

Enhancing Quality and Timeliness in Immigration Removal Adjudication

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

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INTERIM DRAFT

We provide this interim draft of the report for the Adjudication Committee's for its April 23, 2012, meeting. We have inserted the revised sections that we provided the Committee for its review of recommendations on Feb. 22, March 12, and April 5. We have deleted the recommendations we prepared for the Committee's review. ACUS staff will provide revised recommendations in a separate document. We will undertake technical and typographical corrections, and some substantive updating for the final report's submission in early May.

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Enhancing Quality and Timeliness in Immigration Removal Adjudication

Executive Summary [reserved]

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 in 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 removability from 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 as reflected in our first major draft submitted in January 2012, ACUS officials proposed that we submit a series of interim reports and recommendations for meetings of ACUS's Committee on Adjudication over the months of February through April. We prepared this interim draft, including the substance of the interim reports, for the Committee's use in connection with its April 23, 2012 review of the recommendations it wishes to send forward.

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

- the origin of removal cases in the DHS (without assessing DHS prosecution policies per se);

- legal representation for those in removal proceedings;

- immigration court and BIA case management and court management practices, including the immigration courts' use of video hearings;

- BIA decision-making; and

- additional topics if possible.

The recommendations as reviewed by the Committee are in a separate document prepared by the staff of the Administrative Conference.

II. Framework for Analysis and Methods

A. Framework

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 economical 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 assumption that given fiscal realities, Congress would be extremely unlikely to increase significantly the resources for immigration removal adjudication agencies. Thus, this report reflects the principal of “doing better with existing resources.” We also worked with the assumption that the current statutory and regulatory framework governing removal adjudication 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 courts and judges to implement. We have referenced, and sometimes endorsed, others’ proposals for statutory changes.

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, we have sometimes looked to the nation’s state and federal judicial systems for comparative analysis. We have done so because of 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.

B. Methods

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 (OPAT) graciously produced two series of particularized data runs—over 20 separate data sets—for us in response to our requests.

For most of the time this report was in production, the most recent EOIR data on removal adjudication—in its Statistical Year Book and in the separate data runs—was for fiscal year 2010 (October 2009-September 2010). On February 21, EOIR released its FY 2011 Statistical Year Book. We have not been able, given the constraints of producing the

interim report and the final report due on May 7, to redo all our data presentations according to the 2011 Year Book, and we did not ask OPAT to redo the data sets it provided with FY 2011 data. Thus, report contains an amalgam of data, mainly from 2010 and earlier years, but with prominent 2011 data points where possible. Where we could do so conveniently, we have presented 2011 Year Book data alongside 2010 data, but we have not reconstructed many of the tables, especially those with multiple data sources not limited to published Year Book data (e.g., Appendix 3's multi-page presentation of 2010 matters, court-by-court).

2. Interviews

We began our research in late April with the first of a series of meetings with EOIR Director Juan Osuna, complemented by interviews and discussions with other personnel at EOIR's headquarter. 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.

Assistant Chief Immigration Judge Edward Kelly was our liaison with the EOIR and with the Office of the Chief Immigration Judge (OCIJ) in particular, including the assistant chief immigration judges with whom he cooperated in arranging our interviews with judges in the several courts we visited. He is also the EOIR liaison member to ACUS. He was uniformly helpful and cheerful in all aspects of our inquiry.

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 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 agreed to alert the judges to the survey and make clear they were permitted to respond to it. OCIJ insisted that they be permitted to vet the questions in draft, which led us to remove some questions we had intended to ask. They also insisted that the survey be totally anonymous—precluding even data on the number of judges on the responding judges' courts or the length of their tenures as judges. As a result, 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 percent of the 265 judges listed on the EOIR website as of early 2012. Not all of the judges who responded answered each 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 survey the court administrators or ICE trial attorneys.

4. Consultation within the Administrative Conference and Related Groups

We consulted with the staff of the Administrative Conference and with members of two related groups. One is the ACUS standing Committee on Adjudication, under whose jurisdiction we conducted the study. We are grateful to the committee's chairman, Judge John Vittone, and the committee members who met five times to consider our analyses and proposed recommendations. 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. We are grateful to those Group members who provided comments. 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 draft and some subsequent revised sections. 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.

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. Removal 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.¹

EOIR houses the Office of the Chief Immigration Judge (OCIJ), of which the 59 immigration courts are a part, 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."²

The Attorney General appoints the EOIR Director. EOIR's 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 judges who hear cases (less than 100 last year)³ involving employer verification of work authorization violations, immigration-related document fraud, and failure to comply with statutory international information dissemination requirements.

¹ "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).

² 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>.

³ 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*].

EOIR's appropriation for fiscal 2012 is currently slightly less than the \$305,000,000, provided for the Justice Department's budget subcategory "Administrative Review and Appeals" almost all of which funds EOIR with less than one percent going to the Office of the Pardon Attorney.⁴ EOIR does not report, at least publically, the dollar allocations to its several components. However, one of us, for a separate project, estimated the allocations for the 2010 "Administrative Review and Appeals" appropriation of \$300,685,000,⁵ based on DOJ-reported object class allocations and personnel figures provided by EOIR's Public Affairs Office. That estimate suggests 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.⁶

1. Immigration Courts

The "EOIR Immigration Court Listing" on the EOIR Website⁷ current either as of January or February, 2012, (it uses both) identifies 60 court locations, but EOIR officials explained that one location ("Chicago Detained") was on the list for technical reasons and they did not consider it a court. The 59 courts are located in 27 states and two territories. The courts had 265 immigration judges (as of January or February) as well as supporting staff. The number of judges per court ranges from less than one (a judge splits time between two courts) to 31. The median size is 4.9 judges, and the common or modal size is two judges (18 courts). 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. (Hereafter in this report, unless otherwise indicated, "judge" means "immigration judge.")

These 59 courts are not the only locations where judges hold hearings. EOIR officials estimate that within the last year, judges held hearings in at least 150 additional hearing locations in county jails, state and federal prisons, as well as DHS-maintained facilities to detain aliens awaiting hearings.

And, as explained below, EOIR and DHS have a robust program to hold hearings using video conferencing technology, both from court to court, and court to other hearing locations. EOIR officials told us that in determining where to open up a hearing location by video, they consider available resources, the location's current and projected caseload, its proximity to existing courts whose judges may be able to cover the docket,

⁴ Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552.

⁵ 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).

⁶ EOIR PERSONNEL STATISTICS, provided by EOIR (on file with author).

⁷ Available at <http://www.justice.gov/eoir/sibpages/ICadr.htm> (viewed April 11, 2012).

technological issues, other court needs within the immigration court system, and appropriate coordination among DHS, EOIR, the private bar and, where applicable, any federal, state, county, or municipal authorities that may be involved. An official told us “If we are called upon to hold hearings and if all these considerations are satisfactory and within [the EOIR]’s mission, standards, technological capacity, etc., we may hold hearings there.”

In addition to the immigration courts, the OCIJ (Office of Chief Immigration Judge) includes a deputy chief immigration judge, and eleven assistant chief immigration judges (ACIJs), all appointed by the Attorney General.⁸ At least as of early April, 2012, 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.⁹ 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)¹⁰, but rather career attorneys in the excepted service.¹¹ As members of the excepted service, they are employed for indefinite terms and not subject to many of the personnel regulations that govern employees in the regular civil service. Congress defines an immigration judge as “an attorney whom the Attorney General appoints as an administrative judge” and says that immigration judges are “subject to such supervision and shall perform such duties as the Attorney General shall prescribe.”¹² The DOJ itself refers to immigration judges “as the Attorney General’s delegates in the cases that come before them,”¹³ but adds that “[i]n deciding the individual cases that come before them, and subject to applicable governing standards, [they] shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [Immigration and Nationality] Act.”¹⁴ The Chief Immigration Judge selects immigration judges through a competitive process in which the ACIJs participate. See discussion in Section V.D. below.

⁸ For biographical information OCIJ officials, see Executive Office for Immigration Review, *Office of the Chief Immigration Judge*, U.S. DEP’T OF JUST. (March 2012) <http://www.justice.gov/eoir/fs/ocijbio.htm>.

⁹ 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*].

¹⁰ 5 U.S.C. § 701 *et seq.*

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

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

¹³ 8 C.F.R. § 1003.10(a) (2010).

¹⁴ 8 C.F.R. § 1003.10(b) (2010).

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

2. Board of Immigration Appeals

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

The INA does not define the BIA. Instead, implementing regulations create the BIA and specify its size of 15 members (including a chair), all appointed by the Attorney General.¹⁶ Regulations also authorize the EOIR Director to designate temporary BIA members from among immigration judges, retired BIA members, retired immigration judges, and certain other EOIR officials. As of March 2012, the BIA had a chairman, 13 regular members and five temporary members. Their biographies are available on the EOIR website.¹⁷

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.

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

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

¹⁶ 8 C.F.R. § 1003.1(a)(1) (2010).

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

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 2006,¹⁸ 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 2010.¹⁹

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.²⁰ 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.²¹ 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.²² 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.²³

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.²⁴ Alternatively, officers may put individuals in immigration

¹⁸ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS JUDICIAL BUSINESS OF THE UNITED STATES COURTS at 222-29 (2010) available at

www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf.

¹⁹ 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”).

²⁰ 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>.

²¹ See generally INA § 237(a) (2010); 8 U.S.C. § 1227(a) (2006) for grounds of removal.

²² 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).

²³ See INA § 235(b); 8 U.S.C. § 1225(b) (2006).

²⁴ The official regulations governing voluntary departure in lieu of being placed in removal proceedings are found at 8 C.F.R. § 240.25 (2010).

court removal proceedings, or in some situations, formally remove them without immigration court intervention.²⁵ 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).²⁶

At various times, CBP has coordinated enforcement with the U.S. Attorney in a border state. Part of CBP's enforcement policy in southern Arizona, for example, is to use criminal enforcement for as many cases as the federal district court can accommodate and to take those cases that could not be criminally prosecuted to the immigration court under a policy known as the Consequence Delivery System.²⁷ 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 FY2011,²⁸ up from 189,000 in 2001.²⁹ Congress has greatly expanded funding and resources for border enforcement. The Bush and Obama administrations have posted members of the National Guard along the southern border.³⁰

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,³¹ but establishing "indisputability" in the removal context is hardly a simple task.

²⁵ See discussion *infra* at Section a, at 16.

²⁶ 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*].

²⁷ 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).

²⁸ *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>.

²⁹ *DHS Immigration Enforcement Actions, 2010*, *supra* note 26, at 4.

³⁰ See, e.g., National Guard Supports Border Security Efforts, CPB.GOV (Mar. 1, 2011), http://www.cbpc.gov/xp/cgov/newsroom/news_releases/national/03012011_7.xml.

³¹ 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

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 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.³²

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.³³

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.³⁴ 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.³⁵ 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.

[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*].

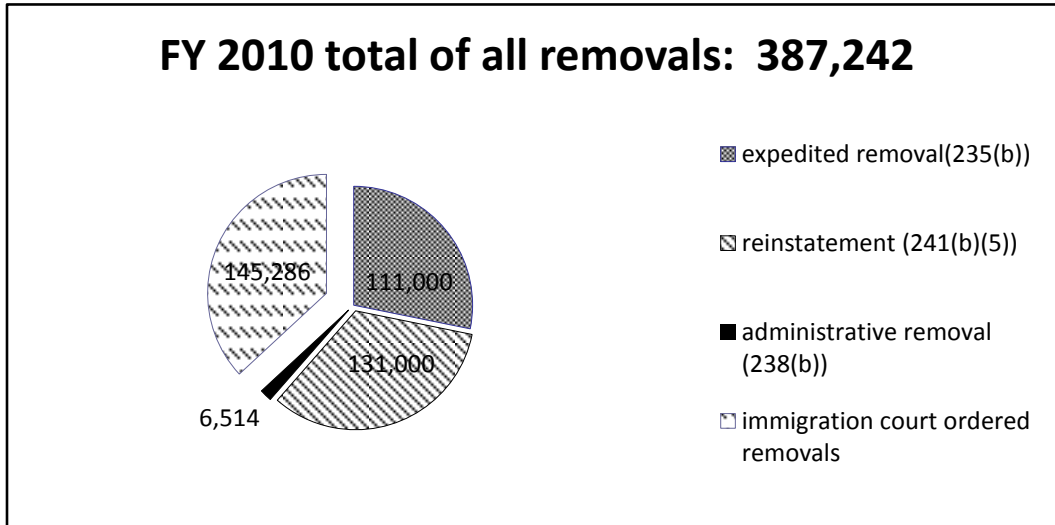
³² *DHS Immigration Enforcement Actions, 2010*, *supra* note 26, at 4.

³³ *Id.*

³⁴ See INA § 101(a)(43) (2010); 8 U.S.C. § 1101(a)(43) (2006).

³⁵ 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).

Chart 1: Forms of Removal, 2010*



* 2010 data except § 238(b) administrative removals data are based on 2008, the most recent year of published data. **A fall 2011 request to ICE for current data is still pending as of April 15, 2012.**

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 2009.³⁶ 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.³⁷ 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.

³⁶ *ABA Comm’n on Immigr. Rept., 2010, supra* note 31, at 1-13.

³⁷ *Id.*, at 1-12–1-15, based on data that DHS generated on request.

Immigration court “receipts” (filings) and completions have both been going steadily up, as shown in Table X. Over the last five years proceedings received have risen 21 percent, and all matters by 28 percent, due to a heavy increase in bond redeterminations. Proceedings received have increased four percent just over 2010.

Completed proceedings have increased more slowly over the most recent five years, by 11 percent, but basically stayed even with proceedings received compared to 2010.

