriate, or for using it insufficiently. Likewise, we heard some changes from private lawyers and advocates for pro se respondents that some courts insist “mechanical application” of the manual’s rules, such as directing or allowing court administrative staff to refuse to accept materials due to technical errors such as failing to sequentially number all of the pages in an application. We note these concerns but have been unable to establish how widespread or meritorious they are.

Even judges who praise the Manual acknowledged that it is probably difficult for at least some unrepresented respondents to use, even if they can read English, because its prose appears directed principally at attorneys.

[b] Supplemental instructions

Some judges told us that they prepare supplemental instructions to assist parties, especially those proceeding pro se, in preparing documents in a manner consistent with the court’s or judge’s expectations.

Recommendations, 37-39

¹⁷¹ See discussion of the Attorney General reforms in the beginning of Section IV, *supra* at 27.

¹⁷² OCIJ PRACTICE MANUAL, *supra* note 102.

¹⁷³ *Id.* at 1.

37. That EOIR, perhaps through its LOP, work with non-profit legal services providers to develop a pro se version of the OCIJ Practice Manual that explains terms and concepts with which lay persons, especially from other countries, are unlikely to understand.
38. That EOIR share best practices developed by individual courts or judges by collecting and sharing any supplement instructions used to aid the parties in preparing submissions to the court.
39. That EOIR develop video kiosks in the waiting rooms or similar spaces within the courts so that the respondents can access the court website and find instructional materials.

[2] Pre-hearing, or Status, Conferences or Exchanges

In 1986, the late William Robie, who became the first chief immigration judge upon EOIR's 1983 creation, said that the

primary distinction that we have made in our system between how immigration judges operated when they were part of the [Immigration and Naturalization] Service and how they operate today is in philosophy. Not only have we emphasized the independence of the Judges from the Service, but we have pressed them to be the managers of their caseload. Traditionally, the attorneys have managed the caseload in immigration judge proceedings. Our feeling is very strong that if the judge does not manage the caseload it is not going to move the system. This philosophy has been shared by a number of judicial systems. Most of the progressive judicial systems in the country today have had to move to this philosophy, again, because of a growing caseload and an effort to reduce backlog and delays in getting individuals an opportunity to have a hearing.¹⁷⁴

One of the instruments to serve this goal were “pre-hearing conferences,” at the discretion of the judge, in order, in Robie’s words:

to narrow issues, to obtain stipulations, to exchange information voluntarily, and to otherwise simplify and organize the proceedings, particularly in cases which are complex or are likely to require a significant amount of time. We have found that this works considerably better. Again, nothing really new or innovative. We are merely taking some existing practices out of systems that work fairly well and trying to put them into place in this system.¹⁷⁵

That goal has persisted. The OCIJ Practice Manual says that “[p]re-hearing conferences are held between the parties and the Immigration Judge to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceeding” and “strongly encourage[s]” the parties “to confer prior to a hearing in order to narrow issues for litigation.”¹⁷⁶ The Manual also encourages parties to file pre-hearing statements “even if not ordered to do so by the Immigration

¹⁷⁴ William Robie, *The Purpose and Effect of Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMM. L.J. 269, 272-73 (1986).

¹⁷⁵ *Id.* at 279.

¹⁷⁶ BIA PRACTICE MANUAL, *supra* note 145, at Ch. 4, §4.18.

Judge.”¹⁷⁷ A March 2008 OCIJ Operating Policy and Procedures Memorandum (“Guidelines for Facilitating Pro Bono Legal Services”) said that “pre-hearing statements can be especially valuable in pro bono cases, where the representative’s time and resources might be limited.”¹⁷⁸ Similar incentives would seem to operate for retained counsel. The Chief Immigration Judge’s five-day September 2011 “advanced training” for 45 new immigration judges included an hour on “Rulings on Motions: Issues, Tips & Techniques” (taught by an immigration judge) and two hours on “Docket Management: Reports and Techniques to Improve Efficiency,” taught by a chief clerk and deputy chief.¹⁷⁹

Pre-hearing or status conferences have not received a great deal of attention in the extensive commentary on the immigration courts. The ABA Commission on Immigration, for example, referenced pre-hearing conferences but only briefly and only as a recommendation for “greater use of prehearing conferences,” with little analysis of why they are little used.¹⁸⁰ A 2009 Appleseed report asserted, albeit without citing any evidence, that “[m]andating pre-hearing conferences at the request of either party would shorten hearings and make them more efficient by increasing Trial Attorney’s preparedness and by narrowing the issues before hearings.”¹⁸¹

Most judges we interviewed asserted fairly vigorously that the press of cases renders impossible the use of such preliminary steps, but we do not know how many judges use such conferences or how extensively. Furthermore, these conferences are not coded as such in the court’s database but are usually marked as “reset master calendars” or as an individual calendar. The judges also said that ICE attorneys would not be inclined to cooperate in such hearings. ICE officials, however, told us that they encourage the use of such conferences and said that immigration court leadership has not pressured judges to use them.

In our interviews, several judges noted that they had little authority to push the parties toward settlement or available time to hold status conferences. In a few courts, judges had tried to experiment with formally requiring parties to meet before the hearing and found that the parties were unlikely to comply. Some judges use the master calendar hearing to narrow issues and specifically ask the attorneys if they have had a chance to meet and discuss the issues in the case. It appears to be common practice for judges to instruct

¹⁷⁷ *Id.* at Ch. 4, §4.19.

¹⁷⁸ *OPPM: Facilitating Pro Bono Legal Services*, *supra* note 10, at 4.

¹⁷⁹ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Session Agenda, provided by EOIR (on file with author).

¹⁸⁰ *ABA Comm’n on Immigr. Rept., 2010*, *supra* note 29, at 2-41.

¹⁸¹ APPLESEED, ASSEMBLY LINE JUSTICE, *supra* note 65, at 18. *See also Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (written statement on Behalf of Appleseed, Texas Appleseed and Chicago Appleseed) available at <http://appleseednetwork.org/LinkClick.aspx?fileticket=K2R6rcJciJI%3d&tabid=596>.

attorneys to confer for ten to twenty minutes before the court formally begins the hearing. Judges told us that without that brief pause, there would be little communication between government and respondent counsel.

In San Diego, the court developed a standardized form, (see Appendix 6 now available in the Immigration Judge Benchbook¹⁸²) that is designed to help the judge elicit specific commitments from the attorneys about the next steps in the case and what, if any, factual and legal issues can be agreed upon and stipulated to at that point in the proceeding. The judge completes the form by hand and places it in the record of proceedings file and gives copies to the parties. The San Diego judges firmly believe the form works because the culture there is one in which attorneys know that they must be prepared to stipulate and narrow issues at an early stage in the adjudication.

In our discussion about the dearth of hearings or pre-hearing consultations, judges noted that they had little time to add these hearings or even if willing to hold the hearings, they reported that they had few tools to incentivize the attorneys to cooperate. In other words, the norm in the immigration court is to use hearing time to move the case forward. This is unlike most criminal and civil court systems where procedural rules and court practice force the parties to narrow issues and dispose of some disputes through conference, stipulation, and negotiation.

A related issue is the apparent paucity of informal document sharing between the government and the respondent. The government's "A File" may contain documents relating to the respondent's entry and status to the U.S. Typically, Trial Attorneys require respondents file FOIA requests to obtain the non-classified/confidential documents within their official A File.¹⁸³ A few people told us that when asked, some Trial Attorneys will share portions of the A File with respondent's counsel. Developing a practice that encourages earlier and easier access to the A File may facilitate the narrowing of issues, settlement discussions, and fewer delays for preparation. In some cases, the failure to produce records from the A File may frustrate the constitutional guarantee of a fundamentally fair removal hearing.¹⁸⁴

[AWAITING SURVEY DATA]

¹⁸² Available at <http://www.justice.gov/eoir/vll/benchbook/index.html>.

¹⁸³ 8 C.F.R. §§103.8, 103.9, 103.10 (2011).

¹⁸⁴ Recently, the Ninth Circuit Court of Appeals vacated a removal order where many of the documents sought by the respondent who claimed he had acquired citizenship through adoption and subsequent naturalization were present in the Trial Attorney A File throughout the removal proceeding. *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). The Ninth Circuit noted that the INA states that the respondent "shall have access to his entry document" and other [non-confidential] records and documents related to his entry or presence in the United States". *Id.* at 374 citing INA § 240(a)(c)(2)(B); 8 U.S.C. § 1229a(c)(2)(B)(2006). Further the opinion found that to force the respondent to rely solely on FOIA requests "would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it." *Id.* See also Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 431, 539-542 (2011) (discussing among other constitutional concerns the *Dent* opinion and the need to increase access to government records under the 5th Amendment).

Recommendations, 40-42

40. That EOIR revise its coding scheme to allow judges or court administrators to identify what the Practice Manual calls “pre-hearing conferences.”
41. That EOIR consider a pilot project in one or more courts to test the effectiveness of mandatory pre-hearing conferences to be convened in specified categories of cases and to evaluate situations in which the judge should order the Trial Attorney to produce essential records from the A File.
42. That EOIR evaluate the use EOIR Form-55 and/or create a new form and recommended procedure for stipulations by the represented parties.

[3] Amendments to the NTA and the Authority to Administratively Close a Case

A number of judges noted that because the regulations allow the Trial Attorney to amend the charges and allegations at any time during the proceeding, it can be difficult to anticipate the scope and content of a case even after the first master calendar. The government attorneys told us the amendments may be necessary because they need to correct or augment the charges initially prepared by agency personnel who draft and file the NTA, largely without ICE Trial Attorney review.

We asked judges if they had the authority to close a case administratively when they thought the parties were not ready, or where essential related immigration adjudications are pending before another agency. Technically no statute or regulation addresses the authority of the judge to order administrative closure. The court can order termination of a removal proceeding where respondents establish they are citizens or the government is unable to establish the allegations in the NTA. There is also a regulatory provision authorizing termination where the respondent demonstrates prima facie eligibility for naturalization and proves that a naturalization application is pending before the CIS.¹⁸⁵ Unlike termination, an administrative closure is not a final decision and does not prevent the government or the respondent from moving to re-calendar the NTA. The EOIR has instructed judges to use administrative closure systematically when there have been significant alterations in the substantive immigration law or after litigation settlements ordering these closures; e.g., new eligibility for adjustment of status.¹⁸⁶ Barring one of these situations, the ability to administratively close a case is governed by BIA precedent ruling that only with consent of both parties—government and respondent—may the court administratively close a matter.¹⁸⁷

¹⁸⁵ 8 C.F.R. § 1239.2(f) (2010).

¹⁸⁶ *E.g.*, ABC Settlement administratively closing removal cases involving certain asylum applicants to allow them an opportunity to have the asylum application reconsidered; or administrative closure to allow the adjudication of a legalization application under INA §§ 245A, 210 (2010); 8 U.S.C. §§ 1255a, 1160 (2006).

¹⁸⁷ *See In re Alba Luz Gutierrez-Lopez*, 21 I. & N. Dec. 479 (B.I.A. 1996).

Chapter Five of the OCIJ's Practice Manual contains a reference to the administrative closure; it also discusses how to prepare a Motion to Recalendar a case that has been administratively closed, but the Manual does not provide guidance for initiating or preparing a Motion for Administrative Closure.¹⁸⁸ Several BIA and federal court cases specifically explain that case completion goals alone are not a reason for a judge's granting a motion for continuance, a motion closely related to administrative closure. Some courts of appeals are reluctant to review a refusal to continue or administratively close a case because those courts believe the decision is committed to the discretion of the agency and judicial review is precluded by statute or because there is no meaningful standard to review.¹⁸⁹

Recommendations, 43-44

43. That EOIR amend the OCIJ Practice Manual [or, if legal counsel believes it necessary, seek to amend the CFR] to define specifically "Motions for Administrative Closure;" authorize the judge to initiate this motion *sua sponte*; indicate that a specific basis for administrative closure should be the failure of the parties to meet and confer as previously directed by the judge; and authorize government and private counsel under the procedural rules to object to the administrative closure orally or in writing. (EOIR may want to codify within the procedural rules governing these motions a list of common reasons that a judge should consider in evaluating the basis for administrative closure, such as those referenced above.) If the caseload of the court grows so large that the court cannot possibly address the backlog of cases, administrative closures of low priority or very old cases may be an appropriate mechanism to manage the workload of the courts.¹⁹⁰
44. That EOIR amend the Practice Manual [or seek to amend the CFR] provision that allows the government to amend the charges and allegations in the NTA at any time in the proceeding. The new rule would liberally allow amendment at the first master calendar but following that hearing, amendment would only be considered based on motion to the court and good cause show for why the government could not have presented the charges or allegations earlier.

[4] Vertical Prosecution Cooperation and Conditional Decisions on Relief

In some immigration courts, the ICE Chief Counsel organized the ICE Trial Attorneys into teams and then assigned the teams to cover the dockets of specific judges. In one city, teams of six to seven Trial Attorneys were assigned to three judges. In another city, teams of two to four attorneys were assigned to two judges. Three attorneys from the Office of the Principal Legal Advisor (OPLA)

¹⁸⁸ See OCIJ PRACTICE MANUAL, *supra* note 102, at page 99.

¹⁸⁹ See, e.g., Diaz-Covarrubias v. Mukasey, 551 F.3d 1114 (9th Cir. 2009) (no meaningful agency standard to allow review); Cantu-Delgadillo v. Holder, 584 F.3d 682 (5th Cir. 2009) (reviewing a constitutional challenge to denial of administrative closure).

