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Abstract

The US immigration court system seeks to "fairly, expeditiously, and uniformly administer and interpret US immigration laws" (DOJ 2022a). It represents the first exposure of many immigrants to due process and the rule of law in the United States, and occupies an integral role in the larger US immigration system. Yet it labors under a massive backlog of pending cases that undermines its core goals and objectives. The backlog reached 1.87 million cases in the first quarter of FY 2023 (Straut-Eppsteiner 2023, 6). This paper attributes the backlog to systemic failures in the broader immigration system that negatively affect the immigration courts, such as:

- Visa backlogs, United States Citizen and Immigration Services (USCIS) application processing delays, and other bottlenecks in legal immigration processes.
- The immense disparity in funding between the court system and the Department of Homeland Security (DHS) agencies that feed cases into the courts.
- The failure of Congress to pass broad immigration reform legislation that could ease pressure on the enforcement and court systems.
- The lack of standard judicial authorities vested in Immigration Judges (IJs), limiting their ability to close cases; pressure parties to "settle" cases; and manage their dockets.
- The absence of a statute of limitations for civil immigration offenses.
- Past DHS failures to establish and adhere to enforcement priorities and to exerci prosecutorial discretion (PD) throughout the removal adjudication process, including in initial decisions to prosecute.
- The location of the Executive Office for Immigration Review (EOIR), which oversees US immigration courts, within the nation's preeminent law enforcement agency, th

Department of Justice (DOJ).

- The misconception of many policymakers that the court system should primarily serve as an adjunct to DHS.
- A past record of temporary judge reassignments and government shutdowns.

The paper supports a well-resourced and independent immigration court system devoted to producing the right decisions under the law. Following a short introduction, a long section on "Causes and Solutions to the Backlog" examines the multi-faceted causes of the backlog, and offers an integrated, wide-ranging set of recommendations to reverse and ultimately eliminate the backlog. The "Conclusion" summarizes the paper's topline findings and policy proposals.

Introduction

The Executive Office for Immigration Review (EOIR) is the arm of the US Department of Justice (DOJ) that oversees the US immigration court system. It seeks to "fairly, expeditiously, and uniformly administer and interpret US immigration laws" through 68 immigration courts, three adjudication centers, and the Board of Immigration Appeals (BIA) (DOJ 2022b, 2–3). US immigration courts labor under a backlog that grew from roughly 186,000 cases in fiscal year (FY) 2008, to 1.79 million by the end FY 2022 (Table 1), and rose to 1.87 million in the first quarter of FY 2023 (Straut-Eppsteiner 2023, 6). Over the years, the backlog's composition has changed. The number of asylum-seekers in the backlog, for example, increased from less than 100,000 cases in FY 2008 to 749,133 at the end of the first quarter of FY 2023 (ibid.).

Table 1. EOIR, CBP, and ICE Enacted Budget, Fiscal Years 2003–2022 (Dollars in Millions).

Fiscal year	EOIR	CBP	ICE
2003	188	5,887	3,2
2004	189	5,997	3,6
2005	199	6,344	3,127
2006	220	7,113	3,866

Fiscal year	EOIR	CBP	ICE
2007	227	7,746	4,697
2008	238	9,285	5,054
2009	264	11,251	5,968
2010	298	11,541	5,742
2011	297	11,245	5,805
2012	302	11,781	5,983
2013	304	11,737	5,628
2014	312	12,464	5,948
2015	347	12,805	6,191
2016	422	13,295	6,178
2017	440	14,440	6,770
2018	505	16,318	7,452
2019	563	17,257	7,906
2020	673	16,530	8,310
2021	734	16,282	8,350
2022	760	18,075	8,877
2023	860	20,856	9,139

Note: The figures are rounded to the nearest $1 million for EOIR and the nearest $100 million for ICE and CBP.

Source: CBP and ICE budgets for FY2003–FY2023: DHS (2023); EOIR budget for FY2003–FY2024 DOJ/EOIR, Budget and Performance Summary, multiple years (FY2005–FY2024), Falls Church, EOIR. The FY 2005–FY2016 EOIR budget figures are available at https://www.justice.gov/archives/jmd/justice-management-division-archive, and the FY2017–2024 figures are available at https://www.justice.gov/doj/budget-and-performance.

The backlog varies in severity by state, court, and hearing location. Florida has nearly 334,000 pending cases, for example, and Hawaii has 204 pending cases (TRAC 2023). The San Francisco court has more than 94,000 pending cases and the court in Adelanto, California has 130 (ibid.). For reasons explained below, the backlog has grown more dramatically in non-detained cases before courts in the interior of the country, than in courts located in states along the US-Mexico border. Exacerbating this problem, US Immigration and Customs Enforcement (ICE) interviews of new arrivals, which typically lead to their placement in removal proceedings, are themselves delayed by many years in some jurisdictions (Nelson 2023).

The backlog is not a harmless problem or one that can be easily fixed. On the one hand, it perversely punishes those with strong claims to remain, delaying their ability to gain relief from removal and to integrate. On the other, it prevents the timely adjudication of cases with weaker claims. The large number of asylum-seekers and other migrants granted humanitarian parole (allowed to remain in the US temporarily) in the first two years of the Biden administration has put these problems in stark relief.[1] The backlog also dis-incentivizes pro bono counsel and charitable legal agencies from assuming representation in cases that may extend for many years.

EOIR's persistent attempts to reduce the backlog have failed because the immigration court system did not create this problem and cannot resolve it on its own. The backlog is an intractable problem because it is systemic. It results from well-known anomalies and failures in the broader US immigration system, which the political branches of government have failed to address for decades. Yet this has not stopped Members of Congress or past administrations from attributing the backlog to court inefficiencies, or blaming the courts for incentivizing illegal migration (Figure 1).