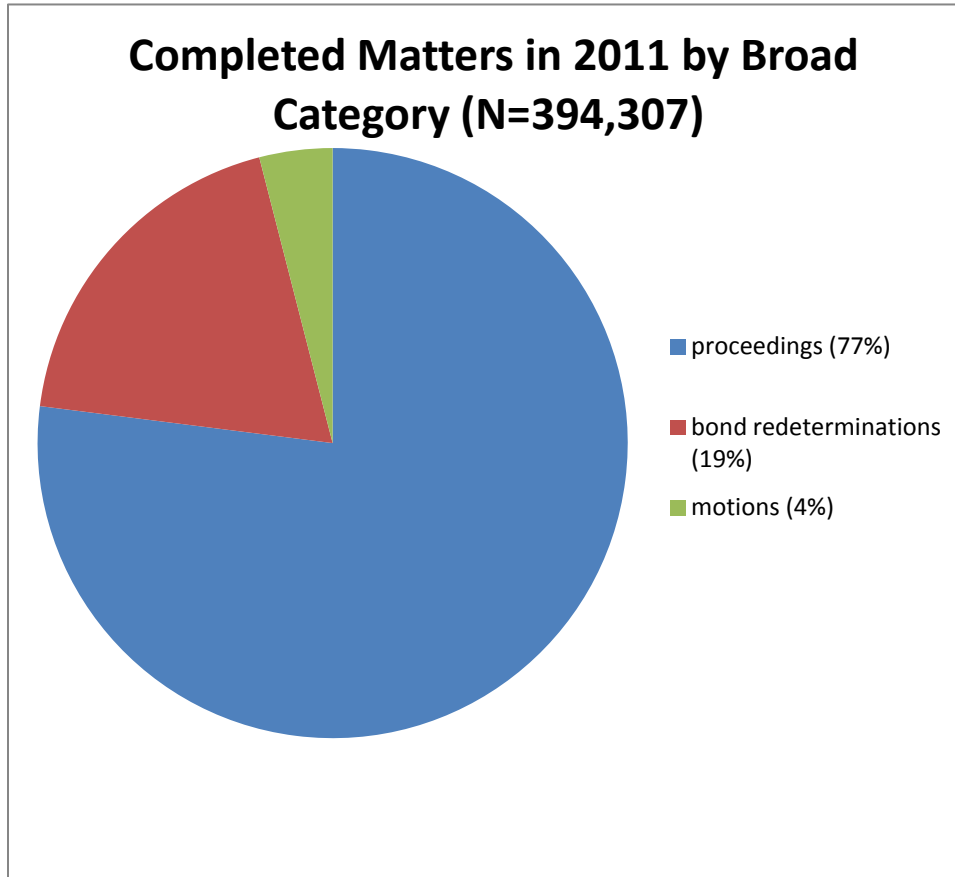
Table X—Immigration Court Receipts and Completions, 2007-2011

RECEIPTS	Proceedings	Bonds	Motions	Total
FY07	279,403	42,652	13,868	335,923
FY08	291,982	45,905	14,232	352,119
FY09	327,918	51,603	13,624	393,145
FY10	326,573	52,647	15,018	394,328
FY11	338,114	76,856	15,604	430,574
%over 07	21%	80%	13%	28%
%over10	4%	46%	4%	9%

COMPLETIONS	Proceedings	Bonds	Motions	Total
FY07	273,480	42,399	13,866	329,745
FY08	281,244	45,240	14,267	340,751
FY09	290,465	50,524	13,393	354,382
FY10	287,878	51,449	14,922	354,249
FY11	303,287	75,258	15,762	394,307
%over 07	11%	77%	14%	20%
%over10	5%	46%	6%	11%

The chart shows the breakdown for 2011 completions:

Chart 2: Matters by Broad Category, 2011



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. The judge also 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 2011 immigration judges completed 303,287 proceedings. They rendered merits decisions in 220,048 (73 percent) of those completed proceedings. The other 83,239 were closed administratively or transferred to a different location or granted a change of venue. The 73 percent figure for merits decisions was down slightly from 2010, when 77 percent of the completions were merit decisions.³⁸

The 220,048 merits decisions comprised four types of dispositions, the majority of which were removal orders:

- 161,354 (73.3 percent) were orders of removal;
- 31,763 (14.4 percent) were grants of "relief," such as asylum;
- 25,562 (11.6 percent) were "terminations," in which the judge decided that the government could not sustain the charges it filed, the respondent established

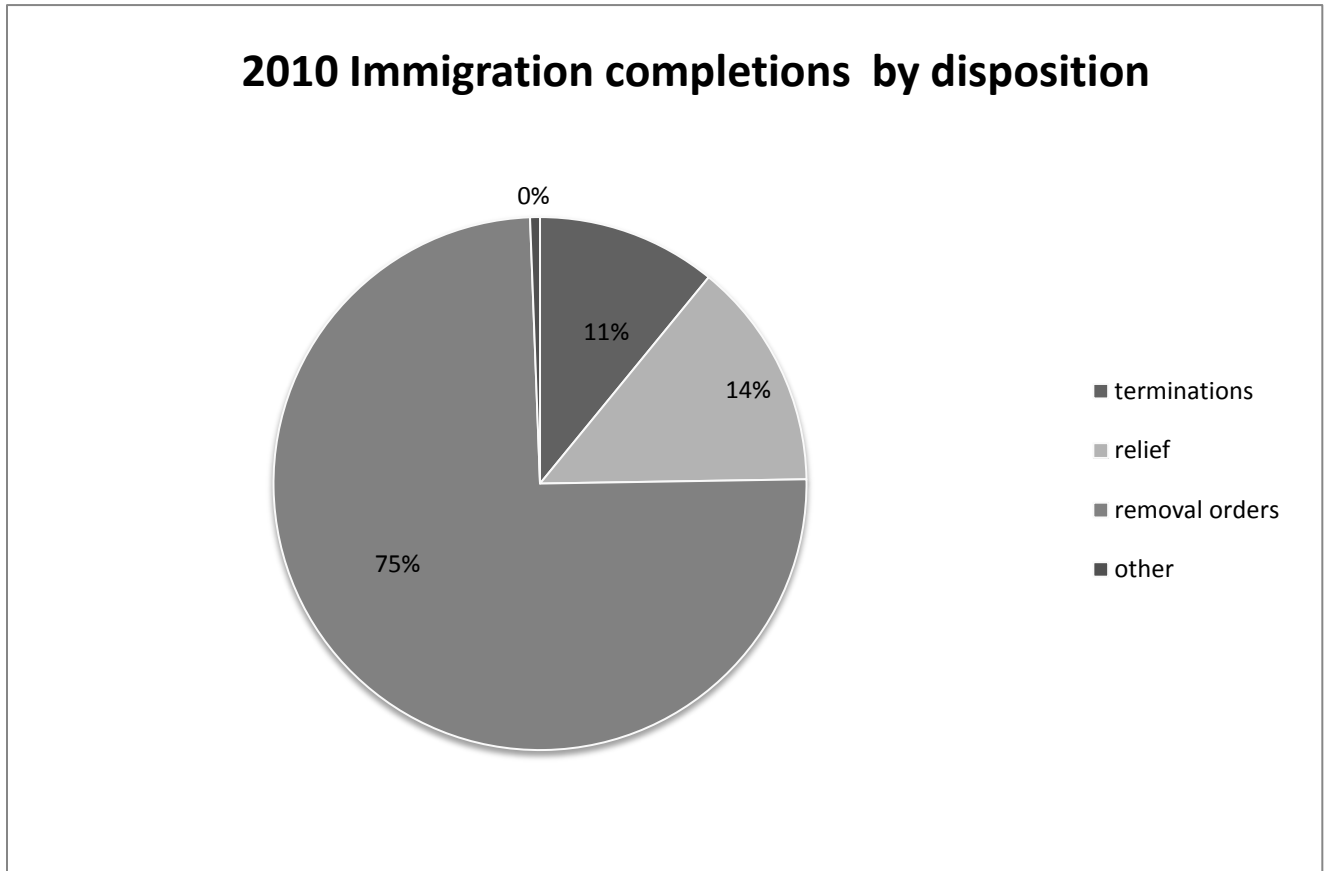
³⁸ *Statistical Year Book, 2011, supra* note 3, at D 1--2.

eligibility for naturalization, or the government agreed to dismissal of the proceedings; and

- 1,369 (0.6 percent) of the decisions were categorized as “other.”

The Chart 3 shows the breakdown graphically:

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 24,000.³⁹

Table A: Immigration Judge Merit Decisions 2007-2011 (Number and percent)*

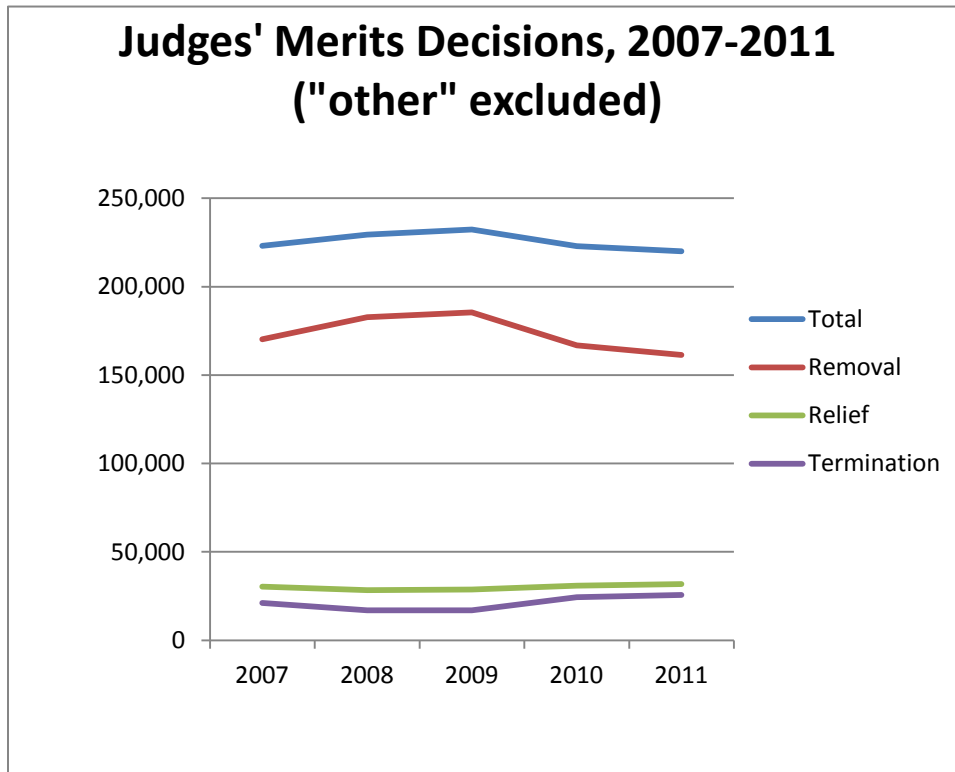
	2007	2008	2009	2010	2011
Total	223,085	229,463	232,385	222,909	220,048
Removal	170,291 76.3%	182,727 79.6%	185,421 79.8%	166,860 74.7%	161,354 73.3%

³⁹ *Id.*

Relief	30,263 13.6%	28,386 12.4%	28,676 12.3%	30,947 13.8%	31,763 14.4%
Termination	21,146 9.5%	17,033 7.4%	17,038 7.3%	24,369 10.9%	25,562 11.6%

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

Chart 4: Merits Decisions 2007-2011



[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 21 percent of judges' decision in 2011 for respondents whom DHS detained at no time during the proceedings (down from 31 percent in 2007) and 26 percent, for aliens who had been released from detention (down from 29 percent in 2006). (Obviously, respondents in

detention rarely fail to appear.)⁴⁰ We do not know the reason for the decline in the total number of in absentia orders; many factors may have contributed. In 2006, Congress amended the INA to include a ten-year limitation on eligibility for discretionary relief if a person fails to appear.⁴¹

[b] Stipulated removal orders

Judges also issue a form of removal called a “stipulated removal order.”⁴² These orders are not scheduled as “hearings” either master calendar or individual hearings. In fiscal year 2010, judges signed 27,943 stipulated removal orders.⁴³ 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.⁴⁴ 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

⁴⁰ *Id.* at H2-3.

⁴¹ See INA § 240(B)(7), 8 U.S.C. 1229a(B)(7).

⁴² 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*].

⁴³ OFFICE OF PLANNING, ANALYSIS AND TECHNOLOGY DATA, provided by OPAT (on file with author) [Hereinafter *OPAT DATA*].

⁴⁴ SEE JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, *DEPORTATION WITHOUT DUE PROCESS* (2011) available at <https://nilc.org/document.html?id=6>.

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 161,354 immigration court removal orders in 2011, 30,385 (19 percent) were voluntary departures.⁴⁵ DHS officials can also grant voluntary departure to individuals who are apprehended in the field including those whom officers do not place in removal proceedings.⁴⁶

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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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

⁴⁵ *Statistical Year Book, 2011*, *supra* note 3, at Q1.

⁴⁶ 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.).

⁴⁷ *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).

⁴⁸ *ABA Comm'n on Immigr., Rept. 2010*, *supra* note 5 at I-50 ff.

⁴⁹ *Statistical Year Book, 2011*, *supra* note 3, at O.

judge review of the custody decisions as well as bond set by DHS.⁵⁰ On any one day in 2009, about 32,000 individuals were in ICE detention facilities;⁵¹ the number of respondents in detention at some point in 2001 was about 209,000; it rose to over 378,000 in 2008;⁵² and declined to about 363,000 in 2010.⁵³

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.⁵⁴ 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 facilities and has little space within the facilities 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."⁵⁵ 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.⁵⁶

[3] Hearings by video technology

⁵⁰ *ABA Comm'n on Immigr. Rept., 2010, supra* note 31, at 1-12–1-15.

⁵¹ 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).

⁵² 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>.

⁵³ *DHS Immigration Enforcement Actions, 2010, supra* note 26, at 4.

⁵⁴ *ABA Comm'n on Immigr. Rept., 2010, supra* note 31, at 1-57 (citing, in part, Translational Records Clearinghouse (TRAC) and ICE data).

⁵⁵ INA § 292 (2010); 8 U.S.C. § 1362 (2006).

⁵⁶ 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).⁵⁷

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;⁵⁸ those cases involved 17,578 respondents.⁵⁹ EOIR reports that less than ten percent of judges' decisions result in appeals to the BIA.⁶⁰ (The BIA has held that an alien may not appeal from an in absentia 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 7,501 motions to reopen BIA proceedings filed in 2011. In 2011 the BIA received 27,327 appeals involving decisions by immigration judges, as well as 8,725 appeals from decisions of DHS agencies.⁶¹ 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 2006.⁶² This has long been the BIA's practice.⁶³

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.⁶⁴ Defenders of the practice say that many

⁵⁷ *OPAT DATA*, *supra* note 43.

⁵⁸ *Statistical Year Book, 2011*, *supra* note 3, at T2.

⁵⁹ *Id.* at X1.

⁶⁰ *Id.* at X. In cases where any relief was sought (71,924 proceedings), the percentage rate of appeals is 15.3%. *Id.*

⁶¹ *Id.* at T2.

⁶² *OPAT DATA*, *supra* note 43.

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

⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷

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,⁶⁸ from organizations of various types,⁶⁹ scholars,⁷⁰ advocates,⁷¹ U.S. courts of

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).

⁶⁵ 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).

⁶⁶ *Id.*

⁶⁷ *OPAT DATA*, *supra* note 43.

⁶⁸ *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.

⁶⁹ *E.g.*, *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 31, 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,⁷² immigration judges,⁷³ BIA members,⁷⁴ the DOJ,⁷⁵ and the Government Accountability Office.⁷⁶ (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.

⁷⁰ See Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635 (2010); Wheeler, *supra* note 5; 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).

⁷¹ E.g., Noel Brennan, *A View From the Immigration Bench*, 78 FORDHAM L. REV. 623 (2009), (describing the reports of the Katzmman Study Group to promote adequate representation for those in removal proceedings in the New York City area).

⁷² 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.

