Enhancing Quality and Timeliness in Immigration Removal Adjudication

Lenni B. Benson & Russell R. Wheeler

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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Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

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Executive Summary [reserved—see summary sheet of recommendations for Feb. 22, 2012 meeting]

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 removabillity form the United States.

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. As the project proceeded, and in light of the number of likely recommendations, ACUS officials proposed that we submit a series of interim reports from January through April. This is the second of the reports, for discussion by the Adjudication Committee on February 22.

Sections I-IV, and VI of this February 16 interim draft are basically but not completely the same as those sections in the January 12 draft report. Section V ("Analysis and Recommendations") is longer and in some parts revised. **We have not revised those parts of Section V dealing with (a) transferring some aspects of immigration court jurisdiction over asylum and related claims to other forums, and (b) the use of video and audio technology in enhancing representation and conducting hearings. (We have renumbered the recommendations to facilitate a report recommendation renumbering and reordering; these new numbers are not permanent. For convenience, we have shaded those portions of Section V that deal with those two topics.**

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

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- 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 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 initiating, and representing the government in, 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

[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/JudicialBusinespdfversion.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").

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.

The response rate to the survey was robust—181 judges submitted responses. That number is 68.5 percent of the 264 judges listed on the EOIR website in December 2011. Not all of the judges who responded answered every one of the 28 questions. Judges added 754 written comments. We of course don't know how representative if at all they are of the views of judges who did not add comments.

We were unable to ask questions about years on the bench, number of judges on the court, and other control factors that would allow us to assess how representative those who were completed the survey were to the entire population of judges. With a 68 percent response rate, though, we can assume a fairly high degree of representativeness. Moreover, we were able to ask the judges to estimate whether their respondent populations were "mostly detained", "more detained than non-detained," "roughly half and half," "more non-detained than detained," and "mostly non-detained." We collapsed the responses into three groups, "more detained" "half and half" and "more non-detained." The responses closely track actual 2010 data that EOIR provided us; we grouped those data as "more detained" (55 percent and above) and "more non-detained" (45 percent and below).

	Survey estimate	EOIR data
More detained	25%	22%

Roughly half and half	6%	7%
More non-detained	68%	71%

We were unable to secure permission to survey the court administrators or ICE trial attorneys.

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.

We submitted our first draft on December 19 and met with the Adjudication Committee on January 25. ACUS scheduled three subsequent meetings to review portions of the draft. The committee met on February 22 to consider all our recommendations *except* those dealing with transferring some jurisdiction for asylum adjudication from the immigration courts to the USCIS Asylum Office and the use of video conferencing; we submitted on February 16 a second draft report with revised analysis and recommendations on the subject for the February 22 meeting.

5. Comments on Interim Draft Reports

This report reflects comments received on our January 12 report. We received informal comments from various EOIR and DHS officials, none of which represented official agency views; the National Association of Immigration Judges; various groups and individuals involved in representing aliens in removal adjudication; and from several law professors. We have tried to convey the gist of all these comments and respond as appropriate. Some comments stated agreement or likely agreement with recommendations in our January 12 report, but we have not repeated those statements because in many instances the wording, and in a few cases, the substance of recommendations in this draft interim report are different.

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 initiated by agencies within the DHS, and is governed principally by the Immigration and Nationality 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.

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

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

[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.

Legal Orientation and Pro Bono Program (LOP) are housed within the Office of Legal Access; these programs recruit non-profit organizations to provide basic legal briefings to detained respondents and seek to attract pro bono legal providers to represent them. The BIA 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. 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 (59 if the "Chicago Detained" facility is included) 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

[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).
[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).

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 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 Administrative Procedure Act (APA)[11], but rather career attorneys in the excepted service.[12] 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."[13] The DOJ itself refers to immigration judges "as the Attorney General's delegates in the cases that come before them,"[14] 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."[15] 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

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[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*].

[11] 5 U.S.C. § 701 *et seq.*

[12] *See* 5 C.F.R § 302; http://www.doi.gov/hrm/pmanager/st6b.html.

[13] INA § 101(b)(4) (2006); 8 U.S.C. § 1101(b)(4) (2006).

[14] 8 C.F.R. § 1003.10(a) (2010).

[15] 8 C.F.R. § 1003.10(b) (2010).

judges and also the certified representative and recognized collective bargaining unit that represents the immigration judges of the United States."[16] 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.[17] Regulations also authorize the EOIR Director to designate temporary BIA members from among immigration judges, retired BIA members, retired immigration 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.[18] EOIR's Director 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 removal adjudication process, unless the person is detained and making a habeas corpus challenge to the terms of detention. 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.

[16] 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).
[17] 8 C.F.R. § 1003.1(a)(1) (2010).
[18] *See Board of Immigration Appeals*, U.S. DEP'T JUST. (Nov. 2011) http://www.justice.gov/eoir/fs/biabios.htm.

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.[19] That number dwarfs the number of non-citizens whom DHS can realistically remove, 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.

There are many reasons why an alien may be removable from the United States Some entered the country illegally and are residing in the U.S. without authorization. Many entered lawfully but have remained beyond any authorized stay. Others have violated the terms of their nonimmigrant status or have committed an offense that renders them subject to removal, such as alien smuggling.[20] Removal proceedings also include some people who are seeking admission to the U.S. and whom the government believes are statutorily inadmissible; they are removable because the statute bars their admission.[21] (Prior to 1997, the INA divided these proceedings into deportation and exclusion hearings.) As discussed below, some people can be denied admission at the border under an expedited removal procedure that generally does not involve immigration court review.[22]

In general, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE), apprehend non-citizens whom they suspect are removable—CBP at or between ports of entry, 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.[23] Alternatively, officers may put individuals in immigration court removal proceedings, or in some situations, formally remove them without immigration court intervention.[24] In 2010, DHS made almost 517,000 apprehensions, 90 percent of them by CBP. In addition, CBP returned approximately 476,000 aliens to their home country without a removal order (the great majority were from Mexico and Canada).[25]

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

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[19] 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.

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

[21] *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).

[22] *See* INA § 235(b); 8 U.S.C. § 1225(b) (2006).

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

[24] *See* discussion *infra* at Section a, at 16.

[25] 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*].

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.[26] 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.

ICE effected 396,906 removals in FY2011,[27] up from 189,000 in 2001.[28] Congress has greatly expanded the funding and resources for border enforcement. The Bush and Obama administrations have also posted members of the National Guard along the southern border.[29]

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,[30] 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, as well as those apprehended within 100 miles from the border who were not admitted or paroled 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

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[26] *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).

[27] *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.

[28] *DHS Immigration Enforcement Actions, 2010, supra* note 25, at 4.

[29] *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 .

[30] 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*].

asylum or that they fear persecution or torture if returned to their 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.[31]

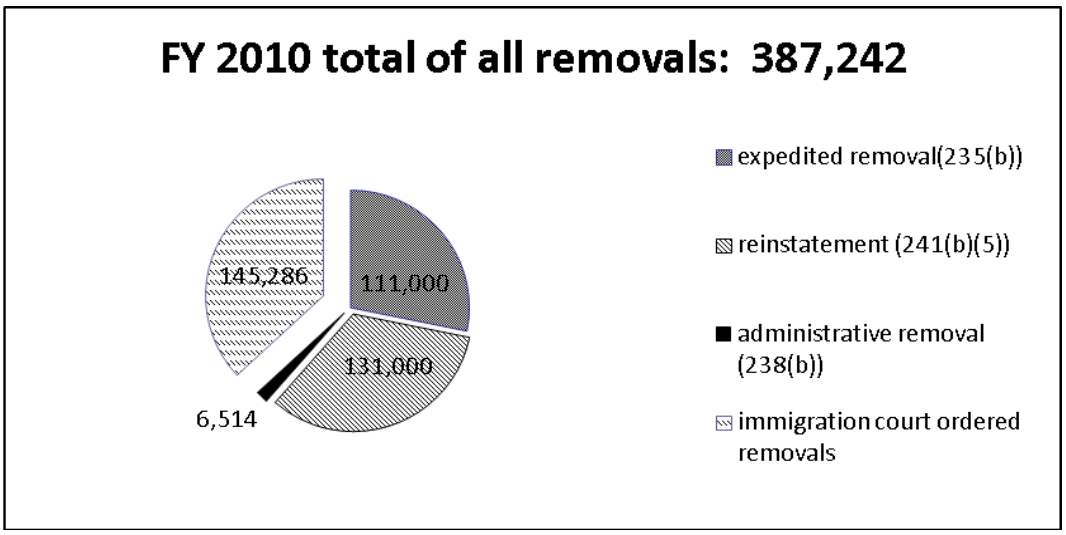
DHS officers may also remove aliens who had left the country under a removal order and then illegally reentered the United States. The prior order of removal is the basis for the subsequent removal, and there is no immigration court role in these INA § 241(a) (5) reinstatement of final removal orders. 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.[32]

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 lawful permanent resident status.[33] 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 an aggravated felony in immigration matters. Non-citizens may also be subject to removal for criminal conduct that is not an aggravated felony. [34] 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*

[31] *DHS Immigration Enforcement Actions, 2010*, *supra* note 25, at 4.
[32] *Id.*
[33] *See* INA § 101(a)(43) (2010); 8 U.S.C. § 1101(a)(43) (2006).
[34] *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).



* 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

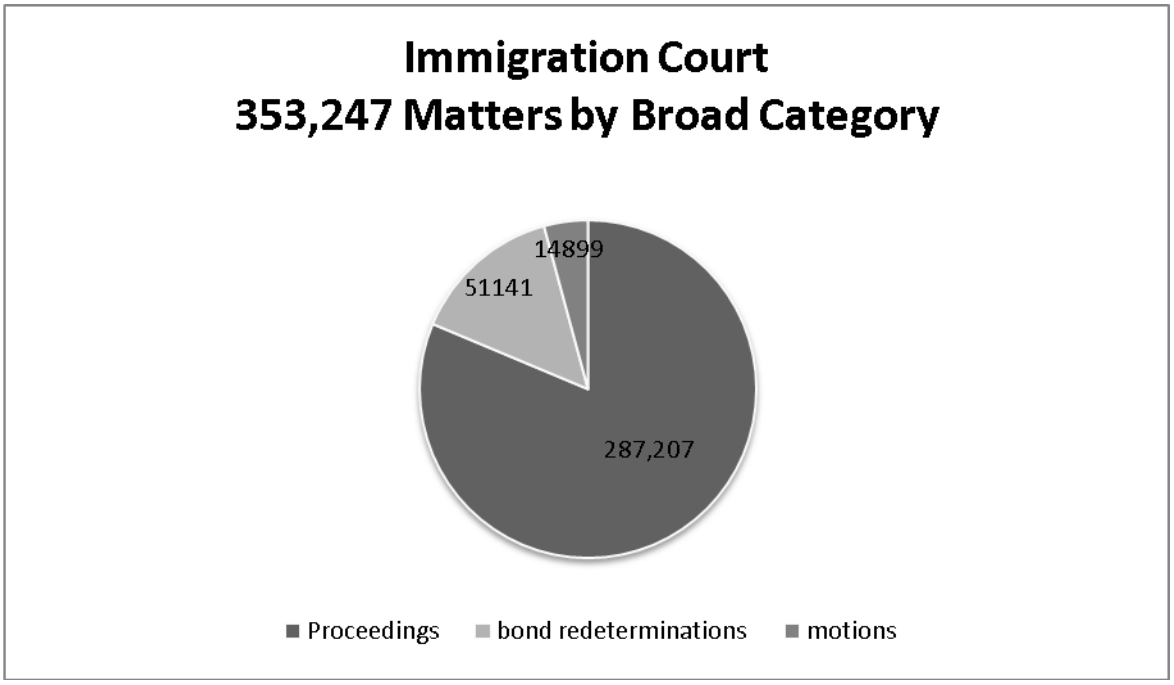
Jurisdiction vests with the immigration court when the DHS officer files, with the court, a "Notice to Appear" (NTA), a charging document. Total NTAs rose from over 153,000 in 2004 to over 221,000 in 2009.[35] The latest available data indicate that in 2008, ICE issued about 62 percent of all NTAs, CBP issued about 20 percent, and USCIS about 18 percent. CBP-issued NTAs dropped from about 55 percent in 2006, and ICE's NTAs rose from about 30 percent that year.[36] 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 USCIS'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 the removability and eligibility for relief and/or protection from removal of 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 redetermination 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:

[35] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 1-13.
[36] *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 removable and, if so, is the respondent nevertheless eligible for one of the limited forms of statutory or regulatory relief or protection 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, among other things, 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. At 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 state and federal civil litigation (involving other than relatively simple matters) 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, do not occur frequently 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.[37]

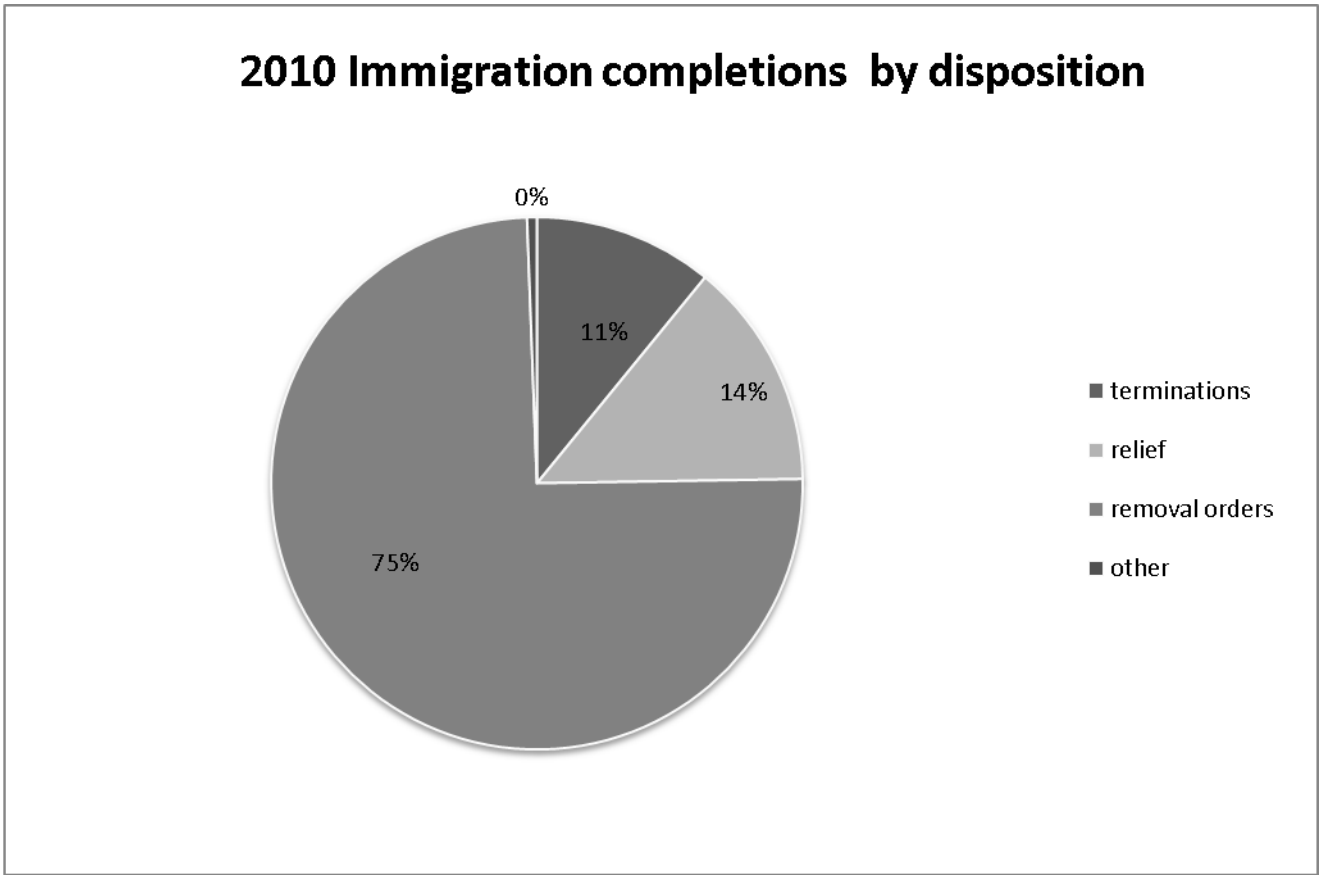
The 222,909 merits decisions comprised four types of dispositions:

- 24,317 "terminations," in which the judge decided that the government could not sustain the charges it filed, the respondent established eligibility for naturalization, or the government agreed to dismissal of the proceedings;
- 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:

[37] *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.[38]

Table A: Immigration Judge Merit Decisions 2006-2010*

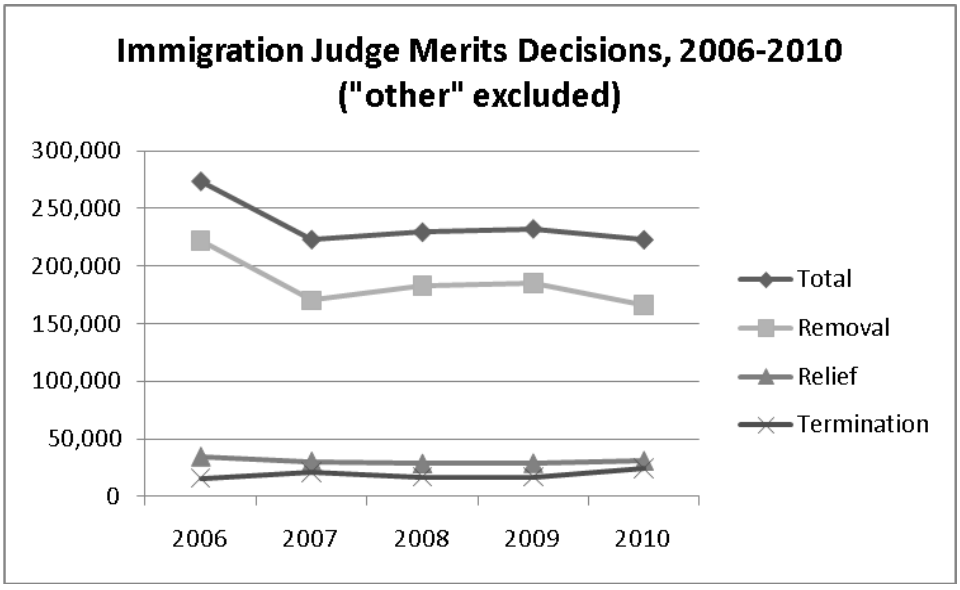
	2006	2007	2008	2009	2010
Total	273,761	223,085	229,463	232,385	222,909
Removal	222,211	170,291	182,720	185,410	166,424
Relief	34,411	30,264	28,369	28,664	30,838
Termination	15,985	21,146	17,033	17,035	24,317

*A small number of "other" decisions are not shown.

[38] *Id.*

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

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 by clear, unequivocal, and convincing evidence that the respondent is removable, the judge must 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.)[39] 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. In 2006, Congress amended the INA to include a ten-year limitation on eligibility for discretionary relief if a person fails to appear.[40]

[b] Stipulated removal orders

[39] *Id.* at H2-3.

[40] *See* INA § 240(B)(7), 8 U.S.C. 1229a(B)(7).

Judges also issue a form of removal called a "stipulated removal order."[41] These orders are not scheduled as "hearings" either master calendar or individual hearings. In fiscal year 2010, judges signed 27,943 stipulated removal orders.[42] 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.[43] Others believe this procedure helps the respondent complete the removal process quickly, most often where the respondent is ineligible for any relief from removal, 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.[44] DHS officials can also

[41] *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*].
[42] OFFICE OF PLANNING, ANALYSIS AND TECHNOLOGY DATA, provided by OPAT (on file with author) [Hereinafter *OPAT DATA*].
[43] *SEE* JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS (2011) *available at* https://nilc.org/document.html?id=6.
[44] *Statistical Year Book, 2010, supra* note 5, at Q1.

grant voluntary departure to individuals who are apprehended in the field including those whom officers do not place in removal proceedings.[45]

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.[46] Some immigration court proceedings are held within or adjacent to detention centers. Statutory and DHS detention policies have been a source of controversy. The ABA Commission on Immigration pointed to the rapid growth in the number of detainees, especially in facilities that DHS cannot supervise adequately; what the Commission regarded as overly broad mandatory detention pursuant either to the INA or DHS policies; and practical restrictions on access to family and lawyers imposed on those by detention in remote facilities.[47] 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.[48] 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 aliens in expedited removal; the statute provides limited review of detention in this context. Congress has repeatedly expanded the category of non-citizens who must be detained during regular removal proceedings, primarily with certain categories of convictions. DHS has set priorities for the detention of aliens not subject to mandatory detention, and those detained can seek immigration judge review of the custody decisions as well as bond set by DHS.[49] On any one day in

[45] 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.).

[46] *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).

[47] *ABA Comm'n on Immigr., Rept. 2010, supra* note 5 at I-50 ff.

[48] *Statistical Year Book, 2010, supra* note 5, at O.

[49] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 1-12–1-15.

2009, about 32,000 individuals were in ICE detention facilities;[50] the number of respondents in detention at some point in 2001 was about 209,000; it rose to over 378,000 in 2008;[51] and declined to about 363,000 in 2010.[52]

ICE can and does transfer detainees from one site to another. According to one estimate, in the first six months of 2008, over half the 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.[53] Frequent transfer of detainees, especially to remote detention centers, limits detainees' access to representation. DHS is in the process of consolidating its detention centers, and DHS officials told us that detainee transfers have decreased recently.

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."[54] As discussed more fully below, in 2010 less than half the respondents in 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.[55]

[3] Hearings by video technology

[50] 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).
[51] 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.
[52] *DHS Immigration Enforcement Actions, 2010, supra* note 25, at 4.
[53] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 1-57 (citing, in part, Translational Records Clearinghouse (TRAC) and ICE data).
[54] INA § 292 (2010); 8 U.S.C. § 1362 (2006).
[55] *See* Appendix 3 provided data on rates of representation by court location.

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).[56]

3. Board of Immigration Appeals

Both the government and the respondent may seek review of immigration judges' decisions before the BIA. In 2010, 15,556 of the 222,909 immigration judge decisions were appealed to the BIA;[57] those cases involved 17,578 respondents.[58] EOIR reports that less than ten percent of judges' decisions result in appeals to the BIA.[59] (The BIA has held that an alien may not appeal from an inabsentia order.). 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.[60] These appeals involve challenges to USCIS denials of family-based immigrant visa 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.[61] This has long been the BIA's practice.[62]

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.[63] Defenders of the practice say that many

[56] *OPAT DATA, supra* note 42.
[57] *Statistical Year Book, 2010, supra* note 5, at T2.
[58] *Id.* at X1.
[59] *Id.* at X. In cases where any relief was sought (71,924 proceedings), the percentage rate of appeals is 15.3%. *Id.*
[60] *Id.* at T2.
[61] *OPAT DATA, supra* note 42.
[62] 8 C.F.R. § 1003.1(e)(27) (2010) the appellant must request oral argument.
[63] *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*

of the appeals are easily disposed of and that, as a quality control measure, what one EOIR official described as "the senior legal staff:" review random samples of three categories of BIA final decisions before they are mailed out to the parties.[64] The three categories are: Single Board Member decisions 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.[65]

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.[66]

4. U.S. Courts of Appeal

Respondents, but not the government, may seek review of a BIA decision in the court of appeals in the circuit in which the immigration court concluded the proceeding. The DOJ Office of Immigration Litigation (OIL) represents the government before the court of appeals. 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,[67] from organizations of various types, [68] scholars,[69] advocates,[70] U.S. courts of

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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).

[64] 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).

[65] *Id*.

[66] *OPAT DATA*, *supra* note 42.

[67] *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.

[68] *E.g., ABA Comm'n on Immigr. Rept., 2010, supra* note 30, 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.

appeals judges,[71] immigration judges,[72] BIA members,[73] the DOJ,[74] and the Government Accountability Office.[75] (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.

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[69] *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. 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).

[70] *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).

[71] *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.

[72] Slavin & Marks, *supra* note 16; Brennan, *supra* note 70; 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).

[73] 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).

[74] *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 77 and note 78.

[75] 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.

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

Diagnoses underlying the many prescriptions offered over the last few years have been based largely on impressions from direct observation and comments reported by secondary observers. There has been some quantitative research, such as several analyses of decisional disparities in asylum cases.[76]

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.[77] In June 2009, EOIR announced that it had substantially completed implementation of the 22 measures[78] and claimed completion of other measures in subsequent press releases.[79] 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."[80] 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.

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[76] 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 75; RAMJI-NOGALES ET AL, *supra* note 69; 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/.

[77] Executive Office of Immigration Review, *Caseload Performance Reporting Needs Improvement*, *supra* note 75.

[78] 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.

[79] *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.

[80] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, 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 matters on average in 2008. The per judge figure 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.[81]

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).[82]

b. Hearings

For 2010's 287,207 completed proceedings, judges held 852,230 hearings[83] (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]

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. [86]

There is no separate code in the OPAT data system for pre-hearing or similar conferences.[87] Judges and court administrators typically code such conferences as master

[81] *Id.*, at B-4.
[82] *Statistical Year Book, 2010, supra* note 5.
[83] *OPAT DATA*, *supra* note 42.
[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 42.

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

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 under the INA. In fact, though, the EOIR Statistical Year Book reports that in 2010 only 25 percent of all proceedings involved applications for relief.[88] 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 voluntary departure (seven and a half percent) or in terminations of proceedings (six percent). These cases, especially terminations, 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 some of the most complex and from the perspective of the respondent some of the most important adjudications. There is, moreover, considerable variation in individual courts' case mix, including the proportion of cases involving requests for relief. (See Appendix 3.)

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,[89] and 819 decisions per year in 2010 on average for Veterans Law

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[87] *OPAT DATA, supra* note 42.
[88] *Statistical Year Book, 2010, supra* note 5, at N1.
[89] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 2-37.

Judges.[90] The comparison with federal district courts is even starker, even granting that cases in federal district court deal with a much wider range of issues. 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.[91] 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.[92] 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.[93] 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.

We asked the judges in our survey to identify "the four most common reasons that all cases are not addressed" of those scheduled for a master calendar hearing session and those scheduled for an individual calendar hearing session. The most frequently entered reason for both was some variation of "more cases scheduled for the session than the judge was able to complete." As to master calendar sessions, 32.9 percent of the judges responding gave some variation of that reason, and 46.0 percent of those responding gave such a reason for not being able to complete all individual calendar hearings scheduled.

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 judges using a standard cross-vocational measures, found higher levels of stress and burnout than in almost any other profession surveyed.[94] As of mid-2009, according to TRAC, immigration judges on average had 72 minutes to deal with each matter received,

[90] Briefing material from BVA officials (August 9, 2011) at 16 (on file with authors).
[91] Calculated from data in Judicial Business of the U.S. Courts 2010, *supra* note 1, at 14 (Judicial Caseload Indicators) and Table T-1 at 388.
[92] *Statistical Year Book, 2010*, *supra* note 5, at Y1.
[93] 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/.
[94] Lustig et al., *supra* note 72.

down from 102 minutes in 1999.[95] 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.[96]

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 wider 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."[97] 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.)[98] 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.[99] As of May 2011, that number had increased to 86,[100] 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 information that local law enforcement agencies provide the FBI about individuals 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.[101]

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[95] 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.
[96] *See* discussion, *infra* at V.c.1.b.[2] text accompanying note 185.
[97] *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 .
[98] 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.
[99] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 2-17.
[100] *Supra* note 93, at 3-4.
[101] *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/# (last visited Dec. 31, 2011).

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 removal[102] 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 USCIS.

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 pursue removal of 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 OCIJ Practice Manual,[103] 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-

[102] *See* INA § 240A(a) and 240A(b) (2010); 8 U.S.C. § 1229b(A)(a) and § 1229b(b) (2006).
[103] 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].

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 now to assess possible changes in immigration removal adjudication, and the agencies that conduct it, in terms of the three strategies of resource enhancement, demand reduction, and process modification.

A. Resource Enhancement

EOIR is underfunded for its mission. The imbalance between demand and resources is reflected in the judges' survey responses, reported earlier, on why not all cases scheduled for master and individual calendar sessions can be heard as scheduled. We also asked the judges to "[c]onsider the concept of a model immigration court" and to rank four of 12 listed items that they believed "would most contribute to creating and sustaining such a court.", and, separately, to identify, from among ten listed factors, the four that they believed "would most improve your court." Of the 181 judges who responded to the survey, the same number,158 answered, both questions, and resources were at the top of both lists. For the model court, 62.7 percent selected "adequate time for the judge to review the file" and 61.4 percent selected "a sufficient number of law clerks." For the "improve your court" question, 71.5 percent selected "additional law clerks" and 61.4 percent selected the mirror image of "more judges," i.e., "fewer cases." (The other responses selected by substantial numbers on both questions involved more counsel for respondents and better prepared counsel on both sides.) Appendix 5 presents all the complete responses to both questions.

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 more resources, would require EOIR to tolerate longer times to disposition. In 2010, the ABA Immigration Commission called, for example,[104] for more judges; for "[r]equir[ing immigration judges to issue] more written, reasoned decisions" which would require "additional resources" including not only more judges, but other changes, such as increasing judges' administrative time, additional training (requiring "sufficient funding") and related support. It also called for 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."[105] If implemented without additional

[104] *ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at 2-2, 2-3, 3-2 (summarizing the recommendations).
[105] *Id.* at 2-38–2-42.

judges or reduced caseloads 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.

Congress should support the mission that it has assigned EOIR by providing larger appropriations, but our focus is on recommendations to use resources more effectively because we do not believe Congress will provide larger appropriations in the foreseeable future. Here we offer recommendations about temporary resource allocation and better estimating resource needs. (We note but do not comment on a recent National Research Council report on immigration enforcement that recommended significant changes in DHS and DOJ budgeting approaches, including a suggestion that the two agencies work more closely to develop budget models to assess the agencies' needs more accurately. The report praised the agencies for their flexibility and ability to "make due" with resource allocations but warned that failing to coordinate the agency budgets and priorities may make achieving enforcement goals more difficult.[106].)

1. Temporary Immigration Court Personnel

a. Judges

Regulations allow for the appointment of temporary BIA members from within EOIR and DOJ. OCIJ officials told us that EOIR is developing a proposed regulation to allow the appointment of temporary immigration judges but could provide no further information because the regulations are in development. Recent controversies over the since-corrected politicized hiring of immigration judges make it essential that EOIR's processes for hiring the temporary judges and monitoring their work be transparent; we assume they will be. (On February 16, the due date for this interim report, we received from Adjudication Committee Liaison Member Judge Daniel Solomon information that EOIR has a memorandum of understanding with the Drug Enforcement Administration to use temporary judges from that agency to conduct removal proceedings. We were unable, given our deadline, to learn more about this arrangement but will follow up for our next report.)

Some commentators on our January 12 draft report doubted that temporary judges if drawn from the same DOJ and EOIR employee pools as the temporary BIA members would have the knowledge of immigration law and procedures (including circuit variations) and skills of judicial deportment, docket management, and courtroom control that OCIJ seeks to develop in permanent judges through initial and continuing education and that judges acquire through experience. We cannot say more because we are not privy to the draft regulations.