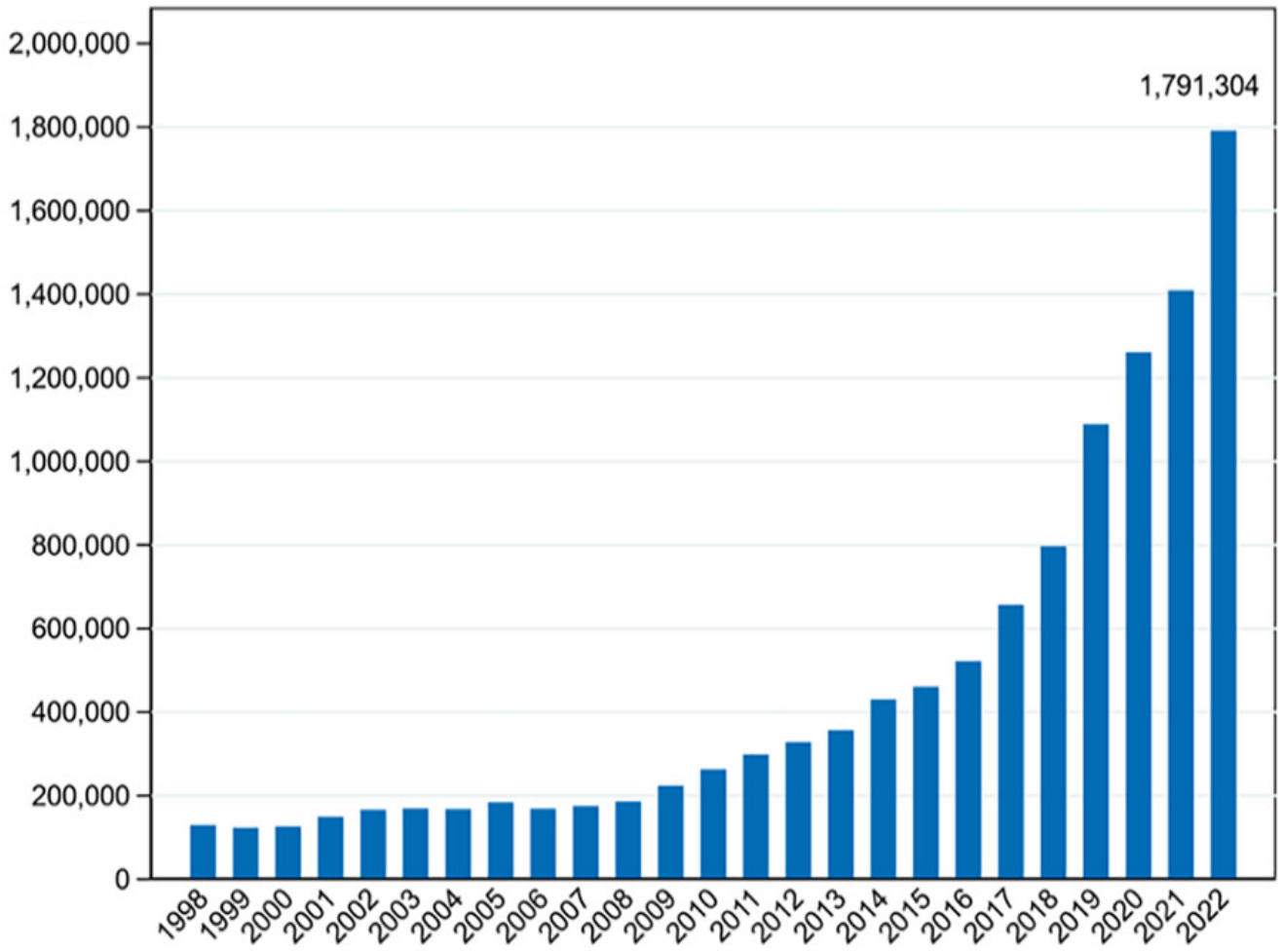

Figure 1. Cases Pending Before Immigration Courts, Fiscal Years 1998–2022.

Source: The number of pending cases between FY 2008 and 2022 come from EOIR (2023a), and before 2008 from TRAC (2023).

This criticism is misguided: Immigration Judges (IJs) labor under heavy caseloads and have historically received sparse legal support (ABA 2010, 2-16 and 2-17; Osuna 2016), although staffing has improved in recent years (EOIR 2023b). House appropriators have directed EOIR to make status reports on the hiring of IJs and "judge teams" which include judicial clerks, legal assistants, interpreters, and administrative employees (EOIR 2021a, Exhibit L). funding for EOIR remains grossly insufficient to accommodate incoming cases from much less to make headway in reducing the backlog.

This paper examines the systemic problems that have created and sustain the backlog. If not decisively addressed, these problems will make the backlog's continued growth an inevitability. They include:

- An insufficiently resourced immigration court system, compared to the immigration enforcement agencies that perpetuate the backlog.
- The inability of EOIR and the failure of the Department of Homeland Security (DHS) — particularly, the Assistant Chief Counsels from ICE's Office of the Principal Legal Advisor (OPLA) ("OPLA trial attorneys" or "OPLA attorneys") — to limit the cases coming into the court system.
- Immense backlogs and processing delays elsewhere in the immigration system, particularly the legal immigration system, that heavily contribute to the court backlog.
- IJ reassignments based on changing enforcement priorities that over time have accounted for multi-year delays in tens of thousands of cases.
- The difficulties IJs face in managing their dockets given their lack of discretion and lack of many of the authorities possessed by criminal courts and administrative law judges.
- Past failures by DHS to apply meaningful enforcement priorities and prosecutorial discretion (PD) to keep non-priority cases or what should be non-priority cases from entering the immigration court system.

On the latter point, scholars have identified several significant categories of pending cases potentially ripe for an exercise of PD (Chen and Markowitz 2021; Markowitz and Noroña 2021). The paper confirms the potentially substantial impact on backlog reduction of establishing non-priority categories of cases and adhering to PD guidelines.

The paper situates the backlog in the context of EOIR's relationship with DHS and DOJ, and the larger US immigration system. It details EOIR's tenuous authority over the court system and the barriers confronting IJs as they seek to complete cases and manage their dockets. It outlines the categories of cases that compose the backlog and spur its growth. The paper also describes neuralgic problems within the US immigration system that drive the backlog. For this reason, it refers to the court system as the "dumping ground" for unresolved problems in the broader immigration system. Finally, its main contribution may be to set forth the politically difficult steps that, in combination, would reverse and ultimately eliminate the backlog.

Causes and Solutions to the Backlog

The US foreign-born population increased from 9.6 to 45.3 million between 1970 and 2021 (MPI 2022). Of this population, 21.2 million had not naturalized as of 2021 (US Census Bureau 2023), offering an upper bound number of US residents who could theoretically come before the immigration courts. Despite immense changes in its composition and needs over time, the United States has not overhauled its legal immigration system in 58 years,[2] or meaningfully altered it in 33 years.[3] It has not passed a general legalization program for 37 years[4] or any version of the Development, Relief, and Education for Alien Minors Act (DREAM Act) in more than two decades.[5] The nation's overarching demographic realities and political failures, including egregious underinvestment in EOIR, have significantly stressed the immigration court system.

Insufficiently Resourced Immigration Court System

Successive Congresses and administrations have found common cause in increasing funding and expanding the authorities of US immigration enforcement agencies. These agencies, in turn, feed massive numbers of cases into the immigration courts each year.

In FY 2022, EOIR's enacted budget of $760 million represented just 3 percent of the combined budgets — equaling $24.6 billion — of the two main DHS enforcement agencies, ICE and Customs and Border Protection (CBP) (Table 1). Although the ratio of EOIR to CBP/ICE funding has marginally increased in recent years, this disparity has been a defining feature of the US immigration system since DHS's creation (Table 1).

Moreover, this analysis understates the disparity between immigration enforcement and court funding because it fails to account for the significant role of additional agencies within DHS (such as US Citizenship and Immigration Services [USCIS]), other federal agencies, and states and localities in immigration enforcement.

EOIR's FY 2021 budget provided for 2,277 full-time equivalents and the agency employed 559 IJs in FY 2021 (DOJ 2022b, 10, 23; Table 2). By way of comparison, OPLA, with more than 1,300 attorneys and nearly 300 support personnel, enjoys resources comparable to EOIR, despite arguably more limited responsibilities.[6]

Table 2. Number of Immigration Judges Hired and on Board, Fiscal Years 2010–2022.

Fiscal year	Total immigration judges hired	Total immigration judges on board	Immigration judge attrition
2010	17	245	
2011	39	273	11
2012	4	267	10
2013	8	262	13
2014	0	249	13
2015	20	254	15
2016	56	289	21
2017	64	338	15
2018	81	395	24
2019	92	442	45
2020	99	517	24
2021	65	559	23
2022	104	634	29

Source: EOIR (2023b).

EOIR has long needed more human resources of all kinds — judges, lawyers, clerks, and support personnel. Yet between 2011 and 2015, the number of IJs fell due to a DOJ hiring freeze, which extended from January 21, 2011 to February 14, 2014, and to the government shutdown in October 2014 (Table 2). The shut-down alone led to 2,882 continuances in hearings in FY 2015 (GAO 2017, 23, 40–42, 70), illustrating how temporary disruptions contribute to the backlog.

EOIR also needs greater physical infrastructure, including more and expanded court physical infrastructure will need to increase substantially to accommodate the number of judges and court personnel needed to reduce the backlog.

In recent years, the number of IJs and legal support personnel has grown (Table 2), although not nearly at the rate needed to adjudicate incoming cases, much less to make a m

dent in the backlog. Compounding these challenges, EOIR has experienced higher than normal IJ attrition in recent years (CRS 2022, 21). On average, it lost 12 judges (net) per year between 2009 and 2016, a figure that has more than doubled in the intervening years (DOJ 2022b, 6). Moreover, it takes significant time and multiple steps to recruit, vet, hire, and train new judges, and it takes additional time for new IJs to become as efficient and productive as experienced judges (ibid., 26).

EOIR's budget request for FY 2023 of $1,354,889 significantly exceeds its 2022 enacted budget and provides for an additional 100 IJs and related support staff (DOJ 2022b, 10).[8] Funding at this level is a step in the right direction. Yet absent broad reform of the US immigration system, EOIR will need far more than an additional 100 judges.

A comparison of case completions, receipts, number of judges, and average completions by IJ between 2011 and 2022 (Table 3) suggests the size of the need.

Table 3. Total Case Completions, Initial Receipts, Number of Immigration Judges (IJs), and Case Completions per IJ.