⁷³ Slavin & Marks, *supra* note 15; Brennan, *supra* note 71; 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).

⁷⁴ 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).

⁷⁵ 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 78 and note 79.

⁷⁶ 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>.

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.⁷⁷

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.⁷⁸ In June 2009, EOIR announced that it had substantially completed implementation of the 22 measures⁷⁹ and claimed completion of other measures in subsequent press releases.⁸⁰ 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.”⁸¹ 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.

⁷⁷ 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 76; RAMJI-NOGALES ET AL, *supra* note 70; 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/>.

⁷⁸ Executive Office of Immigration Review, *Caseload Performance Reporting Needs Improvement*, *supra* note 76.

⁷⁹ 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>.

⁸⁰ 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>.

⁸¹ *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 31, at 2-16.

1. Workload

In 2011, the immigration courts received 430,574 total “matters,” up by nine percent from 2010. They completed 394,307 matters, up by 11 percent from 2010. Per judge, they completed 1,488 matters on average, up from up from 1,338 matters on average in 2010. The per judge figure is a rough one, calculated principally for comparative purposes, because we used the 265 judges on board in early 2012 as the base number.⁸²

a. Completed Matters

Completed matters in 2011 included:

- 75,258 bond redetermination matters (roughly 283 on average for each of the 265 judges reported in office in early 2012),
- 15,762 motions to reopen or reconsider (roughly 60 per judge, on average); and
- 303,287 completed proceedings (roughly 1,144 per judge, on average).⁸³

b. Hearings

For 2010’s 287,207 completed proceedings, judges held 852,230 hearings⁸⁴ (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.⁸⁵ 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.)⁸⁶

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.⁸⁷

There is no separate code in the OPAT data system for pre-hearing or similar conferences.⁸⁸ Judges and court administrators typically code such conferences as master

⁸² *Id.*, at B-4.

⁸³ *Statistical Year Book, 2011, supra* note 3.

⁸⁴ *OPAT DATA, supra* note 43.

⁸⁵ *Id.*

⁸⁶ 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 2.

⁸⁷ *OPAT DATA, supra* note 43.

⁸⁸ *OPAT DATA, supra* note 43.

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 2010, in ten courts (again, using the early 2012 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 early 2012. 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 early 2012 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 2011 only 24 percent of all proceedings involved applications for relief, down by one percent from 2010 and five percent from 2003.⁸⁹ 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,⁹⁰ and 819 decisions per year in 2010 on average for Veterans Law

⁸⁹ *Statistical Year Book, 2010*, *supra* note 3, at N1.

⁹⁰ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 31, at 2-37.

Judges.⁹¹ 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.⁹² 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.⁹³ 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 FY2010.⁹⁴ 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.

Several commentators recommended that we update our data to reflect the 2011 fiscal year data that was published in early February or to use external reporting sources such as the Syracuse University TRAC project. We have added some footnotes with more recent data but because our original numbers were generated by special reports generated by EOIR, we have not had sufficient time to confirm and update all the statistical information provided in this and other sections of the report. Still, Human Rights First notes that TRAC reported that the backlog of cases in “December 2010 was 267,752 and the average waiting time for a cases pending in the courts as of February 2011 was 467 days, a 2.6% increase from September 2010 and a 44% increase from FY 2008.”⁹⁵ And they note that TRAC reported wait time increased to 507 days from 489 at the end of September 2011.

The mismatch of workload to judges means that judges must often defer some cases they are scheduled to hear. 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

⁹¹ Briefing material from BVA officials (August 9, 2011) at 16 (on file with authors).

⁹² 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.

⁹³ *Statistical Year Book, 2010*, *supra* note 3, at Y1.

⁹⁴ 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/>.

⁹⁵ Comments of Human Rights First at page 5

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 issuing reasoned opinions in contested cases that explain the judge’s decision to the parties and appellate bodies to continuing education (formal and otherwise). 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.⁹⁶ As of mid-2009, according to TRAC, immigration judges on average had 72 minutes to deal with each matter received, down from 102 minutes in 1999.⁹⁷ 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.⁹⁸

3. Prospects for the Future

EOIR may be looking, not at additional appropriations, but rather at flat line or 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.”⁹⁹ When we began our study, in April 2011, the EOIR website showed 270 immigration judges; as of early 2012, it showed 265. (A decline in the number of judges is not unheard of: the number dropped from 218 in 2003 to 205 in 2007.)¹⁰⁰ 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

⁹⁶ Lustig et al., *supra* note 73.

⁹⁷ 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>.

⁹⁸ See discussion, *infra* at V.c.1.b.[2] text accompanying note 189.

⁹⁹ *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>.

¹⁰⁰ 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>.

law clerks, or one for every 3.7 judges.¹⁰¹ As of May 2011, that number had increased to 86,¹⁰² lowering the ration to 3.1.

The spending cuts that will likely preclude additional EOIR resources may also preclude more DHS apprehension resources. Regardless, the growth in DHS's controversial "Secure Communities" program may produce more NTAs. 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 2013.¹⁰³

EOIR officials 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 removal¹⁰⁴ 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. Oddly, 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 report 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.

¹⁰¹ *ABA Comm'n on Immigr. Rept., 2010, supra* note 31, at 2-17.

¹⁰² *Supra* note 94, at 3-4.

¹⁰³ *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/# (last visited Dec. 31, 2011).

¹⁰⁴ *See* INA § 240A(a) and 240A(b) (2010); 8 U.S.C. § 1229b(A)(a) and § 1229b(b) (2006).

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,¹⁰⁵ and, in some cases, have been effective in other high-volume courts; and
- expand its efforts to enhance the availability of quality representation to respondents as a means of easing the burden on the system caused by non-citizens' trying to negotiate on their own a complex adjudication process that few of them understand.

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

V. ANALYSIS AND SUGGESTIONS FOR CHANGE

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. 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 the complete responses to both questions.

¹⁰⁵ 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].

Most reports about immigration adjudication recommend outright increase in resources—especially more judges—as well as changes that hinge on additional resources. 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,¹⁰⁶ 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.”¹⁰⁷ If implemented without additional judges or reduced caseloads most of these changes would probably lengthen completion times. More 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 suggestions 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.¹⁰⁸)

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.

¹⁰⁶ *ABA Comm’n on Immigr. Rept., 2010, supra* note 31, at 2-2, 2-3, 3-2 (summarizing the recommendations).

¹⁰⁷ *Id.* at 2-38–2-42.

¹⁰⁸ 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

Some commentators on our earlier drafts doubted that temporary judge--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, during which time they would receive both their annuity and a salary.¹⁰⁹ 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 to serve as temporary law clerks and might be better suited for those positions than as trial judges. 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 who conduct 11 to 15, or had more demanding caseloads.

¹⁰⁹ *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).

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.¹¹⁰ The federal judiciary has assigned weights to district court cases since 1946 and publishes each court’s annual weighted filings.¹¹¹ The objective is 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).¹¹² 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 24 percent of 2011’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.

One response to our earlier draft was to the effect that EOIR’s need for more judges is apparent without weighted caseload measures. That is true but weighted caseloads serve a purpose in addition to documenting the need for additional judges, namely facilitating 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

¹¹⁰ 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, *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>.

¹¹¹ Administrative Office of the U.S. Courts, *2010 Federal Court Management Statistics* at vii-viii and *passim* (2010)

¹¹² *Supra* note 18, at 83, 167.

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.

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. Determining case weights takes judge time—especially diary studies—but they reap benefits.

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).

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,¹¹³ and the NAIJ, in 2011 Senate Judiciary Committee testimony,¹¹⁴ 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)¹¹⁵.

¹¹³ *See also* ABA Comm’n on Immigr. Rept., 2010, *supra* note 31, at 308.

¹¹⁴ *Supra* note 109.

¹¹⁵ *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](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf) (describing various approaches to case weighting); *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2008) (statement of William O. Jenkins, Director of Homeland Security and Justice) *available at* www.gao.gov/assets/130/120386.pdf (critiquing the Lombard & Krafska 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

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, but that EOIR did not have funds at present to undertake the effort.

b. Documenting NTA Origination

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.¹¹⁶

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 suggestion, 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.

B. Reduce the Demand for EOIR Services

We propose two basic ways to reduce the demand for EOIR services, thus permitting judges, BIA 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.

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 31, at 308.

¹¹⁶ See *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 31, at 1-10-1-25.

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 strip 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.¹¹⁷ 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 threats.¹¹⁸ 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 issued new guidance on placing individuals in removal proceedings. USCIS 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.¹¹⁹

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.¹²⁰ It issued further instructions and initiated case-

¹¹⁷ 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 119.

¹¹⁸ Morton *supra* note 117.

¹¹⁹ 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\(Aproved%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Aproved%20as%20final%2011-7-11).pdf).

¹²⁰ See Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE (Aug. 18, 2011, 2:00PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>; Letter from Janet Napolitano, Secretary of

by-case reviews of pending cases in November¹²¹ and March.¹²² EOIR has suspected immigration court dockets in six cities while DHS officials review case files to determine whether to defer prosecution of some detained respondents.

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 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.

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.

¹²¹ 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>.

122 DHS expanding deportation case reviews to 4 more cities, will temporarily suspend court docket (Associated Press), Washington Post, March 29, 2012, *available at* http://www.washingtonpost.com/politics/dhs-expanding-deportation-case-reviews-to-4-more-cities-will-temporarily-suspend-court-docket/2012/03/29/gIQArp5YjS_story.html.

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.¹²³ 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 ABA 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 background 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 Immigration Litigation lawyers, who represent the government at the final stage of the process, federal court review of 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.

The ABA Commission on Immigration and others have recommended greater participation by the USCIS Refugee, Asylum, and International Operations Directorate (Asylum Office) in adjudicating asylum applications.¹²⁴

¹²³ *ABA Comm'n on Immigr. Rept., 2010, supra* note 31, at 1-61.

¹²⁴ *Id.* at 1-61-1-64.

[1] Expedited Removal

This subsection concerns people seeking asylum within the expedited removal process.

Congress created the expedited removal system to allow the government to remove, immediately and without court involvement, people apprehended at the border who lack documents or used fraud to seek entry.¹²⁵ 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 conduct a credible fear interview, DHS usually 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 on account of one of five protected grounds: political opinion, religion, nationality, race or membership in a particular social group.) An asylum officer who concludes that the individual has met the credible fear standard prepares an NTA, thus starting removal proceedings so that a 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 asylum claim 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 credible fear determination only to the authority to grant asylum, thus possibly keeping the case out of the immigration courts. According to data reported by the ABA Commission, in the 2000-2004 period, asylum officers made positive credible fear determinations in 5,000 cases, and immigration courts granted relief (mainly asylum but also withholding or deferral of removal) in 28 percent of them. If asylum officers had had authority to grant asylum where the applicant met the statutory standard of well-founded fear, and if they had granted asylum at rates identical to those of the immigration courts, the courts would have seen 1,400 fewer receipts and DHS 1,400 fewer cases to litigate. According to the ABA Commission, the change proposed regarding expedited removal asylum claims would require regulatory but not statutory change.¹²⁶

DHS in 2008 recommended against implementation of a similar recommendation,¹²⁷ Pointing to the “accelerated timeframe and nature of the credible fear process,” DHS said that having asylum officers conduct a credible fear review and the more demanding review of an asylum claim could deprive applicants of the time and resources to develop

¹²⁵ As previously discussed there are other situations. *Supra* at III.C. 1. Forms of Removal.

¹²⁶ *ABA Comm’n on Immigr. Rept., 2010, supra* note 31; INA § 235(b)(1)(A)(ii)(2010); regulations implementing the review are found at 8 C.F.R. § 1235.6 (2009).

¹²⁷ 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).

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 asylum officers were not confident that the in-depth interview could be conducted using only video.¹²⁸

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.”¹²⁹ We agree for three reasons. First, the Asylum Office is qualified to make these assessments in the affirmative filing context. Second, the adjudication by the Asylum Office reduces immigration court workload. Third, this additional authority provides an expedited process for at least some subset of those individual who arrive at the border sufficiently prepared to establish eligibility for asylum; aiding this vulnerable population is humane and appropriate.

Human Rights First (HRF), a national non-profit organization that is very experienced in assisting asylum applicants, commented on our draft report that the credible fear interviews are often conducted under very challenging circumstances...” with communication significantly impeded by high levels of background noise in the detention centers . . . , poor sound quality on the telephones made available to the Asylum Office to call contract interpreters, and, in many cases, poor quality interpretation.” HHIF did not oppose this proposal, but said that because some applicants would need more time to prepare and develop their application for protection, once an individual has met the credible fear standard, the application process should move to the usual “affirmative” asylum interview process. That should be possible if DHS releases individuals from detention once the Asylum Officer determines the individual has met the credible fear standard.

Authorizing the Asylum Office to grant asylum may avoid delays in asylum grants caused by immigration court backlogs. By statute, if an asylum seeker does not file an application within one year of entry, the application can be time barred. A 2010 HRF study¹³⁰ and an independent report by several scholars¹³¹ said that immigration courts rejected a growing number of applications due to the time bars. The scholars report that in 2010, 53,400 people (in expedited removal and otherwise) were subject to the time bars and that if the adjudication could have been heard first before the asylum office, more than 15,000 applicants and their derivative family members could have completed their cases within the deadline and without need for immigration court review. We also

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Human Rights First, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency,” available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

¹³¹ Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, “Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum,” *William and Mary L. Rev.* (Dec. 2010), available at <http://wmlawreview.org/files/Schrag.pdf>.

heard some anecdotal reports that in Texas and several other courts, individuals who are subject to expedited removal seek protection at the border, are paroled (released from detention) into the U.S. and have passed a credible fear interview yet missed the one year filing deadline because the busy immigration courts could not hear their cases within the time deadline and these *pro se* applicants did not know they needed to press the court for an earlier hearing date due to the court's rule requiring both a hearing to allow the in-person filing of an application for asylum. This procedure is also one we recommend changing to allow more flexibility.

Some commentators on our draft report questioned the adequacy of Asylum Office resources and whether our proposal if implemented might extend detention for some individuals. While the DHS might choose to implement this concept by paroling all individuals who meet the credible fear standard, if they do not, our proposal to allow a grant of asylum may not fit those situations where the Asylum Officer has insufficient information and knows that to determine eligibility, the applicant will need more time and process to complete the application. This proposal would only authorize the Asylum Office to grant cases if the application begins in the expedited removal context. Further, we assume that in this subset of cases, the individual applicant would also be eligible for parole and the asylum application process could be completed in the manner used in affirmative applications as we recommend for all asylum adjudications within the immigration courts.