NAIJ has proposed using retired immigration judges as senior judges, citing recent statutory authority for agencies to hire retired federal employees on a part-time basis,

[106] *See* BUDGETING FOR IMMIGRATION ENFORCMENT, A PATH TO PERFORMANCE (NATIONAL ACADEMIES PRESS 2011) *available at* http://www.nap.edu/openbook.php?record_id=13271&page=5

during which time they would receive both their annuity and a salary.[107] We do not know what that would cost.

b. Law clerks

EOIR might consider temporary immigration court law clerks, in lieu of or in addition to temporary judges. We presume that DOJ and EOIR personnel who could be spared for temporary judicial service could also be spared, and would be as well or better suited, to serve as temporary law clerks. Law clerks emerged as a pressing need in two questions in our survey. As we reported above, 61.4 percent of the judges selected a "sufficient number of law clerks" as an item that would "most contribute to creating a 'model immigration court,'" almost the same as the 62.7 percent who selected "adequate time for judge to review the file." As to items that "would most improve your court, 71.5 percent selected "additional law clerks," ten percent more than the 61.4 percent who selected "fewer cases."

A response to our survey reported a rumor that, immigration courts may see fewer law clerks next year. If true, that would bolster the case for temporary law clerks.

2. Refined Data on Immigration Court Caseloads

a. Case Weighting

In any judicial system, different types of cases require different amounts of judicial time. One judge, in a survey response, claimed that "[o]ne mental disability case on a 20-case detained docket is equivalent to 30/40 cases." Looked at from a different angle, of the judges responding to our survey query as to the number of merits hearings they conduct in a typical week, 39.1 percent selected "6 to 10" while 28.6 percent selected "11 to 15," but we don't know whether, on average, those who conduct six to ten hearings a week were less efficient than those 2 who conduct 11 to 15, or had more demanding caseloads.

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. 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. At least since the mid-1990s, the National Center for State Courts has provided courts with guidance on weighting caseloads.[108] The federal

[107] *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).

[108] *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 COURTS (1998) *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=24 and Victor E. Flango & Brian J. Ostrom,

judiciary has assigned weights to district court cases since 1946 and publishes each court's annual weighted filings.[109] The goal is to get measures, of the work required to dispose of different types of cases, that are more accurate than raw filing data. For some specifics: in the year ending June 2011, nationally, raw filings per federal district judge nationally were 549 but weighted filings were only 490. In some courts, however, 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).[110] *See* Appendix 5

Weighting systems recognize that not all cases of a certain type present the same time demands. Every actual case of a case type with a relative weight of 2.00 will not require twice as much time as every actual case of a case type weighted 1.00. 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.

Case weights serve two primary purposes. First, they provide a more accurate, and thus more credible, description of the number of judges needed to handle a caseload. An EOIR appropriations request for X additional judges to deal with Y anticipated raw filings tells Congress less than a requested based on weighted filings. A raw-filings-based request provokes the implicit question "How much additional work will the anticipated caseload require? Will it demand enough additional work to justify additional judges?" Or consider the fact we reported earlier: despite the conventional wisdom that almost all respondents seek some form relief from removal, in fact only 25 percent of 2010's completed proceedings involved an application for relief. The first conclusion from that fact might be that immigration courts see a lot of proceedings, but most of them are relatively simple. A weighted caseload index would allow a more precise analysis.

While increased judgeships are not likely in the foreseeable future, it would behoove EOIR to develop a case weighting system now in anticipation of the day when they will be.

Second, weighted caseloads facilitate more sophisticated management analysis. Later in our report, we note that the two largest courts in the system—New York City and Los Angeles—account for a disproportionate number of the adjournments (continuances) granted in all courts for all fiscal 2010 completed proceedings. Those two courts, however, ranked relatively low, nationally, in proceedings per judge. These facts might provoke speculation about the quality of case management in those courts, but another question is whether the comparatively low percentage of proceedings per judge overlooks the comparative difficulty or complexity of the proceedings themselves. We know those courts include a disproportionately large number of more difficult cases—proportionately more cases seeking relief, for example, which may require more adjournments—but accurate weighted caseload figures would allow more sophisticated analysis.

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.

[109] Administrative Office of the U.S. Courts, *2010 Federal Court Management Statistics* at vii-viii and *passim* (2010)

[110] *Supra* note **1**, at 83, 167.

There are a variety of methods for weighting cases. In "diary studies" judges record the time they spend on their cases over a period of several weeks. With "Delphi" techniques, administrators and researchers use an iterative process through which judges reach consensus agreement on the judicial time , on average that different case types consume—or the time they require, which may not be the same thing. Some courts use "event-based weighting," which assesses the various events that occur typically in the different types of cases and build weights based on the number of events that typically occur in different types of cases and the time required to complete them.

Policy-makers in assessing resource needs consider 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).

To be sure, determining case weights takes judge time—especially diary studies—but they reap benefits.

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,[111] and the NAIJ, in 2011 Senate Judiciary Committee testimony,[112] advocated EOIR's adopting the case-weighting method that the federal courts used in 2003-04 (a method using both events analysis and Delphi-like techniques) [113].

OCIJ officials told us informally they thought the weighted caseload concept may merit further explanation, especially if it appears likely that it could result in cost savings and efficiencies.

b. Documenting NTA Origination

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[111] *See also ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at 308.

[112] *Supra* note 107.

[113] *See* PATRICIA LOMBARD & CAROL KRAFKA, 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 (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 & Krafka 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 **30**, at 308.

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

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 the NTA's prepared by state and local governments pursuant to INA § 287(g) joint enforcement agreements. In May 2009, the ABA Commission sought information from DHS on its NTAs and in November received six years of data organized according to which DHS component issued the NTA.[114]

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 insight on whether NTAs from the different elements of DHS might require different levels of judicial time "to sort out" discrepancies and ambiguities, as several judges put it. NTA source data could also be an element in any case weighting scheme, if the different agencies produce cases that tend to vary in complexity. DHS officials told us informally that they believed it would be inappropriate for EOIR to assess the relative quality of DHS components' NTAs. That task, they believe, is DHS's responsibility. We think, however, that EOIR would be well within its authority to look for possible systemic links between different agencies NTAs and the extent of judicial work they engender. We do not see how EOIR's doing so would infringe on any evaluation DHS may wish to undertake, which we presume might be for different reasons than EOIR's.

The NTA includes the name and title of the DHS officer who filed it, but that information will not necessarily tell a court administrative staff which agency filed the NTA. To implement this idea, DHS may have to amend the NTA form, preferably with fields to allow the completing officer to check the relevant agency identifiers. EOIR would have to expand its data collection to capture the information.

Recommendations, 1-3

1. That EOIR continue to seek appropriations beyond current services levels but that it plan for changes that will not require new resources.
2. To increase the immigration court workforce, that EOIR:
    a. If it implements regulations to allow for temporary immigration judges, consider whether short-term temporary judges can bring the skill set required of an immigration judge and include transparent selection procedures and rigorous procedures for monitoring their performance;
    b. Consider NAIJ's proposal for recalling senior judges for temporary assignment;
    c. Consider, in addition or in lieu of temporary judges, using the same likely pool of employees for assignment as temporary immigration court law clerks.
3. To refine its information about immigration court workload:
    a. 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 additional judges

[114] *See ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at1-10–1-25.

and more accurate monitoring and reporting of immigration court workload, 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.)

b. That DHS revise the NTA form to allow the completing officer to indicate easily the officer's agency affiliation, being 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.

c. That EOIR expand its data collection field to provide a record of the sources of each NTA filed in the immigration courts.

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 who are in the country unlawfully. ICE must also process removal cases for people who hold lawful status but who ICE believes are subject to the grounds of removal. A finding of deportability would then strips the individual of lawful status and allow removal from the U.S. unless the person qualified for relief or a waiver.

ICE, like its predecessor agencies, has issued advisories to field personnel setting out prosecutorial priorities to guide ICE officers and attorneys.[115] 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. It provided a non-exclusive list of 19 (mainly humanitarian) factors to consider, ranging from military service, to time in the U.S. (particularly time in legal status) but including as well criminal history and potential national security

[115] *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 117.

threats.[116] The memo said that a legitimate exercise of prosecutorial discretion also includes deciding whether to issue, file, serve, or cancel an NTA.

In November, USCIS also issued new guidance on placing individuals in removal proceedings. USCIS has recently initiated a significant number of removal proceedings. The memorandum appears to direct USCIS officers to seek supervisory review before placing persons in removal and parallels some of the prosecutorial priorities in recent ICE memoranda.[117]

In August 2011, the Obama administration created an interagency task force to identify—from among persons awaiting removal proceedings—those who are most appropriate for the exercise of prosecutorial discretion.[118] It issued further instructions in November.[119] The immigration court case mix could change if Secure Communities identifies more non-citizens who are serious criminal offenders and if ICE puts a priority on removing them (two important "ifs"). A higher percentage of cases with more tenuous claims for relief might require less judge time. On the other hand, those with serious criminal convictions may be motivated to fight removal because their criminal conduct may render a return to the U.S. impossible due to permanent bars on admissibility.

We offer no comment on DHS prosecution priorities. Some judges expressed in our interviews frustration about 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 in interviews on what they perceive as the failure of ICE attorneys to evaluate and reject NTAs for legal insufficiency, another matter that we could not include in our survey but that appeared rarely in open-ended survey comments. Two of the 45 judges who volunteered end-of-survey open-ended comments recommended "having DHS attorneys review NTAs before they are filed. . . .Many of the agents preparing NTAs simply do a poor job of drafting or are not sufficiently familiar with the law. This requires at least one additional hearing to afford DHS the time to correct the errors made and sometimes results in the termination of cases because the

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[116] Morton *supra* note 115.

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

[118] *See* Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHILE 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.

[119] *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.

charges brought cannot be sustained." Another said "no NTA should be accepted by the Court unless it is screened for sufficiency of evidence. . . . Judges at each Court could rotate onto a panel to review the NTA's to determine they should be accepted by the Court."

Several judges and court administrators told us that the common view is that CBP issues the largest proportion of legally insufficient NTAs, but we have no other evidence to support or refute that view. If it is true, it may reflect the pace of work on the border and the fact that many border patrol agents, although they receive what DHS officials told us is "legal training," still lack the knowledge or experience to produce legally sufficient NTAs at the same rate as do other DHS components.

ICE officials told us that ICE trial attorneys have the authority to reject insufficient NTAs and ICE encourages them to do so; that ICE attorneys continue to review cases before EOIR pursuant to agency guidance; that attorneys do review NTAs in certain circumstances; and that ICE attorneys have the opportunity to amend or seek dismissal of in the removal proceedings. Both judges and DHS officials suggested in interviews several reasons for ICE attorneys' possible 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 underway 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.

We endorse an ABA Commission on Immigration recommendation that DHS require DHS-lawyer approval for the issuance of any NTA—on a pilot basis in offices with sufficient attorney resources.[120] We could not ask about this proposal in our judge survey. DHS officials told us informally that implementing this proposal would require what they called substantial resources; that, DHS policies, to use the officials' word, "ensure" the efficient use of agency resources; and that if legally insufficient NTAs still get filed, ICE attorneys can amend them or seek their dismissal in the removal proceeding itself. We endorse the ABA recommendation, however, because the better course is, where possible, to keep the insufficient NTAs from getting into court in the first place.

We also support the recommendation because it will help ensure that, before an NTA is lodged with the court, one of the prosecuting attorneys has evaluated the case and made a determination that the case fits current agency priorities. Also, the attorney, at least ideally, would also try to complete backgrounds checks to identify criminal convictions that might need to be raised in the case during this pre-filing stage. ICE counsel often do not review a file until after the case has commenced in the court system. In our interviews ICE officials, said several times that NTA review before the commencement of the case could be of great benefit to the system's operations, a comment echoed by Office of

[120] *ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at 1-61.

Immigration Litigation lawyers, who represent the government at the final stage of the process, federal court review of removal orders.

Recommendation,4

4. 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 USCIS Refugee, Asylum, and International Operations Directorate (Asylum Office) in passing on asylum applications.[121]

[1] Expedited Removal

Congress created the expedited removal system to allow DHS to immediately remove, without court involvement, people apprehended at the border.[122] 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.

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

[121] *Id.* at 1-61–1-64.
[122] As previously discussed there are other situations. *Supra* at 18.

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.[123] According to the ABA Commission, the change proposed regarding expedited removal asylum claims would require regulatory but not statutory change.[124]

The Asylum Office in 2008 recommended against implementation,[125] 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.[126]

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."[127] 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.

Recommendations, 6-8

5. That USCIS 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, USCIS 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.

[123] For the purposes of this estimate we are assuming that outcomes would be identical regardless of the forum—asylum officer or immigration judge.
[124] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30; INA § 235(b)(1)(A)(ii)(2010); regulations implementing the review are found at 8 C.F.R. § 1235.6 (2009).
[125] 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).
[126] *Id.*
[127] *Id.*

6. That USCIS 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.][128]
7. That USCIS 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.[129] 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. (It is possible that a statutory amendment is unnecessary for this change. The immigration court adjourns cases to allow other USCIS 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

[128] *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.
[129] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. N.110-457 (2008).

2006 to 32,961 in 2010.[130] 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 Merits[131]

	Asylum Applications Completions on the Merits						
	All	Affirmative			Defensive		
FY		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 proceedings received.[132] The Congressional Research Service reported similar data on asylum and withholding of removal applications.[133]

[130] *Statistical Year Book, 2010, supra* note 5, at I1.
[131] *Id.* at K.
[132] *Id.* at I3, B4.
[133] *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.

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,[134] 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.

USCIS 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.)[135] 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 USCIS rejected a USCIS Ombudsman recommendation that the agency begin to charge a fee with asylum applications.)[136] USCIS 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.

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[134] *Statistical Year Book, 2010, supra* note 5, at I1-3.

[135] 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 138.

[136] *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.

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.]

9. 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.

10. That USCIS, 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 USCIS 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)

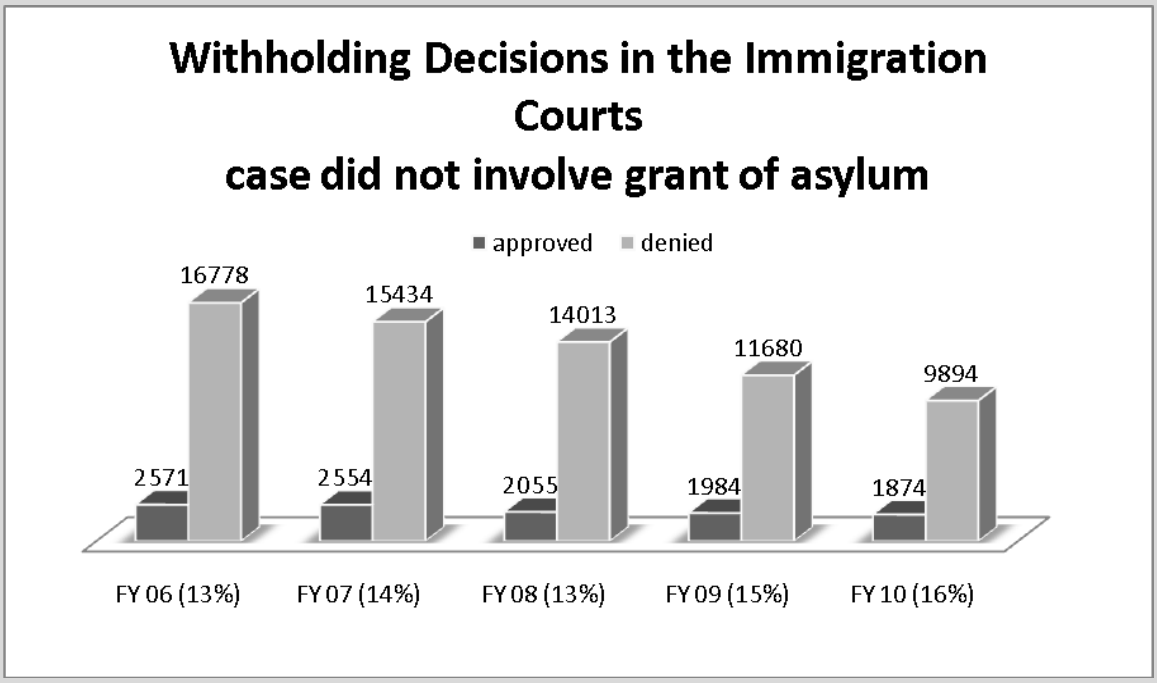
When individuals affirmatively file for asylum, an asylum officer interviews them about whether they meet the statutory criteria of a well-founded fear of persecution on account of membership in a protected group. Some people are statutorily ineligible for asylum but qualify for a more limited type of 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.[137] 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 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

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

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.[138]

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.[139] 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

[138] 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).
[139] 59 Fed. Reg. 62284, 62301 (Dec. 5, 1994).