Fiscal year	Total case completions	Initial receipts	Number of IJs	Annual case completions per IJ
	(1)	(2)	(3)	(1)/(3)
2011	219,136	238,159	273	803
2012	186,073	212,936	267	697
2013	155,952	196,619	262	595
2014	141,682	230,178	249	569
2015	143,647	193,006	254	566
2016	143,493	228,457	289	497
2017	163,083	295,261	338	482
2018	195,141	316,133	395	494
2019	277,081	547,281	442	627
2020	232,221	369,732	517	449

Fiscal year	Total case completions	Initial receipts	Number of IJs	Annual case completions per IJ
	(1)	(2)	(3)	(1)/(3)
2021	115,855	244,049	559	207
2022	313,849	706,640	634	495

Source: Total Case Completions and *Initial Receipts* obtained from EOIR (2023a); and *Number of IJs* from EOIR (2023b).

Tables 4 and 5 analyze the number of IJs (with related court personnel) needed to reverse and eliminate the backlog under two scenarios. In the first scenario, CMS projects future case receipts and case completions per judge based on the average figures from FY 2011 to 2022. However, it excludes FY 2020 and 2021 from this calculation due to the effect of the COVID-19 pandemic on the court system (its temporary closure and gradual reopening) and because of methodological problems related to counting case completions in the Trump era. In the second scenario, CMS assumes that annual case receipts and completions per judge will equal the figures from FY 2022, a year that experienced a historically high number of case receipts from DHS. The starting point in both these scenarios is the backlog (1.79 million cases) and the number of IJs (634) at the end of FY 2022.

Table 4. Number of Judges Needed to Eliminate Backlog in 5 and 10 Years.

	Scenario 1			Scenario 2	
	Number of judges at end of FY 2022	Judges needed to eliminate backlog in 10 years	Judges needed to eliminate backlog in 5 years	Number of judges at end of FY 2022	Judges needed to eliminate backlog in ye
Number of judges on board	**634**	**870**	**1,184**	**634**	**1,790**
Annual case completions	361,380 (634 × 570)	495,900 (870 × 570)	674,880 (1,184 × 570)	313,830 (634 × 495)	886,050 (1,790 ×

	Scenario 1			Scenario 2		
	Number of judges at end of FY 2022	**Judges needed to eliminate backlog in 10 years**	**Judges needed to eliminate backlog in 5 years**	**Number of judges at end of FY 2022**	**Judges needed to eliminate backlog in 10 years**	
New cases received annually	316,467	316,467	316,467	706,640	706,640	
Additional annual pending cases (new cases received annually−annual case completions)	−44,913	−179,433	−358,413	392,810	−179,410	
Backlog at end of FY 2022	**1,791,304**	**1,791,304**	**1,791,304**	**1,791,304**	**1,791,304**	
Backlog at end of FY 1	1,746,391	1,611,871	1,432,891	2,184,114	1,611,894	
Backlog at end of FY 2	1,701,478	1,432,438	1,074,478	2,576,924	1,432,484	
Backlog at end of FY 3	1,656,565	1,253,005	716,065	2,969,734	1,253,074	
Backlog at end of FY 4	1,611,652	1,073,572	357,652	3,362,544	1,073,664	
Backlog at end of FY 5	**1,566,739**	894,139	**0**	**3,755,354**	894,254	
Backlog at end of FY 6		714,706			714,844	
Backlog at end of FY 7		535,273			535	
Backlog at end of FY 8		355,840			356,024	
Backlog at end		176,407			176,614	

	Scenario 1			Scenario 2		
	Number of judges at end of FY 2022	**Judges needed to eliminate backlog in 10 years**	**Judges needed to eliminate backlog in 5 years**	**Number of judges at end of FY 2022**	**Judges needed to eliminate backlog in 10 years**	
of FY 9						
Backlog at end of FY 10		**0**			**0**	

Source: Total Case Completions and *New Cases* from EOIR (2023a); *Number of Immigration Judges* EOIR (2023b).

Table 5. Estimated Backlog with Additional 200 Judges Hired Each Year.

End of fiscal year	**Number of judges at end of FY 2022**	**Average case completions per IJ**	**Annual case completions**	**New cases received annually**	**Annual change in pending cases (new cases−case completions)**	**P ca ye (b at F 1,7 + c p**
Scenario 1						
FY 1	634	570	361,380	316,467	−44,913	1,7
FY 2	834	570	475,380	316,467	−158,913	
FY 3	1,034	570	589,380	316,467	−272,913	
FY 4	1,234	570	703,380	316,467	−386,913	9
FY 5	1,434	570	817,380	316,467	−500,913	4
FY 6	1,634	570	931,380	316,467	−614,91	

End of fiscal year	Number of judges at end of FY 2022	Average case completions per IJ	Annual case completions	New cases received annually	Annual change in pending cases (new cases−case completions)	P ca ye (b at F 1,7 + c p
Scenario 2						
FY 1	634	495	313,830	706,640	392,810	2,
FY 2	834	495	412,830	706,640	293,810	2,
FY 3	1,034	495	511,830	706,640	194,810	2,
FY 4	1,234	495	610,830	706,640	95,810	2,
FY 5	1,434	495	709,830	706,640	−3,190	2,
FY 6	1,634	495	808,830	706,640	−102,190	2,
FY 7	1,834	495	907,830	706,640	−201,190	2,
FY 8	2,034	495	1,006,830	706,640	−300,190	2,
FY 9	2,234	495	1,105,830	706,640	−399,190	1,
FY 10	2,434	495	1,204,830	706,640	−498,190	1,
FY 11	2,634	495	1,303,830	706,640	−597,190	6
FY 12	2,834	495	1,402,830	706,640	−696,190	

Source: Total Case Completions and New Cases EOIR (2023a); Number of IJs from EOIR (2023b)

In both scenarios, CMS assumes that case receipts and IJ average case completions will remain fixed into the foreseeable future. In other words, it assumes (unrealistically) there will be no new policies, practices, migration flows, or conditions (like a government shut-down) that negatively affect the backlog.

Table 4 projects the number of IJs needed to eliminate the backlog within 5- and 10-years. It assumes that the projected number of IJs would be available beginning in year 1 and throughout the time it takes to eliminate the backlog. Under the first scenario, it would require 870 judges to eliminate the backlog in 10 years, and 1,184 judges to eliminate the backlog in five years. Under the second scenario, it would require 1,790 judges to eliminate the backlog in 10 years, and 2,152 judges to eliminate the backlog in five years.

Table 5 uses the same two case receipt and completion scenarios as Table 4. However, it examines how long it would take to eliminate the backlog by adding 200 IJs per year. It finds that based on the first scenario, it would take six years to eliminate the backlog and under the second scenario 12 years.

The stark difference between the projected number of IJs needed to eliminate the backlog under the two scenarios is due to the far higher number of new cases placed by DHS into the court system in FY 2022. These projections highlight the central importance of DHS exercising PD and reducing referrals to the court system as part of an integrated backlog reduction plan.

Overall, Tables 4 and 5 should not be viewed as a prescription for specific staffing levels, but as indicia of the size of the problem and need.[9] CMS's overall analysis suggests that it would be extremely difficult to eliminate the backlog exclusively by adding IJs, legal support personnel and physical infrastructure. On the other hand, it illustrates that far more IJs and related court resources must be part of any meaningful backlog reduction plan. This analysis also shows why EOIR cannot formulate an ideal budget or staffing plan in the absence of broader reforms of the US immigration system and more discipline by DHS in prioritizing the cases it refers to the court system. Increased staffing needs to be coupled with the other recommendations set forth in this study to reverse and ultimately eliminate the backlog.

Recommendations

To accommodate the volume of cases referred by DHS to the immigration courts, Congress should benchmark EOIR's budget at 6 percent of the combined budgets of CBP and ICE, which would double the current ratio of EOIR to CBP/ICE funding (Table 1). The 6 pe figure is consistent with CMS's analysis on the need for far higher numbers of IJs an court personnel under any viable backlog reduction plan (Tables 4 and 5). This reform would bring EOIR staffing and resources closer to the levels needed to accommodate incoming cases.

EOIR should also place new IJs and court personnel in locations that are easily accessible to or that otherwise enjoy sufficient numbers of pro bono attorneys and charitable legal immigration organizations, given the importance of representation to the operation of the court system.