¹⁹⁰ This closure of low priority or old cases might be seen as analogous to the procedures the BIA used to expedite adjudication of newer cases while working to reduce the backlog of old cases.

and approximately 12 judges we interviewed who worked with these teams told us that the goal was to ensure that the same attorney or a prepared team member would follow a case from master calendar through completion. If the government attorney who appeared at the first master calendar would not be available at subsequent hearings, the team would take responsibility for knowing what, if any, actions DHS needed to pursue or would be conversant with legal position previously taken in the case. As one judge put it, the vertical prosecution teams meant she could count on the government attorney to “follow up” between hearings.

In a few interviews, judges with experience in vertical prosecution expressed concern over a “strict” form of it used in large courts where DHS assigned only one or two Trial Attorneys to appear before the judge in all proceedings. In the judges’ view, this form of vertical prosecution caused delays because frequently the court had to work around the prosecutors’ calendar restrictions. We also learned of a pilot use of vertical prosecution in San Francisco several years ago that was abandoned apparently due to judge objections and the difficulty of scheduling cases to ensure that the same individual Trial Attorney was assigned throughout the length of a case. One judge also expressed a concern that this form of vertical prosecution diminished a perception of the court as impartial and create an appearance that the judge was “inappropriately” too familiar with the DHS Trial Attorneys because anyone visiting that court—or regularly appearing respondent counsel—would always see the same prosecutor appearing in that judge’s court. Some commented that it might give an impression that respondent’s counsel were “outsiders.”

We spoke to six members of the private bar and non-profit organizations about vertical prosecutions. Most interviewees said that the ICE Trial Attorneys should have specific prosecution assignments so that the private counsel could know which Trial Attorney to contact as soon as a case was assigned to a judge. Even more importantly, the members of the private bar whom we interviewed generally wanted the ability to negotiate with the Trial Attorney to narrow issues, to discuss the order of witnesses, to prepare stipulations, or to have conversations about pending actions within the case. When the case file is not assigned to a specific attorney, these lawyers reported great difficulty in getting ICE Trial Attorneys to discuss cases with them outside of regular hearing time and even more difficulty in getting them to commit to stipulations.

Senior personnel in the OPLA told us that the office favors teams of Trial Attorneys in a form of modified vertical prosecution but that some immigration courts had resisted the full integration of vertical prosecution teams.

Another technique that might improve the preparation and behavior of the attorneys who appear in court would be to allow the judge to prepare a provisional or conditional order pending the final results of security checks. Some judges believe they may not “conditionally” grant relief and continue a case awaiting the results of security checks. Similarly these judges believe they cannot deny a case

while DHS is conducting a required security check. 8 C.F.R. § 1003.47 makes clear that the relief cannot be granted without the necessary security checks, but the regulation does not prohibit a “conditional grant.” A conditional grant would allow the immigration judge to prepare his or her decision soon after the testimony and review of the application for relief. If the judge is going to deny the relief, the security check is technically not essential to the judge issuing a decision on the application.

Recommendations, 45-49

45. That EOIR not oppose plans that ICE Chief Counsel might devise to implement a vertical prosecution arrangement in particular courts.
46. That EOIR consider providing judges guidance on what they may do to require that government counsel are fully prepared to represent the government and are responsible for necessary actions that DHS must complete between hearings. EOIR can make clear that the judge has authority to rely on a member of a prosecution team to follow up on important evidence, forensic examination, securing required security checks, locating government files, etc.
47. That EOIR instruct judges to treat all ICE Trial Attorneys as responsible for the actions and omissions of other Trial Attorneys in the same case. Judges may hold ICE Trial Attorneys accountable for the commitments made in prior hearings, in the same manner the court holds private counsel working in the same law firm or non-profit responsible. Parties should be able to expect that the commitment made by an attorney in a hearing will be met in a subsequent hearing. This practice could be established through judicial education programs. Further, the OCIJ should amend the Practice Manual to explicitly define the responsibility of the Trial Attorneys. This recommendation does not require an amendment of existing regulations.
48. That EOIR clarify the authority for judges to make conditional decisions on applications for relief where trial counsel did not secure completed agency action and clarify that the judges may continue the case for a period such as sixty days or some other period that does not create undue hardship on individuals who have been granted relief but allows the DHS sufficient time under the totality of the circumstances to complete the biometric check;
49. That EOIR authorize a special docket for cases awaiting biometric results with a special coding for these cases to allow later measurement of the degree to which the security checks are solely responsible for the delays. When the check is complete, if the Trial Attorney found the results of the security check warranted a resumption of the hearing, the Trial Attorney would move to calendar a resumed individual hearing to address the biometric results. If no further hearing is necessary, the Trial Attorney could file a notice with the court and respondent stating that no new evidence was presented in the results of the security check and upon receipt of this notice, the judgment would convert to a final order.

[5] Continuances (Adjournments)

As in all court systems, immigration judges adjourn, or continue, proceedings to a future date to permit parties to prepare for the next event, obtain evidence, seek legal representation, identify experts, or many other reasons. There is debate within courts generally over how freely judges should grant continuances. Some judges are fairly liberal in granting continuances, preferring to err (if at all) on the side of permitting the parties to pursue the litigation as they think best. Other judges believe that a liberal continuance policy encourages lawyers to be dilatory, and, conversely, that lawyers who know that a request for a continuance will likely be unsuccessful, will be prepared, thus shortening the time to disposition and reducing the costs to the parties and to the court system.

We thought it important to review data on immigration court continuances (adjournments), and in response to our request, OPAT provided us with tables showing the adjournments in proceedings that were completed in 2005, 2008, and 2010, sorted by the over 70 adjournment and call-up codes that judges assign to an adjournment to designate a reason for it. (Obviously, not all the adjournments occurred in those respective years, because a proceeding might take several years to reach completion.)

OPAT and other EOIR personnel warned us to be cautious in analyzing these data because a judge may adjourn a hearing for several reasons but can only assign one code to it. (A judge may grant an adjournment, for example, because both the respondent's and government attorneys seek time to prepare, but the judge must attribute the adjournment to one or the other of them.) ACIJ's told us they do not use adjournment data in assessing the performance of the judges they supervise, because they can get information from their own observation and from the court administrators about problems.

We wanted to know what if anything the adjournment data might say about the behavior of respondents and their lawyers, of ICE attorneys, and the judges.

We first eliminated from the data adjournments that were not related to the behavior of those three actors as well as "case completion" adjournments, which are assigned to a hearing at which the proceeding is completed.

Table F: Adjournment Factors Eliminated

	2005	2008	2010
Total hearings in proceedings	684,337	737,948	852,230
<i>Less</i>			
(a) Case completions*	10,001	269,569	280,780
(b) Operational adjournments	19,316	48,497	56,274
(c) No adjournment entered*	288,981	4,925	4,864
* We presume a change in coding instructions explains why the 2005 "No adjournment" figure is similar to the 2008	366,039 (53%)	414,957 (56%)	510,312 (60%)

and 2010 case completion figures.

The number of adjournments per completed proceeding has increased over these three years, as shown below:

Table G: Number of Adjournments per Completed Proceeding

	2005	2008	2010
Completed proceedings	331,672	291,781	287,207
Adjournments (subset)	366,039	414,957	510,312
Ratio of proceedings to Adjournments	1.10	1.42	1.77

We grouped the adjournments using the OPPM's assignment of adjournments as "alien-related," "DHS-related" and "IJ-related," and note that, judges attributed in all three years, about two-thirds of the adjournments to the alien and/or his or her attorney.

Table H: EOIR Assignment of Codes as Alien/DHS/Judge Related

	2005	2008	2010
Aliens	69%	70%	68%
DHS	7%	15%	19%
Judge	25%	15%	13%

We rank ordered the 2010 adjournments, sometimes grouping closely-related adjournments together, by percentage of the subtotal (first chart, 510,312), and then indicate the percentages for the same items in 2005 and 2008. So, for example, adjournments coded as those granted to allow the respondent and/or the respondent's lawyer or accredited representative to prepare for a next event, constituted 20 percent of the total subset of 2010 adjournments.

Table I: Major Reasons for Adjournments as Assigned by Judges

	Percent of all adjournments		
	2005	2008	2010
Alien attorney prep/other requests	26	21	20
Alien to seek rep	16	15	14
Alien application pending with DHS	4	9	10
Alien to provided updated forensic	1	9	9
DHS to provide updated forensics	1	6	9
Alien filing other application in immigration court	12	8	7
Adjournment to the merits hearing	12	8	6
Judge absence (sickness, other assignment, etc.)	4	4	5
DHS-detainee related adjournments	1	4	5
Adjourned because alien wanted a different date or forum	8	4	4
DHS preparation	3	3	3
Alien/attorney no show (illness, etc.)	2	2	2
Alien contesting charges citizenship	0	1	1
Alien family related adjournments	0	1	1
DHS file unavailable	1	1	1
Insufficient time to complete hearing	1	1	1
TOTAL	92%	97%	98%

2005--7.5% adjournments were attributed to "Case Conversion" (Code 98) which the OPPM does not define. In 2008 and 2010, code 98 was 2% and <1%

Nothing striking emerges from this table (other than the apparent high level of consistency in reasons assigned for continuances, especially in 2008 and 2010). The data do call into question some of the assertions we heard in our interviews. Many judges we interviewed, for example, said it was often necessary to continue a case because the ICE attorney did not have the case file, either due to the attorney's behavior or because the agency could not route the file to the attorney in time for the hearing. As the table shows, judges ascribed the "DHS file unavailable" to only one percent of the adjournments. (Again, though, keep in mind the caution about adjournments that might be due to multiple causes but can be assigned only one code.)

We also wanted to learn whether the various types of adjournments are distributed fairly evenly across the courts. As a preliminary matter, we analyzed what proportion of the most frequent adjournments in 2010 (10,000 or more) was attributable to the two largest courts, New York City and Los Angeles. Those courts accounted, together, for 12 percent of 2010's 287,207 completed proceedings, but, as seen below, they accounted for 27 percent of the adjournments in 2010. That figure is due largely; it would seem, to the

nature of their caseloads. As seen in Appendix 3, they are comparatively low in terms of completed proceedings per judge but high in the proportion of cases in which the respondent seeks relief from removal and in which the respondent has a lawyer. (The weighted caseload index that we recommended earlier would be helpful in assessing this particular point.)

Table J: Adjournments for New York City and Los Angeles

Adjournment for	NYC and LA
All	27%
DHS forensics 24	82%
Alien forensics 36	46%
I-130 pending 7C	29%
DHS prep	22%
Other alien, attorney request 12	20%
IJ absence 34, 35, 19	19%
Attorney preparation (2)	15%
Alien seeking attorney 1	13%
Adjourn to merits hrg 17	13%
Alien released from detention	<1%

Note also, however, that those two courts accounted for 82 percent of the continuances that judges ascribed to the need to permit the Trial Attorney to provide updated biometric data and almost half the continuances attributed to the need to permit the respondent to do so. If we remove those two courts' continuances ascribed to those two reasons, the proportion of such continuances nationally as shown in Table I would drop from nine percent to four percent, and from eight percent to three percent respectively.

Recommendation, 50

50. That EOIR consider whether adjournment code data, despite their limitations, may facilitate system-wide analysis of case management practices.

[6] *Enhancing Immigration Judge Authority by Enhancing Attorney Accountability*

Some of the unnecessary delay in immigration adjudication is created by counsel, either as a tactic (e.g., to provide more time for the respondent to remain in the country), because of individual incompetence, or because of organizational inefficiencies (e.g., government attorneys not meeting deadlines because they did not receive files in time).

In this section we discuss expanding attorney discipline and increasing options available to the judges to ensure attorney preparation and adequate performance. In other portions of the report we recommend giving judges the power to administratively close cases or to encourage the parties to enter into stipulations as a method of obtaining more control over the case docket. *See* Section V.C.1.B.[2] and [3].

[a] Incentivizing private, non-government, attorneys

Under current regulations, the EOIR may subject private attorneys to discipline.¹⁹¹ The agency website lists disciplined attorneys and includes copies of the orders related to the discipline. As of December 2011, 464 attorneys were on the list.¹⁹² While we did not review all of these orders, the vast majority appear to be the result of requests by DHS or EOIR disciplinary counsel for reciprocal discipline based on the disciplinary actions of a federal court or state bar. While the EOIR has increased its attention to attorney discipline, it appears to some observers of the courts that more resources could be expended to investigate and prosecute attorneys who are repeatedly ill prepared and harm the interests of their clients.

The most recent amendments to the disciplinary regulations state that an individual judge may not initiate discipline against an attorney but must prepare a complaint to EOIR Disciplinary Counsel.¹⁹³ This may be an acceptable procedure for serious attorney discipline ranging from suspension to expulsion from the immigration courts. However, some judges expressed a desire to be able to act directly. This authority could be seen as analogous to a federal judge's authority to issue sanctions such as written and oral reprimands against counsel under Rule 11 of the Federal Rules of Civil Procedure.

Other judges said that one of the problems they saw was not unethical or egregious behavior but lack of sophistication, training, and adequate preparation. Several judges explained that they will take personal time to try to encourage the new attorney to become more familiar with immigration law and they would refer the attorney to reading materials or they might suggest the attorney needed to find an experienced mentor attorney. Further, as is discussed above, some of the courts have partnered with bar associations and other CLE providers to try to offer more training and programming for the private bar.

¹⁹¹ *See* 8 C.F.R. § 1003.101 et seq.