DHS commentators informally questioned whether this procedure would duplicate resources and whether it would decrease efficiency. In cases where the DHS determined that detention was warranted, the recommendation might expand the length of detention. They noted that it is not clear what would happen if the parole applicant does not appear at the Asylum Office or fails to complete the asylum application. Under the expedited removal statutes and regulations the individual is usually detained but if granted parole and fails to successfully complete the asylum process, the DHS would have the ability to revoke the parole and to resume the expedited removal process. The burden would fall to the applicant to seek review of a denied asylum application before the immigration court – this is similar to existing procedure where the immigration court may, upon the individual's request, review the finding of an asylum officer that the person lacks credible fear. This happens in a very small number of cases. It is possible this review would increase under the new procedure but that would be similar to the right to *de novo* review of the asylum adjudication before the immigration court if an affirmative application for asylum is not granted by the Asylum Office. These informal DHS comments are correct that using this procedure in all cases would create an additional layer of adjudication to the asylum applicant at the border (once before the asylum office and review before the IJ) but these cases would still be barred from further BIA review by statute. Our recommendation is to provide the Asylum Office with flexibility to adjudicate cases in the first instance but does not mandate that every case that passes the "credible fear" standard be diverted to the Asylum Office for full adjudication.

These DHS commentators also suggested that several regulations would have to be amended to expand the Asylum Office adjudication in this context and we have noted that in our revised recommendation.

(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 that non-citizens who are not in removal proceedings file with the Asylum Office. 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, if ICE establishes that a person who is already in removal proceedings 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.¹³² The ABA Commission recommended that Congress authorize judges to divert defensive applications to the Asylum Office for adjudication. If the Asylum Office did not grant asylum, it would refer the case back to the immigration court to consider the claim. We agree. (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 2006 to 32,961 in 2010.¹³³ 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 Merits¹³⁴

FY	All	Asylum Applications Completions on the Merits					
		Affirmative			Defensive		
		Total	Denial	Grants	Total	Denials	Grants
06	29,751	18,550	9,020	9,530 51%	11,201	7,457	3,744 33%
07	27,727	16,380	7,953	8,427 51%	11,347	6,921	4,426 39%

¹³² See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. N.110-457 (2008).

¹³³ *Statistical Year Book, 2010*, supra note 3, at I1.

¹³⁴ *Id.* at K.

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%
11	22,075	12,333	4,155	8,178 66%	9,742	6,416	3,326 34%

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. One commentator on our earlier draft said it is not clear that the same asylum office would conduct the credible fear interview and continue with the full asylum interview. HRF noted that non-adversarial interviews are the model used to evaluate asylum claims in most of the countries of the world.

Overall, as Table B shows, the total number of immigration court asylum grants to defensive seekers is not great—2,771 in 2010. (They rose to 3,326 in 2011.¹³⁵) 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.¹³⁶ The 2011 figures were, for those same courts, 58 percent of the asylum receipts, where asylum claims were on average 26 percent of all proceedings received. The Congressional Research Service reported similar data on asylum and withholding of removal applications.¹³⁷

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,¹³⁸ but as seen in Table B immigration courts completed only 19,413 claims on the merits, a significant difference

¹³⁵ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FY 2011 STATISTICAL YEAR BOOK, K2 (2012) available at www.justice.gov/eoir/statpub/fy11syb.pdf. [Hereinafter *Statistical Year Book, 2011*].

¹³⁶ *Id.* at I3, B4. FY 2011 STATISTICAL YEAR BOOK, at I2, B3.

¹³⁷ 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/homesecc/R41753.pdf>.

¹³⁸ *Statistical Year Book, 2010*, *supra* note 3, at I1-3.

even recognizing that receipts in one year are not all disposed of in the same year.¹³⁹ 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.¹⁴⁰

In our interviews, some judges recognized the workload relief the proposal might provide and others said that asylum cases offer an interesting respite from the daily grind of removal cases. We asked in our survey about the judges' agreement with this statement: "Judges should have the authority to allow the asylum office to adjudicate all defensive asylum claims, reserving for unsuccessful applicants the right to seek the judge's de novo consideration of the application." Of the 157 judges who responded, 93 (59.2 percent) agreed (37.5 percent strongly). It does not appear, moreover, that agreement was motivated much by a desire to reduce workload, although not knowing the courts of the judges in the survey makes definitive statements risky (and, to be sure, some judges commented, for example, "[t]his could alleviate the court of some of its burden due to an ever-increasing case load.") Nevertheless, agreement with the statement was strongest (72.7 percent) among judges who said they average one to five merits hearings per week; of those who said they averaged 16 or more such hearings a week, 52.9 percent agreed with the asylum statement. Cross tabulations with other responses similarly did not suggest that judges who are most concerned about too many cases were more inclined than others to favor shifting the defensive asylum claims initially to the Asylum Office.

In our interviews, judges noted that referral of defensive asylum claims is currently used in the case with juveniles and 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, these judges were not confident that the Asylum Office notified the court when an asylum application was approved. The 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. Furthermore, requiring children and/or their guardians to return to the immigration court

¹³⁹ In 2011 there were 41,000 asylum receipts; immigration courts completed only 22,075 claims on the merits. *Statistical Yearbook, 2011* at I2.

¹⁴⁰ One commentator suggested that the high rate of abandonment of asylum claims may be due to an increasing phenomenon where people file a claim for asylum affirmatively knowing it is likely to be referred to the immigration court because the Asylum Office cannot grant the case. Once within the immigration court the individual abandons the asylum application and seeks relief known as cancellation of removal – a special limited form of relief for people who have lived at least ten years within the U.S., have good moral character, and whose removal would result in exceptional and extremely unusual hardship to a U.S. Citizen or LPR spouse, parent, or child. See INA § 240A(b); 8 U.S.C. § 1229b(b). There is no affirmative process of seeing cancellation benefits without being in removal proceedings. Many people exploring reforms would like to suggest such an opportunity. We did not propose that change in this report because we thought it would require statutory change and the current benefit within the courts is capped at 4,000 grants per year.

to check on the status of an adjudication before the Asylum Office is burdensome and a drain on the resources of the court as well as the many pro bono and non-profit organizations that represent these children. We are recommending administrative closure for all cases referred to the Asylum Office, not just juvenile cases, as the more efficient method.

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.)¹⁴¹ 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.)¹⁴² 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.

All commentators on our earlier draft who referenced fees for asylum applications opposed the idea, saying it was wrong to charge for adjudicating an international obligation and noting that many asylum seekers have fled their home countries with few if any resources. We agree that fees are difficult for many people, and even if a fee waiver is available, the adjudication of that waiver requires time and resources. However, we only suggest exploring the possibility. Most immigration petitions for status, including some that offer protection to victims of crime or to unaccompanied juveniles, do have a fee for adjudication and for those who cannot afford the fee; the agency adjudicates a needs based waiver.

[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, asylum officers interview them about whether they meet the statutory criteria of a well-founded fear of persecution on account of membership in a protected group. Some are statutorily ineligible for asylum but qualify for a more limited type of protection known as withholding of removal.¹⁴³ There are basically two ways to qualify for withholding of removal. One is to establish that if returned to the country of origin the individual will more likely than not be subjected to

¹⁴¹ 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 144.

¹⁴² 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.

¹⁴³ INA § 241(b)(3) (2010); 8 U.S.C. §§ 1231(b)(3) (2006).

persecution and harm. The second is to establish eligibility for protection under the U.N. Convention Against Torture by establishing a likelihood of torture if returned. This second form of withholding is also called “restriction on removal.” Withholding prohibits the government from removing the individual to a specific country. People who are granted withholding may not sponsor relatives or travel internationally, but are eligible for work authorization.

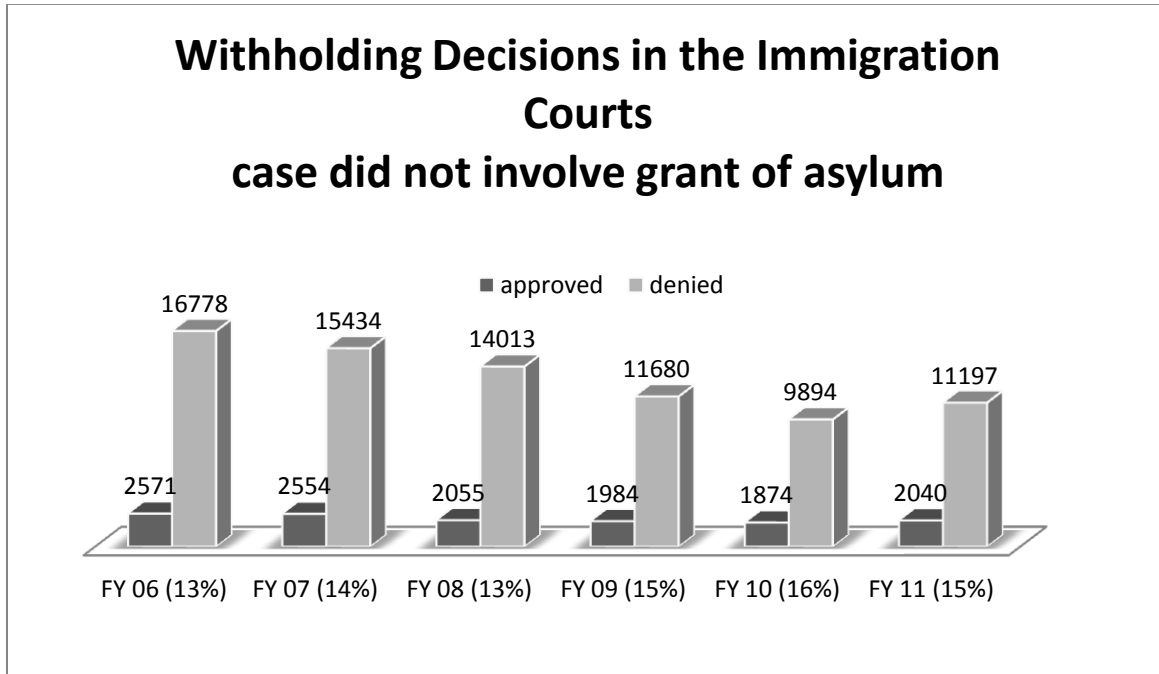
Just as we recommend that the Asylum Office be the first entity to adjudicate asylum claims, we recommend a change to prevent the piecemeal adjudication of some cases where the individual has established a likelihood of persecution or torture but is ineligible for asylum due to a statutory bar. These individuals may be eligible for withholding and their adjudication should also begin with the Asylum Office.

Specifically, we propose that the Asylum Office make the necessary factual and legal findings to determine eligibility for withholding or restriction on removal at this stage. 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. Several commentators said the opposite impact would occur, that individuals granted withholding protection would never pursue the more expansive relief of asylum because they would not fully understand the limited protection offered in withholding and the inability of the individual to secure permanent resident status or to sponsor immediate family for reunification –rights that do exist if the individual is granted asylum.

We make this recommendation to create a unified adjudication of eligibility for asylum and the related humanitarian protections. It may reduce the number of cases in the courts because in 2010, the courts approved withholding in 1,874 (16 percent) of the cases where asylum was not granted (or may not have been sought). An important distinction between asylum and withholding is that asylum relief includes a path to permanent residence and derivative benefits for immediate family.¹⁴⁴ An individual granted withholding of removal cannot travel internationally because a person who departs voluntarily has no right to return to the U.S. (withholding alone confers no formal status to the individual.)

Chart 5: Withholding Decisions in the Immigration Courts

¹⁴⁴ 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).



Source: Year Book 2010 K-4, Year Book 2011 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 or grant restriction on removal under CAT. This was not always the case. The authority of the Asylum Office to adjudicate withholding in most cases was eliminated in 1995.¹⁴⁵ Congress has delegated the authority to formally withhold removal to the Attorney General and therefore the immigration courts. However, it might be possible for this authority to be delegated by regulation to the Asylum Office. Alternatively, DHS currently has the authority to place individuals under supervised release and to grant work authorization and identity documents. Regulations could make clear that 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.

Several commentators pointed out that a grant of withholding is made after the judge has found that the individual is removable. The BIA explains the significance in *Matter of I-S- & C-S-*: “Although entering an order of removal prior to granting withholding may appear to be a technicality, it is not an insignificant one. It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld. Indeed, the statute providing for withholding of removal is entitled ‘Detention and Removal of Aliens Ordered Removed.’ Section 241 of the Act. This title clearly suggests that a removal order must precede any grant of withholding of removal.”¹⁴⁶ A grant of withholding of removal relates only to a specific country (i.e. withholding of removal to

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

¹⁴⁶ 24 I&N Dec. 432, 433 (BIA 2008) (emphasis in original)

Nigeria). DHS is not precluded from removing an alien granted withholding of removal to a third country.

There is little evidence, however, of DHS's affirmatively seeking to remove individuals after a grant of withholding based on changed country conditions or of seeing third countries. If DHS believes that the issuance of the order removal must, in all cases, precede the grant of protection equivalent to the withholding of removal, then this proposal is unlikely to move forward. However, DHS may have the flexibility to create categories of supervisory release and to exercise its prosecutorial discretion in these cases where the applicant demonstrates significant threats of harm or torture. The goal is to offer protection to those who establish eligibility as quickly as possible and to minimize the use of the resources of the immigration court to readjudicate issues that have been or could be developed in the Asylum Office.

Under current procedure, if the asylum officer finds the individual is subject to one of the bars to asylum eligibility,¹⁴⁷ e.g., applied later than one year without a qualifying justifying exception¹⁴⁸ or has a conviction for a particularly serious crime, or one of the other statutory bars, the asylum officer tells the applicant that the USCIS cannot grant the relief sought and files an NTA. This is not called a denial of asylum but a "referral" to the immigration court.

If the Asylum Office could grant withholding of removal or the equivalent protection of supervisory release and work authorization, 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 protections 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.

Commentators on our earlier draft said the asylum office might be inclined to offer applicants withholding in lieu of full asylum even in cases where there was no statutory bar to asylum eligibility and that many pro se applicants would not realize what they would give up if they did not seek asylum before the immigration court. Some proposed hybrid approaches that would allow the applicant to accept a grant of withholding protection but then the Asylum Officer findings that the individual met the higher qualifications of a more likely than not persecution would be binding upon DHS if the applicant pursued a *de novo* review of asylum eligibility (a lesser standard of fear of persecution) within the immigration courts. Under current procedure, no finding of the

¹⁴⁷ INA § 208(b)(2) (2010); 8 U.S.C. § 1158(b)(2) (2006).

¹⁴⁸ See INA § 208(a)(2) (2010); 8 U.S.C. § 1158(a)(2) (2006).

Asylum Officer in cases referred to the Immigration Court is binding on DHS and the entire case is subject to *de novo* review.

We propose only that USCIS and DHS consider a reform of the adjudication process to allow preservation of the positive findings of “well-founded fear of persecution” or “probable persecution” and thus narrow the open issues such as statutory bars for immigration court review. While it is one-side, we are uncomfortable recommending that if the findings of the Asylum Officer are binding on DHS they should also be binding on the applicant because so many people are self-represented in the asylum office and many of the traditional hall marks of due process protections in administrative proceedings are not available in the informal asylum interview process. Some examples of differences in the informal process as opposed to the process before the immigration court are a lack of a record, lack of formal translation, limited role of advocates, limited ability of witnesses to testify in support, etc.