EOIR's Inability to Limit Cases Coming into Its Court System

NTAs are charging documents issued to non-citizens by DHS agencies, particularly CBP, ICE, and USCIS, which set forth the grounds of removability and their factual basis. By regulation, NTAs can be issued by "any immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port-of-entry" and by 45 categories of DHS officers, as well as other "duly authorized officers or employees."[10] Following the issuance of an NTA, DHS must take the additional step of serving the NTA on the immigration courts in order to initiate removal proceedings.

A 2018 Trump-era policy memorandum, which DHS rescinded in 2021, directed USCIS staff to serve NTAs "upon issuance of an unfavorable decision on an application, petition, or benefit request," if the noncitizen was "not lawfully present in the United States." (USCIS 2018a). This policy led to an increase in the number of NTAs issued by USCIS — from 91,711 in FY 2017 to more than 140,000 in both FY 2018 and in FY 2019 (Table 6, CRS 2022, 29).

Table 6. Notice to Appear Issued by DHS Component, Fiscal Years 2011–2020.

Fiscal year	USBP		USCIS		ICE ERO		
	Number	Percent	Number	Percent	Number	Percent	Num
2011	31,739	12.4	44,638	17.4	162,627	63	17,5
2012	31,506	13	41,778	17.3	146,808	61	21,(
2013	42,078	18.4	56,896	24.9	105,791	46	23,(
2014	118,753	42.9	56,684	20.5	82,111	30	
2015	64,775	33.3	56,835	29.2	46,274	24	20,4
2016	93,146	34	92,229	33.7	45,980	17	42,5
2017	88,315	31.4	91,711	32.6	69,910	25	31,4

Fiscal year	USBP		USCIS		ICE ERO		
	Number	Percent	Number	Percent	Number	Percent	Nun
2018	116,428	30.2	140,246	36.3	81,332	21	47,9
2019	521,894	65.7	140,396	17.7	69,730	8.8	61,8
2020	57,928	27.6	83,732	39.9	48,664	23.2	19,1
2021	353,911	68.9	62,451	12.2	56,636	11	40,8

Note: CBP OFO, Customs and Border Protection, Office of Field Operations; ICE ERO, Immigration and Customs Enforcement, Enforcement Removal Operations; USBP, United States Border Patrol; USCIS, US Citizenship and Immigration Services.

Source: Moskowitz and Lee (2022) and Leong (2022).

DHS issued 385,942 NTAs in FY 2018 and 793,912 in FY 2019 (Table 6).[11] EOIR received fewer NTAs due to the COVID-19 pandemic in FY 2020, but received 706,640 new cases in FY 2022 (Table 3).

Since 2008, the immigration courts have completed fewer cases each year than they have received from DHS.[12] Over the last five years (2018–2022), IJs received an average of nearly two times more cases per month than they could complete (Figure 2).

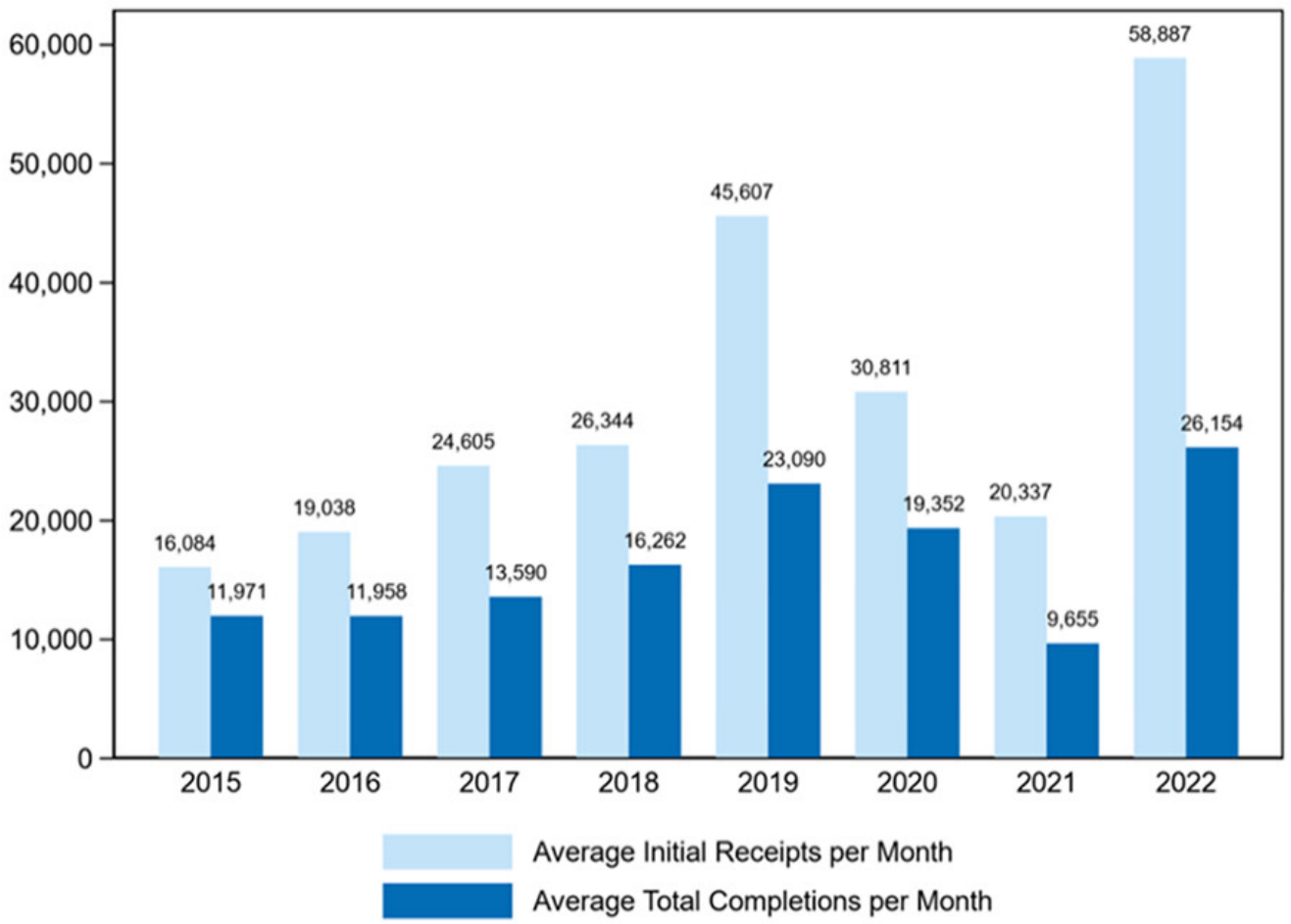

Figure 2. Average Initial Receipts and Total Completions per Month, Fiscal Years 2015–2022.

Source: EOIR (2023c).

Exacerbating EOIR's resource and operational challenges, DHS serves NTAs on the court system with little coordination or notice. In Operation Horizon, for example, DHS served 78,000 cases on the courts that had been processed at the border.[13]

In the criminal justice system, the district attorney decides if it will prosecute a case. In the immigration system, DHS officers from several component agencies serve NTAs without OPLA trial attorneys reviewing whether a case should be initiated (Figure 4). EOIR ha argued that the de facto prosecutor in removal cases (OPLA attorneys) should revie for legal sufficiency and determine their readiness for adjudication (Osuna 2016). Others have proposed variations of this idea (ABA 2010, 1-61; Kerwin, Meissner, and McHugh 2011, 19). As Figures 3 and 4 indicate, the number of NTAs issued exceeded the number of case

completions (typically by a large margin) every year but one between FY 2011 and 2022, suggesting that these proposals have not gained purchase.