¹⁹² Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *List of Currently Disciplined Practitioners*, U.S. DEP'T JUST., (Dec. 2011), <http://www.justice.gov/eoir/discipline.htm#top> (last visited Jan. 6, 2012).

¹⁹³ 8 C.F.R. § 1003.104 adopted in 73 Fed. Reg. 76914 (2008). *See also*, Peter L. Markovitz, *The Robert L. Levine Distinguished Lecture Overcoming Barriers to Immigrant Representation: Exploring Solutions: Report of Subcommittee 2: Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 73 FORDHAM L. REV. 541, 574-75 (2009) (calling for expanding the role of judge oversight).

[AWAITING SURVEY RESULTS]

Recommendations, 51-52

51. That EOIR develop procedures allowing a judge to issue an order to show cause why an attorney should not be publically reprimanded for lack of preparation, obstructive behavior, or other behavior that impedes the operation of the court. Ideally, these procedures would be available to the judge to sanction both the private bar and ICE Trial Attorneys (discussed below). Sanctions would not include monetary or formal disciplinary rulings but are supplemental to the existing disciplinary procedures.
52. That EOIR study and consider developing mandatory CLE materials. When a judge finds an attorney's behavior is substandard due to lack of substantive or procedural knowledge, the judge would have the ability to order the attorney to complete a CLE course and to pass a qualifying examination. If the existing resources of the EOIR are insufficient to develop such a program, the agency should explore pro bono partnerships with existing reputable CLE providers or consider seeing regulatory authority to issue fines that would subsidize the cost of developing such training and educational materials.

[b] ICE Trial Attorneys

Under the current regulatory model there are no disciplinary procedures within EOIR for ICE Trial Attorneys' failure to meet deadlines or other problematic behavior. Some of these matters may be referred to the Office of Professional Responsibility within ICE. The OCIJ Manual simply refers individuals with complaints to the District General Counsel for ICE.¹⁹⁴ The American Immigration Lawyers Association (AILA) website refers people with complaints about ICE counsel to the Office of Bar Counsel in Washington. We do not know if judges ever make such a referral.

The statute provides, in part, that immigration judges "shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter."¹⁹⁵ Immigration judges have long requested that DOJ prescribe the regulations mentioned. In a 2006 memorandum, the Attorney General mentioned the need to have "Updated and Well-Supervised Sanction Authorities for Immigration Judges for Frivolous or False Submissions and Egregious Misconduct" and "Updated Sanction Powers for the" BIA. The memorandum noted, however, that the statutory authorization to impose a civil monetary penalty "exists only for conduct 'in contempt of an

¹⁹⁴ OCIJ PRACTICE MANUAL, *supra* note 102, at 10.3(c), pp. 132.

¹⁹⁵ INA § 240(b)(1) (2010); 8 U.S.C. § 1229a(b)(1) (2006).

immigration judge's proper exercise of authority" and thus "its use will require substantial oversight."¹⁹⁶

EOIR officials have reported consistent efforts to issue regulations to give effect to the statutory provision,¹⁹⁷ but they told us that DHS has just as consistently objected to the regulations' adoption during OMB negotiations. In our other interviews, DHS officials made clear that they will continue to oppose implementation of contempt regulations on the grounds that, as they put it, one set of government lawyers should not have such authority over another set of government lawyers.

Recommendation, 53

53. That EOIR should continue its efforts to implement the statutory grant of immigration judge contempt authority.

c. Video and Telephone Hearings

In the mid-1990s, EOIR began pilot use of video conferencing (VC) (or video teleconferencing, VTC) in removal adjudication, and increased its use after Congress in 1996 authorized its use at the discretion of the judge, without requiring the parties' consent (telephone proceedings on the merits do require respondent's consent).¹⁹⁸ VTC links the judge, the respondent, counsel, and witnesses from two or more remote locations. According to EOIR-information provided in 2011 to an ACUS research team, VTC is available in 40 immigration courts and being installed in the remainder of the courts and in 77 other places, including DHS detention facilities, and part of a new immigration judge's orientation program is "brief training" on the use of VTC.¹⁹⁹ In addition, in 2004, EOIR created the "Headquarters Immigration Court" (HQIC) within its main building in Falls Church. The four judges on this court do not have their own dockets but rather conduct hearings in proceedings that courts around the country transfer to the HQIC in order to ease backlogs.²⁰⁰

VTC arrangements can vary considerably and are not restricted to detained cases. The judge, for example, may be in a courtroom, the respondent, the government attorney and the respondent attorney if any in a second courtroom, or the respondent may be in a detention center, the judge in a courtroom, and the lawyer(s) in a third location. If the respondent is represented, the attorney has to choose whether to be with the client or the court. In a few detention facilities, the counsel for the respondent must attend the hearing

¹⁹⁶ ATT'Y GEN MEMORANDUM, *supra* note 71.

¹⁹⁷ *EOIR's Improvement Measures*, *supra* note 75.

¹⁹⁸ INA §§ 240(b)(A)(iii)-(iv), 240(b)(B) (2010); 8 U.S.C. §§ 1129a(b)(2)(A)(iii)-(iv), 1129a(B) (2006).

¹⁹⁹ Olorunnipa, *supra* note 167, at 29, 31.

²⁰⁰ See Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Headquarters Immigration Court*, U.S. DEP'T JUST., (2008), available at <http://www.justice.gov/eoir/sibpages/HQICFactSheet.pdf>.

with the judge and the respondent and his counsel communicate solely through the video technology during the hearing.

Table K shows the use of video and telephone hearings in 2010. VTC was used in 12.4 percent of the over 850,000 hearings conducted in removal proceedings and in almost 30 percent of the roughly 78,000 bond redetermination hearings.²⁰¹

Table K: VTC Use in 2010 Completed Proceedings and Bond Redeterminations

	Removal Proceedings	Bond Redeterminations
Total hearings	852,230	78,187
In person	736,385 (86.4%)	53,390 (68.3%)
Video	105,901 (12.4%)	22,933 (29.3%)
Telephone	9,944 (1.2%)	1,864 (2.4%)

Not surprisingly, VTC is used, proportionately, much more in bond hearings than in removal hearings because respondents seeking bond redeterminations are detained, and a video hearing eliminates the need to transport the detainee to a court.

For a recent Administrative Conference project on VTC's use in high-volume administrative adjudication agencies,²⁰² ACUS staff assessed EOIR's use of VTC through interviews with EOIR officials. (It used VTC in social security and veterans' benefits adjudication as case studies but decided against assessing VTC in immigrant removal adjudication on the same case study basis, citing the complications involved and the lack of data within EOIR on VTC's use.)

The ACUS "In-House Research Report" draft summarizes the results of ACUS staff interviews with, and other information provided by, EOIR officials²⁰³ and tracks the arguments for and against current and expanded use of VTC in removal adjudication that we heard in our interviews with immigration judges, interviews with and government and respondent counsel and arguments found in the literature.²⁰⁴ [AWAITING SURVEY RESULTS] (Although the report said, in an apparent reference to our report, that ACUS "plans to study the use of video hearings by EOIR in-depth as part of its forthcoming Immigration Adjudication project,"²⁰⁵ we did not have the time or resources to go deeply

²⁰¹ Table based on *OPAT DATA*, *supra* note 40.

²⁰² AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION, REC. NO. 2011-4, ADMIN. CONFERENCE OF THE U.S. (2011) (adopted on June 17, 2011) *available at* [www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20\(Video%20Hearings\).pdf](http://www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20(Video%20Hearings).pdf) [Hereinafter ACUS VIDEO HEARINGS REPORT].

²⁰³ Olorunnipa, *supra* note 167.

²⁰⁴ See ACUS VIDEO HEARINGS REPORT, *supra* note 202; Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259 (2008) (both citing the literature). See also *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 29, at 2-26-27.

²⁰⁵ ACUS VIDEO HEARINGS REPORT, *supra* note 202, at 2 n.7.

into the matter, certainly not to design and execute empirical research to answer the dispositive question, viz., whether VTC is associated with significant differences in outcomes of removal adjudication proceedings.)

Proponents and critics of VTC in removal adjudication hearings offer several arguments, which we summarize below. [AWAITING SURVEY RESULTS]

- It provides cost-savings to EOIR and to DHS, and enhances safety, by making it unnecessary to transport detained respondents to a court for a hearing, and, to a lesser degree, reduced travel for judges and staff. EOIR officials provided ACUS researchers an EOIR Comptroller's Office memo that said in 2010 EOIR saved \$2,342,382 in travel costs it would have spent had judges and staff travelled to hearings that were instead conduct by VTC.²⁰⁶ The memo provided no further details.

The cost savings estimate is somewhat puzzling. By our estimate,²⁰⁷ in 2010 EOIR allocated \$2,726,000 to travel, \$2,044,500 of it in the immigration courts. According to Table E, in 2010 VTC accounted for about 106,000 of the 852,000 proceedings removal proceedings and almost 23,000 of the 78,000 bond hearings. It is not clear how travel costs for those VTC hearings—had they been in person—would have cost more than the much greater number of hearings that indeed were held in person.)

- It can increase the availability of representation during hearings, even if the counsel is not in the same location as the respondent. VTC enables an attorney who is unable or unwilling to travel to the site of a hearing to participate in the hearing. Furthermore, OCIJ has encouraged judges to allow attorneys appearing pro bono to use the VTC equipment to confer briefly with their clients in remote locations²⁰⁸ (a request that would seem equally justified for most paid counsel). We received a summary of an informal survey by the assistant chief immigration judges of their respective courts (undertaken by OCIJ for other purposes).²⁰⁹ It indicates that judges usually grant such requests, if the time involved is brief, partly on the view that doing so may speed the hearing. When they grant such request, they often clear the courtroom except for a security guard and translator.
- Similarly, it promotes effective case management by making judges available in numerous sites, when needed, within short time spans.
- The equipment has the auxiliary benefit, subject to EOIR or DHS policies, of allowing lawyers to consult with detained clients, apart from hearings themselves.
- Proponents say the quality and reliability of current VTC allows these benefits without the compromises that might have been necessary in earlier versions of the

²⁰⁶ *Id.* at 32-33.

²⁰⁷ *Id.* at 2 n.7.

²⁰⁸ *OPPM: Facilitating Pro Bono Legal Services*, *supra* note 10.

²⁰⁹ *QUERY RE: VTC and current practice: Summary of Comments Received*, (Exec. Off. for Immigr. Rev. informal manuscript (Oct. 2011) (provided by EOIR officials) (on file with authors).

technology. Proponents claim that the integrity and quality of the visual images is more than adequate. Furthermore, in 2010, of the over 850,000 adjournments in removal proceedings, judges assigned the “televideo malfunction code to only 696 of them ,”²¹⁰ compared to 268 out of 2005’s 684,337 adjournments and 672 of the 737,948 in 2008. This suggests that even as video’s use is increasing, the number of mechanical problems is not increasing by a corresponding rate (noting again the caveat that the coded adjournment may be imprecise).

By contrast, critics point to:

- The inability of respondent’s counsel to be physically present with both the judge and the respondent. If counsel is at the judge’s site, s/he cannot confer freely with the respondent. If counsel is with the respondent, s/he cannot, as the ABA Report put it, “establish credibility and connect emotionally with the judge.”²¹¹ VTC arrangements may also impede the judge’s, or the respondent’s attorney’s communication with the ICE Trial Attorney.
- The screen image, regardless of visual quality, cannot duplicate an in-person hearing, where the fact finder can observe “nonverbal cues and a sense of the applicant’s demeanor.”²¹² Critics argue that in cases where credibility assessments are key to an immigration judge’s ruling, especially in asylum and related cases, the video format may not provide adequate visuals of body language. (As we previously noted, the Asylum Office uses VTC to conduct some limited interviews but does not use it for full asylum interviews.²¹³) CIS officials told us, furthermore, that the Office does not use VTC to conduct full interviews and that all VTC interviews that result in a negative finding (lack of credible fear) are subject to supervisory view.²¹⁴

Proponents respond, as paraphrased by the ACUS staff report, that EOIR tells judges that judging credibility by demeanor (whether at a video hearing or an in-person one) is the agency’s least preferred method and that it should not be used when other methods of judging credibility are available to an IJ.²¹⁵

The judges with whom we spoke had different takes on this matter. In one court, for example, the judges said they thought VTC was appropriate for master calendar hearings, which are generally brief and cover procedural and process rather than merits matters, but that it was less appropriate for merits hearings. Other judges, though, said just the opposite: VTC cannot capture the numerous events occurring in a multiple-respondent master calendar hearing but is appropriate for a merits hearing.

²¹⁰ *OPAT DATA*, *supra* note 40.

²¹¹ *ABA Comm’n on Immigr. Rept., 2010*, *supra* note 29, at 2-27.

²¹² Walsh & Walsh, *supra* note 204, at 265.

²¹³ Letter from Baker to Baer, *supra* note 122.

²¹⁴ Email from Ted Kim, *supra* note 135.

²¹⁵ ACUS VIDEO HEARINGS REPORT, *supra* note 202, at 35.