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,[140] e.g., applied later than one year without a qualifying justifying exception[141] or has a conviction for a particularly serious crime, the asylum officer tells the applicant that the USCIS 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 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

11. 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.[142]

12. 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.

[140] INA § 208(b)(2) (2010); 8 U.S.C. § 1158(b)(2) (2006).
[141] *See* INA § 208(a)(2) (2010); 8 U.S.C. § 1158(a)(2) (2006).
[142] *See supra* note 133 (describing and explain the delegations of authority to the various components of DHS in the Homeland Security Act).

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 USCIS 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 DHS[143]

	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.[144]

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. The BIA disposes of most of its cases by single-member decisions, but the percentage of immigration court appeals so disposed is lower than the percentage of DHS appeals so disposed, as seen in Table D.[145] 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

[143] Adapted from Table 16, *Statistical Year Book, 2010, supra* note **5**, at T2.
[144] United Airlines, Inc. v. Brien, 588 F.3d 158 (2d Cir. 2009).
[145] Table 17, *Statistical Year Book, 2010, supra* note **5**, at T2; *OPAT DATA, supra* note **42**.

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%)

USCIS's Administrative Appeals Office (AAO) hears other appeals from USCIS 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.[146]

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 $110[147] 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 USCIS director to, among other things, "represent[USCIS] in visa petition proceedings before the Executive Office for Immigration Review."[148]

In commenting on this proposal in our January 12 draft, several organizations representing the private bar and individual attorneys expressed concern about the quality of the AAO procedures, referencing AAO website posts of processing times for various types of appeals of the denials of visa petitions. Some waiting times exceed two years.[149] There is no direct link from the AAO webpage to its published decisions. Instead selected cases are posted on the USUSCIS electronic library webpage and organized by subject

[146] *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.

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

[148] 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.

[149] Processing times are listed by visa petition category. *See* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8ff31eeaf28e6210VgnVCM100000082ca60aRCRD&vgnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD.

matter.[150] In October,2010, USCIS issued a press release heralding the issuance of two AAO precedent decisions – the first in over twelve years.[151]

Several DHS officials reminded us that the AAO does have a process for identifying and vetting precedent decisions, as outlined in a document on the AAO website.[152] At least one person voiced a concern that CBP might eliminate an appellate procedure for the transportation fines, which could increase overall litigation costs for the public and the government. We received no comments from CBP officials about this proposal.

Recommendations, 13

13. To direct some appeals currently in the BIA's jurisdiction to more appropriate forums:

    a. That DHS seek statutory and regulatory change to allow all appeals of denied I-130 petitions to be submitted to the USCIS's Administrative Appeals Office (AAO).

    b. That DHS amend regulations to send all appeals from CBP airline fines and penalties to AAO. Alternatively, CBP could eliminate any form of administrative appeal and have airlines and other carriers seek review in federal courts.

    c. 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; issue precedent decisions more often and increase their visibility; and publicize clear processing time frames so that potential appellants can anticipate the time that the appeal will be in adjudication.

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 court administration operations. Moreover, providing this information to the ICE trial attorneys, whether by hard copy or electronically, provides greater access for the government counsel and thus impairs the appearance of neutrality and independence. (In some courts, the administrators have

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[150] *See* http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/?vgnextoid=0609b8a04e812210VgnVCM1000006539190aRCRD&vgnextchannel=0609b8a04e812210VgnVCM1000006539190aRCRD.

[151] *See* *http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f8925403f0bcb210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD*. A search of the Lexis database on February 14, 2012 did not locate any new precedent cases. The rarity of precedent decisions is one of the strong criticisms of the AAO operations.

[152] *See* http://www.uscis.gov/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf.

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.

Several DHS officials, commenting on our January 12 draft report, expressed concern that providing greater public access to the dockets might raise privacy concerns, a legitimate concern *if* the public gained access to all information within the docket. Our proposal, though, concerns electronic production of the same types of information now posted publically on the immigration courts' bulletin boards on the day of the hearing. Many court systems also deal with privacy concerns through their electronic registration systems.

Recommendation, 14

14. 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.[153] 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.)[154]

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,[155] 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.[156]

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 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.[157] Diligent asylum applicants can face delays of six months or longer to work authorization eligibility simply because the court cannot docket another

[153] *See* 8 C.F.R. § 1274a.12(c)(10) (2010).
[154] 8 C.F.R. § 1274a.12(c)(8)(i) (2010) and 8 C.F. R. § 208.7 (2010).
[155] *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.
[156] A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (D. Wash. filed Dec. 15, 2011).
[157] 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.

proceeding in the interim. Further, total applications for asylum have fallen, as shown in Table B above,[158] 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 eligibility150 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

15. 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.

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

17. 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

Immigration court efforts to deal with the volume of cases they carry now, and in the future, can be affected by:

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

- 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
- 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 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 think 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."[159] By considerable margins immigration judges and DHS officials told us that adequate respondent representation serves adjudicative efficiency as well as fairness to respondents.

The American Immigration Council's Legal Action Center's written comments on our January 12 draft report urged caution because while "a right to counsel 'at no expense to the Government' – …does not provide the *right* to paid counsel – it does not preclude the government from providing paid counsel when it chooses to do so or when otherwise required." It is possible that in some situations, due process would require the appointment of free counsel. We do not disagree , but for the purposes of discussion and based on our earlier assumption that new resources are unlikely, we did not base our assessment on a proposal that would require free counsel.

We asked judges in our survey their agreement with this statement: "When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly;" Of the 166 judges who responded. 92.0 percent agreed (68.6 percent "strongly"); 5.4 percent selected "neutral." Responding to our survey questions about factors contributing to a "model court," 55.7 percent selected "high percentage of respondents represented by quality lawyers." As to factors that would "most improve your court," 50.0 percent selected "more quality counsel for respondents."

[159] 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.*

Overall, slightly over two percent of judges responding to the "competent lawyer" statement disagreed with it, although almost seven percent of the judges with predominantly detained dockets disagreed. A few judges complained in our interviews that lawyers often slow down the process to get their clients more time in country. A handful of judges commented to our survey that lawyers need to be competent but also "committed to an efficient and fair resolution of the case, [which] sometimes . . . means the client is deported" and that without a lawyer "you receive much more honest responses to questions."

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.[160] EOIR officials told us that a proceeding is coded as "represented" if the respondent is represented at the time the case is completed.[161] Thus, the representation figures probably overstate 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 in some courts with heavily detained dockets to 81 and 73 percent (New York City and Los Angeles). 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 courts	BIA appeals from IJ decisions
FY06	35%	65%
FY07	47%	71%
FY08	40%	76%
FY09	40%	77%
FY10	43%	79%

These percentages, however, are noticeably lower for those 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.[162] 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.)[163]

Having a lawyer does not ensure "adequate representation." Studies have documented levels of inadequate representation. In 2010-2011, according to research by the Katzmann Study Group (described later in this section) with the Vera Institute of Justice, New York

[160] *Statistical Year Book, 2010, supra* note **5**, at G, V.
[161] *OPAT DATA, supra* note **42**.
[162] *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).
[163] *OPAT DATA, supra* note **42**.

immigration judges said respondents received "inadequate" legal assistance in 33 percent of the cases in their courtrooms and "grossly inadequate" assistance in 14 percent of them. Generally, the judges said pro bono attorneys and those from nonprofit organizations and law school clinics performed better than private lawyers.[164]

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

We describe here costs to the immigration courts, government attorneys, and the U.S. Treasury, of respondents' limited access to adequate legal representation or advice, in support of our recommendation that EOIR press Congress that funding representation for respondents, especially detainees, will "work efficiencies and cost savings." Several who commented on our January 12 draft report said, as one put it, that we "provide[d] no empirical data to support this conclusion." It is true that we did not undertake a controlled experiment to test whether providing lawyers to respondents would work efficiencies (and we cannot imagine how one might actually do so in the removal adjudication context). However, when we prepared the January12 draft, we did know about the judges' overwhelming agreement with our survey statement—"When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly" (see above). That finding lends credence to our claim. We have tried to articulate the types of savings below and discussed some of the published data.[165]

The lack of competent counsel means:

- some respondents' remaining in tax-supported detention based on unrealistic hopes they will receive relief, hopes a competent and responsible attorney would explain are groundless. (We know of no published data documenting the number of detainees who, by some objective measure, have no realistic hope for relief. Pro bono counsel repeatedly told us that such detainees are a drain on detention resources, but they may have only limited access to the population and thus limited ability to evaluate the matter. ICE officials, in informal comments, disputed the statement that respondents remain in detention based on unrealistic hopes for relief; the officials said that ICE attorneys will notify the judge when a detained alien is not eligible for relief and judges will issue removal orders.)
- lengthened removal proceedings, and thus increased detention costs in some cases, because of continuances that judges grant to allow respondents to seek

[164] *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).

[165] In a recently published law review article Professor Linda Kelly articulates similar savings if counsel were provided to children in removal proceedings. Her articles cites several of the Vera studies we mention above. *See, e.g.,Linda H. Kelly, The right To be Hear: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children,* 31 B.C. THIRD WORLD L.J. (2011) at n. 150.

representation. Almost 14 percent of continuances granted in 2010 were to allow the respondent to try to find representation;[166]

- 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 can provide. The INA is a complex statute, about which the courts of appeals are often in conflict. Judicial education programs are essential components of any well-administered court system, but the adversary system 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
- 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

Non-profit organizations visit detention centers to provide "Know-Your-Rights" (KYR) presentations and sometimes screen cases for later referral for full representation. Many of these presentations fall within EOIR's Legal Orientation Program (LOP), which Attorney General Holder has described as a "critical tool for saving precious taxpayer dollars."[167] 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.[168] DHS officials reminded us that DHS detention standards set forth requirements for such presentations; they told us that detention standards now in development would regulate how to schedule presentations so that they could, at least in some circumstances, be conducted more often.

EOIR administers some programs through contracts with the Vera Institute of Justice, which in turn arranges for presentations by local 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.* Detention facilities managers said they observe fewer behavioral problems by participants, and judges said participants were better able to articulate relief to which they might be entitled and to understand the

[166] *See* Table I, *infra*. at 2.
[167] *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.
[168] *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.

proceedings.[169] Of the 167 judges who responded to our survey question about the frequency of KYR programs held under EOIR's Legal Orientation Program's aegis in their court or nearby detention center, 76 (45.5 percent) said there were no such programs

Our survey asked judges about their agreement with this statement: "'Know-your-rights' presentations conducted under the aegis of EOIR's Legal Orientation Program contribute to fair and effective proceedings." Of the 134 judges who responded to this item, 90 (67.0 percent) agreed, with 25.3 percent agreeing "strongly." A comparatively large number of judges (28.3 percent) took the "neutral" option, probably because they were not familiar with the programs. Not all judges who agreed that KYR presentations contribute to fair proceedings are from courts with such programs. One judge who said there were no presentations in or hear his court said, "they occur in the location where I am occasionally detailed and they are INCREDIBLY helpful." Another who checked "Agree strongly" commented "I know nothing about this program but it sounds like a great idea." Several other "agree" choosers commented similarly.

The timing of these presentations, however, can be problematic. Several LOP providers told us in our interviews 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.

Our survey asked how often the presentations occur. Of the judges who said their courts or nearby detention centers had programs, over half (60.4 percent) said they didn't know their frequency. Of the 36 who provided an answer, the most common response was "several times a week" (41.6 percent) followed by "once a week" (22.2 percent). Almost none selected "once a day." It is difficult to read much into these small numbers.

A separate survey question asked whether the presentations occur "frequently enough to benefit most respondents." Seventy four judges responded and about half (48.6 percent) agreed that they did, with 32.4 percent taking the "neutral" option. When we compared these responses to the question about the programs' contribution to fair and effective proceedings, there was a high association between those saying the programs made a contribution to fair and effective proceedings and those who said they occurred frequently enough to benefit the respondents. This result is not surprising, and even at that is based on low numbers.

In recommending, as we do below, increased support for LOP programs, we note the point pressed on us by several advocacy groups and members of the bar, that LOP programs are necessarily an adequate substitute for individual representation by competent lawyers.

[169] 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%2Bevalution_updated%2B5-20-08.pdf.

An EOIR long-term goal is to allow all registered representatives to access the courts' dockets electronically. LOP providers suggested, pending implementation of that goal, that it would enhance the presentations if registered providers had electronic access the court dockets (in the same manner as is provided to DHS counsel) to help them prepare for the presentations, potentially recruiting additional assistance or notifying needed translators. DHS officials, though, told us that such access may implicate privacy considerations, but the providers we spoke with were not suggesting that they have electronic access to anything more than information to which they would later have paper access.

[b] "Accredited representatives"

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

Although several public interest lawyers expressed concerns about the qualitative assessment of the accredited representative's skills and what they said was the lack of parallel disciplinary procedures for accredited representatives and attorneys, EOIR officials told us that as a factual matter, the disciplinary procedures for attorneys are exactly the same as those for accredited representatives

[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. In 2011, courts and EOIR posted consumer warnings. These efforts are important, but 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.

EOIR officials have told us informally that, based on their assessment of the list of free legal service providers on the EOIR website, they are drafting regulations they believe will improve its accuracy and utility.

The American Immigration Council's Legal Action Center suggested we evaluate the availability of substantive and procedural remedies for victims of unscrupulous practitioners. They pointed to Attorney General Eric Holder's decision[170] directing EOIR to initiate rulemaking to evaluate the current framework for adjudications claims of

[170] *See Matter of Compean*, 25 I.& N. Dec. 1 (AG 2009)

ineffective assistance of counsel and to determine modifications that could be proposed for public consideration.[171]

[d] Assisting pro bono, clinics, and other non-government lawyers

1. Examples of efforts

Increasingly, immigration judges and others encourage pro bono representation, and organizations such as Catholic Charities, the American Immigration Lawyers Association, and Human Rights First all provide such representation. Some other examples (which we present for illustration albeit at the risk of slighting others' contributions by not mentioning them):

- The ABA has projects in several cities. The Immigration Justice Project in San Diego, for example, tries to ensure that every person appearing in the court has access to pro bono counsel and hosts trainings for pro bono counsel.[172]
- Judge Robert Katzmann of the U.S. 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 (and better) representation to those in removal proceedings in the New York City area.[173]
- More than 17 New York City immigration judges have volunteered to work on pro bono initiatives. In 2011 and 2012, with CLE partners in the bar associations and private firms, they planned a series of CLE programs that included mock trials held at the court involving ICE trial attorneys, the private bar, and the judges.[174] The sessions have been fully subscribed and the 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 held a summit on these issues at its January 2012 annual "presidential summit."

[171] More information is available at the American Immigration Council, Legal Action Center letter on ineffective assistance of counsel. *See* http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf.

[172] *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).

[173] *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).

[174] *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 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).

A NY State Bar Committee on Immigration goal is to increase representation for detained individuals throughout New York and developing KYR presentations.

- The Phoenix immigration court has a Memorandum of Understanding with the Phoenix College of Law, where a part-time clinical instructor supervises students who attend weekly master calendar sessions. The judges call cases with represented respondents first, allowing the students and supervisor to consult with unrepresented individual about eligibility for relief. The Arizona courts want to have similar programs in Tucson and arrange for law students to appear in one of the detention centers to help with bond applications. Bar organizations in other cities staff similar screenings and opportunities to consult with the pro bono counsel. 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.[175]

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. The rooms do not have reading materials or videos providing any information, other than the list of pro bono providers.