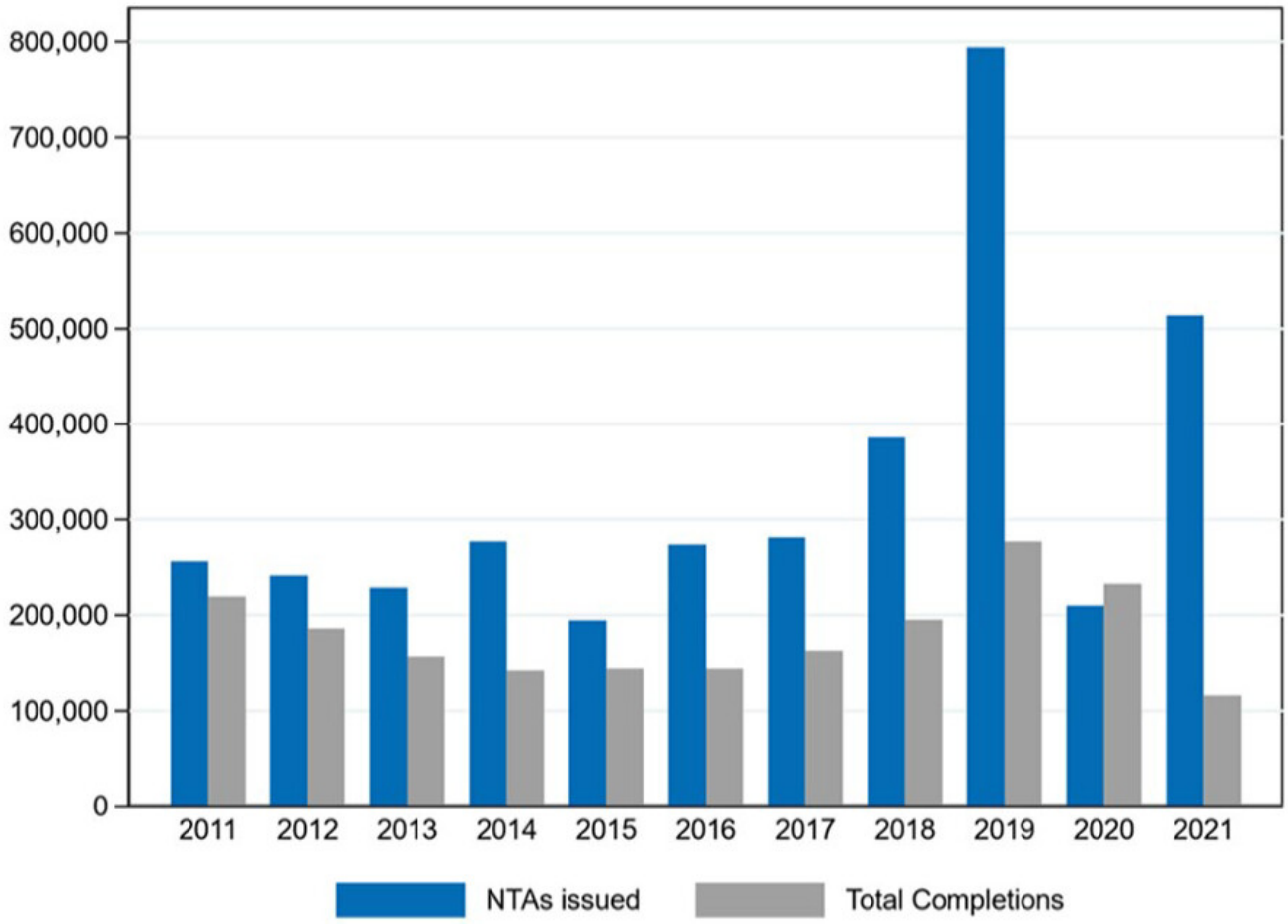

Figure 3. NTAs Issued and Immigration Court Case Completions, Fiscal Years 2011–2021.

Source: CMS obtained total case completion numbers from EOIR (2023c); NTAs issued for FY2011–FY2020 from Moskowitz and Lee (2022), and; NTAs issued for FY2021 from Leong (2022).

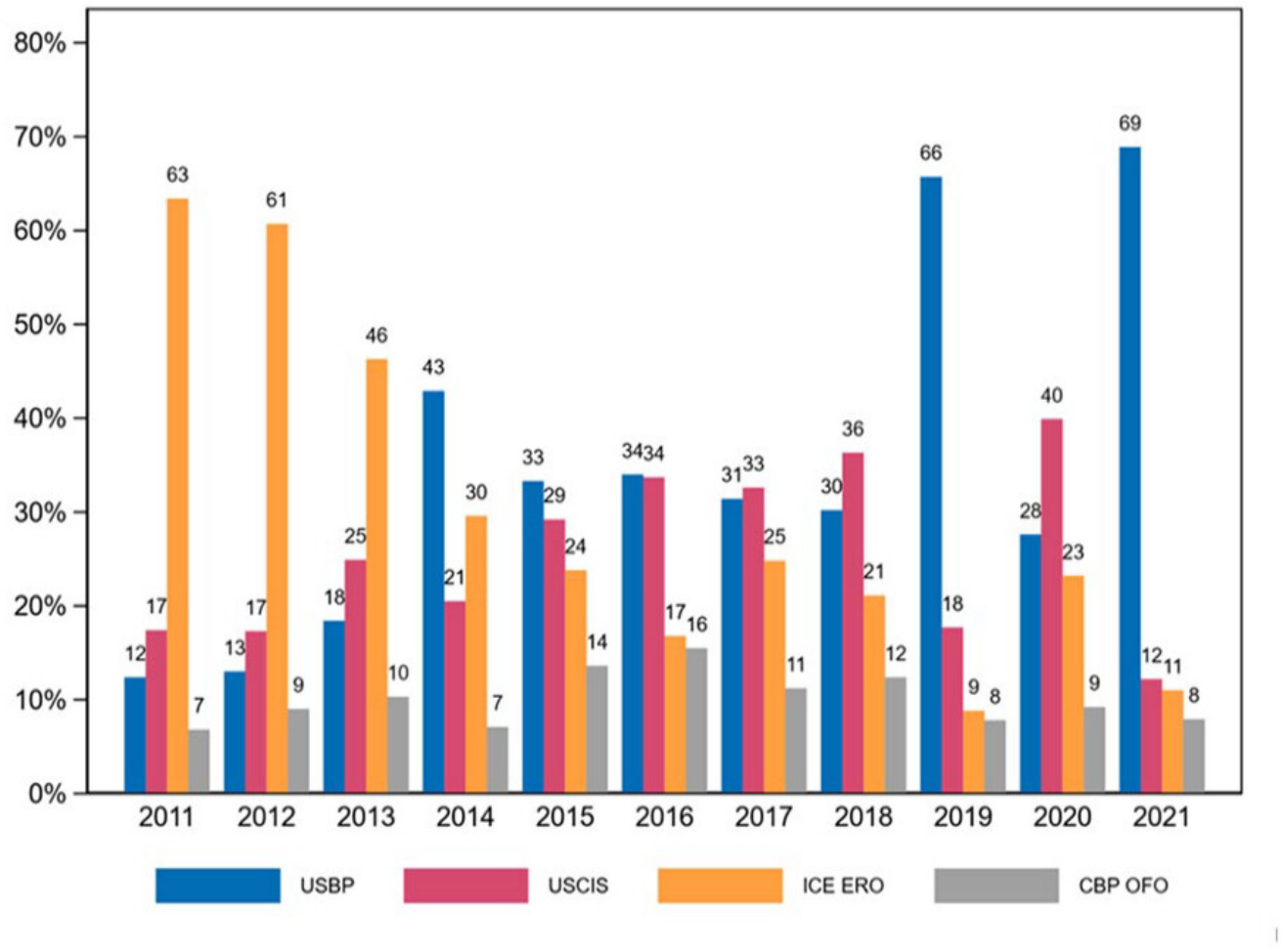

Figure 4. Notice to Appear Issued by DHS Component, Fiscal Years 2011–2021.

Source: NTAs issued for FY2011–FY2020 from Moskowitz and Lee (2022); NTAs issued for FY2021 from Leong (2022).