Based on comments received from judges and others we have rescinded parts of our earlier recommendation that would have created temporary immigration judges out of a cadre of senior asylum adjudicators.

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 DHS¹⁴⁹

	2007	2008	2009	2010	
TOTAL APPEALS	36,633	33,513	32,952	35,833	35,962
Appeals from IJ decisions	32,324 88%	30,492 91%	28,638 87%	27,277 76%	27,237 76%
Appeals from DHS Decisions					
Visa Petitions Decisions	3,980 11%	2,851 8%	3,986 12%	8,606 24%	8,705 24%
212 Waiver Decisions	139 <1%	117 <1%	27 <1%	21 <1%	19 <1%
Airline Fines and Penalties*	190 <1%	53 <1%	301 <1%	1 <1%	1 <1%

¹⁴⁹ Adapted from Table 16, *Statistical Year Book, 2010*, *supra* note 3, at T2.

*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 2009.¹⁵⁰

We suggest that appeals from DHS agency decisions that now go to the BIA remain in DHS.

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.¹⁵¹ From 2006 to 2010, immigration court appeals produced from 87.0 percent to 92.3 percent single member decisions, but 99 percent or more DHS appeals got single member decisions.

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

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

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.¹⁵²

Because the AAO is a fee-supported rather than appropriations-supported operation, the cost to citizens and non-citizens for filing visa petition appeals for family members would rise from the current \$110¹⁵³ 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

¹⁵⁰ United Airlines, Inc. v. Brien, 588 F.3d 158 (2d Cir. 2009).

¹⁵¹ Table 17, *Statistical Year Book, 2010*, supra note 3, at T2; *OPAT DATA*, supra note 43.

¹⁵² 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.

¹⁵³ BOARD OF IMMIGRATION APPEALS, PRACTICE MANUAL (2007) at 118, available at www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf [Hereinafter BIA PRACTICE MANUAL].

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."¹⁵⁴

In commenting on this suggestion in an earlier 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.¹⁵⁵ 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 matter.¹⁵⁶ In October, 2010, USCIS issued a press release heralding the issuance of two AAO precedent decisions – the first in over twelve years.¹⁵⁷

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.¹⁵⁸ 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.

¹⁵⁴ 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.

¹⁵⁵ Processing times are listed by visa petition category. *See* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8ff31eeaf28e6210VgnVCM100000082ca60aRCRD&vgnnextchannel=df316685e1e6210VgnVCM100000082ca60aRCRD>.

¹⁵⁶ *See* <http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/?vgnextoid=0609b8a04e812210VgnVCM1000006539190aRCRD&vgnnextchannel=0609b8a04e812210VgnVCM1000006539190aRCRD>.

¹⁵⁷ *See* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f8925403f0bcb210VgnVCM100000082ca60aRCRD&vgnnextchannel=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.

¹⁵⁸ *See* <http://www.uscis.gov/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf>.

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 than for respondents and thus impairs the appearance of neutrality and independence. (In some courts, the administrators have developed an electronic “workaround” where the court can build a bridge between the EOIR database and the ICE trial attorney case management system. The electronic access is limited and does not provide access to the full EOIR case management system, but does allow the ICE Attorney to see all cases docketed and some case status information.)

The lack of electronic access creates another problem in situations where the NTA filings have to be 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.

The electronic docket and filing system that EOIR is developing 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 surmised that the system might take ten more years before it could be fully integrated.

To reduce EOIR’s administrative burdens and possible perceptions of lack of neutrality, we suggest that EOIR explore interim steps to provide limited electronic access to registered private attorneys, accredited representatives, and ICE trial attorneys.

Several DHS officials, commenting on one of our earlier drafts, said that providing greater public access to the dockets might raise privacy concerns, a legitimate point *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 publicly 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.

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.¹⁵⁹ 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.)¹⁶⁰

The current regulations, however, stop the clock that counts days toward work authorization eligibility where judges attribute the adjudication delay to the respondent. While the grant of work authorization is solely within DHS's authority, 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,¹⁶¹ 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.¹⁶²

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 important in deterring frivolous asylum claims, but the lengthy delays in many of the immigration courts have extended the adjudication process

¹⁵⁹ See 8 C.F.R. § 1274a.12(c)(10) (2010).

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

¹⁶¹ 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>.

¹⁶² A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (D. Wash. filed Dec. 15, 2011).

far beyond 180 days. In short, diligent asylum applicants can face long delays to obtain work authorization eligibility simply because the court cannot docket another proceeding in the interim. Further, total applications for asylum have fallen, as shown in Table B above,¹⁶³ and largely stayed well below the high rates in the mid and late 1980s.

We propose that EOIR stop using adjournment codes to track the delays in asylum adjudication and tell 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. 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.

Furthermore, we suggest that DHS revise its regulations and procedures to allow asylum and withholding applicants to apply for work authorization provided that at least 150 days have passed since the filing of an asylum application. The DHS would have 30 additional days to consider the application for work authorization. ICE counsel who believe the applicant unreasonably delayed the filing of the application would make a formal written motion to the judge and serve it on the respondent or respondent's counsel articulating the factual and legal basis for the objection to the issuance of work authorization. The respondent would have 15 days to respond to the motion. The judge could then rule on whether the ICE motion should be granted.

The vast majority of comments we received on the proposal that EOIR stop using adjournment codes as a basis to stop or start the work authorization clock were supportive. Many advocates believe that the bars to work authorization are frequently the result of crowded immigration dockets and the complexity of completing an asylum application and all the accompanying biometric and security data. There was also a concern about the inability to secure work authorization pending an appeal to the BIA of an immigration judge's denial of asylum, an appeal that can require many months or even years to complete. Work authorization by itself is an important issue for the applicants but the work authorization card is also a form of government-issued identification that can be very important to people who are without documentation or fleeing a country of persecution where they are unable or unwilling to seek passports or other forms of identification.

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:

¹⁶³ See Table B: Immigration Court Asylum Cases Decided On The Merits, *supra* at 2.

- 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 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., due to 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. They 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—by lawyers or nonlawyers—be “at no cost to the government.”¹⁶⁴ 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 comments on an earlier draft 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 agree, but, for this 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.

Our survey asked judges about 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.”

¹⁶⁴ 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.¹⁶⁵ EOIR officials told us that a proceeding is coded as “represented” if the respondent is represented at the time the case is completed. 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
FY07	48%	75%
FY08	45%	78%
FY09	45%	78%
FY10	49%	79%
FY11	51%	80%

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.¹⁶⁶ 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.)¹⁶⁷

Having a lawyer does not ensure “adequate representation.” Studies have documented levels of inadequate representation. In 2010-2011, according to research by the Vera Institute of Justice undertaken for and with the Katzmann Study Group (described later in this section) with New York immigration judges said respondents received “inadequate”

¹⁶⁵ *Statistical Year Book, 2011*, *supra* note 3, at G, V.

¹⁶⁶ *Statistical Year Book, 2010*, *supra* note 3, at O3 (identifying court proceedings with detained respondents); *OPAT DATA*, *supra* note 39 (identifying the number of represented respondents).

¹⁶⁷ *OPAT DATA*, *supra* note 43.

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.¹⁶⁸

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

We encourage EOIR to continue to tell Congress that funding representation for respondents, especially detainees, will work efficiencies and cost savings both for EOIR and DHS. We articulate the types of savings below and discussed some of the published data.¹⁶⁹

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 representation. Almost 14 percent of continuances granted in 2010 were, according to judges’ assigned adjournment codes, to allow the respondent to try to find representation;¹⁷⁰
- 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. Several DHS officials who commented informally on an earlier draft said we provided “no empirical data to support this conclusion.” They

¹⁶⁸ 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, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, (2011) available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf and in Steering Committee of the New York Immigrant Representation Study Project, *Accessing Justice* . . . 33 Card. L. Rev. 357, 364, 388-94 (2011).

¹⁶⁹ 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.

¹⁷⁰ See Table I, *infra*. at 2.

were, however, commenting on an earlier draft, prepared before we had our survey results, including 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).;

- 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."¹⁷¹ EOIR administers some programs through contracts with the Vera Institute of Justice, which in turn arranges for presentations by local groups. 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.¹⁷² We endorse that recommendation.

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.

Value of Know-Your-Rights programs The Vera Institute 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

¹⁷¹ 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>.

¹⁷² 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.¹⁷³ 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 near 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.

(In suggesting increased support for LOP programs, we note the point pressed on us by several advocacy groups and members of the bar, that LOP programs, while clearly valuable, are not an adequate substitute for individual representation by competent lawyers.)

Timing of the presentations Timing 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 the presentation provided 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.

¹⁷³ NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, VERA INSTITUTE OF JUSTICE, LEGAL ORIENTATION PROGRAM, EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II (2008), available at http://www.vera.org/download?file=1778/LOP%2Bevaluation_updated%2B5-20-08.pdf.

LOP provider access to electronic dockets 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, citing Attorney General Holder’s decision¹⁷⁴ directing EOIR to initiate rulemaking to evaluate the current framework for adjudicating claims of ineffective

¹⁷⁴ See *Matter of Compean*, 25 I.& N. Dec. 1 (AG 2009)

assistance of counsel and determining modifications that could be proposed for public consideration.¹⁷⁵ We have urged the EOIR to conduct further evaluation.

[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 provide such representation. Some other examples (which we present for illustration albeit at the risk of slighting others' contributions):

- 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.¹⁷⁶
- 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.¹⁷⁷
- 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.¹⁷⁸ 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." A NY State Bar Committee on Immigration goal is to increase representation for detained individuals throughout New York and developing KYR presentations.

¹⁷⁵ 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>.

¹⁷⁶ 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).

¹⁷⁷ 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).

¹⁷⁸ 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).

- 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.¹⁷⁹

The courts we visited that were not located within a detention facility all had pro bono rooms for private consultations outside of the main public lobby. They 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 members, moderators, presenters, or other capacities. 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 the topic and the presenter. The attorneys who could benefit the most from CLE are those that are least likely to attend."

¹⁷⁹ 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.

We made several suggestions encouraging the expansion of CLE materials, the development of a national curriculum and most importantly, the ability of judges to require CLE attendance and completion as part of a remedial sanction.

[2] Technology to Enhance Consultation and Representation

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

[a] Audio or video links for consultation

As explained more fully below, video conferencing equipment is available in all but one very small immigration courts, and in many 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

Audio links are another way to facilitate consultation. DHS officials, in informal comments on an earlier draft of this report, said that current ICE detention standards “allow[] detainees to make direct or free calls to their legal representatives.” They added that “future, proposed detention standards will provide that full telephone access shall be granted in order for a detainee to contact legal representatives to obtain legal representation, when subject to expedited removal, and to legal service providers or organizations listed on the ICE free legal service provider list.”

Providing even this simple technology in some detention centers, however, faces considerable hurdles. 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.¹⁸⁰ Yet, some state and local jails are introducing video technology to allow family members to visit with incarcerated relatives. In New York, the State Bar is exploring 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 advisory 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.

¹⁸⁰ NAT’L IMMIGRATION JUST. CNTR., *supra* note 155.

Video technology can broaden access to legal orientation information, and ICE detention standards “encourage[] qualified individuals and organizations to submit electronically formatted presentations (i.e., videotape, DVD, etc.) on legal rights,” the content of which ICE must approve. They also direct facilities to “provide regularly scheduled and announced opportunities for detainees in the general population to view or listen to the electronic presentation(s).”¹⁸¹ Some of this information is available through prerecorded video with foreign language captioning. The technology to facilitate this is widely used on such websites as You Tube. To the degree the detained population has access to these recordings, subsequent 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. On April 19, 2012, the ABA Commission releasing the video.

Personnel at the Vera Institute, in commenting on an earlier draft, reported that LOP presentations are available as audio recordings on CD or MP3 for LOP participants in Arabic, Mandarin, Vietnamese, and French. She reported that, as part of a recent pilot effort, Vera is putting a small amount of LOP funds towards phone-based interpreter services, to help LOP providers work with non-English and non-Spanish speakers. 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 to the degree facilities limit visit to the libraries, these KYR videos should also be available in other areas of detained facilities.

Although the ICE standards speak in terms of prerecorded electronic presentations, it appears that some groups make KYR presentations by video. One judge, in supplementary comments on our survey, said 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 offered the KYR presentations and has made it much easier for the pro bono attorneys to volunteer to make these KYRs.”

Several non-profit commentators, while agreeing that video technology could help expand KYR and even limited representation in detention facilities, urged caution in relying solely on such technology, arguing “that in-person presentations and meetings are preferable to video, and that video should only be used if necessary.” A few commentators argued that KYR presentations through VTC are inappropriate for vulnerable populations such as juveniles or people with mental illness, victims of trafficking and some categories of asylum seekers because attorneys cannot build sufficient rapport and trust with the clients 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.

¹⁸¹ Standard 37, “Legal Rights Group Presentations,” section M (“Electronic Presentations”) *available at* <http://www.ice.gov/detention-standards/2008/>

[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.”¹⁸² 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.

Despite these downsides, we suggest that EOIR encourage a more flexible approach to limited appearances. Pro bono counsel and some judges to whom we spoke said that limited appearances within the representation-deprived removal adjudication system may be better than no representation, if the respondent understands the limits it entails. 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 stands for a different proposition than that limited appearances are disallowed.¹⁸³

[4] Pro Se Law Clerks

We also discussed in our interviews the concept of pro se law clerks and suggest that EOIR may wish to pilot test the concept in one or more large courts with sufficient personnel resources to assign a lawyer to the test.. 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:¹⁸⁴

- screen complaints, petitions, and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints, that have been

¹⁸² OCIJ PRACTICE MANUAL, *supra* note 105, at Ch. 2, § 2.3(d).

¹⁸³ 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.

¹⁸⁴ *Law Clerk Job Descriptions*, National Center for State Courts (May 26, 2010)

[http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks\(16\).htm](http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks(16).htm) (providing the job description, as prepared the U.S. District Court, District of Utah).

- 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.

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 released the “Immigration Court Practice Manual¹⁸⁵ as a response to one of the Attorney General’s 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.”¹⁸⁶ 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 CFR provisions that authorize steps that the Manual either authorizes or encourages.

We suggest that OCIJ consider producing a version of the manual for pro se respondents who are unlikely to be familiar with the manual’s United States legal terms and usage. A non-profit service provider might be willing to assist in developing such a pro se version.

¹⁸⁵ OCIJ PRACTICE MANUAL, *supra* note 105.

¹⁸⁶ *Id.* at 1.

Our interviews provided conflicting evidence of the 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 for demanding compliance when such compliance was inappropriate, or for using it insufficiently. Likewise, private lawyers and advocates for pro se respondents charged that some courts insist on "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 further 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. We suggest that OCIJ consider creating a central repository of such instructions that judges can consult and consider adapting and adopting to their needs.