- Translation may be hampered depending on the translator’s location vis-à-vis the non-English speaking respondent. By the same token, VTC may limit the ability to family members, witnesses and others from participating in or observing the proceedings.
- There can be delays in delivery of documents that parties submit during the hearing. In an in-person hearing, documents can be exchanged hand to hand, but in VTC, that must be faxed to the judge or other participants. (EOIR does not yet authorize email transmission of hearing-related documents.) We also heard anecdotal evidence that some judges refuse to accept faxed materials for admission into the record, requiring the parties to have mailed all documents prior to the hearing or necessitating an adjournment to await receipt of the documents. The OCIJ Practice Manual appears to be contradictory on this exact point. In section (d) of Chapter 4 discussing VTC hearings it says “...Immigration Judges often allow documents to be faxed between the parties and the Immigration Judge.” However, under Chapter 3.1 (vii) the Practice Manual states: “**Faxes and e-mail.** The Immigration Court does not accept faxes or other electronic submissions unless the transmission has been specifically requested by the Immigration Court staff or the Immigration Judge. Unauthorized transmissions are not made part of the record and are discarded without consideration of the document or notice to the sender.”²¹⁶
- Finally, critics, while acknowledging VTC’s growing use in administrative and civil adjudication in other court systems, note that it has been resisted in criminal proceedings. Removal proceedings are civil proceedings but critics of VTC’s use in removal proceedings—including almost all of the attorneys to whom we spoke who represent respondents—pointed to the functional similarities between removal adjudication and criminal procedures and argued that the underlying dynamics affecting fairness are relevant. Congress encourages its use, for example, for federal court actions filed by prisoners alleging civil rights violations. In 2002, the Judicial Conference amended Federal Rules of Criminal Procedure 5 and 10 to permit initial appearances and arraignments by video conferencing with the consent of the defendant. The Supreme Court, however, declined to forward to Congress an amendment to Rule 26 to permit witness trial testimony by video, citing the confrontation clause (which does not govern civil removal adjudication). As recently as 2006, moreover, researchers in the Federal Judicial Center’s project to examine the impact of technology on the adversary process reported that despite the rights involved in criminal proceedings and the strong differences of opinion over video hearings, “little empirical information” was available about the extent of its use or its effects on participant behavior.

²¹⁶ At least one judge explained the refusal to accept faxed transmissions in VTC hearings as a desire to enforce the filing deadlines in Chapter 3.1 (b) because allowing faxes would encourage late or last minute filings. OCIJ PRACTICE MANUAL, *supra* note 102.

What is missing in these arguments is reliable evidence of whether VTC has an effect on outcomes—whether differences that may be observed in the outcomes of VTC versus in-person hearings can reliably be attributed to the use of VTC. In 2004, EOIR answered the question in the negative simply by asserting that “VC does not change the adjudication quality or decisional outcomes.”²¹⁷ Subsequent EOIR press advisories have been less definitive, such as a 2009 release that asserted “VTC technology allows court proceedings, as well as meetings and training, to be conducted efficiently and effectively, even though participants are not together at one site. . . . Even with the many efficiencies of VTC, EOIR’s primary concern is to ensure fairness and to accommodate the needs of respondents and their legal representatives.”²¹⁸ EOIR officials told the ACUS staff, and more recently us, that they monitor the use of VC equipment, consider comments received from attorneys and others, and emphasize to judges the need to try to accommodate needs of participants in VTC proceedings. But they also acknowledged, quoting the ACUS report, that “the agency does not keep or analyze evaluative data regarding outcomes of video hearings versus in-person hearings.”²¹⁹ EOIR officials said that, given the many variables at play in removal adjudication, a reliable evaluation might be impossible.

The best way to answer the question of effects, if any, on outcomes would be a classic control-group experiment that assigned cases that are similar in all major characteristics randomly either to VTC or in person hearings. The challenges of such an effort in the overworked immigration courts are obvious.

We are aware of only one effort to identify outcome differences attributable to VTC in United States removal hearings, viz., a 2008 article by Frank and Edward Walsh that summarized popular, academic, and judicial commentary on the hard-to-discount differences in how fact-finders perceive individuals who are physically present in a courtroom versus those observed through the VTC medium.²²⁰ The article then presented OPAT-provided data on the disposition of asylum claims in 2005 and 2006,²²¹ as summarized in Table L below, to which we have added 2010 data that OPAT provided us. (We eliminated the small number of telephonic hearings; hearings involving withdrawn or abandoned claims, as well as larger numbers of hearings coded as “Other”, which typically represent a case in which the judge did not decide on the asylum claim because the respondent, for example may have received another type of relief.)

²¹⁷ See Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Headquarters Immigration Court*, U.S. DEP’T JUST., (July 21, 2004) available at www.justice.gov/eoir/press/04/HQICFactSheet.pdf.

²¹⁸ Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: EOIR’s Video Teleconferencing Initiative*, U.S. DEP’T JUST., (Mar. 13, 2009) available at www.justice.gov/eoir/press/VTCFactSheet031309.pdf.

²¹⁹ ACUS VIDEO HEARINGS REPORT, *supra* note 202, at 37.

²²⁰ Walsh & Walsh, *supra* note 204.

²²¹ *Id.* at 271-72.

For all three years, VTC hearing asylum grants were in the 23 percent to 29 percent range, while in-person grant rates rose from 38 percent to 50 percent.

Table L: Asylum Grants and Denials for Seekers in VTC and In-Person Hearings*

Disposition and forum	2005	2006	2010
VTC grant	109 (23%)	101 (24%)	216 (29%)
VTC deny	365 (77%)	317 (76%)	541 (72%)
In-person grant	11,473 (38%)	13028 (45%)	8,338 (50%)
In-person deny	18,478 (62%)	15998 (55%)	8,233 (50%)

*--2005 2006 data as reported by OPAT to Walshes; 2010 data as reported by OPAT to Benson/Wheeler

Walsh and Walsh also analyzed outcome differences for asylum seekers not represented by attorneys and observed only minor differences with the rates for all seekers. They furthermore reported that the results were statistically significant as to the general population and the unrepresented population.

The authors, however, did not report the effect of detained status on the relationships and the likelihood that VTC asylum claimants were more likely to be detained and, may have been ineligible for asylum for the same reasons they were detained, such as statutory bars due to criminal conduct, or were less likely to have approvable asylum claims.²²² We asked OPAT to provide us information on 2010 asylum grants by type of hearing (VTC or in person), representation status, and detained status. Table M presents the results for those in detention, those who had been detained but were released when the case was completed, and those who were never detained.

²²² *Id.*

Table M: 2010 Asylum Application Grants and Denials, By Detention Status and Representation Status

DETAINED	Total	Represented	Not represented
VTC grant	136 (24%)	127 (42%)	9 (4%)
VTC deny	423 (76%)	179 (59%)	244 (96%)
IP grant	212 (11%)	153 (18%)	59 (6%)
IP deny	1,649 (89%)	703 (82%)	946 (94%)
RELEASED			
VTC grant	43 (39%)	35 (43%)	8 (28%)
VTC deny	67 (61%)	46 (57%)	21 (72%)
IP grant	1,153 (46%)	1,048 (48%)	105 (33%)
IP deny	1,374 (54%)	1,160 (53%)	214 (67%)
NEVER DETAINED			
VTC grant	37 (42%)	34 (48%)	3 (18%)
VTC deny	51 (58%)	37 (52%)	14 (82%)
IP grant	6,973 (57%)	6,699 (59%)	274 (38%)
IP deny	5,210 (43%)	4,753 (42%)	457 (63%)

We have not had the time to subject these data to statistical tests. We note, however, that in the “in-person hearing” (IP) categories, the 50 percent grant rate for 2010 asylum seekers shown in Table L drops to 11 percent for detained seekers as seen in Table M. In fact, detained asylum seekers in 2010 did better overall if they had a VTC hearing (24 percent) than an in-person hearing (11 percent). Detained seekers in VTC hearings who were represented got asylum 42 percent of the time.

For those with VTC hearings, asylum seekers who had been released from detention, and those who had never been detained fared better than detained respondents (39 percent and 42 percent respectively), but, unlike detained respondents, fared worse than respondents in in-person hearings. (39 percent to 46 percent for released applicants and 42 percent to 57 percent for never detained applicants). The number of released and never-detained asylum seekers who had VTC hearings was quite low (in double or single digits, making the percentages volatile). The differences in success for represented and non-represented respondents are noticeable in all categories—for example, 42 percent of detained respondents in VTC hearings got relief versus 4 percent (N=9) for non-represented VTC detainees.

Without a controlled analysis that includes more factors such as the nationality of the asylum applicant, the reason for the denial (statutory bar vs. credibility determination), whether interpreters were used, the availability of alternative forms of relief, it is not

possible to draw firm conclusions on the impact of VTC alone on outcomes, although the Walsh's flat assertions that VTC affects asylum outcomes seem questionable.

Recommendations, 54-58

54. That EOIR revise the OCIJ Practice Manual to provide judges, attorneys, and pro se respondents more guidance about how to prepare for and conduct proceedings using VTC. Further, that the OCIJ consult with the Asylum Office and review their VTC best practices for possible adoption and integration into EOIR procedures. Further that the OCIJ develop a system, that randomly selects VTC hearings for observation by ACIJ's and/or other highly trained personnel such as BIA staff attorneys or visits by senior members of the Asylum Office, to prepare formal evaluations of the VTC hearings, especially those involving claims for asylum or other humanitarian relief. Ideally these special observers would also review a random selection of in-person hearings to offer a comparative assessment.
55. That EOIR, as it works toward implementing electronic docketing and electric case files (which will permit ready access to documents in video proceedings), consider the interim use of document cameras in video proceedings to avoid the need to fax documents between locations.
56. That EOIR consider the feasibility of a more formal evaluation of VTC beyond the informal monitoring that it says it conducts today, not for the purpose of revisiting the use of VTC, to which Congress and EOIR are committed, but rather to provide more systematic information on how to make its use more effective and to ensure against undue prejudice.
57. That EOIR encourage judges to permit counsel and respondents to use the courts' VTC technology to prepare for the hearing so that their first experience is not the high stakes hearing.
58. That EOIR should consider providing surveys or questionnaires to the parties and their witnesses to gather information about how the VTC may have impaired hearing during the proceeding. EOIR should evaluate the data collected periodically to determine if corrections to procedures or technology are warranted.

2. BIA Case Management Procedures

Appeals to the BIA in 2010 were 35,787, down by 10 percent from 39,743 in 2006; appeals from immigration judge decisions only were down by an even greater percentage, from 33,600 in 2006 to 27,196 in 2010. Completions were also down, by 20 percent, from 41,475 in 2006 to 33,305 in 2010, completions in immigration judge appeals were down from 36,348 to 27,428. There has also been a change in the mix of cases. In 2006, 85 percent of the appeals filed came from the immigration courts, the rest from DHS offices (almost all appeals from denials of family visa petitions).

The BIA has been extensively analyzed. Our interviews with BIA members and others suggest that the earlier problems with BIA performance have abated to the point that our research time and resources would be better spent on other subjects. We do offer the summary analysis that follows as well as one specific recommendation concerning possible changes to BIA regulations.

In 2002, Attorney General Ashcroft reduced the BIA from 23 members to 11 and revised the regulations governing the procedures and standards used on review.)²²³ Soon thereafter, petitions for review in the U.S. courts of appeals (“BIA Appeals”) shot upward, reaching a peak in mid-decade, especially in the courts of appeals for the Second and Ninth circuits. BIA appeals as a percentage of all filings have receded but not to the levels seen before the Attorney General’s changes. The tables below provide more specific information.)²²⁴

Table N: BIA Appeals as a Percent of All Appeals

(12 month period ending Sept. 30)

	2001	2006	2011
Total appeals filed	57,464	66,618	55,126
BIA appeals	1,760 (3 %)	11,911 (18%)	6,331 (11%)

The BIA, over all, is contributing almost half as many cases to the courts of appeals dockets as it did in the peak year, 2006, but still considerably more than in 2001.

The *rate* of appeal, however, has not declined so sharply.

Table O: Rate of Appeal from BIA Decisions

(12 month period ending Sept 30)

	2001	2006	2011
BIA decisions	27,268	36,352	26,994
BIA appeals	1,757 (6%)	11,911 (33%)	6,311 (23%)

The rate of appeal, again, peaked in 2006 and has dropped in 2011 but to nowhere near the rate in 2001.

Finally, the spurt in BIA appeals has affected some courts of appeals much more than others—in particular those in the Second and Ninth Circuits.

²²³ See Press Release, U.S. Dep’t of Just. Attorney General Issues Final Rule Reforming Board of Immigration Review Procedures (Aug. 23, 2002) *available at* <http://www.justice.gov/eoir/press/02/BIARestruct.pdf> (describing changes in regulations). The regulations were published in 67 Fed. Reg. 54878 (Aug. 26, 2002).

²²⁴ Drawn from data reported in Statistics Div., BIA Filings-June 30, 2011, Admin. Off. of the U.S. Courts, (on file with authors).

Table P: Total Appeals, BIA Appeals, Rate of Appeal (CAs 2 & 9)

	(12 month period ending Sept 30)			
	2001	2006	2008	2011
Total appeals filed CA-2	4,519	7,029	6,904	5,541
BIA appeals	170 (4%)	2,640 (38%)	2,865 (41%)	1,405(25%)
Rate of appeal*	3%	45%	42%	30%
Total appeals filed CA-9	10,342	14,636	13,577	11,947
BIA appeals	954 (9%)	5,862 (40%)	4,625 (34%)	2,963(24%)
Rate of appeal*	10%	43%	42%	33%

*--Underlying figures not shown

Did respondents appeal a much greater percentage of the BIA decisions in 2011 than they did they decisions in 2001 because 2011 BIA decisions were more vulnerable, or for some other reason? Did they appeal a lower percentage of decisions in 2011 than in 2006 because the decisions were less vulnerable or because the economic downturn put legal fees beyond reach of many respondents? To the degree that the level of appeals from its decisions is a measure of adequate BIA performance, the rather sharp decline in appeals and the less dramatic drop in the rate of appeals could suggest that serious performance difficulties have abated.²²⁵ In any event, the variation in the rate of appeal does not appear to be associated with any change in the ratio of single member to panel decisions. See Table Q below:

Table Q: Completions of Appeals from IJ and DHS Decisions and Procedural Characteristics

	Completions	Single Member Affirmances	Oral Argument
2006	41,475	38,649 (93.2%)	3
2007	35,394	32,325 (91.3%)	2
2008	38,369	35,656 (92.9%)	0
2009	33,102	30,124 (91.0%)	1

The rate of appeal, though, is affected by factors other than BIA performance, such as the state of the economy and costs of pursuing appeals; discipline of abusive attorneys who filed frivolous cases; developments in the doctrinal law that have refined issues frequently litigated in the court; and perhaps an increase in pre-appeal opportunities to remain in the U.S. ranging from granting of motions to reopen to the use of deferred departure.