Recommendations

DHS's issuance and service of NTAs should be guided by meaningful enforcement priorities and PD guidelines, as should decisions to dismiss and administratively close cases in removal proceedings. PD's potential as a backlog reduction tool can be illustrated by three ca of pending cases that could be considered for an exercise of PD:

- Cases in removal proceedings for at least five or three years;
- Cases in which the respondent has a USCIS application pending that, if approved, would result in permanent residence;

- Cases involving applications for relief that both EOIR and USCIS have statutory authority to adjudicate, albeit at different stages of the immigration process and subject to different requirements.[14]

EOIR reports that as of March 10, 2023, there were:

- 731,149 cases in removal proceedings that had been pending for at least three years and 277,412 pending for at least five years.[15]
- 40,414 cases in which there was a past court adjournment due to an application pending at USCIS. This figure excludes persons that did not notify the court that they had an application before USCIS.
- 684,404 cases in which an application for relief had been filed (with EOIR) that USCIS could also adjudicate in certain circumstances.[16]

Markowitz and Noroña (2021) and Chen and Markowitz (2021) proposed this latter category of cases (among others) for PD.[17]

DHS should issue formal guidance that vests responsibility for screening NTAs with a specially trained corps of OPLA attorneys (Kerwin, Meissner, and McHugh 2011, 21). The guidance should instruct OPLA trial attorneys not to pursue removal in non-priority cases or cases that merit PD. It should also instruct OPLA attorneys to support the dismissal of non-priority cases, if the respondent agrees. DHS should also "revise the NTA form or instruct its completing officers to clearly indicate [their] agency affiliation," a step that would "enhance the immigration court's ability to better estimate future workload" (ACUS 2012, recommendation 22). In addition, DHS should serve a completed (with the time and date) copy of the NTA with the court within a week of serving it on the respondent. At present, incomplete or delayed NTAs leave respondents in a legal limbo and can prejudice their claims by causing, for example, asylum-seekers to miss the one-year filing requirement.

DHS should not issue or serve NTAs in cases that will not result in removal, such as in cases of unaccompanied children seeking Special Immigrant Juvenile Visas, noncitizens wi applications, petitions or requests for immigration benefits before USCIS, or nationa countries that do not accept the return of deportees.[18] Nor should an NTA be issued served if removal would work disproportionate harm on respondents or their US family members. Humanitarian and equitable considerations may support an exercise of PD in

cases involving, for example, the elderly, family breadwinners, veterans, or persons with criminal records based on a relatively minor violation or a crime committed years in the past.

DHS should limit the NTAs it serves each year on the court system to a number *below* what the courts system can reasonably accommodate until the backlog's growth is reversed and its size meaningfully reduced. EOIR is a crucial component of the immigration system. It serves neither EOIR's or the broader immigration system's interests to flood EOIR with cases it cannot complete. As a result of the status quo, 1.87 million cases languish in the backlog, including a large number that DHS should have kept out of removal proceedings. Others respondents fall within enforcement priorities, but remain in the country for years due to the backlog. This state of affairs demands a more disciplined immigration system as a whole, and more accessible data on whether a non-citizen qualifies for PD.

DHS should file cases with the immigration courts expeditiously, so as not to overly burden the system with unanticipated, low-priority cases. To ensure timely service of NTAs, DHS and DOJ should issue a joint policy directive that voids NTAs if they are not filed with the immigration courts in 30 days and that removes them from the court system unless the respondent opposes this step.

Backlogs and Processing Delays Elsewhere in the Immigration System that Contribute to the Immigration Court Backlog

The US immigration courts bear the brunt of the immigration system's neuralgic problems. Even when it operates efficiently, the removal adjudication process requires significant time and multiple steps. The latter include DHS's issuance and filing of an NTA, the initial master calendar hearing, bond hearings, merits hearings, and the IJ's decision on removability and relief from removal (DOJ 2022b, 16).[19] In a high volume of cases, there are additional bottlenecks and delays (Booz Allen Hamilton 2017). Respondents and OPLA trial attorneys can also appeal decisions to the BIA. OPLA can request reviews of cases by the Attorney General, which occurs in a very small number of cases. In addition, respondents can file petitions for review to a circuit court of appeals.

Efficiency has become a buzzword in the literature and discourse on the backlog. Immigration court efficiency is an important goal, but ill-conceived efficiency "reform" risk making the system less efficient. In the early 2000s, such reforms led to a doubling of appeals of BIA rulings (Martin 2008), a very inefficient outcome. More than that, they can work at cross-purposes to the ability of IJs and the BIA to "fairly, expeditiously, and uniformly administer and interpret US immigration laws" (DOJ 2022b, 2).

In 2022, EOIR projected that full-time judges could complete an average of 500 cases per year and with "additional efficiencies" could substantially increase their output (ibid., 26). In January 2018, the EOIR Director issued a memorandum that set case priorities and "performance metrics" for IJs that included:

- The completion of at least 700 cases per year;
- Timelines for the completion of different types of cases, motions, and other matters, and;
- A remand rate (which measures decisions overturned on appeal) of less than 15 percent (EOIR 208).

In 2021, the Biden administration rescinded this memorandum. The president of the National Association of Immigration Judges (NAIJ) characterized these metrics as part of an "evaluation model which emphasized productivity quotas and deadlines over judicial competence" and that contravened the legal duty of judges "to exercise independent judgment and discretion" in individual cases.[20] Performance metrics that afford IJs insufficient time to complete cases have long been a leading cause of IJ stress, burnout, and retention difficulties (Legomsky 2010, 1655). As such, they work at cross-purposes to an integrated backlog reduction strategy.

The major cause of backlogs is not IJ or court inefficiency, but factors exogenous to the court system, including backlogs elsewhere in the US immigration system. Perhaps the most egregious example involves persons in removal proceedings with pending USCIS petitions, applications, or requests for immigration benefits.

A high percentage of those in immigration court backlogs are also mired in multi-year visa backlogs, as well as USCIS application processing delays, despite paying significant fees to cover processing costs (CIS 2022, 5; USCIS 2023).

CMS examined the demographic characteristics of US residents in the family-based visa backlog, using as a proxy US undocumented residents living in households with a US citizen or lawful permanent resident (LPR) family member who could petition for them (Ker… Warren 2019). It found a population with strong equitable ties to the United States w… thus, good candidates for an exercise of PD. Fifty-nine percent had lived in the Unite… for at least 10 years and 23 percent at least 20 years. Seventy-two percent (aged 16 and older) were in the labor force, and they were employed at rates that exceeded the US population. Two-thirds (aged 18 or older) had earned at least a high school diploma or its equivalent. Twenty-five percent had a bachelor's degree or higher. Thirty-two perce…

mortgaged residences and 12 percent in homes owned free and clear. In addition, the nearly 1 million US-born children under age 21 living in these households would suffer severe consequences if their parent(s) were removed.

Visas backlogs result from a combination of numerical limits on all family-based visa preference categories and all employment-based categories, limits on individual visa categories, per country caps, existing backlogs, and continuous demand (Wheeler 2019). The backlogs are the longest in visa categories for countries with the highest demand for visas. As of November 1, 2021, 4.1 million intending immigrants languished in visa backlogs — 3.97 million in family-based and 171,617 in employment-based visa backlogs. For family-based visas, these included:

- 291,645 pending cases in the first preference category for unmarried sons and daughters of US citizens.
- 390,489 in the 2A preference category for the spouses and minor children of LPRs.
- 390,489 in the 2B preference for the unmarried adult sons and daughters of LPRs.
- 638,590 in the third preference category for the married sons and daughters of US citizens.
- 2,240,258 in the fourth preference category for the brothers and sisters of US citizens (DOS 2022).

The US State Department's Bureau of Consular Affairs reports each month on the availability of visas by priority date (the official filing date of a visa petition). However, visa priority dates do not advance steadily. Some months they regress.

Beyond visa backlogs, there were 8.7 million USCIS applications and petitions pending by the fourth quarter of FY 2022, as well as significant processing delays (USCIS 2022a). As of January 31, 2023, for example, the median processing time was 12.7 months for an I-130 petition for alien relatives and 12.5 months for an I-485 application to adjust to permanent residence based on a family relationship (USCIS 2023).

The CIS Ombudsman has highlighted the "snowball" effects of these delays, that req "workarounds" by USCIS and the applicant, and that can lead to unemployment, lost benefits, and "anxiety, stress, and depression." (CIS 2022, 2–3). Persons in court backlogs — sometimes the very same people — experience the same adverse effects.

The 90,000 appeals pending before the BIA and the high number of appeals filed each year represent another source of the immigration court backlog (DOJ 2022b, 5).[21] The BIA has only 23 permanent members to accommodate this work and cases on appeal remain on the immigration court dockets.

Policy Recommendations

Intending immigrants in the family- and employment-based visa backlogs have already been determined by the government to have a qualifying family relationship or job offer that makes them potentially eligible for a visa. Because most will secure lawful permanent residence in due course, their cases should not clog the court system.