[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.¹⁸⁷ 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."¹⁸⁸

We suggest that EOIR undertake a concerted effort to test the utility of such conferences—in various forms—as a means of saving aggregate time of judges and parties in litigation.

a. EOIR Goals and Policies

¹⁸⁷ *ABA Comm'n on Immigr. Rept., 2010, supra* note 31, at 2-41.

¹⁸⁸ APPLESEED, ASSEMBLY LINE JUSTICE, *supra* note 69, 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>.

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.¹⁸⁹

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.¹⁹⁰

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.”¹⁹¹ The Manual also encourages parties to file pre-hearing statements “even if not ordered to do so by the Immigration Judge.”¹⁹²

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.”¹⁹³ 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.¹⁹⁴

¹⁸⁹ 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).

¹⁹⁰ *Id.* at 279.

¹⁹¹ BIA PRACTICE MANUAL, *supra* note 153, at Ch. 4, §4.18.

¹⁹² *Id.* at Ch. 4, §4.19.

¹⁹³ *OPPM: Facilitating Pro Bono Legal Services*, *supra* note 9, at 4.

¹⁹⁴ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Session Agenda, provided by EOIR (on file with authors).

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]

Our survey 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	
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 to file FOIA requests to obtain the non-

classified/confidential documents within their official A File.¹⁹⁵ 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. (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.¹⁹⁶) The better practice would be for the DHS to disclose proactively unrestricted documents as part of the adjudication process.

[2. Status or prehearing conferences—extent of judicial involvement]

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.”¹⁹⁷ 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,		

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

¹⁹⁶ See *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). The court 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 court found that to force the respondent to rely solely on FOIA requests “would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it.” *Id.* See also Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 431, 539-542 (2011) (discussing among other constitutional concerns the *Dent* opinion and the need to increase access to government records under the 5th Amendment).

¹⁹⁷ 8 C.F.R. 1003.21(a)

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. Some of those 20 may not have checked both statements, 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 the "don't have time" 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. One of us visited the San Diego court, however, and 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,¹⁹⁸ we encountered few judges outside of San Diego who were familiar with it.

¹⁹⁸ See "Record of Master Calendar Form" in "Tools for the IJ" available at <http://www.justice.gov/eoir/vll/benchbook/index.html>.

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%
ATTORNEYS NOT PREPARED		
Respondent attorney not prepared	32	20%
DHS attorney not prepared	17	11%
Attorney (unspecified) not prepared	52	32%
MATERIAL MISSING, UNAVAILABLE		
Biometrics missing	58	36%
Forms/documents missing	50	31%
DHS file missing	22	14%
UNFORESEEN OR COMPLEX ISSUES		
Testimony issues	37	23%
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 appeared 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 to hold 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."

[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.¹⁹⁹ 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

¹⁹⁹ 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-Pedroza 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).

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.²⁰⁰ 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.²⁰¹ 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.²⁰² In late January 2012, the BIA issued a new precedent 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.²⁰³

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.²⁰⁴ 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

²⁰⁰ 8 C.F.R. § 1239.2(f) (2010).

²⁰¹ *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).

²⁰² *See In re Alba Luz Gutierrez-Lopez*, 21 I. & N. Dec. 479 (B.I.A. 1996) *reversed by Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012).

²⁰³ *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.

²⁰⁴ *See* OCIJ PRACTICE MANUAL, *supra* note 105, at page 99.

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 earlier, 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 USCIS 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.

[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 comments on our survey, one judge disagreed that the parties would narrow the issues at the master calendar if the judge directed, commenting “[s]ince 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.”

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.

[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.

EOIR officials expressed concerns, informally, about eliminating the in-person filings. Immigration proceedings are recorded and an "out of court room" adival would not be part of the record of proceedings. Shifting the communication of the advisals to court personnel could be very difficult both in staffing and in maintaining consistency. We note these objections but believe the oral advisals and confirmation of the applicant's understanding could take place during the merits hearing and that scheduling a hearing to receive the filing of the asylum application adds to the burden on all of the parties and in busy immigration courts can significantly delay the final adjudication because of the lack of hearing time.

Further adoption of our suggestion for referral of the asylum application to the USCIS Asylum Office would eliminate need for this hearing because adjudication would not be immediately before the court. Only in cases where the Asylum Office could not grant the application and referred the case back to court would the advisals be issued by the judge.

[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 OPM.²⁰⁵ that appears to focus on using the stipulated order *before* the first master calendar hearing is scheduled. However, nothing in the OPM 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 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.

²⁰⁵ 8 C.F.R. § 1003.25(b) (2010); OPM: *Stipulated Removals*, *supra* note 42.

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.

[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) and based on that review suggest that EOIR consider the data, despite their limitations, as a source for information and analysis of national and individual court management practices. (EOIR officials told us that they are, in fact, engaged in a review of all data they collect.)

Adjournment Code Data 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. (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 lawyers, ICE attorneys, and judges as well as “case completion” adjournments, which are assigned to the hearing at which the proceeding is completed.

Table F: Adjournment Factors Eliminated

	2005	2008	2010
Total hearings in proceedings	684,337	737,948	852,230
<i>Less</i>			
(a) Case completions*	10,001	269,569	280,780
(b) Operational adjournments	19,316	48,497	56,274
(c) No adjournment entered*	288,981	4,925	4,864

* We presume a change in coding instructions explains why the 2005 “No adjournment” figure is similar to the 2008 and 2010 case completion figures.

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

Table G: Number of Adjournments per Completed Proceeding

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

We grouped the adjournments using the OPM’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%

Frequently used adjournment codes 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."

Geographic variation 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.

We have suggested that the EOIR allow judges to assign more than one code for a continuance.

[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 not receive files in time).

In this section we discuss expanding attorney discipline and increasing options available to the judges to ensure attorney preparation and adequate performance. In other portions of the report we recommend giving judges the power to administratively close cases or to

encourage the parties to enter into stipulations as a method of obtaining more control over the case docket. *See* Section V.C.1.B.[2] and [3].

[a] Incentivizing private, non-government, attorneys

Current regulations allow EOIR to discipline private attorneys²⁰⁶ The EOIR website lists disciplined attorneys and includes the related orders. In December 2011, 464 attorneys were on the list.²⁰⁷ 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.²⁰⁸ 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%
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

²⁰⁶ *See* 8 C.F.R. § 1003.101 et seq.

²⁰⁷ 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).

²⁰⁸ 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).

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; 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 earlier drafts 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.

[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."²⁰⁹ 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."²¹⁰ 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."²¹¹

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

²⁰⁹ OCIJ PRACTICE MANUAL, *supra* note 105, at 10.3(a) and (c), pp. 132.

²¹⁰ INA § 240(b)(1) (2010); 8 U.S.C. § 1229a(b)(1) (2006).

²¹¹ ATT'Y GEN MEMORANDUM, *supra* note 75.

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,²¹² 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.

c. Video Hearings

Video conferencing (VC) (or video teleconferencing, VTC) allows judges to conduct hearings even though the judge, respondent and government attorney—and respondent’s counsel and witnesses, if any—are in two or more different locations. In this section of the report, we describe the use of VTC in removal adjudication, summarize competing claims as to its strengths and weaknesses, present and analyze responses to the two VTC question on our survey of judges, and consider preliminarily the effect, if any, of VTC on the outcomes of asylum cases in immigration court.

[1] Immigration court use of VTC

In the mid-1990s, EOIR introduced VTC in removal adjudication on a pilot basis. Congress in 1996 authorized its use at the discretion of the judge, without requiring the parties’ consent. (Telephone proceedings on the merits do require the respondent’s consent.)²¹³

According an EOIR “directory” of immigration court VTC equipment,²¹⁴ as of October 2011, 58 of the 59 immigration courts had at least one VTC unit (the exception was the very small Fishkill, NY court)—159 units in all. Of the 159, 150 were for removal hearings; nine were in pro bono rooms or conference rooms or other office settings. The number of VTC units for hearings ranged from seven (Los Angeles) to one, in over ten courts. The average number of units per court was 2.5; the modal number was two. An additional nine units were in EOIR hearing locations, such as the Huntsville, Texas, detention center. Almost all of the 168 units were owned by EOIR; DHS owned a handful. These 168 units, however, are in addition to VTC units in other DHS detention facilities as well as local, state, and federal jails and prisons where judges may hold hearings.

²¹² *EOIR’s Improvement Measures*, *supra* note 79.

²¹³ INA §§ 240(b)(A)(iii)-(iv), 240(b)(B) (2010); 8 U.S.C. §§ 1129a(b)(2)(A)(iii)-(iv), 1129a(B) (2006).

²¹⁴ EOIR, Immigration Court Video Conferencing Directory, Updated 10/17/2011 (in possession of authors)

Table K shows the in-person, video, and telephone hearings held in proceedings and bond redeterminations that were completed in 2010. Not all the hearings occurred in 2010; some cases that were completed in 2010 originated and held hearings in prior years. VTC was used in over 12 percent of the over 850,000 hearings conducted in removal proceedings and in almost 30 percent of the roughly 78,000 bond redetermination hearings—overall usage of almost 14% of the hearings.²¹⁵

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

	Removal Proceedings	Bond Redeterminations	Both
All hearings	852,230	78,187	930,417
In person	737,385 (86.5%)	53,390 (68.3%)	790,775 (84.9%)
Video	105,901 (12.4%)	22,933 (29.3%)	128,834 (13.8%)
Telephone	8,944 (1.1%)	1,864 (2.4%)	10,808 (1.2%)

Because VTC obviates the need for respondents to go to a hearing site, it is used more for hearings involving detained respondents (including those seeking bond redeterminations) than for hearings for non-detained respondents. But VTC is not used only in detained cases. In addition to the “headquarters courts,” judges in other courts conduct VTC hearings for respondents in courthouses in other cities.

VTC arrangements can vary considerably. The judge, for example, may be in a courtroom with the government attorney and any witnesses. The respondent may be in a detention center. If the respondent is represented, the attorney has to choose whether to be with the client or the court. A few detention facilities bar respondents’ from participating in the hearing from the detention facility; in those situations—and in situations when the attorney does not for other reasons appear in the detention facility—the respondent and his counsel communicate solely through the video technology during the hearing.

Requests for in-person hearings The government or the respondent in a VTC hearing may request an in-person hearing. We do not know how often they request them, or whether respondents are even aware that they may do so, but we have the number of adjournments that judges attributed to the respondent’s or government’s “request for an in person hearing” (and we assume that an adjournment so described means an adjournment to an in-person hearing). The number of such grants is small but may be on the rise:.

		2005	2008	2010
Adjournments for request for an in-person hearing by:	Alien	408	333	1,296
	DHS	54	69	84
	Total	462	402	1,380

From 2005 to 2010, the total number of hearings increased by 24 percent, but the number of adjournments to in-person hearings increased from 462 to 1,380 (198 percent). We

²¹⁵ Table based on *OPAT DATA*, *supra* note 43.

don't know whether adjournments to in-person hearings in 2010 grew at a much greater rate than all hearings because of the increase in VTC hearings generally or judges' growing willingness to grant request for in-person hearings or some combination. Nor do we know whether the increase in 2010 is an aberration and/or whether the numbers reflect the inadequacies of the adjournment codes. Some who commented on an earlier draft speculated that the increase in requests for in-person hearings could reflect the increase, however, slight in respondents with lawyers, who may be more aware than pro se respondents that they may request in-person hearings.

A judge's granting a request for an in-person hearing, especially for a detained respondent, may cause a delay in the hearing as ICE and EOIR seek a place and time to hold the hearing. We suggest EOIR instruct judges to make this clear to respondents who request in-person hearings.

[2] Competing claims about VTC in Removal Proceedings

The "In-House Research Report" (for ACUS's recent project on VTC's use in high-volume administrative adjudication agencies²¹⁶) summarizes the results of ACUS staff interviews with, and other information provided by, EOIR officials.²¹⁷ Its summary of the arguments for and against current and expanded use of VTC tracks those that we heard in our interviews with immigration judges, and with government and respondent counsel, and arguments found in the literature.²¹⁸ (The report used VTC in social security and veterans' benefits adjudication as case studies but decided against assessing VTC in removal adjudication on the same case-study basis, citing the complications involved and the lack of data within EOIR on VTC's use. Although the report said, in an apparent reference to our project, that ACUS "plans to study the use of video hearings by EOIR in-depth as part of its forthcoming Immigration Adjudication project,"²¹⁹ 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.)

Of the four non-governmental entities that commented on the VTC portions of our earlier draft, all were unabashedly opposed to its use in any but the most limited circumstances, if at all. They said video hearings threaten respondents' due process rights to be heard, to consult meaningfully with counsel, to have proceedings adequately translated, and to fully see, and be seen by, the other participants. Human Rights First said it welcomed

²¹⁶ AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION, REC. NO. 2011-4, ADMIN. CONFERENCE OF THE U.S. (2011) (adopted on June 17, 2011) available at [www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20\(Video%20Hearings\).pdf](http://www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20(Video%20Hearings).pdf) [Hereinafter ACUS VIDEO HEARINGS REPORT].

²¹⁷ Olorunnipa, *supra* note **Error! Bookmark not defined.**

²¹⁸ See ACUS VIDEO HEARINGS REPORT, *supra* note 1; 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 31, at 2-26-27.

²¹⁹ ACUS VIDEO HEARINGS REPORT, *supra* note 1, at 2 n.7.

“short-term efforts “ to improve VTC’s use but objected to our description of VTC as “here to stay,” and said the short term efforts should not “serve to institutionalize or normalize the use of VTC in the system.” The American Immigration Council’s Legal Action Center “reject[ed] the premise that the use of video hearings should continue pending the execution of empirical research to assess the impact of this practice on the outcome of removal proceedings.” The American Bar Association said that it “opposes using ... VTC... in immigration hearings, except in procedural matters in which the noncitizen has given consent.” The Harvard Immigration and Refugee Clinical Program “recommend[ed] that [VTC] be eliminated in immigration court.”

EOIR officials, not surprisingly, take a different view, as summarized in the 2010 ACUS draft report:²²⁰

In line with the agency’s goal, an EOIR official noted that the use of VTC technology to hold hearings is a force multiplier that is a tool of efficient caseload management used by the agency as a way to respond flexibly and efficiently to the demands of its high caseload. When asked, one EOIR official noted that VTC technology has significant advantages over in-person hearings such as convenience, safety, flexibility in scheduling hearings and increasing efficiency in administration by, in effect, projecting Immigration Judges into various DHS detention facilities where respondents scheduled to appear before an IJ on immigration related charges are being held.