²²⁵ Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405 (2007) (suggesting an interplay of factors that motivate respondents to see judicial review of BIA decisions).

a. BIA Regulations on Referring Cases to Three-Member Panels

The BIA in 2008 proposed amending its regulations governing the criteria where a single member could refer the case to a three-member panel. Existing regulations provide criteria that limit the use of three-member panels to specific situations: (1) the need to settle inconsistencies among the rulings of different immigration judges, (2) the need to establish a precedent construing the meaning of laws, regulations, or procedures, (3) the need to review a decision by an immigration judge or DHS that is not in conformity with the law, (4) the need to resolve a case or controversy of major national import, (5) the need to review a clearly erroneous factual determination by an immigration judge, or (6) the need to reverse the decision of an immigration judge or DHS.²²⁶

The proposed regulations would have allowed the creation of a three-member panel whenever the BIA member believed the case presented: “The need to resolve a complex, novel, or unusual issue of law or fact.” These regulations, though proposed in 2008, have not been finalized.²²⁷ We were told, however, that they were not controversial when proposed and may be in their suspended status because they arose during the transition in presidential administrations, when both had other priorities.

Recommendation, 59

59. That EOIR should proceed to make the 2008 proposed regulations final.

D. Court Performance and Immigration Court Management

A court system’s performance can be affected by how it balances, structurally and operationally, judges’ independence and accountability. Some systems place a heavy emphasis on independence, as seen in the good behavior tenure of federal district and appellate judges. Some emphasize accountability, as in states where some judges must compete in elections for short terms and in the emphasis in executive branch adjudicative systems on management oversight.

Also, judges do their jobs within an organizational framework that can lean toward centralized authority or to local autonomy.

We said at the outset of this report that although we have conducted our analysis based on the obvious fact that the immigration courts and BIA are part of a federal executive branch, we also assessed immigrant removal adjudication with at least one comparative eye on court systems in the nations’ state and federal judicial branches. Like those courts, and unlike all but a few of the agencies that conduct adjudication, immigration courts and the BIA use an adversary process to decide case of major national importance, involving some individuals for whom the case approaches life or death importance.

²²⁶ 8 C.F.R. § 1003.1(e)(6)(i)—(vi) (2010).

²²⁷ See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654 (proposed June 18, 2008).

In other ways, these EOIR components, in particular the immigration courts, resemble judicial branch court systems more than they do most of the federal executive branch administrative adjudication agencies. Unlike all but a few of the administrative agencies that conduct adjudication, the immigration courts represent a large judicial system (264 judges) and are dispersed across the country. EOIR's Office of Chief Immigration Judge (like the Chief Administrative Law Judge in the Social Security Administration) is analogous to other court system's centralized management as vested in the U.S. Supreme Court or the chief justice or in a few cases a judicial council.

1. Immigration Judge Selection and Evaluation

a. Selection

Immigration judge selection has been a staple of recent commentary, especially since reports surfaced in 2007 of inappropriate partisan hiring of judges by department political appointees, practices documented in a 2008 DOJ Inspector General/Office of Professional Responsibility.²²⁸ Complaints of inappropriate judicial recruitment often reflect concern that those so selected will feel pressure, perhaps out of gratitude, to decide cases in ways their selectors want. But there is little evidence that the department officials who meddled in the hiring process knew or cared what immigration judges do, just that party loyalists got jobs. In any event, the Attorney General instituted a new hiring practice that re-vested authority in EOIR.²²⁹ OCIJ officials insist that the process is now non-partisan and merit-based, and we have no evidence to suggest it is not. The changes in judge hiring practices were not part of the 22 "improvement measures" that Attorney General Gonzales announced in 2006. EOIR has explained the hiring practice changes in press releases separate from those updating implementation of the improvement measures. A 2010 release on EOIR efforts to increase the number of judges also asserted that the "requirements for becoming an immigration judge set high standards for the applicants and the screening process ensures that only the best candidates are selected." In addition to having at least seven years of "post-bar legal experience," the release said that applicants are evaluated on criteria of temperament; knowledge of immigration law and procedures; litigation experience, preferably in high volume litigation arenas; experience in conducting administrative hearings; and knowledge of judicial practices and procedures."²³⁰ ACIJ's told us they participate in the hiring process and believe it is working well. We did not have the time to assess the quality of newly hired judges, much less compare them systematically to judges who have been serving longer in the immigration courts, or operationalize and test the

²²⁸ U.S. DEP'T OF JUST. OFFICE OF RESPONSIBILITY & OFFICE OF INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) available at <http://www.justice.gov/oig/special/s0807/final.pdf>.

²²⁹ *Id.* at 114-15.

²³⁰ Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Immigration Judge Hiring Initiative*, U.S. DEP'T JUST., (Mar. 2010) available at http://www.justice.gov/eoir/press/2010/EOIR_IJHiring_FactSheet.pdf.

empirical assertion that the “screening process ensures that only the best candidates are selected.” Other EOIR press releases reporting on implementation of the 22 improvement measures describe orientation and continuing education for judges and staff, as well as performance evaluations described later in this paper.²³¹

Despite these changes, some have called for more precise standards and greater participation by interested stakeholder groups in the process in order to promote diversity and proper judicial temperament.²³² The NAIJ, by contrast, has referred to “a cumbersome hiring and clearance process.”²³³ We have not had the time to weigh these objections or assess the likely feasibility of the proposals.

Likewise, we did not have time to assess any changes in recent years in the demographic makeup of the judicial corps or in the mix of pre-judicial vocations. A preponderance of former immigration prosecutors within the corps of immigration judges has been a concern going back at least to 1983,²³⁴ when the first Chief Immigration Judge worried that “[h]istorically, individuals selected to become immigration judges were individuals who had come through the” since abolished Immigration and Naturalization Service. In 2010, the ABA Immigration Commission cited more recent complaints of homogeneity in backgrounds and charges that irascible judge behavior and disparities in the proportion of asylum grants may be an outcome of those hiring patterns.²³⁵

Recommendations, 60-61

60. That EOIR in the interests of transparency consider publishing annually, as do some courts,²³⁶ or posting periodically, summary and comparative data on the gender and race/ethnicity composition of categories of EOIR personnel (e.g., judges, BIA members, staff by occupational category), as well as summary information on judges’ prior employment, with due attention to any statutory restrictions to protect privacy.
61. That some other group, if EOIR is disinclined to post such information, or forbidden to do so, post such information based on judges’ names on the EOIR website and Internet-available biographical information.

b. Performance Monitoring and Evaluation

The popular press in recent years has reported instances of abusive immigration judge behavior toward parties before them, a matter amplified by criticism in court of appeals

²³¹ *EOIR’s Improvement Measures*, *supra* note 75.

²³² *ABA Comm’n on Immigr. Rept., 2010*, *supra* note 103, at 2-18–2-19, 2-29.

²³³ Improving Efficiency, Statement of Nat’l Ass’n of Immigr. Judges, *supra* note 105.

²³⁴ See, e.g., William Robie, *The Purpose and Effect of Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMM. L.J. 269, 271-72 (1986).

²³⁵ *ABA Comm’n on Immigr. Rept., 2010*, *supra* note 103, at 2-19.

²³⁶ E.g., The [Federal] Judiciary Fair Employment Practices Annual Report, (2011, published by the Administrative Office of the U.S. Courts).

opinions.²³⁷ We have no grounds to doubt the accuracy of specific reports but have no way of knowing how representative they are of the overall conduct of immigration judges (and, frankly, nor do circuit judges, who see the records in only a small fraction of immigration court proceedings).

These press, judicial, and other complaints likely helped make conduct and professionalism a leading component of the Attorney General's 2006 changes. Five dealt directly with monitoring and evaluating performance and dealing with complaints of misconduct.

[1] Individual Judge Performance Evaluation

The first of the Attorney General's 2006 EOIR "Improvement Measures" was "Performance Evaluations for Immigration Judges and BIA Members." This subject is a moving target within EOIR, and we were unable to give it the time and attention that we did to other topics. We offer the observations below, but have presented no specific recommendations. [AWAITING SURVEY RESULTS].

The June 2009 update on implementation of the improvement measures reported that "EOIR plans to implement performance evaluations for immigration judges on July 1, 2009."²³⁸ In our spring 2011 interviews with various personnel in the immigration court leadership, however, we were told that ACIJs would begin the evaluation process in July 2011.

In interviews of judges who had gone through the evaluation process, the most common complaint was that the appraisal was a "pass/fail" evaluation stating only that behavior was satisfactory. These judges believed there was little room in the evaluation for praise or specific modeling of best practices and incentives to do better. Other judges were glad the evaluation process was "pass/fail" and they believed that their ACIJ did a good job of giving them areas of improvement and continuous communication throughout the year, not just at the time of evaluation. Still others told us that they did not understand the evaluation process or know the bases on which they would be evaluated. Finally, a few judges expressed concern that there was not more robust mentoring of new judges and clearer communication during a judge's probationary period.

[AWAITING SURVEY RESULT]

There has been an undercurrent of resistance among some judges to the use of quantitative measures in evaluating their performance. The Chief Immigration Judge has regularly promulgated case completion goals, most recently in July 2010, adding a new goal, for example, of completing 100 percent of credible fear review determinations

²³⁷ See *ABA Comm'n on Immigr. Rept., 2010, supra* note 103, at 2-19 (citing commonly referenced judicial opinions).

²³⁸ *EOIR's Improvement Measures, supra* note 75.

within seven days.²³⁹ The goals are a response to the 1993 Government Performance and Results Act, which has among its purposes “improv[ing] Federal program effectiveness and public accountability by promoting a new focus on results, service quality, and customer satisfaction.”²⁴⁰ On their face, the case completion goals are similar to the ABA’s “Standards of Timely Disposition” for state trial courts—for example, that “90 percent of all civil cases should be settled, tried, or otherwise concluded within 12 months of the date of case filing; 98 percent for within 18 months . . . and the remaining within 24 months . . . except for individual cases in which the court determines exceptional circumstances exist for which a continuing review should occur.”²⁴¹ Of course, the ABA standards are not mandatory unless a particular trial court elects to make them so as to its operations. By the same token, though, EOIR regards the case completion goals as aspirational, although some judges believe as a practical matter that they are not.

We heard only passing references to case completion goals in our interviews. The president and vice-president of the NAIJ wrote recently that although EOIR has said that the goals are aspirational, “not inflexible mandates, . . . judges perceive these goals to be mandatory and frequently in conflict with ideal conditions for adjudicating cases fairly and independently,” citing judges’ narrative responses to a survey on judicial stress.²⁴²

EOIR’s signed Agreement with the National Association references the evaluation standard “Accountability for Organization Results,” as one of the three “job elements” in the judges’ evaluation instrument (the other two are “Legal Ability” and “Professionalism”).²⁴³ The Agreement notes EOIR’s determination that subpart 3.1 (“Acts consistently with the goals and priorities established by the Chief Immigration Judge”) does “not encompass any specific numerical or time-based production standards, such as case completion goals” except for statutory or regulatory based deadlines. Similarly the agreement provides that evaluations (as opposed to the standards for evaluations) will not be based “primarily” on “such standards”.

As far as we could tell from our interviews, moreover, ACIJs do not get centrally generated quantitative reports of judicial performance but rather in their supervision of the courts, rely on their own observation and those of the respective court administrators to alert them to judges who may be having problems in completing cases.

²³⁹ Memorandum from Brian O’Leary, Chief Judge, New Case Completion Goals FY2010, to all Immigration Judges (and others) (July 14, 2010) (on file with the authors).

²⁴⁰ Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) at § 2(b)(3).

²⁴¹ AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS 86, at 2.52(a) (1992).

²⁴² Slavin & Marks, *supra* note 15, at 1787 citing Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64-65 (2008).

²⁴³ Executive Office for Immigration Review Performance Plan, provided by EOIR (on file with the authors).

As stated above, we were unable to study this matter sufficiently to draw conclusions or make recommendations. We note, as have others, that the use of quantitative measures as part of individual judge performance evaluations is a generally accepted practice within state courts (although that says little about EOIR evaluations). “Judicial Performance Evaluation” (JPE for short) refers to a process by which independent commissions, created typically by state law, evaluate judges periodically in such areas as legal knowledge, integrity and impartiality, communication and administrative skills, and judicial temperament, using surveys and interviews of court users, case management data, and reviews of the judge’s work product. JPE results have been put to various purposes: providing voters objective data on which to determine whether to retain judges in office; providing judges feedback on their performance; and helping to shape judicial education programs.²⁴⁴

Recommendation

We are not in a position, at least at this time, to make specific recommendation on these matters.