Instead, DHS and EOIR should continue the Biden era "reset" of the immigration courts by directing IJs and OPLA attorneys to employ discretion to dismiss the cases of those with pending USCIS applications, petitions, and requests for immigration benefits.[22]

In addition, Congress should pass legal immigration and visa backlog reform legislation. Like many endemic problems, Congress could easily solve the issue of visa backlogs by reissuing the unused visas of past visa holders who emigrated (Warren and Kraly 1985; Kerwin and Warren 2017, 318–9). The original Build Back Better Act, for example, would have recaptured and reissued visas from FY 1992 to FY 2021.[23] Congress could also:

- Increase or even eliminate overall family-based and employment-based visa caps;
- Increase per country caps;
- Treat the spouses, unmarried children, and parents of LPRs as "immediate relatives" under the law, removing them from numerical limits[24];
- Pass legislation that did *not* count the derivative family members of principal beneficiaries against per country and annual quotas.

Pending bills in the 118th Congress would adopt many of these strategies (Fwd.us 2022).

Congress should pass legislation that provides a path to permanent residence to no in long-term visa backlogs (Kerwin and Warren 2019, 41). The original Build Back Be would have allowed persons in visa backlogs to adjust to LPR status and would have exempted certain backlogged intending immigrants from per-country and worldwide visa limits, if they paid a supplemental fee.[25] Congress should also expand eligibility for in-country adjustment of status under Section 245(i) of the Immigration and Nationality Act

(INA). In-country adjustment is available at present to beneficiaries of family-based and employment-based visa petitions filed on or before April 30, 2001. If Congress moved forward this date by 20 years, it would reduce filings for requests for relief or immigration benefits by persons seeking to preserve their ability to remain and work in the United States until a visa becomes available.

For some, removal proceedings constitute the only way to gain legal status. As discussed below, for example, cancellation of removal is a form of relief from removal, available to both undocumented residents and LPRs with strong equitable ties to the United States.[26] However, it cannot be sought affirmatively; that is, outside of removal proceedings. To avoid denying legal recourse to cancellation-eligible non-citizens whose cases are closed or who have not been placed in removal proceedings, it will be necessary to create an affirmative path to permanent residence for them.

Since the 9/11 terrorist attacks, DHS and DOJ have prioritized the interoperability of their databases and the need to share immigration-related information. DHS should automatically inform EOIR whenever a person in removal proceedings has a pending USCIS petition, application, or request for an immigration benefit. EOIR has a data field on pending USCIS cases. However, at present, EOIR receives and enters this information in its database only if the respondent provides it. This problem should be quickly remedied.

The Effect of Judge Reassignments

Roughly twice as many non-citizens have entered the undocumented population in recent years by overstaying temporary visas than by illegally crossing a border (Warren and Kerwin 2017). Yet the temporary reassignment of judges has mostly occurred in response to concerns related to border control. Each of the last three administrations has prioritized border enforcement and established accelerated dockets at the border, leading to temporary IJ reassignments (CRS 2022, 37). These measures have increased immigration court backlogs in non-detained cases in the interior of the country. Contributing to this trend, respondents released at the border receive changes of venue to courts in the interior of the country. To address the problem of reassignments, EOIR has established Immigrati… Adjudication Centers in Fort Worth, Texas, Falls Church, Virginia, and Richmond, Virg… which are staffed by IJs without standard dockets and who can be assigned to priority cases.

Table 7 compares the growing backlog in select interior and border courts over a six-year period.

Table 7. Pending Cases by Select Border and Interior Courts.

City, State	2017	2018	2019	2020	2021	2022	2023
Charlotte, NC	11,517	15,885	21,688	44,200	52,719	67,663	74,219
Chicago, IL	25,310	29,109	43,793	47,462	56,280	84,311	96,840
Omaha, NE	8,545	10,654	14,426	17,635	21,014	26,469	28,268
Philadelphia, PA	9,550	14,247	20,543	27,624	33,741	45,616	49,889
El Paso, TX	4,729	4,173	16,650	15,369	14,705	19,615	18,676
Laredo, TX	—	—	—	—	—	3,264	2,794
Otay Mesa, CA	685	439	512	241	198	542	339
Tucson, AZ	685	729	1,837	2,266	1,910	1,208	1,286

Source: TRAC (2023).

It can be difficult to compare IJ productivity before, during, and after reassignments because of their short duration and because IJs on reassignment often handle different types of cases and on different timelines than cases in their normal dockets. By extension, it is difficult to quantify the extent to which reassignments have contributed to the backlog.

It is not difficult, however, to understand the historic effect of reassignments, which some commentators refer to as docket "shuffling." Reassignments created a positive feedback loop (albeit one with a negative policy outcome), leading to an ever increasing backlog. It took temporarily reassigned IJs time to transition to and assume their new caseloads. In some reassignments, judges reported having little work to do (Preston 2018), compared to heavy workloads in their normal dockets. They needed to reschedule cases in their dockets, delaying their adjudication. For some IJs, this meant scheduling hearings many years into the future.[27]

Given that the backlog was growing, every time judges were reassigned, they needed to reschedule hearings further into the future, creating a significant body of cases pending for

years. All of these variables added to the backlog's growth and their effect was compounded with every major reassignment, leading to ever higher and longer backlogs. Over the last decade, there have been several major reassignments.

- From 2014 to 2017, EOIR administered accelerated dockets that required that master calendar hearings be held within 21 days for unaccompanied minors and within 28 days for family units (families with children) (EOIR 2014, 2015; CRS 2022, 38).[28]
- From March through December of 2017, 100 judges were detailed to eight detention centers at the border in an effort to expedite the removal of illegal border crossers and to reduce the backlog, but these reassignments reportedly had the opposite effect (Preston 2018).
- In June 2018, then Attorney General Sessions announced the deployment of 18 immigration judges to detention centers at the US-Mexico border as part of a zero tolerance policy toward border crossers, including asylum seekers (DOJ 2018).
- Under the Trump administration, EOIR created dedicated dockets to adjudicate "family unit" cases in 10 immigration courts — Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, Miami, New Orleans, New York City, and San Francisco. It set a one-year deadline for completion of these cases (EOIR 2018a).
- In 2019, the Trump administration implemented its misnamed Migrant Protection Protocols (MPP), which returned US asylum-seekers to Mexico to await their removal proceedings. In response, DHS built new stand-alone (not satellite) court facilities. EOIR attempted to hold initial hearings in MPP cases within 30–45 days, typically via video conference. Because of the high volume of enrollees in this program, EOIR did not meet these goals and backlogs increased significantly (CRS 2022, 39).
- On May 28, 2021, DHS Secretary Alejandro Mayorkas and Attorney General Merrick Garland announced the establishment of a dedicated docket for families apprehended between ports of entry (POEs) on or after that date (DOJ 2021).[29] IJs were directed decisions in these cases within 300 days of the master calendar hearing. Case co accelerated in FY 2022 (TRAC 2022b). By the end of 2022, the cases of 110,000 pe had been assigned to the dedicated docket (TRAC 2022a), and hearings had been held in 12 locations (EOIR 2022a).

- EOIR will also need to assign judges to handle the cases referred to it through the new Asylum Merits Interviews (AMI). An interim final rule (IFR) establishing AMIs went into effect on May 31, 2022. The IFR provides that the USCIS Asylum Corps will adjudicate the claims of asylum-seekers found to have a "credible fear of persecution."[30] In the past, IJs adjudicated the asylum claims of respondents determined (by asylum officers [AOs]) to have a credible fear, which in most years constituted the lion's share of asylum cases in expedited removal.[31] The new system "is expected to reduce EOIR's workload, allowing EOIR to focus efforts on other priority work and to reduce the growth of its substantial current backlog."[32] Yet IJs will still adjudicate asylum and related protection claims in cases *denied* by AOs. These cases will be referred for streamlined proceedings, beginning in six cities (DHS 2022b). The IFR will require master calendar hearings to be scheduled 30–35 days after service of the NTA. Thus, the new system will prioritize asylum claims from the border over cases on the normal docket.

Many studies have proposed an enhanced role for the Asylum Corps in the adjudication of asylum cases before IJs (USCIRF 2005, recommendation 2; ABA 2010, 1-61-1-64; ACUS 2012, 14–15). Yet AMIs will almost certainly increase the backlog of cases pending with the Asylum Corps, which grew from roughly 50,000 in FY 2014, to 571,628 in FY 2022 (Figure 5). In FY 2022, the Asylum Corps received more than 202,000 affirmative asylum applications, and as of November 15, 2022, it had 607,651 asylum applications pending (USCIS 2022b). By December 2022, 978 asylum cases had been referred to the AMI program for adjudication by the Asylum Corps (Straut-Eppsteiner 2023, 3).