2. CLE programs (for pro bono and other non-government lawyers)

Continuing legal education programs can enhance the work of pro bono lawyers, as well as paid counsel. We asked in our survey about judge participation in CLE programs as panel member, moderator, presenter, or other capacity. Of the 154 judges responding, 51 (33.1 percent) said they participated in such programs at least once a year; 58 (37.6 percent) said they never or almost never did and 45 (29.2 percent) said they did so less than once a year. Participation rates did not vary greatly according to whether the judges' caseloads were mainly detained or not.

Seven of the 58 judges who said they never participated and two of the 51 who said they did so at least annually added comments such as "the approval process through the Ethics Office at the EOIR General Counsel's office is so rigorous, and there are so many embarrassing qualifications to the statements one would make [during a CLE presentation] that it is not worth it."

Regardless of their participation level, a substantial majority of 147 judges agreed that "CLE programs improve attorney performance" (84.3 percent, with 40.8 percent agreeing strongly). Only 6.0 percent disagreed. The percent agreeing was highest among those who said they participated at least once a year (91.6 percent) but was 74.5 percent even among those who said they never or almost never participated. Seven of those who checked "Agree" qualified their response with comments along the lines of "Depends on

[175] 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.

the topic and the presenter. The attorneys who could benefit the most from CLE are those that are least likely to attend."

Recommendations, 18-19

18. That EOIR, to increase the availability of competent representation for respondents:

    a. Continue to make the case to Congress, regardless of the likelihood of statutory change, that funding representation for those, especially those in detention, who are unable to pay the cost of hiring individual counsel will work efficiencies and cost savings.

    b.. Consider a more intensive assessment of the paraprofessional programs that provide legal representation and the accreditation process and continue its assessment of the accuracy and usefulness of the pro bono lists provided at the courts and on the agency website.

    c. Develop—in consultation with groups that are encouraging pro bono representation and seeking to improve the quality of representation in general—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.

19. To enhance the number and value of know-your-rights presentations, that EOIR:

    a. Continue to give high priority for any available funds for the Legal Orientation Program.

    b. While recognizing DHS requirements for KYR providers, continue to promote 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.

    c Consider giving LOP providers electronic access to the court dockets in the same manner as is provided to DHS counsel.

    d. 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,[176] 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 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; DHS officials pointed out that ICE detention standards provide for various kinds of detainee access to legal advice, but that all DHS facilities may not be able to provide it due to space, budget, and other constraints.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.[177] 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] Using video technology to enhance KYR presentations

KYR presentations sponsored under the aegis of EOIR's LOP cannot reach all respondents who might benefit from them, when they 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.

Stacey Strongarone of the Vera Institute reported, about our January 12 draft, that LOP presentations are available as audio recordings on CD or MP3 that LOP participants can listen to in Arabic, Mandarin, Vietnamese, and French. She also reported that, as part of a recent pilot effort, Vera is putting a small amount of LOP funds towards phone based interpreter services, to better help LOP providers work with non-English and non-Spanish speakers.

[176] 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.

[177] NAT'L IMMIGRATION JUST. CNTR., *supra* note 155.

Several non-profit commentators agreed that video technology could help expand KYR and even limited representation in detention facilities but urged caution in relying solely on video or telecommunication, arguing "that in-person presentations and meetings are preferable to video, and that video should only be used if necessary." A few commentators took the position that tele-video conferencing is absolutely inappropriate for vulnerable populations such as juveniles or people with mental illness, victims of trafficking and some categories of asylum seekers. These commentators believe that attorneys cannot build sufficient rapport and trust with the clients in this manner and more importantly, might miss evidence due to poor communication or lack of a physical meeting where scars and other evidence of violence might be readily apparent to the attorney.

Video technology can broaden access to KYR presentations in two ways. One way is to transmit presentations. One judge told us that his court "is proactive with AILA and other groups in promoting these KYR presentations. The use of the Court's facilities (when available) and VTC system has greatly increased the number of detained aliens offer the KYR presentations and has made it much easier for the pro bono attorneys to volunteer to make these KYRs."

Second, 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. 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 KYR videos should also be available in other areas of detained facilities.

Recommendations, 31-34

20. 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.

21. 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.

22. 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.

23. 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. (DHS officials questioned the need for this recommendation, because ICE detention standards already "allow detainees to make free or direct calls" to legal representatives and that future regulations may expand this access.)

24. That EOIR encourage judges to permit pro bono attorneys to use the court's video facilities to transmit KYR presentations into detention centers.

[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. It tells 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, unless the judge "specifically allows a limited appearance."[178].

Limited appearances are obviously subject to abuse; an attorney might collect a fee for a master calendar appearance but leave the respondent in the lurch to navigate the rest of process alone. Pro bono counsel and some judges to whom we spoke, however, 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. EOIR officials told us informally that the expanded use of limited appearances was worth further consideration but that changes to the advice to parties in the practice manual would require changes to the underlying regulations as well, citing BIA precedent. As explained in the footnote, however, we believe the precedent cited stand for a different proposition than that limited appearances are disallowed.[179]

[178] OCIJ PRACTICE MANUAL, *supra* note **103**, at Ch. 2, § 2.3(d).

[179] Citing *Matter of Velazquez*, 19 I&N Dec. 377 (BIA 1986) ("there is no 'limited' appearance of counsel in immigration proceedings", as quoted in Immigration Judges Benchbook and *Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997) However, this case arose in the context where an individual tried to disclaim the admissions and statements of his prior counsel because the individual thought first attorney would only be making a motion to change venue and a request for bond. The statement "there are no limited appearances" means that respondents may be bound by the actions of any counsel who appear in their case. We are discussing allowing limited in scope representation so that attorneys will be encouraged to take on representation in situations where they may not be willing to commit to representing an individual for the full scope of the removal hearing. Understood in this context, no regulation change may be required.

Recommendation, 25

25. That EOIR encourage use of limited appearance in appropriate circumstances by modifying underlying regulations as necessary and

    a. Consider issuing an OPPM to explain to judges circumstances in which judges may wish to permit limited appearances and necessary warnings and conditions they should establish; and

    b. Amend the Practice Manual to reflect this modified policy.

[4] Pro Se Law Clerks

We also discussed in our interviews the concept of pro se law clerks. Some state and federal courts employ attorneys in the clerk's or court administrator's office to assist both pro se litigants and the judges who deal with them. We provided our interviewees a job description for such a position posted by a federal district court:[180]

- 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.

Interviewees were intrigued by the concept but noted that implementation would require a court to adjust its staffing internally; additional funds would be unavailable to add new hires. Some EOIR officials were skeptical that pro se law clerks could provide as much assistance as well-designed "know-your-rights" presentations.

Recommendation, 26

[180] *Law Clerk Job Descriptions,* National Center for State Courts (May 26, 2010) 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).

26. 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.

b. Case Management Procedures

[1] Advice and Assistance Regarding Case Management Practices

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

In 2008, the Chief Immigration Judge issued an "Immigration Court Practice Manual,"[181] describing it as a response to one of the Attorney General's 22 2006 directives for court improvement. The Manual responded to the public's desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their 'best practices nationwide."[182] The Chief 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 Practice Manual's use. 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; some criticized judges either for demanding compliance when such compliance was inappropriate, or for using it insufficiently. Likewise, we heard 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 difficult for some unrepresented respondents to use, even if they can read English, because its prose is directed principally at attorneys. EOIR officials told us informally that they thought seeking a way to develop a pro se version of the manual was worth consideration.

[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.

[181] OCIJ PRACTICE MANUAL, *supra* note **103**.
[182] *Id.* at 1.

Recommendations, 27

27. That EOIR enhance the guidance available to practitioners and pro se respondents by:

    a. By developing, perhaps through the LOP in cooperation with a non-profit legal services providing, 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.

    b. Sharing best practices developed by individual courts or judges by collecting and disseminating supplement instructions that individual judges have developed to aid the parties in preparing submissions to the court.

    c. Developing 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

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.[183] A 2009 Appleseed report claimed (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."[184]

a. EOIR Goals and Policies

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.[185]

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[183] *ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at 2-41.

[184] APPLESEED, ASSEMBLY LINE JUSTICE, *supra* note **68**, 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.

[185] 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).

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.[186]

That goal has persisted. The Practice Manual tells the parties 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." The Manual "strongly encourage[s]" the parties "to confer prior to a hearing in order to narrow issues for litigation."[187] The Manual also encourages parties to file pre-hearing statements "even if not ordered to do so by the Immigration Judge."[188]

A March 2008 OCIJ Operating Policy and Procedures Memorandum ("Guidelines for Facilitating Pro Bono Legal Services") told judges that "pre-hearing statements can be especially valuable in pro bono cases, where the representative's time and resources might be limited."[189] Similar incentives would seem to operate for retained counsel. OCIJ'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.[190]

b. Judges' Practices

There are at least two ways in which judges try to get issues narrowed or otherwise prepare for merits hearings so as to limit those hearings to the issues that are clearly in dispute: (a) encouraging the parties to consult at some point in the proceeding, including immediately before the hearing begins, and (b) convening one or more status or prehearing conference in which the judge participates

[1. Instructing the parties to confer]

We asked judges to indicate which one or more of several listed practices they typically use "to have the parties narrow the issues that need to be adjudicated." The responses are below, from the 154 judges who answered the question, and total more than 100 percent because we asked them to select as many as apply.

Percent and number

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[186] *Id.* at 279.
[187] BIA PRACTICE MANUAL, *supra* note 147, at Ch. 4, §4.18.
[188] *Id.* at Ch. 4, §4.19.
[189] *OPPM: Facilitating Pro Bono Legal Services, supra* note **10**, at 4.
[190] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Session Agenda, provided by EOIR (on file with author).

Right before I commence the merits hearing, I give the parties ten to fifteen minutes to discuss the case and narrow the issues.	44.8%	69
I tell the parties—at some point prior to the merits hearing that will resolve the disputed factual or legal issues—that I want them to confer to try to narrow issues in dispute	42.8%	66
I never or almost never tell the parties that I expect them to confer.	15.5%	24
I require the attorneys, prior to the merits hearing, to stipulate on the record to at least some of the issues in the case.	14.2%	22
None of these statements reflect my typical practice.	25.9%	40

We also asked about agreement with this statement: "At the master calendar stage the parties usually refine and narrow the issues, if I direct them to do so" and got these responses from 160 judges:

	Percent	Number
Agree strongly	21.8%	35
Agree	42.5%	68
Neutral	13.1%	21
Disagree	16.8%	27
Disagree strongly	5.6%	9

There was little variation based on predominately detained or nondetained caseloads.

Most of the judges who expressed disagreement said issues could not get narrowed at the master calendar because the parties are insufficiently familiar with the files. Several also said the DHS attorneys were unwilling or unable to narrow issues, at least at this stage.

On a related topic, our interviews suggested an 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.[191] 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.[192]

[191] 8 C.F.R.§§103.8, 103.9, 103.10 (2011).

[192] 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

[2. Status or prehearing conferences--extent]

What about direct judicial involvement in efforts to narrow issues—judge-attended status conferences with the parties? In most criminal and civil court systems procedural rules and court practice force the parties to narrow issues and dispose of some disputes through conference, stipulation, and negotiation. Both rules and practice also recognize that not all cases need or could benefit from prehearing conferences.

The governing regulations make clear that "[p]re-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise simplify and organize the proceeding."[193] Our survey provided helpful information on immigration judges' use of such conferences, but in many ways, we have only scratched the surface of this topic.

One of our survey questions referred to "'status conferences' with the parties (either as a master or individual hearing) to exchange information, narrow issues, obtain stipulations, and/or take other steps to simplify and organize the proceedings." We presented a range of practices and asked the judges to identify as many of them that "describe your practice/experience with such conferences (even if you don't refer to it as a 'status conference')" The responses from the 165 judges who answered the question:

	Percent	N
For the most part, I simply don't have time to hold such conferences, even if they might be helpful.	41.8%	69
I try to hold a status conference in every case in which I think it would be effective.	37.5%	62
I don't hold a formal status conference but have used a "call up" date procedure to check quickly that the case is progressing, e.g., filings have been made, biometrics are complete, etc..	24.8%	41
I hold status conferences by telephone (but on the record), waving the physical appearance of the parties and counsel.	12.1%	20
I tried to hold such conferences but the parties were uncooperative.	7.2%	12
I don't believe I have the authority to order the parties to participate in such conferences.	3.0%	5

These responses suggest, overall, that the norm in immigration court is to use hearing time to move the case forward. That is largely true but the reality may be more complex. As the table above shows, at least a third of the judges responding said they hold status conferences in at least some cases. That number is probably low, however, because, to be conservative, we assumed that the 20 judges who said they hold telephone conferences also checked the "try to hold status conferences when they can be effective" option.

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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).

[193] 8 C.F.R. 1003.21(a)

Some may not have, though, thus increasing the number who told the survey they hold some kind of status conference. Also, some of the judges who selected the "don't have time" for such conferences told us in comments that they nevertheless *make* time for them. One judge who checked that option went on to comment "I hold such conferences at 8:15am, before my normal bench time starts, and usually I have 2 or 3 such hearings a week." Finally, the "call up date" procedure can be considered a kind of status conference, particularly for cases that do not present complex legal or factual questions.

We heard in our interviews of different practices in different courts, reflecting different local cultures. We could not probe different cultures in our survey, due to the anonymity requirement. In our visit to the San Diego court, however, we learned that the court developed a standardized form (see Appendix 6, "Record of Master Calendar Pre-Trial Appearance and Order," identified as "Form EOIR-55, May 2009) 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.

In other courts, Form 55 might be called a scheduling order. 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. Although the form is now available in the Immigration Judge Benchbook,[194] we encountered few judges outside of San Diego who were familiar with it.

In our interviews, judges told us that they had few tools to incentivize the attorneys to cooperate. It is hard to say how widespread this problem is. But only a handful of survey respondents (7.2 percent) checked the "I tried but the parties were uncooperative."

What might more status or prehearing conferences accomplish? It is conventional wisdom in courts that encourage active case management (including scheduling orders and status or prehearing conferences) that "judges who say they don't have time to manage their caseload in fact don't have time not to do so." We asked in our survey for judges to identify in their own words "what in your experience are the four most common reasons that all cases [scheduled for a merits hearing] are not addressed during a merits hearing." With the help of two New York Law School students with familiarity with immigration adjudication, we sorted the 538 answers into 20 reasons and present them below, organized into broad categories. Only five of the 161 judges who responded choose to dispute the question's premise with a response such as "[o]ur court doesn't overbook individual hearings, and I am able to address all cases."

	Judges	Percent
INSUFFICIENT TIME		
Too many cases scheduled	74	45%
Too much testimony for time allotted	30	19%

[194] *See* "Record of Master Calendar Form" in "Tools for the IJ"*available at* http://www.justice.gov/eoir/vll/benchbook/index.html.

ATTORNEYS NOT PREPARED		
Respondent attorney not prepared	32	20%
DHS attorney not prepared	17	11%
Attorney (unspecified) not prepared	52	32%
MATERIAL MISSING, UNAVAILABLE		81%
Biometrics missing	58	36%
Forms/documents missing	50	31%
DHS file missing	22	14%
UNFORESEEN OR COMPLEX ISSUES	37	23%
Testimony issues		
PARTICIANTS MISSING		
Attorney absence	23	14%
Respondent absence	16	10%
Witness absence	12	7%
Unspecified absence	7	4%
OTHER		
Interpreter problems	22	14%
Pro se to seek attorney	16	10%
Pending DHS application	11	7%
Pending criminal matter	2	>1%

A prehearing or status conference could not avoid entirely any of these delay-causing factors but they could anticipate some of them. It is not for us to lecture to overworked judges, especially based on their responses to our survey. We only note that responses suggest that judges must continue merits hearings for reasons that status conferences are designed to keep under control: testimony turns out to be longer than expected, or issues emerge that judges or the parties had not anticipated, or attorneys showed up at the merits hearing unprepared to participate. (We do not know how many of the judges who offered these reasons for delay try to control them with status conferences.)§

Tracking Status Conferences

Although over a third of the judges who responded to this question said they try told status conferences whenever they think it would be effective, we don't know their perceptions of how many cases fit that description, or, in fact, the number of status conferences that occur in any given year. There is no separate code in the EOIR data base for "status conference."