[2] Immigration Court Performance Monitoring

Any problems with using quantitative measures in an individual administrative *judge’s* biennial performance evaluation should be distinguished from the use of standards by which to measure and improve *court performance* on a continual basis. Probably the best example of such standards are the Trial Court Performance Standards developed by the National Center for State Courts as part of the national emphasis over the last two decades in measuring organizational performance (the same emphasis that produced the Government Performance and Results Act, to which the immigration court case completion goals are a response). The Trial Court Performance Standards have five elements: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.²⁴⁵

To help courts implement them, the National Center has developed “Courtools,” which provide guidance to courts that want to measure their performance in 10 specific areas, such as “access and fairness,” “trial date certainty,” and “court employee satisfaction.”²⁴⁶ Some state court systems, such as Utah’s, have modified the measurement tools and post the results, system wide, on their website, with the aim of “help[ing] courts identify and

²⁴⁴ See Institute for the Advancement of the American Legal System, *Quality Judges Initiative*, U. DENV. <http://www.du.edu/legalinstitute/jpe.html> (last visited Jan. 6, 2012) (providing JPE resources) (disclosure: Wheeler serves on the Institute’s Board of Advisors); American Bar Association, *Black Letter Guidelines for the Evaluation of Judicial Performance* (2005), available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf; *ABA Comm’n on Immigr. Rept.*, 2010, *supra* note 103, at 2-33.

²⁴⁵ *NCSC: Research: Trial Court Performance Standards*, NAT’L CENTER FOR STATE COURTS, http://www.ncsconline.org/d_research/TCPS/index.html (last visited Jan. 6, 2012).

²⁴⁶ *CourTools Performance Measurement Tools for Trial and Appellate Courts*, NAT’L CENTER FOR STATE COURTS (2011) http://www.ncsconline.org/D_Research/CourTools/index.html.

monitor important performance measures and make improvements to better serve the needs of the public.²⁴⁷ The performance areas include quantitative measures of case disposition—clearance rate (see Appendix 7 for an excerpt) and age of active pending cases, for example—but other areas as well, such as access and fairness in the courts and court employee satisfaction. The performance rankings reflected in the federal courts Court Management Statistics are another example of publically available indices of court performance (see Appendix 5).

Although the measured unit in these schemes is the court, not individual judges, courts that are serious in performing consistent with the standards they have established, need ways to encourage individual judges to perform adequately. According to current research about successfully performing trial courts, however, successful court performance is not simply a matter of getting outlying judges to tow the mark but of creating the types of cultures within the court that are conducive to high performance. National Center for State Court researchers, adapting tools for examining corporate culture, identified several cultural types among state criminal courts and established links between different cultures and court performance.²⁴⁸

Obviously, measuring the culture of individual immigration courts and assessing any links between different court cultures and court performance is a task well beyond this project. Indeed, the workload strains within immigration courts may make inapposite the type of organizational analysis that the National Center researchers were able to conduct in state criminal courts. Assessing the feasibility of such research in the immigration courts and undertaking it if it appears feasible may be a worthwhile endeavor for the Administrative Conference in conjunction with EOIR.

Recommendation, 62

62. That EOIR establish a committee to prepare a report assessing adaptability of performance measures used in other court systems, such as the National Center for State Courts' "Courttools," in a variety of areas. The report of this committee should be made public.

[3] Handling Complaints Against Immigration Judges

The Attorney General's 2006 "Improvement Measures" (included, separate from the call for performance evaluations) the development of "Mechanisms to Detect Poor Conduct and Quality" and "Procedures to Assess Complaints Against EOIR Adjudicators."

EOIR has had at least since 2010 an "Immigration Judge Conduct and Professionalism" page on its website,²⁴⁹ which includes information about filing complaints against judges,

²⁴⁷ *Utah Courts Performance Measures*, UTAH STATE COURTS (Oct. 20, 2011) <http://www.utcourts.gov/courttools/>.

²⁴⁸ Ostrom et al., *supra* note 106.

²⁴⁹ Executive Office for Immigration Review, *Immigration Judge Conduct and Professionalism*, U.S. DEP'T JUST., (Oct. 2011) <http://www.justice.gov/eoir/sibpages/IJConduct/IJConduct.htm>.

a description of the complaint procedure, and summary quarterly statistics on complaints filed and their disposition. In January, EOIR and the NAIJ agreed to an “Ethics and Professionalism Guide for Immigration Judges,” which is also posted on the conduct and professionalism page. As noted earlier, EOIR has assigned one of the ACIJs responsibility for “conduct and professionalism.”

According to information on the conduct and professionalism page, complaints may arise from filings by individuals or groups, or if the OCIJ initiates (i.e., in the argot of judicial discipline, “identifies”) a complaint sua sponte when it becomes aware of possible problematic conduct from any number of sources, including press accounts and judicial opinions. Responses to verified allegations that are not the responsibility of DOJ’s Offices of Professional Responsibility or Inspector General generally rest with the respective assistant chief immigration judges with supervisory authority over the subject judge’s court, as well as the ACIJs for conduct and professionalism and for training and education. In fiscal 2011, EOIR received 159 complaints involving 89 judges. It dismissed 53 complaints, imposed formal disciplinary action as to two complaints, and undertook informal non-disciplinary action as to 73 complaints. Sixteen were concluded when the subject judges resigned or retired and the rest of the complaints were carried over. The data for fiscal 2010 were very similar.

We did not have the time or resources to delve deeply into the complaint process’s design or implementation, especially given the web of executive branch rules and regulations within which the disciplinary process sits. The EOIR complaint processing system, although probably similar to those in most executive agencies, differs from those of almost all state court systems, which have established investigating bodies of judges, lawyers, and laypersons, which receive and research complaints and submit those they regard as meritorious to adjudicating bodies for disposition or further appeal.²⁵⁰ (The federal judicial disciplinary process rests principally within the all judge circuit judicial councils.)²⁵¹

Both the state and federal judicial disciplinary processes make public, with some exceptions, the names of judges whom the adjudicating body formally reprimands. The conventional view is that such publication provides needed transparency to an often obscure process. The EOIR summary statistics do not identify judges who have been formally disciplined. EOIR officials explained that they are barred by statute and executive branch policies from doing so, although some officials volunteered that doing so might increase transparency. (EOIR’s “Summary” of its complaint handling procedure notes that the OCIJ publishes the summary statistics referenced above “to increase the transparency of the process” “[c]onsistent with the Privacy Act.”)

²⁵⁰ See BUREAU OF JUST. STATISTICS, U.S. DEP’T JUST., STATE COURT ORGANIZATION 56 (2004) available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>.

²⁵¹ See 28 U.S.C. ch. 16 (2006).

Recommendation, 63

63. That EOIR, consistent with its commitment to transparency in the judicial discipline process, explain how it is barred by statute from identifying judges upon whom it has imposed formal disciplinary action. This explanation could appear on its “Immigration Judge Conduct and Professionalism” webpage, within the quarterly statistical reports, or in both places.

2. Locus of Management Responsibility

One aspect that distinguishes the immigration courts from most state and federal judicial systems is the absence of almost any management authority vested in the judges of each court. Rather than a chief judge in every multi-judge immigration court, there are within OCIJ, as described earlier, 11 assistant chief immigration judges with supervisory responsibility over from four to nine immigration courts, as seen in Table R (which draws on May 2011 information currently posted on the EOIR website). The duty station of six ACIJs is EOIR’s Falls Church headquarters; they supervise courts located around the country (and, the four-judge video court in the headquarters building and the nearby Arlington court). Five of the ACIJs have duty stations in the metropolitan areas of courts they supervise, and they supervise other courts in other cities as well. Four of the Falls Church-based ACIJs supervise only courts in other cities (and two of those ADIJs have responsibilities for judicial conduct and education).

The courts that have a resident ACIJ account for 118 judges, 45 percent of the 264 on board in early December; 146 judges are in courts without a resident ACIJ.

Table R: Assistant Chief Immigration Judge Assignments²⁵²

ACIJ and Duty Station	Courts at/near duty station (# of judges)	Other Courts
Robert Weisel, New York City	NYC, Varick (32)	Fishkill, Ulster (1)
Larry Dean, San Antonio	San Antonio (7)	Dallas, El Paso, El Paso SPC, Harlingen, Houston, Houston SPC, Pearsall, Port Isabel (27)
Thomas Fong, Los Angeles	Los Angeles (31)	Honolulu, Lancaster, Saipan, Salt Lake City (7)
Edward Kelly, Falls Church	Hdqts Video Ct (4)	Baltimore, Charlotte, Cleveland (11)
Gary Smith, Falls Church	Arlington (5)	Boston, Elizabeth, Hartford, Newark, Philadelphia, York (22)
Robert Maggard, San Francisco	San Francisco (18)	Denver, Las Vegas, Portland, Seattle, Tacoma (15)
Elisa Sukkar, Miami	Krome, Miami (21)	Orlando, San Juan (8)
Jill Dufresne, Falls Church		Batavia, Bloomington, Buffalo, Chicago, Detroit, Kansas City, Memphis, Omaha (25)
Mary Beth Keller, Falls Church (Cond. & Prof.)		East Mesa, El Centro, Imperial, San Diego (7)
Despali Nadkarni, Falls Church		Atlanta, Stewart, New Orleans, Oakdale (10)
Jack Weil, Falls Church (Trg. & Education)		Eloy, Florence, Phoenix, Tucson (13)
	118 JUDGES	146 JUDGES

This placement of the ACIJ's responds in part to one of the measures the Attorney General ordered in 2006: that "the Acting Chief Immigration Judge . . . consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees, on a pilot basis" to evaluate whether the arrangement improved "managerial contact and oversight in those courts."²⁵³ EOIR

²⁵² Drawn from Executive Office for Immigration Review, *EOIR IMMIGRATION COURT LISTING*, U.S. DEP'T JUST., (May 2011) available at <http://www.justice.gov/eoir/sibpages/ICadr.htm> and subsequent communications from the Office of the Chief Immigration Judge.

²⁵³ ATT'Y GEN MEMORANDUM, *supra* note 71.

asserted in June 2009 that the effort has been “well received by immigration judges, EOIR staff, the private bar, and the government bar.”²⁵⁴

We asked why EOIR has adopted the approach of vesting authority for administering the courts in a small number of ACIJs, rather than vesting that authority—subject to national administrative policies—in the judges of each court and creating the position of chief judge in each multi-judge court, with appropriate caseload reductions for those in large courts. The response, in a phrase we heard often, was that “hearing time is the court’s most precious commodity,” and the judges should have no responsibilities other than preparing for and conducting hearings.

An exchange we had with an EOIR official was illuminating. We asked, hypothetically, whether a court’s judges could, on their own, invite a local law professor to come to the court to make a presentation about an area of his or her immigration expertise—and to do so gratis—either in a class room setting or in an informal brown bag lunch. We learned that the judges could not issue such an invitation without the supervising ACIJ’s approval—whether the ACIJ served in the court in question or was based elsewhere. The ACIJ’s prior knowledge and approval was necessary because, as described to us, the ACIJ is responsible for the court’s administration, including how judges allocate their time.

Moreover, we were told, because the “training” involved in the professor’s visit might be useful to other courts, the ACIJ need to know about all such events and opportunities. Furthermore, the ACIJ principally responsible for education and training would need to know, in advance, about the proposed unpaid presentation or brown bag lunch with the professor, inasmuch as that judge needs to know about any and all training or requests for training so as to be in a position to oversee and document all training.

[AWAITING SURVEY RESULTS]

This approach might trace back to the first chief immigration judge, the late William Robie, cited earlier in our report for his efforts to transport to the immigration courts case management techniques that were effective in other court settings. As to court administration, according to a 1993 post-mortem tribute by two immigration court officials,²⁵⁵ Judge Robie:

established a management officer position in each of the larger Offices of the Immigration Judges. . . . By handling the daily administrative requirements of an immigration judge office, management officers afforded the immigration judges the ability to concentrate upon the judicial aspects of their position and focus on the just resolution of the cases that came before them.

We of course cannot say whether Judge Robie would have envisioned the current highly centralized approach to immigration court management and, more important, whether it

²⁵⁴ *EOIR’s Improvement Measures*, *supra* note 75.

²⁵⁵ Jere Armstrong & Richard J. Bartolomei, *A Tribute to the Honorable William R. Robie*, 7 GEO. IMMIGR. L.J. 265, 268 (1993).

is the best approach, and we do not know the degree to which, if any, the current approach may be necessary given DOJ rules governing the behavior of Department attorneys, and if so, whether any change in those rules to recognize the special role of the judges might be possible.

[AWAITING SURVEY RESULTS]

We can say that standards and evaluative tools developed for judicial branch courts²⁵⁶ embrace a different approach. The ABA's judicial administration standards, for example, while recognizing the need for overall centralized management of a judicial system, stress that each trial court should have its own administration "so that it can manage its business."²⁵⁷ The most thorough effort to link management approaches with trial court performance emphasizes the role of local chief judges in promoting cultures conducive to high performance, a phenomenon we discussed earlier. The principal research on trial court culture describes the chief judge's role as "fostering agreement among members and staff of the court in a collegial manner" and "encourage[ing] other judges and staff to embrace one set of cultural orientations in case management style and change management and another set in judge-staff relations and internal organization."²⁵⁸ An international consortium of several U.S. and foreign court administration and research organizations sums up the conventional wisdom: "To become an excellent court, proactive management and leadership are needed at all levels, not only at the top, and performance targets have to be determined and attained. Well informed decision-making [about achieving high performance] requires sound measurement of key performance areas and reliable data."²⁵⁹

As stated above, we were not able, within the confines of this project, to assess various cultures in different immigration courts. Nor were we able to inquire about the degree to which the observations above regarding the locus of management authority are applicable to the immigration courts, whether the ACIJs are performing the chief judge roles found effective in other courts and whether the immigration courts would function better if more management authority were vested in the courts themselves. (A few judges told us that their time on duty is so consumed by conducting hearings to leave little time for the kind of chief-judge led collegial problem solving described above.)