[a] Quality of transmissions, due process protections

Proponents claim that the integrity and quality of the visual images that VTC provides is more than adequate and does not require the compromises that might have been necessary in earlier versions of the technology. In 2004, EOIR asserted that “VC does not change the adjudication quality or decisional outcomes.”²²¹ Subsequent EOIR press advisories have been less definitive; a 2009 release 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.”²²²

As explained in more detail in the next section, only 13.4 percent of judges responding to our survey agreed that VTC hearings, “all things considered, are basically no different than ‘in-person’ hearings” and less than a third, 31.9 percent, said the VTC equipment “allows me to hear and see clearly all participants in remote locations.” Nevertheless 66.2 percent said VTC was “effective for most master calendar hearings;” a smaller number, 37.3 percent, said it was effective for most merits hearings.

Critics say the quality of the VTC transmissions vary greatly, including as between EOIR equipment and that maintained by DHS in some detention facilities. They also say that a

²²⁰ ACUS VIDEO HEARINGS REPORT, *supra* note 1, at 32

²²¹ 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.

²²² 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.

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.”²²³ Critics argue that in cases where credibility assessments are key to an immigration judge’s ruling, especially in asylum and related cases, the video format may not provide adequate visuals of body language. (As we previously noted, the Asylum Office uses VTC to conduct some limited interviews but does not use it for full asylum interviews.²²⁴ USCIS officials told us that all VTC interviews that result in a negative finding—lack of credible fear—are subject to supervisory view.²²⁵)

Proponents of VTC use in immigration court respond, as paraphrased by the ACUS staff report, that EOIR tells judges that assessing demeanor (whether at a video hearing or an in-person one) is the agency’s least preferred method of determining credibility and that judges should not use it when other methods of judging credibility are available.²²⁶

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, partly because of the confrontation clause. Removal proceedings, of course, are civil and thus the confrontation clause does not apply as it would in criminal proceedings. Still, many observers point to the functional similarities between removal adjudication and criminal procedures.²²⁷

One commentator on an earlier draft pointed out that, depending on the hearing location in the detention facility and the type of VTC equipment, the judge may be unable to see whether others who are not authorized to be in the proceeding may be doing so anyway—including, for example, other detainees or guards on break who may find the testimony interesting. The detained respondent’s right to a closed hearing may thus be compromised, creating a risk to the detainee if gang members for example learn of the specifics of the statements or testimony.

We suggest, therefore, that EOIR instruct judges to be alert to possible due process violations that may occur when unauthorized persons are within earshot of statements and testimony offered in hearings and take appropriate steps to remedy any potential violations. We believe it is very important that judges, as well as respondents and their representatives, be alert to possible due process violations if third parties have unevaluated or unauthorized access to the hearing.

[b]Effect on representation and translation

²²³ Walsh & Walsh, *supra* note 218, at 265.

²²⁴ Letter from Baker to Baer, *supra* note 127.

²²⁵ Email from Ted Kim, *supra* note 144.

²²⁶ ACUS VIDEO HEARINGS REPORT, *supra* note 216, at 35.

²²⁷ See, e.g., Jennifer Chacón, “A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights,” 59 DUKE L. J. 1503 (2010), Stephen Legomsky, “The New Path Immigration Litigation: Asymmetric Incorporation of Criminal Justice Norms,” 64 WASH. & LEE L. REV. 469 (2007)

Proponents say VTC can increase the availability of representation during hearings, even if the lawyers are 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 from a remote location. Furthermore, OCIJ has encouraged judges to allow attorneys appearing pro bono to use the VTC equipment to confer briefly with their clients in remote locations²²⁸ (a request that would seem equally justified for most paid counsel). We received a summary of an informal survey that the assistant chief immigration judges undertook to learn their respective courts' practices as to such requests.²²⁹ 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 judges grant such request, they often clear the courtroom except for a security guard and translator.

The equipment has the auxiliary benefit, subject to EOIR or DHS policies, of allowing lawyers to consult with detained clients, apart from hearings themselves, and possibly permitting family members to observe proceedings to which they might otherwise not have access.

On the other hand, critics point to the inability of respondent's counsel to be physically present with both the judge and the respondent. A lawyer with the judge during the hearing cannot confer freely with the respondent in a remote location. A lawyer who is with the respondent cannot, as the ABA Report put it, "establish credibility and connect emotionally with the judge."²³⁰ VTC arrangements may also impede communication with the ICE Trial Attorney by the judge and respondent's attorney. Critics say translation may be hampered depending on the translator's location vis-à-vis the non-English speaking respondent.

[c] Effective case management

Proponents say VTC hearings enhance case management because they allow judges to be available in numerous sites, when needed, within short time spans. The point is obvious.

On the other hand, 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 during a VTC hearing, they must be faxed to the judge or other participants (EOIR does not yet authorize email transmission of hearing-related documents). The OCIJ Practice Manual at Chapter 3.1 tells practitioners that, as a general matter, "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."²³¹ Chapter 4.7, section (d), however, on VTC hearings, recognizes that "Immigration Judges often allow documents to be faxed between the parties and the Immigration Judge."

²²⁸ **OPPM**, *Facilitating Pro Bono Legal Services*, *supra* note 9.

²²⁹ *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).

²³⁰ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 31, at 2-27.

²³¹ OCIJ PRACTICE MANUAL, *supra* note 105.

We heard anecdotal evidence that some judges refuse to accept faxed materials for admission into the record; parties either will have to have mailed all documents prior to the hearing or the judge will have to adjourn the proceedings to await receipt of the documents. One judge explained that he refused to accept faxed transmissions in VTC hearings in order to enforce the Manual’s filing deadlines because allowing faxes would encourage late or last-minute filings.)

In response to our survey, as explained in more detail in the next section, 26.5 percent of the judges agreed that the need to fax documents sometimes creates “non-trivial” problems in conducting the proceedings.

We suggest that EOIR explore the possibility of document cameras for some transmissions in the interim before the installation of an electronic docketing system.

[d] Cost

Proponents say VTC hearings provide save EOIR the cost of transporting judges and staff to hearing sites and saves DHS costs of transporting detained respondents. Although this point is obvious, assuming that equipment costs do not exceed replaced travel costs—and using only those variables as cost elements—the amount of savings is not obvious.

EOIR officials provided ACUS researchers a one-page, undated document, evidently prepared by the EOIR Controller’s office in order to identify savings resulting from the “AG Savings Initiative: Increase the use of video conferencing for the Department.” The document states that \$2,374,451 in “Actual FY 2010 Annual Savings” were attributable to EOIR use of video conferencing. “This is a savings offset, calculated by estimating the amount it would have cost in detail travel, had the Judges and Court Staff not been able to handle the hearings via videoconference.”²³² The document provides no further details.

The cost savings figure is somewhat puzzling, based on an estimate of EOIR’s 2010 budget allocations that one of us undertook (for a separate project) using published Justice Department object class figures and additional data provided EOIR’s Public Affairs Office.²³³ By that estimate, in 2010 EOIR allocated \$2,044,500 to travel for the immigration courts. We assume the bulk of that estimated figure was for hearings, although some was probably for expenses such as orientation and continuing education.

One way to assess the savings that EOIR attributes to VTC is to combine estimated **actual** 2010 travel expenses and travel expenses that EOIR says **would have been allocated** had VTC not been available. .

Estimate of 2010 actual travel expenditures	\$2,044,500 (46.2%)
Travel savings in 2010 that EOIR attributes to VTC	+ \$2,374,451 (53.7%)
Total funds needed for travel if no VTC	\$4,418,951

²³² Document in possession of authors. It is identified as being at Tab E of the ACUS report.

²³³ See text at, and note 7, supra. (We provided this estimate to EOIR officials at the outset of the project and asked for comments or actual EOIR budget figures but received no response.)

By this calculation, 2010 travel costs that the Controller said were rendered unnecessary by VTC were greater than funds actually spent for all immigration court travel, including funds spent on hearing travel alone.

But, according to Table K (at 4, *supra*) VTC accounted for slightly less than 14 percent of the 930,417 hearings involved in proceedings and bond determinations concluded in 2010. To be sure, this does not mean that 14 per cent of hearings convened in 2010 involved VTC, because the hearings, especially for removal proceedings may have occurred in 2009 or earlier. EOIR's expansion of VTC equipment and use may have meant a higher percentage of video hearings during the 12 months of fiscal year 2010, than in earlier years, but we doubt that VTC hearings increased to 54 percent of all hearings that year. (Of course, this analysis assumes a one-to-one relationship between travel dollars and number of hearings, which is not likely, but even with liberal allowances for differences, the numbers still seem hard to square.)

We suggest that EOIR publish a credible explanation of the EOIR cost savings fairly attributable to its use of VTC. Given the opposition to any VTC by sizable portions of advocates representing aliens, and tepid enthusiasm for it among judges, as explained in the next section, it is important that claims of cost savings attributable to VTC be solid.

[3] Survey responses

Two of our survey questions dealt directly with VTC. One asked judges to select one of the five options shown below. Of the 159 judges who responded, 41 said they had "[in]sufficient experience with VTC to permit me to consider the statements." The remaining 118 judges responded as follows:

Video teleconference hearings (VTC) are (select one):	N and percent
Effective for most master calendar hearings, but not for most merits hearings.	39 (33.1%)
Effective for most merits hearings but not for most master calendar hearings.	5 (4.2%)
Are usually effective for both.	39 (33.1%)
Are usually effective for neither	16 (13.5%)
None of these statements describes my view.	19 (16.1%)

Adding the respondents who said VTC was effective for both types of hearings to those who said it was only effective for one or the other produces this breakdown:

Effective for most master calendar hearings: 66.2%

Effective for most merits hearings: 37.3%

The only control we have for assessing these responses is whether the judges identified their caseloads as primarily detained, primarily non-detained, or roughly evenly split. On that measure we saw little difference in the responses, except that 19.4 percent of those with primarily detained dockets said VTC was "usually effective for neither" master nor merits hearings, while only 10.8% of judges with mostly non-detained dockets selected

that option. These might reflect better VTC equipment used in hearings involving judges with mainly non-detained dockets, but the numbers are small and thus the percentages volatile.

These forced-choice responses, moreover, may be somewhat misleading. Eight of the 39 judges who selected “usually effective for both” added comments, mostly negative, such as “But the equipment is so crappy it takes twice as long as an in person hearing”; “Definitely not the ideal way to conduct hearings”; “Documents must be served in advance for this to work well”; “Our agency needs greater technical support;” “The VTC system often has problems ensuring that the interpreter by phone and the respondent by VTC can communicate effectively”; and “VTC is effective assuming the equipment is compatible by DHS’s equipment at the detention facility and the VTC has been tested for sound quality”.

Furthermore, of the 19 judges who selected the “none-of-the-statements-describes-my-views” option, eight added written comments, seven of which were negative. One judge said:

I have not done master calendar hearings by VTC, but I consider VTC to be an inadequate medium for merits hearings, even though I have been forced to use them that way on occasion. I think it is extremely difficult to judge credibility even in the best of circumstances. When the witness is a tiny little head on a TV screen, it is even more difficult. Where attorney and client are [in] two different places, their communication is also extremely difficult. I understand the reasons for using VTC, but I think it raises important due process issues which have not been sufficiently addressed.

A second survey item asked the judges to select as many of the six statements listed below that applied. Again, 159 judges responded, but 40 said that they had insufficient experience with VTC to consider the statements. The remaining 119 responded as follows (percentages exceed 100 percent because judges could select more than one statement).

	<u>N and percent</u>
The equipment allows me to hear and see clearly all participants in remote locations.	38 (31.9%)
VTC hearings, all things considered, are basically no different than “in-person” hearings	16 (13.4%)
Equipment failures that require delay or adjustment occur often enough to be a non-trivial problem in conducting proceedings.	56 (47.1%)
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that the need to transmit documents by fax sometimes creates a non-trivial problem in conducting proceedings	31 (26.5%)
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that other aspects of VTC sometimes create a non-trivial problem in conducting proceedings.	25 (21.0%)
None of these statements describes my view.	30 (25.2%)

Of the 119 judges, almost half (47.1 percent) said that “equipment failures” occur often enough to be a non-trivial problem in conducting proceedings, and some of those judges likely selected at least one of the additional options, as to problems caused by document transmission or other things. If so, that would likely raise the 47.1 percent figure to over half. (Note that 119 judges selected 166 options, in addition to the 30 who said that none of the statements reflected their views.)

As displayed below, there are differences in responses based on the judges’ docket (mostly detained and mostly non-detained) but they are not easy to interpret.

(Factors paraphrased.)	Mostly detained	50-50	Mostly non det	Total
Equip. lets me see/hear clearly	11 28.9%	1	26 68.4%	38
VTC no different than “in person”	5 31.3%	0	11 68.8%	16
Equip. failures occur too often	23 41.1%	4	29 51.8%	56
VTC no different except for doc. transmission	12 40.0%	1	17 56.7%	30
VTC no different except other	7 29.2%	1	16 66.7%	24
None describes my views	7 23.3%	2	21 70.0%	30

Percentages are of the row totals; those shown do not total 100 because percentages aren’t shown for the small number of responses from judges with dockets roughly half-and-half detained and not.

Judges with mostly non-detained docket were much more likely than those with mostly detained dockets to say:

- the equipment allowed them to see and hear participants in remote locations,
- VTC is basically no different from in-person hearings (although the numbers are small).

But they were also more likely to say:

- equipment failures occurred often enough to be a non-trivial problem
- faxing documents sometimes caused non-trivial problems in conducting proceedings, and
- “other aspects of VTC” sometimes created problems.

These responses may suggest, as above, that equipment used in VTC hearings of judges with mostly nondetained dockets is superior to that in hearings of judges with mostly detained dockets. It may also suggest that the cases before judges with mostly non-detained problems are more complex than those of judges with mostly detained populations, with more documents and other moving parts in the hearings that can cause problems.

Thirty-eight of those who responded to this item added written comments:

- ten were essentially neutral (“effective for people who want a speedy hearing and to go home”);

- six were favorable (even though “observing the witness is not as good on VTC as it is live, I think the benefits of VTC far outweigh the negatives”); and
- 22 were critical (including from seven judges who selected the “none-of-these-statements-describes-my-views” option. Five of the 22 commented on the inability to assess demeanor.

(One other item in our survey dealt with VTC: We asked that judges select, from a list of ten factors, four “that you believe would most improve your court.” One of the ten factors was “Increased reliance on video conferencing.” Of the 153 judges who responded, four selected that factor.)

[4] Effect on outcomes

What is missing in these arguments is reliable evidence of whether VTC has an effect on outcomes—put differently, whether differences that may be observed in the outcomes of VTC versus in-person hearings can reliably be attributed to the use of VTC.

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.”²³⁴ EOIR officials said that, given the many variables at play in removal adjudication, a reliable evaluation might be impossible.

The best way to answer the question of effects, if any, on outcomes would be a classic control-group experiment that randomly assigned cases that are similar in all major characteristics 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 immigration court proceedings, a 2008 article that mainly 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.²³⁵ The article also presented OPAT-provided data on the disposition of asylum claims in 2005 and 2006,²³⁶ 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, and larger numbers of hearings coded as “Other”, typically 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, grants for all VTC asylum applicants were in the 23 percent to 29 percent range, while in-person grant rates rose from 38 percent to 50 percent.