We asked the judges in our survey how they code status conferences and got these responses, we presume mainly from the judges who selected one or both of the "hold a conference when it can be effective" and "hold conferences by telephone". Forty-seven said they code status conferences as master calendars; 44 said they code them as individual hearings. In addition, 66 judges (slightly more than the 62 who told us they hold conferences when they think they can be effective) selected the option "I would like there to be a code for status conferences in the docket and a set time for conferences on

the weekly calendar." These responses suggest that judges who use status conferences believe they should be a recognized part of proceedings. Several judges who selected the "code status conferences" option commented "I really DO think the system should be revamped to make status conferences a useful tool, to encourage narrowing of issues and to develop a discovery system for removal cases." Another said, "[u]nfortunately, we do not have this concept recognized officially in immigration court. I believe it should be taught as part of effective docket management for every IJ."

Recommendations, 28 -29

28. That EOIR revise its coding scheme to allow judges or court administrators to identify what the regulations call "pre-hearing conferences" and others call "status conferences."

29. That EOIR try to test the utility of status conferences by

    a. Assembling a working group or some other forum to probe more deeply judges' perceptions of the costs and benefits of such conferences and when and how they are or are not useful.

    b. Based on that probe, considering 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.

    c. Evaluating 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

Judges told us in our interviews that regulations allowing trial attorneys to amend the charges and allegations at any time during the proceeding can make it difficult to anticipate the scope and content of a case even after the first master calendar. Government attorneys told us amendments may be necessary because of the need to correct or augment charges initially prepared by agency personnel who draft and file the NTA, largely without ICE trial attorney review. DHS officials also noted the government sometimes needs to amend the charges to reflect criminal convictions (which might affect removability and eligibility for relief). Advocates and members of the private bar asserted that trial attorneys sometimes wait to amend charges because they did not devote sufficient time to the matter until immediately prior to the merits hearing and that the resulting amendment could cause substantial delays. A few commentators told us that our January 12 draft recommendation of restricting late amendments might be useful in incentivizing ICE trial attorneys to thoroughly assess the charging documents earlier in the case.

It is possible, as some DHS officials note, that creating a rule to limit amending the pleadings could have a *res judicata* or claim preclusion effect. If the DHS failed to allege a charge or make a factual allegation necessary to the case in the initial pleadings, the government may have lost the opportunity to present that claim. The exact state of claim

and issue preclusion in immigration proceedings is an unsettled area of law. Few federal cases have presented the issues.[195] However, the policy behind the common law's creation of the *res judicata* doctrine motivates the recommendations below—attorneys know that if they fail to present any and all claims arising from the same transaction or related to the litigation—they may be barring future litigation of those claims. Courts balance the desire for full litigation against the competing interest in efficiency and certainty in litigation. The recommendations would allow late amendment of pleadings and allegations but requires government counsel to show good cause why the pleading could not have been properly prepared earlier. Over time, if patterns emerge where parties are litigating amendments of pleadings, it may help refine the practices and resources needed for the ICE trial attorneys to avoid the problem. The state of the current practice creates an unequal process in which judges have little or no control over the development of their cases.

We asked judges we interviewed 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 USCIS.[196] 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 proceedings. 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.[197] Barring one of these situations, agency precedents appeared to require with the consent of both parties—government and respondent—before a judge may administratively close a matter.[198] In late January 2012, the BIA issued a new precedent

[195] The scope of claim and issue preclusion in immigration proceedings is complex. The BIA has recognized preclusion effects within immigration matters. *See* Matter of Fedorenko, 19 I.& N. Dec. 57 (BIA 1984). The Ninth Circuit appears to recognize a form of claim preclusion where the government tried to recharge an individual based on a conviction that existed at the time of the first removal hearing. *See* Bravo-Predroza v. Gonzalez, 475 F.3d 1358 (9th Cir. 2007). However, the second and third circuits have questioned this position or distinguished the scope of the preclusive effect. *See, e.g.*, Channer v. DHS, 527 F.3d 275, 280 n.4 (2d Cir. 2008)(acknowledging possibility of preclusion but limiting scope); Duhaney v. AG of the United States, 621 F.3d 340 (3d Cir. 2010)(rejecting the application of preclusion).

[196] 8 C.F.R. § 1239.2(f) (2010).

[197] *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).

[198] *See* In re Alba Luz Gutierrez-Lopez, 21 I. & N. Dec. 479 (B.I.A. 1996) *reversed by* Matter of Avetisvan, 25 I.& N. Dec. 688 (BIA 2012).

decision that expressly disavowed this position and set forth a new general set of criteria guiding a judge's evaluation of administrative closure. The BIA said that the judge must:

> weigh all relevant factors presented in the case, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.[199]

The Practice Manual references 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.[200] 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. Now that the BIA has adopted this tool in *Matter of Avetisyan*, we reaffirm our draft recommendation that the EOIR may want to expressly address the procedures used to prepare such a motion. Regulations should no longer be necessary as the BIA named *Matter of* Avetisyan as a precedent decision. Our recommendation addresses using administrative closure as a tool that could be used, if necessary, to help manage attorney performance and incentivize efficiency before the court.

In response to our January 12 draft, some DHS officials suggested that it was inappropriate for the court to use administrative closure to move "low priority" cases because the priorities are determined by ICE and it would be inappropriate for the court to set its own. We agree with this principle and have modified the recommendation to make it clear that the categorization of cases as "low priority" would mean as defined by ICE policy and directives.

Our interviews and some responses to our January 12 draft revealed advocates' concerns that allowing administrative closure over the objection of the non-citizen might foreclose an opportunity to pursue relief and that those advocates preferred to keep the court proceedings rather than rely solely on the USUSCIS to complete pending adjudications. We agree that it might be inappropriate for an immigration judge to administrative close a case where the respondent is affirmatively seeking relief and have recommended guidance for the judges on that point..

Recommendations, 30

30. That EOIR seed to clarify the proper use of administrative closure by:

[199] Matter of Avetisyan, 25 I. & N. Dec. 688 (BIA 2012)(Part B of the opinion). The BIA opinion states that administrative closure may also be an appropriate tool for appellate cases in some situations as well.
[200] *See* OCIJ PRACTICE MANUAL, *supra* note **103**, at page 99.

a. Amending the OCIJ Practice Manual to define specifically "Motions for Administrative Closure;"

b. Issuing OPPMs or amending regulations to 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. If the caseload of the court grows so large that the court cannot possibly address the backlog of cases, administrative closures of cases that ICE policy and directives would characterize as a low priority may be an appropriate mechanism to manage the workload of the courts.[201]

c. Proposing a change to 8 C.F.R. § 1003.30 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 once the respondent formally admitted or responded to the charges and allegations, amendment would only be considered based on motion to the court and good cause shown for why the government could not have presented the charges or allegations earlier.

d Developing guidance for judges on when administrative closure is appropriate over the objection of the respondent.

[4] Vertical or Unit 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. We use the term vertical prosecution to describe this practice. 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) 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.

In response to our survey, one judge disagreed that the parties would narrow the issues at the master calendar stage if the judge directed. This judge commented "Since DHS is not on a vertical system, no agreements are binding on the merits attorney." Another said "[m]ost often there is a different government attorney at the next hearing, and often a different respondent's attorney, and they will often not be aware of what was said at the last hearing."

[201] This closure of these 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.

In a few interviews, judges with experience in vertical prosecution expressed concern over a "strict" form 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 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's impartiality and created 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. It might give an impression that respondent's counsel were "outsiders." These same judges had fewer concerns if the organization was structured as "unit" prosecution teams.

We spoke to six members of the private bar and non-profit organizations about vertical prosecutions. Most 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 important, the private lawyers 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. The judges also liked the idea that respondent's counsel would know they could communicate with any member of a unit and perhaps achieve stipulations or agreements outside of the court in advance of hearings.

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 attorneys who appear in court would be allowing 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 they believe they cannot deny a case while DHS conducts a required security check. 8 C.F.R. § 1003.47 makes clear that relief cannot be granted without the necessary security checks, but the regulation does not prohibit a "conditional grant." A conditional grant would allow the 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.

Some DHS officials said a special docket for conditional grants was unnecessary and might delay adjudication. It is possible that a security check turns up information that requires further factual development in the case. EOIR could develop a procedure that

protected the ability of the government to "reactivate" the case if material information came forward in a security check that was not previously known to the government but in general, a rule that allowed the judge to deal with the record before him or her and to decide the case when the testimony is current was a better practice for the vast majority of cases.

Perhaps this practice would also create greater incentives within DHS to conduct necessary security checks at an early stage of the proceeding so that the government would be less concerned about the possibility of detrimental information in the individual's past. Conditional grants might, in appropriate cases, make it possible for people in detention to secure release and to reduce detention time. This change would go a long way to freeing judge's dockets from repeat hearings to update the status of necessary paperwork steps. The separate docket would allow the judge and management to have a clearer view of the weight and complexity of cases yet to come before the court and would remove those matters where the judge has made the essential determinations.

Recommendations, 31-33

31. That EOIR not oppose plans that ICE Chief Counsel may devise for vertical prosecution arrangements in courts where the teams assigned would be larger than two attorneys.

32. That EOIR consider providing judges clearer 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. Specifically, EOIR can:

    a. 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.

    b. 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.

    c. Amend the Practice Manual to explicitly define the responsibility of the trial attorneys. This recommendation does not require an amendment of existing regulations.

    d. 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 or security check;

33. 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] Streamline Procedures within the Immigration Court to Avoid Delays in Asylum Application Adjudication

Under current 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 the respondent and any representative to 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 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.

The American Immigration Council's Legal Action Center's comments on our January 12 draft agreed that the in-person filing requirement created delays and while generally supportive of the proposal, expressed concern that a change in the procedure would also require a corresponding change in the "work authorization clock". We have adjusted our recommendations accordingly.

Recommendation, 34

34. That OCIJ, to facilitate the processing of defensive asylum applications

    a. 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, or

    b. Alternatively the OCIJ could issue an OPPM

        1) explaining appropriate procedures for the initial filing of the asylum application without the participation of the immigration judge;

        2) authorizing 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.

3) noting 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;

4) making clear that the filing with court personnel qualifies as a filing with the court for the purposes of triggering the 180 day work authorization period.[202]

[6] Evaluating the Use of Stipulated Orders of Removal

Proceedings in most civil and criminal courts 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, with appropriate safeguards of the rights of the parties, could be an effective tool for both reducing hearing time and 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. Unlike the practice in many parts of the country, we are not recommending stipulated orders where the respondent is not counseled/and or represented by an attorney or accredited representative. DHS officials also told us that if an individual requests a stipulated order of removal, the ICE counsel obtain one if they can.

The American Immigration Council's Legal Action Center, in commenting on our January 12 draft report noted that stipulated removals appear most frequently in courts with high numbers of *pro se* respondents and urged us to oppose their use in any *pro se* case. We agree that using stipulated removals is very problematic where the respondent has had no opportunity to consult counsel.

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 OPPM.[203] that 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 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

[202] In another part of our report we suggest eliminating these type of work authorization clock issues entirely by allowing an assumption of eligibility for work authorization after an application has been pending for 180 days. In our draft report we used the 150 days found in the statute, the regulations allow DHS 30 additional days for adjudication of the work authorization for a total of 180 days.
[203] 8 C.F.R. § 1003.25(b) (2010); *OPPM: Stipulated Removals*, *supra* note **41**.

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. The percentages varied considerably, from less than one percent for some courts to about half of all completed proceedings for another court.

We also suggested that judges consider asking attorneys to discuss a stipulated order of removal in cases where it appears the individual may not be eligible for any relief. In a represented case, the ICE attorney may be able to offer a stipulated order of removal and an agreement of a specific period of deferred departure (non-execution of the order). We do not specify the types of negotiations that might occur but believe some cases could be resolved in this manner rather than the advocates' seeking delay by asking the judges for continuances for preparation time. In some cases, the respondent may prefer the deferred departure period (because of the certainty of the outcome) over the indeterminate result in a removal proceeding. And the respondent may be able to save legal fees.

Recommendations, 35

35. That EOIR consider a pilot project to systematically 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 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.

36. 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.

37. 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.

[7] 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 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).In response to our request, OPAT provided us data on 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 assign only one code to it. (A judge may grant an adjournment because both the respondent's and government attorneys request time to prepare, but the judge must attribute the adjournment to one or the other.) ACIJs 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 (and EOIR officials have told us informally that EOIR has underway an examination of the utility of all the data it collects, including the adjournment codes).

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
Less			
(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 and 2010 case completion figures.	366,039 (53%)	414,957 (56%)	510,312 (60%)

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 identified 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%

Perhaps the most interesting aspect of this table is the high level of consistency in reasons assigned for continuances, especially in 2008 and 2010. The judges' code assigning practices may or may not be defective (in part because of the one-reason-only requirement) but their practices appear consistent, at least for the few years we examined. The data in the table are at odds with some of the survey findings. Judges attributed only one percent of the adjournments to "DHS file unavailable." However, we asked in our survey the most common reasons why judges could not complete all the master and individual calendar hearings in a scheduled calendar setting, thus requiring a continuance; 14 percent of the judges, as to both, entered some variation of "DHS file missing."

We also wanted to learn if the various types of adjournments are distributed fairly evenly across the courts. As a preliminary matter, we analyzed the proportion of the most frequent adjournments in 2010 (10,000 or more) 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. (As we noted earlier, some kind of weighted caseload index 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.

Finally, many of the adjournment codes received scant numbers of adjournments; by our count, 59 of the adjournment and call-up codes used less than one percent of the total assignments. (Codes 7D,E,F,G, for example accounted collectively for 0.76 of the codes entered.) The precision these codes provide may not be worth the proliferation in the code book. They may be due for an overhaul. Such an overhaul might produce fewer codes but codes that more accurately reflect the multiple reasons for an adjournment.

Recommendation,38

38. That EOIR

    a. Continue its evaluation of adjournment code data, as an aid to system-wide analysis of case management practices;

    b. Reevaluate its one-reason-only principle for the codes or devise codes that reflect the multiplicity of reasons for an adjournment.

[8] 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 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

Current regulations allow EOIR to discipline private attorneys[204] The EOIR website lists disciplined attorneys and includes the related orders. In December 2011, 464 attorneys were on the list.[205] While we did not review all of these orders, the vast majority appear to be the result of DHS or EOIR disciplinary counsel requests 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, some observers suggest spending more resources 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 a judge may not initiate discipline an attorney but must instead submit a complaint to EOIR disciplinary counsel.[206] This two-stage process seems appropriate for serious discipline such as suspension or expulsion from the immigration courts. In less serious cases, it may be preferable to allow judges to act directly, in a manner analogous to a federal judge's imposing sanctions such as written and oral reprimands under Federal Rule of Civil Procedure 11.

Our survey asked immigration judges whether their informing "a Justice Department official about a [lawyer] or accredited representative whom the judge believes should be investigated for possible sanctions" was "sufficient for dealing with possibly improper behavior." The 155 judges who responded said the process was:

	Number	Percent
Very sufficient	7	4.5%
Sufficient	55	35.4%

[204] *See* 8 C.F.R. § 1003.101 et seq.

[205] 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).

[206] 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).