We point to our earlier suggestion of a possible ACUS-EOIR project on assessing immigration court cultures.

²⁵⁶ *E.g.*, ABA Judicial Administration Division, *supra* note 241; Trial Court Performance Standards, *supra* note 246; Ostrom et al., *supra* note 106; INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE (2008) available at www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf.

²⁵⁷ ABA Judicial Administration Division, *supra* note 241, at 29.

²⁵⁸ Ostrom et al., *supra* note 106, at 127.

²⁵⁹ INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra* note 256, at 2, 4, 26.

Recommendation

We are not in a position, at least at this time, to make specific recommendation on these matters.

3. Restructuring

A pervasive theme of critics of immigrant removal adjudication has been the independence of immigration judges. They, as noted earlier, are not Administrative Law Judges with the processes and protections provided by the APA, and are described both by statute and DOJ regulations as attorneys who perform tasks delegated by the attorney general, albeit with admonitions as well that they should exercise independent judgment within the structure of the delegation. Some immigration judges and commentators see an inherent conflict.

Those who charge that the judges lack, or appear to lack, independence have usually called for removing the immigration adjudication agencies from the DOJ into some sort of independent status within the executive branch of government—either as a standalone administrative agency or a so-called Article I court with presidentially appointed judges. The ABA Immigration Commission Report describes the alternative approaches.²⁶⁰ Commentators and judges have argued that, even though DHS, not DOJ, attorneys litigate cases in the courts and appeals in the BIA, it is inconsistent with independent judicial decision making to place judges under the administrative control of the nation's chief law enforcement officer.

We have not devoted much attention to this group of proposed changes, for several reasons, whatever their merits. One is that, although, there is an obvious potential for DOJ management's manipulation of immigration judge decision-making, through performance reviews, sanctions, threats of removal for office and similar steps, we have encountered little evidence of such manipulation. Second, although independent agency status would be a barrier against DOJ decisional manipulation, the prospects of creating a new agency are dim, even though EOIR is administratively sufficient within DOJ and might be relocated with little additional long-term cost. Moreover, an autonomous immigration adjudication agency risks poor sailing in the appropriations process compared to one served by the DOJ's advocacy, both with the Office of Management and Budget and Congressional appropriators. Aliens, especially aliens accused or convicted of crimes, who DHS says should not be in the country, are hardly an attractive constituency to appropriators.

Recommendation

We are not in a position, at least at this time, to make specific recommendation on these matters.

²⁶⁰ *ABA Comm'n on Immigr. Rept., 2010, supra* note 29, at Part 6.

VI. Conclusion

We appreciate the cooperation of the many people who met with us and look forward to working with the Administrative Conference as it evaluates these recommendations.

Acknowledgements

We also reiterate the support of our home institutions, including the support of our research assistants and interns.

New York Law School research assistants: Aisha Elston-Wesley, JD Class of 2013 and Eberle Schultz, JD Class of 2013

Brookings Institution interns: Markus Brazill, Eric Glickman, and Carolyn Harbus

We also thank:

JoAnn Tuohy of the Statistics Division, Administrative Office of the U.S. Courts.

Bethany Ow, Esq., formerly an EOIR judicial law clerk in Houston, Texas.

APPENDIX 1

INTERVIEWS

DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Director's Office **Juan Osuna** (Director), April 27 (Falls Church, 4 hours); May 3 (New York, 2 hours); August 8 (Falls Church, 2 hours), brief conversation Nov. 17 (30 minutes).

General Counsel **Robin Stutman** (General Counsel), May 19 (Falls Church, 1 hour)

Office of Legislative and Public Affairs, Office of Planning, Analysis and Technology **Amy Dale** (Assistant Director) and Deborah Blacksten, May 19 (Falls Church, 1 hour) and several follow up telephone conferences including Brett Endres.

Board of Immigration Appeals **David Neal** (Vice Chairman), **Jean King** (Acting Director of Operations) May 19 (Falls Church, 1 hour); and **David Neal** again via telephone Dec 19 (Benson only).

Legal Orientation and Pro Bono Program **Steven Lang** (Coordinator), May 19 (Falls Church, 1 hour) August 8 (Falls Church, 2 hours)

Michael Porter, Chief Deputy Clerk (and other staff), April 27 (Falls Church, 45 minutes)

Office of Chief Immigration Judge, Group interview May 19 with **Brian O'Leary** (Chief Immigration Judge), **Michael McGoings** (Dep. CIJ), Assistant Chief Immigration Judges **Ed Kelly**, **Mary Beth Keller** (ACIJ for Conduct and Professionalism), **Jack Weil** (ACIJ for Education and Training (Falls Church, 3 hours), plus additional interviews in various immigration courts (see below).

Immigration Courts (by state),

Arizona (Benson only)

Phoenix, July 11, Florence, July 12, Eloy, July 13, Tucson, July 14: Interviews of several hours with 13 judges and several administrators, and LOP personnel.

California (Benson only)

Los Angeles, October 17, San Diego, October 19. Several hour interviews with nine judges and several administrators.

Illinois Chicago, October 24 [About 5 hours with most of the members of the court and with administrative personnel].

Maryland July 1 About 4 hours with most of the judges and some administrative personnel.

New York, Interviews on June 1 and June 20 with 11 judges and some administrative personnel, November 30 telephone interview with two judges (Benson only).

Virginia Several hour interview with a subset of Headquarters Court judges and observation of proceeding, October 24.

Civil Division, Office of Immigration Litigation, **David McConnell** (Director), April 28 (Washington, 2 hours).

DEPARTMENT OF HOMELAND SECURITY

Office of General Counsel, Group Interview April 28 **Seth Grossman** (Chief of Staff), **Nader Baroukh** (Associate General Counsel for Immigration), **Nicholas Perry** (Assistant General Counsel for Immigration Enforcement), **Adam V. Loiacono**, Attorney Adviser, Immigration (Washington, D.C., 2.5 hours (Grossman 30 minutes only)).

Immigration and Customs Enforcement

Office of the Principal Legal Adviser, **Peter S. Vincent** (Principal Legal Adviser) May 18 (Washington, 1.5 hours) (joined by **Gary Mead**, Executive Associate Director, Enforcement and Removal Operations, ICE).

Riah Ramlogan, (Deputy Principal Legal Adviser), April 28 (Washington, 1 hour), November 17 30 minutes; November 18 2 hours).

Geraldine Richardson, (Special Assistant to the Office of the Principle Legal Adviser) **(Washington 2 hours) and email correspondence in November.**

Detention Compliance Officers (**2 people names unclear**) July 13, Eloy Detention facility, 1 hour.

Ruben Mayes (Detention Officer) Florence Detention facility, July 12, 1 hour.

Customs and Border Protection

Office of General Counsel, **Jorge Luis Gonzalez**, (Attorney), May 18 (Washington, 1 hour)

Director of the Tucson Border Patrol Sector and Officer in charge of public relations (names to be confirmed) July 14, Tucson, Arizona (2 hours).

Julie A.G. Koller, Attorney (Enforcement)Office of Chief Counsel, via telephone, (Benson only) November 29, 2011 (1 hour).

Citizenship and Immigration Services

Office of General Counsel, **Dea Carpenter** (Deputy General Counsel), May 18 (Washington, 2 hours).

Administrative Appeals Office, **Perry Rhew** (Chief of the AAO) June 21 10 to 11:30 (by phone, 1.5 hours).

Asylum Division, Refugee, Asylum & Int'l. Operations, **Joseph E. Langlois** (Director), **Ted Kim** (Deputy Chief), August 9 (Washington, 1 hour 40 minutes) and subsequent email correspondence.

IMMIGRATION LAWYERS (non-government)

Interviews in Arizona, New York, and Washington, D.C. with 6 attorneys associated with the American Bar Association, American Immigration Council Legal Action Center, Catholic Charities, Katzmann Study Group on Immigration Representation, and members of the private bar, approximately 30 attorneys in all. (Interviewees made clear they were not speaking for organizations with which they might be affiliated.)

OTHER INTERVIEWS

We interviewed Donnie Hachey, Chief Counsel for Operations, and several other personnel of Board of Veterans' Appeals August 9 (Washington, DC, 1 ½ hours).

We interviewed **David Martin** (Univ. of Virginia, former General Counsel, DHS, by phone, May 10, 2 hours).

We spoke during the project with several judges on the U.S. Courts of Appeals.

APPENDIX 2

**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
COMMITTEE ON ADJUDICATION**

John Vittone	Committee Chair, Public Member
Fred W. Alvarez	Public Member
Judge Charles	Center Liaison Representative
Mariano-Florentino Cuéllar	Council Member
Ivan K. Fong	Government Member
Susan Tsui Grundmann	Government Member
Christopher Hughey	Government Member
Mary Lucille Jordan	Liaison Representative
Elaine Kaplan	Government Member
Edward Kelly	Liaison Representative
Richard J. Leighton	Senior Fellow
Robert Lesnick	Government Member
Nadine Mancini	Government Member
Malcolm S. Mason	Senior Fellow
Doris Meissner	Public Member
Bob Schiff	Government Member
Glenn E. Sklar	Government Member
Thomas W. Snook	Liaison Representative
Daniel Solomon	Liaison Representative
Alan Swendiman	Liaison Representative

IMMIGRATION PROJECT WORKING GROUP

Kevin Burke	Judge, Hennepin County District Court (Minnesota)
Dea Carpenter	Deputy General Counsel, USCIS
Bill Ong Hing,	Professor of Law and Asian American Studies, Univ. of Cal., Davis
Edward Kelly,	Assistant Chief Immigration Law Judge, EOIR
Mark Krikorian,	Executive Director, Center for Immigration Studies

Stephen Yale Loehr,	Adjunct Professor, Cornell University Law
Adam Loiacono,	Attorney Advisor, Office of General Counsel, DHS
David McConnell,	Director at Office of Immigration Litigation, US DOJ
David A. Martin,	Professor, UVA Law, former Deputy General Counsel, DHS
Doris Meissner,	Senior Fellow, Migration Policy Institute
Juan Osuna,	Director, EOIR
Riah Ramlogan,	Deputy Principal Legal Advisor, US ICE
Rebecca Sharpless,	Assist. Prof. Clinical Legal Ed., University of Miami Law School
Margaret Stock,	Adjunct Instructor, University of Alaska
Crystal Williams,	Executive Director, American Immigration Lawyers Association

APPENDIX 3

	IJs	Completed Proceedings					Detained Proceedings			Other Matters		All matters	
		Total.	Per judge	w/ app relief	w/ asy. app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
ARLINGTON	5	6,484	1297	32%	22%	52%	24%	10%	24%	255	417	7,156	1431
ATLANTA	4	5,257	1314	20%	13%	51%	24%	9%	26%	828	596	6,681	1670
BALTIMORE,	5	3,613	723	44%	23%	60%	17%	14%	25%	479	361	4,453	891
BATAVIA SPC,	2	1,278	639	9%	5%	35%	66%	12%	27%	920	6	2,204	1102
BLOOMINGTON	3	3,913	1304	18%	11%	38%	52%	7%	15%	1032	97	5,042	1681
BOSTON	6	6,322	1,045	42%	22%	64%	25%	18%	42%	1506	753	8,581	1430
BUFFALO,	1	2,465	2,465	15%	6%	62%	5%	9%	47%	124	148	2,737	2737
CHARLOTTE,	3	3,629	1210	22%	12%	45%	11%	4%	6%	554	243	4,426	1475
CHICAGO	9	8,913	990	17%	7%	34%	43%	6%	14%	1052	385	10,350	1,150
CLEVELAND	3	4,751	1584	22%	16%	35%	54%	4%	6%	427	197	5,375	1792
DALLAS,	4	8,057	2014	12%	3%	33%	57%	4%	11%	501	341	8,899	2225
DENVER,	6	7,326	1221	14%	5%	28%	52%	5%	9%	3092	219	10,637	1773
DETROIT	4	4,082	1021	18%	8%	40%	49%	6%	14%	1419	184	5,685	1421
EAST MESA, CA	1	986	986	16%	8%	21%	87%	17%	15%	683	9	1,678	1678
EL CENTRO SPC		1,707		14%	4%		86%			683	18	2,408	
EL PASO SPC,	3	3,766	1255	8%	1%	30%	82%	9%	19%	986	34	4,786	1595
EL PASO	2	6,770	3385	11%	2%	33%	72%	7%	29%	593	165	7,528	3764
ELIZABETH SPC,	2	1,740	870	14%	10%	34%	63%	5%	8%	886	35	2,661	1331
ELOY	5	7,231	1446	26%	3%	20%	82%	24%	11%	2508	45	9,784	1957
FISHKILL DOC,	0.5	328	656	13%	2%	30%	100%	13%	30%	0	9	337	674
FLORENCE SPC,	3	4,683	1561	13%	3%	36%	62%	18%	18%	1970	31	6,684	2228
GUAYNABO, PR	2	1,705	853	40%	13%	53%	19%	9%	44%	205	178	2,088	1044
HARLINGEN	4	8,768	2192	7%	1%	31%	40%	6%	16%	2023	475	11,266	2817
HARTFORD	2	1,751	876	34%	12%	54%	27%	13%	17%	27	112	1,890	945
HONOLULU	2	827	414	33%	18%	51%	35%	13%	17%	254	62	1,143	572
HOUSTON SPC,	3	11,002	3667	5%	1%	20%	88%	5%	12%	2148	61	13,211	4404
HOUSTON,	7	4,818	688	36%	8%	62%	4%	4%	44%	11	383	5,212	745
IMPERIAL	1	1,157	1157	17%	3%	21%	64%	28%	28&	3	18	1,178	1,178

111 DRAFT [1/12/12]

Subject to further revision based on availability of additional data, including survey responses.