²³⁴ ACUS VIDEO HEARINGS REPORT, *supra* note 216, at 37.

²³⁵ Walsh & Walsh, *supra* note 218.

²³⁶ *Id.* at 271-72.

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%)
In-person grant	11,473 (38%)	13028 (45%)	8,338 (50%)

*--2005 2006 data as reported by OPAT to 2008 article authors; 2010 data as reported by OPAT to Benson/Wheeler

The authors’ conclusion from the 2005-06 data: “the use of VTC actually makes asylum half as likely for those who are forced to use the system.”²³⁷

The authors 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 did not report, however, the effect of detained status on the relationships. Detained asylum claimants may be more likely to be 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. We asked OPAT to provide us information on 2010 asylum grants by type of hearing (VTC or in person), representation status, and detained status. Table M presents the results for those in detention, those who had been detained but were released when the case was completed, and those who were never detained.

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

	Total	Represented	Not represented
DETAINED			
VTC grant	136 (24%)	127 (42%)	9 (4%)
IP grant	212 (11%)	153 (18%)	59 (6%)
RELEASED			
VTC grant	43 (39%)	35 (43%)	8 (28%)
IP grant	1,153 (46%)	1,048 (48%)	105 (33%)
NEVER DETAINED			
VTC grant	37 (42%)	34 (48%)	3 (18%)
IP grant	6,973 (57%)	6,699 (59%)	274 (38%)

Table L shows a 50 percent grant rate for all asylum seekers with in-person hearings. In Table M, that grant rate for 2010 asylum seekers with in-person hearings drops to 11 percent for those in detention. 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. (We have no explanation for this observation; one commentator suggested that asylum seekers

²³⁷ *Id* at 271

in remote detention facilities may have an easier time securing supporting witness testimony if the witnesses can appear by video rather than having to travel to the remote location.)

For 2010 asylum seekers with VTC hearings, those 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.

These data are not at all dispositive—one way or the other—as to the effect of VTC on the grant of asylum claims in removal proceedings, or outcomes in removal proceedings generally. We offer them mainly as a caution against drawing conclusions from research that does not assess all relevant variables. A more reliable assessment of VTC’s impact would come from an experiment that controlled for such factors such as the nationality of the asylum applicant, the reason for the denial (statutory bar vs. credibility determination), whether interpreters were used, and the availability of alternative forms of relief.

We respect the advocacy groups’ deeply-held concerns about the use of VTC but do not endorse their recommendation that EOIR abandon VTC except perhaps in narrow procedural matters with the respondent’s consent, or pending the result of research that establishes definitively that VTC as used in removal adjudication hearings has no impact on case outcomes. VTC in some form is here to stay.

At the same time, we suggest that EOIR undertake several steps, including:

- revising the Practice Manual to provide lawyers and pro se respondents more guidance on how to proceed in VTC hearings
- encouraging judges to permit lawyers and clients to use the court’s VTC equipment to confer prior to the hearing
- undertaking more systematic assessments of VTC’s use, beyond the informal monitoring that it conducts today. Periodic post-hearing surveys of participants, for example, might yield helpful information, as might consultation with USCIS asylum personnel, who have their own policies about the use of VTC in asylum hearings; and, as noted above
- identifying actual cost savings that can be attributed to the use of VTC in lieu of judge and staff travel to sites for in-person hearings.

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. However, we recommend implementation of a portion of the pending regulations relating 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.)²³⁸ 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.)²³⁹

Table N: BIA Appeals as a Percent of All Appeals

(12 month period ending Sept. 30)

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

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

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

Table O: Rate of Appeal from BIA Decisions

(12 month period ending Sept 30)

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

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

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

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%)

²³⁸ 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).

²³⁹ Drawn from data reported in Statistics Div., BIA Filings-June 30, 2011, Admin. Off. of the U.S. Courts, (on file with authors).

Rate of appeal*	3%	45%	42%	30%
Total appeals filed CA-9	10,342	14,636	13,577	11,947
BIA appeals	954 (9%)	5,862 (40%)	4,625 (34%)	2,963(24%)
Rate of appeal*	10%	43%	42%	33%

*--Underlying figures not shown

Did respondents appeal a much greater percentage of the BIA decisions in 2011 than they did they decisions in 2001 because 2011 BIA decisions were more vulnerable, or for some other reason? Did they appeal a lower percentage of decisions in 2011 than in 2006 because the decisions were less vulnerable or because the economic downturn put legal fees beyond reach of many respondents? To the degree that the level of appeals from its decisions is a measure of adequate BIA performance, the rather sharp decline in appeals and the less dramatic drop in the rate of appeals could suggest that serious performance difficulties have abated.²⁴⁰ 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

²⁴⁰ 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).

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.²⁴¹

EOIR proposed a regulation that would have allowed the creation of a three-member panel whenever the BIA member believed the case presented “[t]he need to resolve a complex, novel, or unusual issue of law or fact.” These regulations, though proposed in 2008, have not been finalized.²⁴² 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.

We believe EOIR should assign a priority to getting these draft regulations approved in order to restore greater flexibility in the use of three-member panels. We take no position on other proposals or concepts within the draft regulations.

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.²⁴³ There is little evidence that the department officials who

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

²⁴² 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).

²⁴³ 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>.

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.²⁴⁴ 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 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.”²⁴⁵ 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).²⁴⁶

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.²⁴⁷ The NAIJ, by contrast, has referred to “a cumbersome hiring and clearance process.”²⁴⁸ 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 1983,²⁴⁹ 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.²⁵⁰

²⁴⁴ *Id.* at 114-15.

²⁴⁵ 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.

²⁴⁶ *EOIR’s Improvement Measures*, *supra* note 79.

²⁴⁷ *ABA Comm’n on Immigr. Rept.*, 2010, *supra* note 106, at 2-18–2-19, 2-29.

²⁴⁸ Improving Efficiency, Statement of Nat’l Ass’n of Immigr. Judges, *supra* note 109.

²⁴⁹ *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).

²⁵⁰ *ABA Comm’n on Immigr. Rept.*, 2010, *supra* note 106, at 2-19.

Some court systems publish annual reports²⁵¹ 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.

We suggest that EOIR also consider periodically publishing—or posting on its Website—data on the demographic composition of EOIR personnel, in particular judges, as well as information on their vocational backgrounds.

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.²⁵² 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"²⁵³ 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.)

²⁵¹ *E.g.*, The [Federal] Judiciary Fair Employment Practices Annual Report, (2011, published by the Administrative Office of the U.S. Courts).

²⁵² *See ABA Comm'n on Immigr. Rept., 2010, supra* note 106, at 2-19 (citing commonly referenced judicial opinions).

²⁵³ 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%

Perhaps surprisingly, given the general unpopularity of performance reviews, judges were fairly evenly divided in their perception of the evaluations. Overall, 40.2 percent selected one of the “useful” options, and 43.5 percent selected 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...²⁵⁴

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.²⁵⁵ 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.”²⁵⁶ 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”²⁵⁷ 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

²⁵⁴ Executive Office for Immigration Review Performance Plan, provided by EOIR (on file with the authors).

²⁵⁵ 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).

²⁵⁶ Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) at § 2(b)(3).

²⁵⁷ 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.²⁵⁸

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.²⁵⁹ 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.²⁶⁰

We suggest a modification of the ABA recommendation. 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.”

[2] Immigration Court Performance Monitoring

²⁵⁸ Slavin & Marks, *supra* note 15, at 1787 citing Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64-65 (2008).

²⁵⁹ See ABA Comm’n on Immigr. Rept., 2010, *supra* note 106, at 2-32 to 2-34.

²⁶⁰ 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 106, at 2-33.

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.²⁶¹

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."²⁶² 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."²⁶³ 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 types among state criminal courts and established links between different cultures and court performance.²⁶⁴

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

²⁶¹ NCSC: *Research: Trial Court Performance Standards*, NAT'L CENTER FOR STATE COURTS, http://www.ncsconline.org/d_research/TCPS/index.html (last visited Jan. 6, 2012).

²⁶² *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.

²⁶³ *Utah Courts Performance Measures*, UTAH STATE COURTS (Oct. 20, 2011) <http://www.utcourts.gov/courtools/>.

²⁶⁴ Ostrom et al., *supra* note 110.

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.

[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,²⁶⁵ 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, 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.²⁶⁶ (The

²⁶⁵ 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>.

²⁶⁶ 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>.

federal judicial disciplinary process rests principally within the all-judge circuit judicial councils.)²⁶⁷

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.")

We suggest, to demonstrate EOIR's awareness of the importance of transparency in judicial discipline, that it state on its "Immigration Judge Conduct and Professionalism" website that statutes bar it from publishing the names of judges who have been formally disciplined.

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 least for civil causes, should be vested in one great court, of which all tribunals should be branches, department, or divisions."²⁶⁸ 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).

²⁶⁷ See 28 U.S.C. ch. 16 (2006).

²⁶⁸ *The State-Wide Judicature Act*, 1 J. Am. Judicature Soc'y, Dec. 1917 at 101.

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 Assignments²⁶⁹

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

(EOIR announced the appointment of another ACIJ in April 2012,²⁷⁰ but his assignment is not clear from the EOIR website and EOIR officials told us any changes would not be announced until late April or early May .)

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.”²⁷¹ EOIR

²⁶⁹ 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.

²⁷⁰ See <http://www.justice.gov/eoir/press/2012/IJInvestiture03302012.htm>

²⁷¹ ATT’Y GEN MEMORANDUM, *supra* note 75.

asserted in June 2009 that the effort has been “well received by immigration judges, EOIR staff, the private bar, and the government bar.”²⁷²

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,²⁷³ Judge Robie:

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

We of course cannot say 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

²⁷² *EOIR’s Improvement Measures*, *supra* note 79.

²⁷³ Jere Armstrong & Richard J. Bartolomei, *A Tribute to the Honorable William R. Robie*, 7 *GEO. IMMIGR. L.J.* 265, 268 (1993).

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 courts²⁷⁴ 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."²⁷⁵ 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."²⁷⁶ An international consortium of several U.S. and foreign court administration and research organizations sums up the conventional wisdom: "To become an excellent court, proactive management and leadership are needed at all levels, not only at the top, and performance targets have to be determined and attained. Well informed decision-making [about achieving high performance] requires sound measurement of key performance areas and reliable data."²⁷⁷

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

²⁷⁴ E.g., ABA Judicial Administration Division, *supra* note 257; Trial Court Performance Standards, *supra* note 262; Ostrom et al., *supra* note 110; INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE (2008) available at www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf.

²⁷⁵ ABA Judicial Administration Division, *supra* note 257, at 29.

²⁷⁶ Ostrom et al., *supra* note 110, at 127.

²⁷⁷ INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra* note 274, at 2, 4, 26.

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 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.”)

OCIJ officials have told us informally that they regularly reevaluate the immigration courts; management structure. We encourage that process and believe our survey and related information reported above can enhance it.

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.²⁷⁸ 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.

²⁷⁸ *ABA Comm’n on Immigr. Rept., 2010, supra* note 31, at Part 6.

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.

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: Eberle Schultz, JD Class of 2013, primary assistant, and Aisha Elston-Wesley, 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. Stephanie Gibbs, JD Class of 2012, who assisted with survey tabulation.

Thomas Wellington, statistician, New Haven, CT, who contributed to Lenni Benson's understanding of the survey results.

APPENDIX 1

INTERVIEWS

DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

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

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

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

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

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

Immigration Courts (by state),

Arizona (Benson only)

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

California (Benson only)

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

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

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

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

Virginia Several hour interviews 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, Katzmman 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

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

Interim Draft see explanation on cover.

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

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

COURT	2009			2010		
	St.R.Ord	All Comp.	%	St.R.Ord	All Comp.	%
ARLINGTON (VA)	904	6,692	14%	582	7,156	8%
ATLANTA	327	6,731	5%	373	6,681	6%
BALTIMORE	1	4,834	0%	57	4,453	1%
BATAVIA SPC (NY)	16	2,132	1%	58	2,204	3%
BLOOMINGTON, (MN)	1,127	4,735	24%	737	5,042	15%
BOSTON	13	7,641	0%	18	8,581	0%
CHARLOTTE	268	2,886	9%	51	4,426	1%
CHICAGO	2,583	10,253	25%	2,199	10,350	21%
CLEVELAND	3,005	7,454	40%	1,824	5,375	34%
DALLAS	2,316	7,687	30%	2,743	8,899	31%
DENVER	1,387	11,549	12%	878	10,637	8%
DETROIT	694	5,909	12%	577	5,685	10%
EL CENTRO SPC (CA)	16	2,573	1%	13	2,408	1%
EL PASO SPC	1,153	6,093	19%	840	4,786	18%
EL PASO	118	6,612	2%	479	7,528	6%
ELIZABETH DET. (NJ)	692	2,284	30%	527	2,661	20%
ELOY (AZ)	5,092	12,947	39%	2,547	9,784	26%
HARLINGEN (TX)	2,381	13,475	18%	1,219	11,266	11%
HONOLULU	14	1,383	1%	11	1,143	1%
HOUSTON SPC	3	14,427	0%	7	13,211	0%
IMPERIAL (CA)	36	1,237	3%	43	1,178	4%
KANSAS CITY	1,126	3,523	32%	772	5,052	15%
KROME NORTH SPC (FL)	4,262	12,046	35%	2,185	12,220	18%
LANCASTER (CA)	1,376	8,105	17%	844	7,705	11%
LAS VEGAS, NEVADA	239	4,284	6%	1,516	3,944	38%
LOS FRESNOS (SPC) (TX)	256	3,107	8%	652	3,246	20%
MIAMI	2	12,980	0%	1	14,532	0%
NEW ORLEANS	1	625	0%	114	1,016	11%
OMAHA	121	5,356	2%	976	4,981	20%
ORLANDO	51	6,299	1%	26	5,591	0%
SALT LAKE CITY	1,724	3,335	52%	1,401	3,035	46%
SAN ANTONIO,	21	15,868	0%	52	16,300	0%
SAN DIEGO	1,161	4,739	24%	67	3,384	2%
SAN FRANCISCO	759	9,325	8%	1,750	10,772	16%
STEWART DET. (GA)	518	7,629	7%	244	8,363	3%
TACOMA	2,441	9,812	25%	1,186	9,139	13%
VARICK SPC (NY)	1	2,997	0%	12	2,350	1%
YORK, PENNSYLVANIA	328	7,480	4%	125	7,853	2%
TOTAL	36,533	257,044	14%	27,706	252,937	11%

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

2009, range from <1% (n=7) to 52% (SLC); 2010, range from <1% (n=5) to 46% (SLC)

APPENDIX 5

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

			12-MONTH PERIOD ENDING JUNE 30 [2011]						Numerical Standing	
TEXAS EASTERN			2011	2010	2009	2008	2007	2006		
	Filed Per Case									
	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

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%