No opinion	19	12.2%
Insufficient	45	29.0%
Very insufficient	29	18.7%

Overall, 39.9 percent of the judges said the process was sufficient, while 47.7 percent said it was not. Among the 42 additional comments on this item, eight judges said EOIR disciplinary counsel lawyers, due perhaps to overwork, do not process judges' references promptly enough to make sanctions effective.

In our interviews, some judges said the main problem with respondent's lawyers was lack of sophistication, training, and adequate preparation and that they encourage new attorneys to become more familiar with immigration law, refer them to reading materials, or suggest they find experienced mentor attorneys. As reported earlier, some courts partner with bar associations and other CLE providers to offer more training and programming for the private bar. Substantial majorities of judges, whether or not they participate in CLE programs, believe they improve attorney performance.

Several commentators on our January 12 draft report favored giving judges authority to have "order to show cause" hearings about reprimand or sanction but others questioned using CLE as a form of reprimand and doubted EOIR had the resources to develop such programs. Still, identifying, motivating and educating the weakest performing lawyers in immigration courts may be a long term investment in improving the courts' operating and protecting the parties' interests.

Recommendations, 39

39. To improve the performance of the private bar, that EOIR

a. Develop procedures (as supplements to existing disciplinary procedures) to allow judges to issue orders to show cause why an attorney should not be publically reprimanded for lack of preparation, obstructive behavior, or other behavior that impedes the court's operation. Ideally, these procedures would be available to judges to sanction both the private bar and ICE trial attorneys (discussed below). Sanctions would not include monetary or formal disciplinary rulings.

b. Consider developing mandatory CLE materials that judges could order attorneys to complete (including passing a qualifying examination) based on a finding that an attorney's behavior is substandard due to lack of substantive or procedural knowledge.

c. Explore, if its resources are insufficient to develop such materials, pro bono partnerships with reputable CLE providers or consider seeing regulatory authority to impose fines to subsidize the cost of developing such materials.

[b] ICE Trial Attorneys

EOIR has no disciplinary procedures for ICE trial attorneys' failure to meet deadlines or other problematic behavior. Some of these matters may be referred to ICE's Office of Professional Responsibility. The OCIJ Practice Manual tells practitioners that they, as well as judges, may raise "[c]oncern or complaints about the conduct of DHS attorneys . . . in writing with the DHS Office of the Chief Counsel where the Immigration Court is located."[207] 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 INA says, 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."[208] The 22 "Improvement Measures" that the Attorney General's announced in 2006 included "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 immigration judge's proper exercise of authority'" and thus "its use will require substantial oversight."[209]

Our survey did not ask judges if they should have sanction authority for DHS attorneys but rather whether they agreed with the statement that "Judges should have authority to recommend investigation of DHS attorneys for possible sanction." A substantial majority (80.2 percent) agreed (35.0 percent "strongly"). Twenty-seven judges offered additional comments, which ranged from "I've never had a problem with a DHS attorney that might require sanctions" to "Immigration Judges should be able to exercise contempt power applicable to both DHS attorneys and private bar attorneys as provided in section 240(b)(1) of the Act."

EOIR officials report consistent efforts to issue regulations to give effect to the statutory provision,[210] but they told us that DHS has just as consistently objected to the regulations' adoption during OMB negotiations. In our interviews, DHS officials made clear that they will continue to oppose implementation of contempt regulations because, as they put it, one set of government lawyers should not be able to sanction another set of government lawyers. DHS officials reiterated that there are appropriate methods of filing complaints against the ICE attorneys.

Recommendation, 40

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

[207] OCIJ PRACTICE MANUAL, *supra* note **103**, at 10.3(a) and (c), pp. 132.
[208] INA § 240(b)(1) (2010); 8 U.S.C. § 1229a(b)(1) (2006).
[209] ATT'Y GEN MEMORANDUM, *supra* note **74**.
[210] *EOIR's Improvement Measures*, *supra* note **78**.

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).[211] 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.[212] 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.[213]

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 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.[214]

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.

[211] INA §§ 240(b)(A)(iii)-(iv), 240(b)(B) (2010); 8 U.S.C. §§ 1129a(b)(2)(A)(iii)-(iv), 1129a(B) (2006).
[212] Olorunnipa, *supra* note 176, at 29, 31.
[213] 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.
[214] Table based on *OPAT DATA*, *supra* note 42.

For a recent Administrative Conference project on VTC's use in high-volume administrative adjudication agencies,[215] 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 officials[216] 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.[217] [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,"[218] we did not have the time or resources to go deeply 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.[219] The memo provided no further details.

  The cost savings estimate is somewhat puzzling. By our estimate,[220] 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.)

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[215] 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 [Hereinafter ACUS VIDEO HEARINGS REPORT].
[216] Olorunnipa, *supra* note 176.
[217] *See* ACUS VIDEO HEARINGS REPORT, *supra* note 215; 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 30, at 2-26–27.
[218] ACUS VIDEO HEARINGS REPORT, *supra* note 215, at 2 n.7.
[219] *Id.* at 32-33.
[220] *Id.* at 2 n.7.

- 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 locations[221] (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).[222] 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 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 ,"[223] 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."[224] 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."[225] Critics argue that in cases where credibility assessments are key to an

[221] *OPPM: Facilitating Pro Bono Legal Services, supra* note 10.
[222] *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).
[223] *OPAT DATA*, *supra* note 42.
[224] *ABA Comm'n on Immigr. Rept., 2010, supra* note 30, at 2-27.
[225] Walsh & Walsh, *supra* note 217, at 265.

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.[226]) USCIS 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.[227]

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.[228]

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.

- 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."[229]

[226] Letter from Baker to Baer, *supra* note 125.
[227] Email from Ted Kim, *supra* note 138.
[228] ACUS VIDEO HEARINGS REPORT, *supra* note 215, at 35.
[229] 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 103.

- 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.

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."[230] 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."[231] 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."[232] EOIR officials said that, given the many variables at play in removal adjudication, a reliable evaluation might be impossible.

[230] *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.
[231] 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.
[232] ACUS VIDEO HEARINGS REPORT, *supra* note 215, at 37.

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.[233] The article then presented OPAT-provided data on the disposition of asylum claims in 2005 and 2006,[234] 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.)

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.[235] 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

[233] Walsh & Walsh, *supra* note 217.
[234] *Id.* at 271-72.
[235] *Id.*

those in detention, those who had been detained but were released when the case was completed, and those who were never detained.

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,

41. 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 ACIJs 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.
42. 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.
43 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.
44. 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.
45. 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 earlier problems with BIA performance have abated to the point that our research time and resources would be better spent on other subjects. We did not evaluate and therefore take no position on aspects of BIA performance that continue to prompt

criticism, such as whether the proportion of BIA completions by single member affirmances (over 90 percent) is too high. We recommend implementation, however, of pending regulations to broaden the discretion of BIA members to refer a case to a three judge panel. First, though, we present analysis on the adequacy of BIA remands and the changing relationships between the BIA and U.S. Courts of Appeals caseloads..

a. Adequacy of BIA Remands

Our survey asked: "When the BIA remands a case to you, does the remand adequately inform you of the basis for the remand?" Of the 160 judges who responded, 12 said they had insufficient experience to evaluate. The remaining 148 responded as follows:

	N	%
Almost or almost always (roughly 90-100 % of the time)	58	74.3%
Usually (roughly 75 to 89%)	55	37.1%
Sometimes (roughly 50 to 74%)	20	13.5%
Not often (roughly 25 to 49%)	8	5.4%
Rarely or never (less than 25%)	7	4.7%

Seventeen judges offered additional comments. Eight said the BIA should be more specific about the action the BIA desired upon remand rather than a "remanded for actions consistent with this decision." A few commented that the regulatory change that removed de novo fact finding from the BIA made the remands overly cautious in the language of the remand and could create confusion about what matters needed to be 'reheard" in the immigration court. One comment queried the proportion of staff resources, over 100 staff attorneys assigned to the 15-member BIA and a like number to the 260 judge immigration courts.

b. The BIA and U.S. Courts of Appeals

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.)[236] 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.)[237]

Table N: BIA Appeals as a Percent of All Appeals

(12 month period ending Sept. 30)

[236] *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).

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

	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.

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	11,94712,141
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.[238] 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.

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

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 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.[239]

The proposed a regulation that 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."[240] EOIR officials told us that although the proposed regulation was not controversial when proposed, it was withdrawn along with all pending regulations when the presidential administrations changed in 2009. They added that the regulation is still actively under review but is not a priority.

[238] 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).
[239] 8 C.F.R. § 1003.1(e)(6)(i)—(vi) (2010).
[240] *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).

We take no position on other proposals or concept within those draft regulations. Our comments are limited to the restoration of greater flexibility in using three-member panels.

Recommendation, 46

46. That EOIR should seek to make the 2008 proposed regulations final allowing greater flexibility in establishing three-member panels

3. 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 within an organizational framework that can lean toward centralized authority or to local autonomy.

We said at the outset of this report that although EOIR is part of the executive branch, we assessed immigrant removal adjudication with 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 executive agencies that conduct adjudication, immigration courts and the BIA use an adversary process to decide cases of major national importance, involving some individuals for whom the case approaches life or death importance. Unlike all but a few of the administrative adjudication agencies, the immigration courts constitute a large judicial system over 260 judges 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 its supreme courts or chief justices 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 since reports surfaced in 2007 of inappropriate partisan hiring of judges by DOJ political appointees, practices documented in a 2008 report by the DOJ Inspector General/Office of Professional Responsibility.[241] There is little evidence that the department officials who meddled in the immigration judge hiring process knew or cared what the judges do, only that party loyalists got the jobs.

The Attorney General instituted new hiring practices that re-vested authority in EOIR.[242] OCIJ officials insist that the process is non-partisan and merit-based; we have no evidence to suggest it is not. 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

[241] 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.
[242] *Id.* at 114-15.

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."[243] ACIJs told us they participate in the hiring process and believe it is working well. 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).[244]

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. We certainly were in no position to operationalize and test EOIR's empirical assertion that the "screening process ensures that only the best candidates are selected."

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.[245] The NAIJ, by contrast, has referred to "a cumbersome hiring and clearance process."[246] 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. As early as 1983,[247] 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.[248]

Some court systems publish annual reports[249] of the demographic composition of their workforce, including judges (the selection of whom for the most part the courts do not control) and supporting staff.

Recommendations, 47

47. To promote transparency about hiring practices within EOIR, that

[243] 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.
[244] *EOIR's Improvement Measures*, *supra* note **78**.
[245] *ABA Comm'n on Immigr. Rept., 2010, supra* note 104, at 2-18–2-19, 2-29.
[246] Improving Efficiency, Statement of Nat'l Ass'n of Immigr. Judges, *supra* note 107.
[247] *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).
[248] *ABA Comm'n on Immigr. Rept., 2010, supra* note 104, at 2-19.
[249] *E.g.*, The [Federal] Judiciary Fair Employment Practices Annual Report, (2011, published by the Administrative Office of the U.S. Courts).

a. EOIR publish annually, as do some courts, or post 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.

b. 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 has reported instances of abusive immigration judge behavior toward parties before them, a matter amplified by criticism in court of appeals opinions.[250] 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 records in only a small fraction of immigration court proceedings).

These press, judicial, and other complaints 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.

According to EOIR officials, ACIJs conducted the first performance evaluations under the new system starting in July 2011. The DOJ/EOIR "Performance Appraisal Record" for "Adjudicative Employees"[251] provides for a rating on three job elements—"Legal Ability," "Professionalism," and "Accountability for Organizational Results," leading to an "Overall Rating" of "Satisfactory," "Needs Improvement," and "Unsatisfactory." The rating official (the ACIJ) may provide written comments (and must in the case of an unsatisfactory rating). The form defines the evaluation standards for each job element and instructions for calculating the overall rating.

We asked in our survey: "How useful did you find the ACIJ's assessment of your performance." The responses are below, based on responses from 149 judges who responded to the question. (Only two judges checked "I did not have a review." Thirty checked "Decline to respond" or skipped the question. We don't know whether any of them did not have a review.)

[250] *See ABA Comm'n on Immigr. Rept., 2010, supra* note 104, at 2-19 (citing commonly referenced judicial opinions).
[251] Provided by EOIR officials and on file with the authors.

	Number	Percent
Very useful	19	12.7%
Useful	41	27.5%
No opinion	24	16.1%
No more than marginally useful	29	19.4%
Not at all useful	36	24.1%

Judges are fairly evenly divided in their perception of the evaluations. Overall, 40.2 percent selected one of the "useful" options, and 43.5 percent selected of one of the "not useful" options. Seventeen of the 19 judges who offered additional comments were judges who checked one of the "not useful" options or "no opinion." The bulk of the 17 comments were that the review was uninformative. "I was simply told I was doing a satisfactory job." There was little variation in these overall responses based on whether the judges had a primarily detained or non-detained docket. Other data, unavailable to us, might shed additional light on these responses—such as the length of the responders' tenure as judges and, of course, the nature of the evaluations they received.

Some judges have objected to the use of quantitative measures in evaluating their performance. EOIR's "Agreement" with the NAIJ notes EOIR's determination that subpart 3.1 of the "Accountability for Organizational Results" job element ("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 the OCIJ case completion goals" except for statutory or regulatory based deadlines...[252]

OCIJ has regularly promulgated case completion goals, most recently in July 2010, when it added such goals as completing 100 percent of credible fear review determinations within seven days.[253] The goals respond to the 1993 Government Performance and Results Act, which seeks to "improve Federal program effectiveness and public accountability by promoting a new focus on results, service quality, and customer satisfaction."[254] 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 . . .."[255] Of course, the ABA standards are not mandatory unless a court adopts them. OCIJ regards the case completion goals as aspirational, but the president and vice-president of the NAIJ wrote recently that "judges perceive these goals to be mandatory

[252] Executive Office for Immigration Review Performance Plan, provided by EOIR (on file with the authors).
[253] 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).
[254] Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) at § 2(b)(3).
[255] AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS 86, at 2.52(a) (1992).

and frequently in conflict with ideal conditions for adjudicating cases fairly and independently," citing judges' narrative responses to a survey on judicial stress.[256]

As far as we could tell from our interviews, 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.

The use of quantitative measures as part of judicial performance evaluations is a generally accepted practice within state courts. The 2010 ABA Immigration Commission report recommended that EOIR use an evaluation method based on the "Judicial Performance Evaluation" (JPE for short) models developed by the ABA and the Institute for the Advancement of the American Legal System.[257] JPE denotes a process by which independent commissions, created typically by state law and consisting of judges, lawyers, and other stakeholders, 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.[258]

We endorse a modification of the ABA recommendation. We realize that performance evaluations tend to be unpopular but given the survey responders decidedly mixed assessment of this initial round of evaluations, we think EOIR would do well to consider importing some elements of standard JPE models, including the use of some separate body to receive evaluation data and conduct the reviews. We realize as well that cost is a major barrier to implementing these JPE models full blown, but full-blown implementation is not essential. One of the judges commented on the survey form: "I believe that a system of judicial ratings similar to those used in many state courts would be far more revealing. The parties who appear before me, including respondents, private attorneys and DHS should have the opportunity to comment as they are far more equipped to assess my performance than a supervisor who is acting on after-the-fact hearsay at best. I would even welcome the input of interpreters into the process as it is the people who are in the courtroom day to day who know my work best."

Recommendation 48

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[256] Slavin & Marks, *supra* note **16**, 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).

[257] *See ABA Comm'n on Immigr. Rept., 2010, supra* note 104, at 2-32 to 2-34.

[258] *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 104, at 2-33.

48 That EOIR consider incorporating some elements of current JPE models into its performance evaluation process, including use of a separate body to conduct reviews, agency-wide.

[2] Immigration Court Performance Monitoring

Measuring an individual administrative *judge's* performance evaluation is different from monitoring a *court's* performance. Probably the best example of court performance 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. (That same emphasis 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.[259]

To help courts implement them, the National Center has developed a generic performance monitoring device—"CourTools"—which provides 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."[260] EOIR officials told us there were aware of CourTools and were exploring its applicability to the immigration courts.