	IJs	Completed Proceedings					Detained Proceedings			Other Matters		All matters	
		Total.	Per judge	w/ app relief	w/ asy. app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
KANSAS CITY	2	4,574	2287	17%	10%	39%	25%	4%	31%	354	124	5,052	2526
KROME SPC	4	8,217	2054	14%	4%	30%	83%	15%	22%	3901	102	12,220	3055
LANCASTER,	3	4,820	1607	11%	4%	27%	74%	13%	19%	2861	24	7,705	2568
LAS VEGAS	2	3,556	1,778	18%	8%	33%	56%	2%	6%	253	135	3,944	1,972
LOS ANGELES	31	18,721	604	57%	40%	73%	6%	21%	39%	397	2056	21,174	683
LOS FRESNOS SPC	2	2,275	1138	10%	2%	26%	80%	11%	17%	932	39	3,246	1623
MEMPHIS,	2	2,933	1467	24%	14%	48%	2%	4%	40%	41	153	3,127	1564
MIAMI,	17	13,225	778	43%	27%	59%	6%	10%	10%	1	1306	14,532	855
NEW ORLEANS	1	947	947	25%	9%	50%	14%	<1%	7%	0	69	1,016	1016
NEWARK	6	6,133	1,022	29%	15%	57%	33%	14%	25%	1305	811	8,249	1,375
NY CITY,	29	16,000	552	65%	49%	81%	1%	17%	66%	1	1716	17,717	611
OAKDALE DET CR	3	9,009	3003	3%	1%	14%	85%	3%	8%	3586	60	12,655	4,218
OMAHA,	2	3,871	1936	21%	15%	45%	51%	6%	20%	955	155	4,981	2491
ORLANDO,	6	5,204	867	60%	45%	65%	1%	18%	40%	1	386	5,591	932
PEARSALL	2												
PHILADELPHIA,	4	2,255	564	37%	24%	66%	2%	11%	70%	0	285	2,540	635
PHOENIX,	3	3,427	1142	25%	10%	40%	14%	7%	6%	2	235	3,664	1221
PORTLAND	2	986	493	37%	23%	58%	12%	17%	24%	52	51	1,089	545
SAIPAN,		53		4%	0%	2%	15%			0	0	53	
SALT LAKE CITY,	2	2,834	1417	12%	6%	23%	74%	4%	9%	155	46	3,035	1518
SAN ANTONIO	7	12,721	1817	9%	4%	40%	45%	6%	22%	3176	403	16,300	2329
SAN DIEGO	5	3,106	621	44%	16%	62%	29%	34%	42%	31	247	3,384	677
SAN FRANCISCO	18	9,365	520	38%	23%	47%	35%	10%	14%	964	443	10,772	598
SEATTLE	3	3,209	1070	37%	24%	66%	4%	17%	36%	0	243	3,452	1151
STEWART DET	2	7,401	3701	1%	0%	9%	94%	1%	7%	939	23	8,363	4182
TACOMA,	2	6,342	3,171	8%	4%	24%	74%	9%	9%	2768	29	9,139	4,570
TUCSON	2	5,417	2709	2%	1%	4%	95%	<1%	<1%	0	19	5,436	2718
ULSTER - NY DOC,	0.5	504	1008	16%	2%	19%	98%	16%	19%	2	22	528	1056
VARICK SPC	3	1,313	438	36%	10%	64%	73%	30%	57%	976	61	2,350	783
YORK	2	5,460	2,730	10%	4%	25%	82%	10%	19%	2319	74	7,853	3,927

DRAFT: For Committee Review

January 12, 2012

	IJs	Total.	Completed Proceedings			rep'd	Detained Proceedings			Other Matters		All mattes	
			Per judge	w/ app relief	w/ asy. app		% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
TOTAL	264*	287,207	1064	25%	14%	43%	44%	9%	16%	51,141	14,899	353,247	1,338

*--Total includes 4 Headquarters (Fall Church Video Court) Judges

APPENDIX 4**STIPULATED REMOVALS AS % OF COMPLETED PROCEEDINGS—FY2009 AND 2010***

COURT	2009			2010		
	St.R.Ord	All Comp.	%	St.R.Ord	All Comp.	%
ARLINGTON (VA)	904	6,692	14%	582	7,156	8%
ATLANTA	327	6,731	5%	373	6,681	6%
BALTIMORE	1	4,834	0%	57	4,453	1%
BATAVIA SPC (NY)	16	2,132	1%	58	2,204	3%
BLOOMINGTON, (MN)	1,127	4,735	24%	737	5,042	15%
BOSTON	13	7,641	0%	18	8,581	0%
CHARLOTTE	268	2,886	9%	51	4,426	1%
CHICAGO	2,583	10,253	25%	2,199	10,350	21%
CLEVELAND	3,005	7,454	40%	1,824	5,375	34%
DALLAS	2,316	7,687	30%	2,743	8,899	31%
DENVER	1,387	11,549	12%	878	10,637	8%
DETROIT	694	5,909	12%	577	5,685	10%
EL CENTRO SPC (CA)	16	2,573	1%	13	2,408	1%
EL PASO SPC	1,153	6,093	19%	840	4,786	18%
EL PASO	118	6,612	2%	479	7,528	6%
ELIZABETH DET. (NJ)	692	2,284	30%	527	2,661	20%
ELOY (AZ)	5,092	12,947	39%	2,547	9,784	26%
HARLINGEN (TX)	2,381	13,475	18%	1,219	11,266	11%
HONOLULU	14	1,383	1%	11	1,143	1%
HOUSTON SPC	3	14,427	0%	7	13,211	0%
IMPERIAL (CA)	36	1,237	3%	43	1,178	4%
KANSAS CITY	1,126	3,523	32%	772	5,052	15%
KROME NORTH SPC (FL)	4,262	12,046	35%	2,185	12,220	18%
LANCASTER (CA)	1,376	8,105	17%	844	7,705	11%
LAS VEGAS, NEVADA	239	4,284	6%	1,516	3,944	38%
LOS FRESNOS (SPC) (TX)	256	3,107	8%	652	3,246	20%
MIAMI	2	12,980	0%	1	14,532	0%
NEW ORLEANS	1	625	0%	114	1,016	11%

115 **DRAFT** [1/12/12]

Subject to further revision based on availability of additional data, including survey responses.

COURT	2009			2010		
	St.R.Ord	All Comp.	%	St.R.Ord	All Comp.	%
OMAHA	121	5,356	2%	976	4,981	20%
ORLANDO	51	6,299	1%	26	5,591	0%
SALT LAKE CITY	1,724	3,335	52%	1,401	3,035	46%
SAN ANTONIO,	21	15,868	0%	52	16,300	0%
SAN DIEGO	1,161	4,739	24%	67	3,384	2%
SAN FRANCISCO	759	9,325	8%	1,750	10,772	16%
STEWART DET. (GA)	518	7,629	7%	244	8,363	3%
TACOMA	2,441	9,812	25%	1,186	9,139	13%
VARICK SPC (NY)	1	2,997	0%	12	2,350	1%
YORK, PENNSYLVANIA	328	7,480	4%	125	7,853	2%
TOTAL	36,533	257,044	14%	27,706	252,937	11%

*Based on data in Year Book and data provided by OPAT. N=38. (Eighteen courts recorded no stipulated removals. Data for Pearsal and Saipan were negligible and incomplete.)

2009, range from <1% (n=7) to 52% (SLC)

2010, range from <1% (n=5) to 46% (SLC)

APPENDIX 5

This is a page from the 2010 Federal Court Management Statistics, available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Jun.pl>

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

			12-MONTH PERIOD ENDING JUNE 30 [2011]								
TEXAS EASTERN			2011	2010	2009	2008	2007	2006	Numerical Standing		
OVERALL CASELOAD STATISTICS	Filings*		3,981	3,578	3,500	3,641	3,889	3,571	U.S.	Circuit	
	Terminations		3,480	3,298	3,535	3,671	3,536	3,560			
	Pending		4,070	3,553	3,280	3,321	3,391	3,043			
	% Change in Total Filings	Over Last Year			11.3					19	1
		Over Earlier Years				13.7	9.3	2.4	11.5	34	3
Number of Judgeships			8	8	8	8	8	8			
Vacant Judgeship Months**			12.0	5.9	.0	.0	.0	.0			
ACTIONS PER JUDGESHIP	FILINGS	Total	497	448	437	455	486	447	34	3	
		Civil	424	376	369	376	403	368	23	1	
		Criminal Felony	73	71	68	79	83	79	39	3	
		Supervised Release Hearings**	0	1	0	0	0	0	-	-	
	Pending Cases			509	444	410	415	424	380	20	3
	Weighted Filings**			896	613	568	650	662	528	3	1
	Terminations			435	412	442	459	442	445	48	6
	Trials Completed			17	21	23	23	17	21	65	8
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	11.4	9.7	9.9	9.4	8.8	9.2	73	8	
		Civil**	8.1	10.0	10.4	9.5	9.7	9.2	33	4	
	From Filing to Trial** (Civil Only)			23.2	22.5	26.6	17.8	18.0	15.0	33	6
OTHER	Civil Cases Over 3 Years Old**	Number	190	161	146	82	114	93			
		Percentage	5.6	5.4	5.3	3.0	4.0	3.8	49	5	
	Average Number of Felony Defendants Filed Per Case			1.9	2.1	1.9	2.0	1.7	1.6		

**12-MONTH PERIOD ENDING
JUNE 30 [2011]**

TEXAS EASTERN			2011	2010	2009	2008	2007	2006	Numerical Standing	
	Jurors	Avg. Present for Jury Selection	37.39	43.68	38.68	36.14	39.00	36.58		
		Percent Not Selected or Challenged	31.5	40.6	35.1	38.3	34.4	29.5		

APPENDIX 6

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

**Record of Master Calendar Pre-Trial
Appearance and Order**

Name: _____ Date: _____

File No.: _____ Best Language: _____

Presiding Judge: HON. _____

Government's Attorney: _____ Respondent's Attorney: _____

Factual Allegations No.: _____ **ADMITTED** _____ **DENIED**

Removability: **CONCEDED** **CONTESTED**

The respondent is not interested in INA § 240B(a) relief and will seek the following: _____

Country of choice for removal purposes: _____

The parties acknowledge receipt of a copy of this record and order and have no objections to the contents herein.

Government's Attorney *Respondent* *Respondent's Attorney*

ORDER

The Court directs _____ as the country designated for removal purposes.

All relief applications and documents in support thereof, including proof of fee payment and biometrics registration, must be filed no later than _____, or by such date as may be extended by the Immigration Judge. Failure to timely file the aforementioned documents will result in the conclusion that such applications are abandoned.

Any pretrial motions, legal briefs, and/or pre-hearing statements must be filed by: the Respondent, the Government, or Both Parties no later than _____, and the opposing party's statement must be filed by _____.

All filings and submissions must comply with this Order and with the Immigration Court Practice Manual. The Practice Manual is available at http://www.usdoj.gov/eoir/v11/OCIJPracManual/ocij_page1.htm.

Individual Calendar Trial Date: _____ at _____ a.m./p.m.

Master Calendar re-set Date: _____ at _____ a.m./p.m.

Further Orders, requirements, or issues of note: _____

So ordered _____
Immigration Judge

APPENDIX 7

The Utah state court performance measures page *available at* <http://www.utcourts.gov/courtools/> presents aggregate and in some cases comparative performance measures for the states courts. One of the nine performance measures is “Clearance Rate,” defined as “The number of court cases being completed or disposed of as a percentage of court cases being filed.” Below is a recreated excerpt from the clearance rates report for courts in two of the states eight districts, and the statewide figures.

	Criminal	Misd DUI	Misd	Other	State Felony	Domestic	General Civil	Probate	Prop Rights	Torts	Traffic/ Parking
District 1	95%	100%	105%	87%	110%	93%	105%	86%	96%	67%	105%
Brigham City District	126%	---	---	100%	162%	103%	117%	130%	83%	88%	250%
Logan District	91%	100%	110%	86%	100%	88%	100%	75%	104%	61%	105%
Randolph District	70%	---	0%	76%	60%	33%	86%	0%	200%	0%	78%
District 2	94%	214%	106%	101%	91%	92%	102%	89%	85%	84%	96%
Bountiful District	128%	233%	133%	123%	---	---	---	---	---	---	130%
Farmington District	87% --	167%	81%	86%	96%	98%	88%	96%	86%	200%	
Layton District	101%	0%	69%	105%	---	---	---	---	---	---	86%
Morgan District	93%	---	---	63%	160%	39%	33%	13%	100%	---	100%
Ogden District	89%	---	109%	89%	94%	91%	101%	93%	75%	80%	275%
Statewide	106%	122%	109%	112%	104%	93%	119%	91%	94%	102 %	109%