Some state court systems, such as Utah's, have modified CourTools' measurement devices and post the results of their application on their websites, with the aim (in Utah) of "help[ing] courts identify and monitor important performance measures and make improvements to better serve the needs of the public."[261] The Utah 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 6).

Although the measured unit in these schemes is the court, not individual judges, courts that are serious in performing consistently with the standards they have established, need ways to encourage individual judges to perform adequately. According to current research about successfully performing trial courts, successful court performance is not simply a matter of getting outlier judges to toe the mark but of creating 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

[259] *NCSC: Research: Trail Court Performance Standards*, NAT'L CENTER FOR STATE COURTS, http://www.ncsconline.org/d_research/TCPS/index.html (last visited Jan. 6, 2012).
[260] *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.
[261] *Utah Courts Performance Measures*, UTAH STATE COURTS (Oct. 20, 2011) http://www.utcourts.gov/courtools/.

types among state criminal courts and established links between different cultures and court performance.[262]

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, 49

49. That EOIR seek to monitor immigration court performance by

a. Continuing its assessment of the adaptability of performance measures used in other court systems, publicize the results of its assessment; and

b. Including rank-and-file immigration judges in the assessment.

c. Including stakeholder DHS agencies in its assessment.

[3] Handling Complaints Against Immigration Judges

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

At least since 2010 EOIR has had an "Immigration Judge Conduct and Professionalism" page on its website,[263] which includes information about how to file complaints against judges, 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 ("identifies," in the argot of judicial discipline) 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 ACIJ 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,

[262] Ostrom et al., *supra* note 108.
[263] 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.

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.[264] (The federal judicial disciplinary process rests principally within the all-judge circuit judicial councils.)[265]

Both the state and federal judicial disciplinary processes make public, with some exceptions, the names of judges whom the adjudicating body publically 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.")

Recommendation, 50

50. That EOIR, consistent with its commitment to transparency in the judicial discipline process, state on its "Immigration Judge Conduct and Professionalism" webpage that it is barred by statute from identifying judges upon whom it has imposed formal disciplinary action.

2. Locus of Management Responsibility

a. The OCIJ Management Structure and Rationale

One aspect that distinguishes immigration courts from most state and federal judicial systems is the absence of almost any management authority vested in the judges of each court. An EOIR official told us informally that "OCIJ is one immigration court, in 59 locations. The locations are not autonomous but are an arm of the agency, and that is as it should be." The idea of a "unified court"—one single system-wide court with branches—was first articulated in Progressive Era proposals that "the whole power of each state, at

[264] *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.
[265] *See* 28 U.S.C. ch. 16 (2006).

least for civil causes, should be vested in one great court, of which all tribunals should be branches, department, or divisions."[266] The idea never got implemented because individual courts demanded some flexibility to deal with local problems even within the context of centrally allocated funds and system-wide procedural and administrative regulations.,

The OCIJ management model is 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 posted on the EOIR website in late December). 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 Assignments[267]

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)

[266] *The State-Wide Judicature Act*, 1 J. Am. Judicature Soc'y, Dec. 1917 at 101.

[267] 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.

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 ACIJs 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."[268] EOIR asserted in June 2009 that the effort has been "well received by immigration judges, EOIR staff, the private bar, and the government bar."[269]

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, because the "training" involved in the professor's visit might be useful to other courts, the ACIJ need to know about all such events. Furthermore, the ACIJ principally responsible for education and training would need to know, in advance, about the proposed unpaid presentation or brown bag lunch, 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 it.

This approach might trace back to the first chief immigration judge, the late William Robie, cited earlier in our report concerning status conferences. As to court administration, according to a 1993 post-mortem tribute,[270] Judge Robie:

[268] ATT'Y GEN MEMORANDUM, *supra* note **74**.
[269] *EOIR's Improvement Measures*, *supra* note **78**.
[270] Jere Armstrong & Richard J. Bartolomei, *A Tribute to the Honorable William R. Robie,* 7 GEO. IMMIGR. L.J. 265, 268 (1993).

> 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 how Judge Robie would have regarded the current centralized approach to immigration court management and, more important, whether it is the best approach. Nor do we know the degree to which, if any, the current approach is a product of 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.

b. Judges' Views of their ACIJs

Our survey posed several questions about the ACIJ arrangement. First, we asked about agreement with dual statements—"My ACIJ is aware of the conditions, needs, and problems in my court that need his/her attention," and "I am aware of my ACIJ's preferences and policies as to how I should perform my duties."

We display the responses side by side; 153 judges responded to the first question, and 150 to the second.

	ACIJ aware of court needs, etc.		IJ aware of ACIJ pref's	
	Number	Percent	Number	Percent
Strongly agree	55	35.9%	41	27.3%
Agree	65	42.4%	72	48.0%
Neutral	11	7.1%	26	17.3%
Disagree	11	7.1%	8	5.3%
Strongly disagree	11	7.1%	3	2.0%

Substantial majorities of judges believe their ACIJ's are aware of conditions, needs, and problems in their respective courts (78.3 percent agreed or strongly agreed) and believe they know what their respective ACIJ's expect of them (75.3 percent agreed or strongly agreed). Although we don't know in which specific courts the responding judges work, we observed almost differences in the breakdowns based on whether the judges had predominantly detained or non-detained caseloads. We also know that about 45 percent of the judges are in courts with a resident ACIJ, but the percentages of those agreeing as to both statements are over 75 percent, suggesting that a fair proportion of judges without a resident ACIJ nevertheless believe they understand their ACIJ's preferences and their ACIJ understands the respective courts' needs.

The judges' responses to these questions appear are related in part to their perceptions of the utility of the recently completed performance evaluations. Almost all (94.9%) of those judges who found the performance reviews useful agreed or strongly agreed that their ACIJ was aware of their courts' needs and conditions. Of those who didn't find the review useful, a majority still agreed that their ACIJ's were aware of their courts' conditions, but the figure was only 64.5 percent. Likewise, 89.6 percent of the judges

who said they were aware of their ACIJ's preferences found the reviews useful, but only 59.7 percent of those who disputed the reviews' utility said they knew what their ACIJ's expected of them.

We obviously did not have these data during our interviews and were somewhat limited in any event in those interviews in what we could ask about perceptions of the ACIJs. There are several possible explanations for the observed, weak, relationship between judges' views of their performance reviews' utility and their perceptions of their ACIJs. Those explanations could include attitudes toward the OCIJ management structure generally and in its various elements (including the ACIJ-administered performance reviews); seeing the quality of the review as a reflection on the ACIJ's abilities; or satisfaction or

with the specific review received.

c. Judges' Receptivity to an Alternative Approach to OCIJ Management

Despite these results, we remain curious, based on part on our interviews and written comments on our survey that suggest different cultures in different courts, whether alternative approaches to immigration court management are worth exploring. That high proportions of judges who believe the ACIJs understand their courts needs and that they, the judges, understand the ACIJ's preferences does not necessarily mean that the judges believe the arrangement is superior to others or that it produces effective court management. In fact, a small number of judges who agreed that their ACIJs were aware of conditions in the court added comments such as "while ACIJs are aware of problems there is little they can or will do to alleviate them." Similarly, several judges who agreed that they knew their ACIJs' preferences said "the ACIJ's preferences and policies should have no bearing on how an Immigration Judge performs his or her duties."

Standards and evaluative tools developed for judicial branch courts[271] embrace a less centralized approach than that used by OCIJ. 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."[272] 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."[273] An international consortium of several U.S. and foreign court

[271] *E.g.*, ABA Judicial Administration Division, *supra* note 255; Trial Court Performance Standards, *supra* note 260; Ostrom et al., *supra* note 108; INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE (2008) *available at* www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf.
[272] ABA Judicial Administration Division, *supra* note 255, at 29.
[273] Ostrom et al., *supra* note 108, at 127.

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."[274]

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.

We were able, however, to use our survey to ask the judges their views of an alternative approach to court management by asking whether they agreed or disagreed with this statement:

> "Immigration courts would operate more effectively if, instead of the current [ACIJ] system, in each court with two or more judges, one of the judges served as chief judge to perform the duties currently assigned to the ACIJs, with appropriate caseload reductions for the chief judge where necessary."

The responses are summarized below; 152 judges responded.

	Number	Percent
Strongly agree	35	23.0%
Agree	31	20.3%
Neutral	34	22.3%
Disagree	33	21.7%
Strongly disagree	19	12.5%

Neither agreement nor disagreement received a majority of the responses. Those who agreed with the idea of individual court chief judges were 43.6 percent of the 152 who responded to this question; those who disagreed were 34.2, almost a ten point difference. The second most frequent response of the five available was "neutral" (no opinion).

We compared responses to the local chief judge concept and judges' perceptions of their ACIJs. Of those judges who agreed that their ACIJ was aware of their courts' needs and conditions, 38.6 percent agreed with the concept of local chief judges and an almost identical percentage (37.7 percent) disagreed. Likewise, of those who believed they knew their ACIJ's preferences for their performance, 40.7 percent favored the concept of local chief judges and 34.3 percent disfavored that concept. (The numbers who disagreed that

[274] INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra* note 271, at 2, 4, 26.

their ACIJs knew local conditions or that they knew their ACIJ's preferences were too small to draw much of any conclusions.)

There was some association between judges' preference for local chief judges and the judges' view of the performance reviews' utility. Of the judges who agreed with the concept of local chief judges, a small majority (52.4 percent) said the reviews were not useful, and 30.4 percent said they were useful. Of the judges who disagreed with the concept of local chief judges, 42.9 percent found the reviews useful and 30.2 percent did not.

The 30 additional comments judges offered on this item came roughly equally from those agreeing and those disagreeing, with a few comments from those who selected the neutral option. Those agreeing with the local chief judge concept generally said that "ACIJs tend to be a one-size fits all manner of supervision. Courts have different characteristics (as well as personalities). More local autonomy would fit the flexibility of the agency better." By contrast, a judge who disagreed with the local chief judge idea said, in a manner similar to the EOIR official quoted earlier, that "[h]aving many local 'chief judges' would likely mean a return to the past where 'local rules" meant practices that varied greatly from court to court. We are a nationwide court system and should operate as such." Other judges disagreed with the concept of local chief judges because they disagreed with concept of *any* chief judges, or because current caseloads would make it difficult for one of the court's judges to assume the role.

Some judges commented that it would strain relations in small courts for one judge to conduct reviews of one or two other colleagues. However, if EOIR were to move toward more of a standard JPE performance evaluation, the task could be vested in a separate, agency-wide entity.

The bottom line seems to be that although the judges by large majorities find their ACIJ's aware of their courts' needs and believe they know what their ACIJ's expect of them, they are split on the idea of a different management arrangement, with over four in ten favoring it, over three in ten disfavoring it, and two in ten expressing no opinion. (These results are consistent with what we were told in our limited exchanges on the topic during our interviews. Judges by and large praised their ACIJ but when asked if there should be more local management authority responded along the lines of "probably so.")

Recommendation 51

51 That EOIR assemble a working group of immigration judges and perhaps outside observers familiar with court management structures to evaluate alternatives to the current ACIJ structure.

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.[275] 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.

This matter is not going way, but we have not devoted much attention to proposed changes, whatever their merits. (We did not include a question about it in our survey, but of the 45 responses to a final, open-ended invitation to offer additional comments, eight in one way or the other expressed displeasure with EOIR's placement within DOJ.)

There are several reasons why we devoted little attention to this matter. One is that it has been extensively studied by others, and in the limited time we had for our study, it seemed best to deal with other, less studied topics. Another 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. Third, 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.

[275] *ABA Comm'n on Immigr. Rept., 2010, supra* note **30**, at Part 6.

V. 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

EXCUTIVE 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 IMMIGRATION COURT MATTERS, FY 2010

		Completed Proceedings-					Detained Proceedings			Other Matters		All mattes	
	IJs	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

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

		Completed Proceedings-					Detained Proceedings			Other Matters		All mattes	
	IJs	Total.	Per judge	w/ app relief	w/ asy. app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
IMPERIAL	1	1,157	1157	17%	3%	21%	64%	28%	28&	3	18	1,178	1,178
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

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

		Completed Proceedings-					Detained Proceedings			Other Matters		All mattes	
	IJs	Total.	Per judge	w/ app relief	w/ asy. app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
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
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*

	2009			2010		
COURT	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%
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 Pearsa1 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

RESPONSES TO "MODEL COURT" AND "IMPROVE YOUR COURT" SURVEY QUESTIONS

"**Consider the concept of a 'model immigration court,' i.e., a court that adjudicates cases fairly, timely, and as inexpensively as possible, with courteous treatment of all participants. From the various items below, please rank the four that you believe would most contribute to creating and sustaining such a court.**"

Responding to survey: 181

Responding to this question: 158

Item	Responses	% of responders
Adequate time for judge to review the file	99	62.7%
A sufficient number of law clerks	97	61.4%
A high percentage of respondents represented by quality lawyers	88	55.7%
Prepared respondent's counsel	78	49.4%
Prepared DHS counsel	68	43.0%
DHS counsel who narrow the issues for adjudication	39	24.7%
Use of detention to ensure removal and reduce delay	35	22.2%
Outstanding interpreters	24	15.2%
Outstanding legal assistants	23	14.6%
Outstanding court administrator	17	10.8%
Excellent courtroom equipment	13	8.2%
Excellent office equipment	2	1.3%

Twenty-two judges selected "Another factor, not included above." In the individual comments, the most common factors were variations of those most frequently selected.

Appendix 5 con't. next page

"**Various factors can contribute to better immigration courts. Please rank the four factors that you believe would most improve your court."**

Responding to survey: 181

Responding to this question: 158

RESPONSES TO "IMPROVE YOUR COURT" QUESTION

Item	Responses	% of responders
Additional law clerks	113	71.5%
Fewer cases	97	61.4%
More quality counsel for respondents	79	50.0%
Better prepared respondent counsel	77	48.7%
Better prepared DHS counsel	74	46.8%
Additional staff (excluding judicial law clerks)	68	43.0%
More initial and continuing judicial education	22	13.9%
More forms of legal relief available to respondents	19	12.0%
More timely submission of biometric data	13	8.2%
Increased reliance of video telconferencings	4	2.5%

Twenty-one judges selected "Another factor, not included above." In the individual comments, the most common factors were variations on those already selected.

APPENDIX 6

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

Subject to further revision based on availability of additional data analysis and responses. In our final report, we will ensure that all text and footnote cross references are complete, that all headings and subheadings are in sequence and tables consecutively numbered.

TEXAS EASTERN			12-MONTH PERIOD ENDING JUNE 30 [2011] 2011	2010	2009	2008	2007	2006	Numerical Standing	
	Average Number of Felony Defendants Filed Per Case		1.9	2.1	1.9	2.0	1.7	1.6		
	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 7

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/vll/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

Form EOIR-55
May 2009

APPENDIX 8

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	126%	---	---	100%	162%	103%	117%	130%	83%	88%	250%
Logan	91%	100%	110%	86%	100%	88%	100%	75%	104%	61%	105%
Randolph	70%	---	0%	76%	60%	33%	86%	0%	200%	0%	78%
District 2	**94%**	**214%**	**106%**	**101%**	**91%**	**92%**	**102%**	**89%**	**85%**	**84%**	**96%**
Bountiful	128%	233%	133%	123%	---	---	---	---	---	---	130%
Farmington	87% --	167%	81%	86%	96%	98%	88%	96%	86%	200%	
Layton	101%	0%	69%	105%	---	---	---	---	---	---	86%
Morgan	93%	---	---	63%	160%	39%	33%	13%	100%	---	100%
Ogden	89%	---	109%	89%	94%	91%	101%	93%	75%	80%	275%
Statewide	**106%**	**122%**	**109%**	**112%**	**104%**	**93%**	**119%**	**91%**	**94%**	**102 %**	**109%**