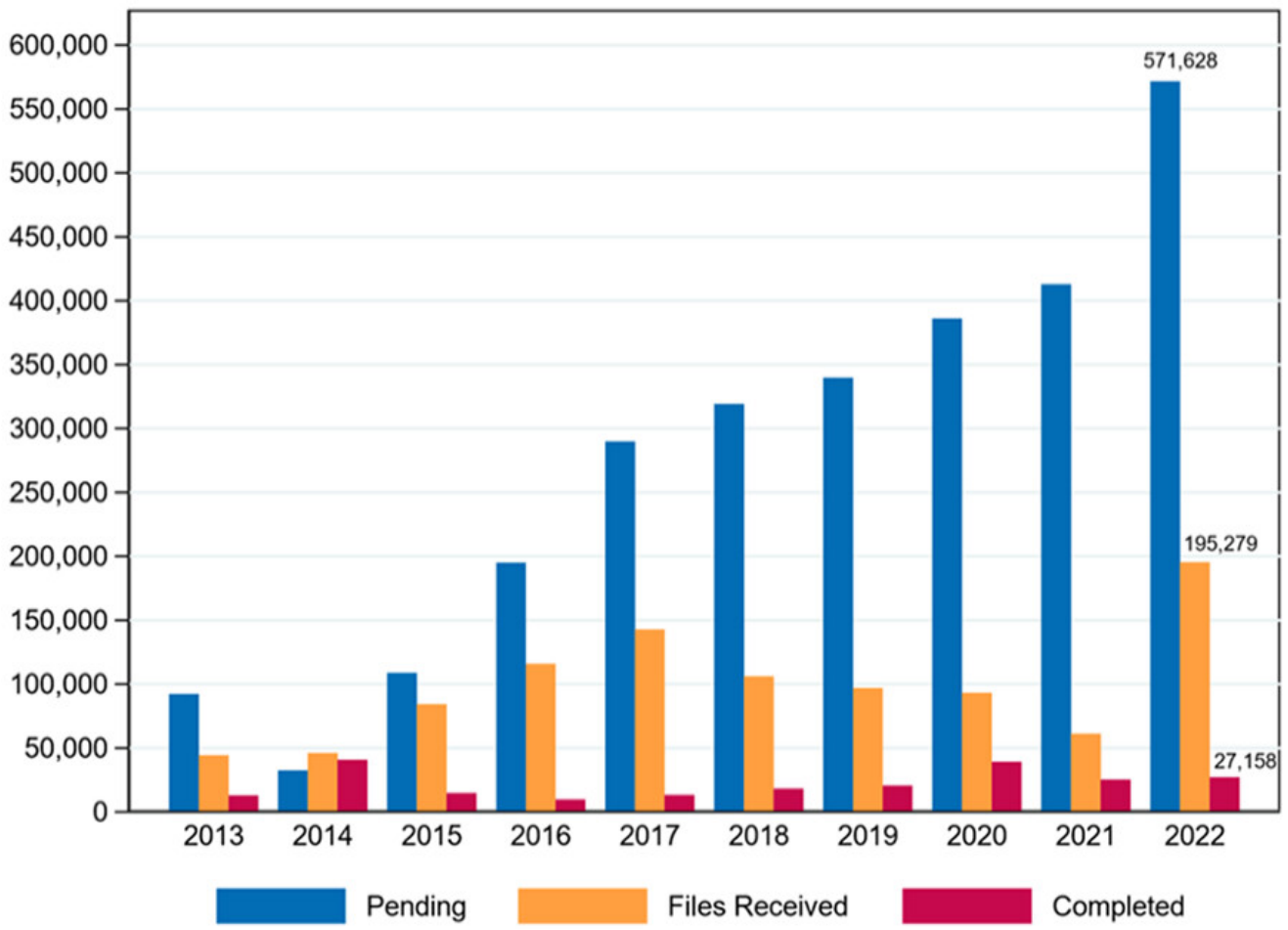

Figure 5. Affirmative Asylum Receipts, Completions, and Pending Cases by Year: FY 2013–2022.

Note: Affirmative asylum figures are from *I-589 Applications* for Asylum or Withholding of Removal. *Total completions* is the sum of *approved* and *denied* cases and does not include administratively closed cases. The total number of forms received by the end of fourth quarter is used as the total *files received*.

Source: FY2013–FY2022: USCIS (2013, 2014, 2015, 2016, 2017, 2018b, 2019, 2020, 2021, 2022b).

As with the immigration court system, the Asylum Corps continues to need far more AOs to adjudicate affirmative asylum cases, to make "credible" and "reasonable" fear determinations, and to reduce its growing backlog. Temporary assignments of 1,882 to the border between FY 2015 and FY 2020 led to a decline in the adjudication of new affirmative asylum cases (CIS 2020, 45–46) (Table 8). At the beginning of FY 2023, USCIS had filled 832 of 1,024 AO positions (USCIS 2022b).

Table 8. USCIS Asylum Division — Historic Hiring.

Staffing category	2015	2016	2017	2018	2019	2020
Federal Employees (starting)	1,037	1,153	1,449	1,612	1,637	1,710
All Staff Onboard	726	989	1,052	1,122	1,373	1,684
Federal Employees Asylum Officers (starting)	425	533	625	686	686	769
Asylum Officers Onboard	349	500	546	542	552	866
Staff Growth	285	116	296	163	25	73
Staff Growth (Asylum Officers)	52	108	92	61	0	83
USCIS Details to Asylum	45	12	15	81	193	171
Asylum Staff Temporarily Assigned to USCIS (RAD)	0	200 TDYs	42 TDYs	0	0	0
Asylum Staff Temporarily Assigned to the Border	45	444	311	498	406	178

Note: RAD, Refugee and Asylum Division; TDY, temporary duty.

Source: CIS (2020).

Policy Recommendations

Successive presidential administrations and DHS have established enforcement priorities that have led to the reassignment of IJs. Reassignments have mostly resulted from enforcement imperatives driven by the White House and DHS, and operationalized by DOJ through EOIR. The priorities may or may not reflect sound policy and political judgm the resulting reassignments have contributed immensely to the backlog's growth ar less efficient court system. For this reason, the Biden and subsequent administrations should minimize the establishment of priority dockets.

Congress should direct the US Government Accountability Office to produce a study on the extent to which IJ reassignments have contributed to the backlog and whether they have

accomplished their policy aims (i.e., to deter illegal entries and expedite the removal of recent entrants). As possible, EOIR administrators should minimize judge reassignments and reassign judges only to locations with sufficient access to counsel and support services.

Enforcement Priorities and Prosecutorial Discretion

Enforcement priorities and PD are central to a backlog reduction strategy that diminishes the number of cases entering the court system and increases the number leaving it.[33] Recent history offers important lessons in establishing an immigration system that advances these inter-related imperatives. The Obama and Biden administrations have tried to promote the exercise of PD within the removal adjudication process, while the Trump administration took the opposite approach.

Under the Obama administration, DHS Secretary Jeh Johnson established three tiers of enforcement priorities (DHS 2014):

- Non-citizens deemed a threat to national security, unlawful entrants arrested at the border, criminal gang members and participants, convicted felons, and aggravated felons.
- Non-citizens convicted of three or more misdemeanors or one significant misdemeanor, certain unlawful entrants or re-entrants, and persons deemed to have abused visa or visa waiver programs.
- Non-citizens issued a final order of removal.

Significantly, Johnson's guidance applied to all stages of the enforcement process and to all "enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning." (ibid.) It also allowed DHS officers to consider a range of factors in PD determinations, including in cases that would otherwise fall *within* its enforcement priorities, such as length of residence, family and community ties, military service, and humanitarian considerations.

By contrast, the Trump administration's interior enforcement strategy prioritized all noncitizens who had violated US immigration laws and, thus, failed to set priorities.[3] failed to articulate PD guidelines. Finally, it set unattainable and contradictory borde enforcement goals, including "the prevention of all unlawful entries"[35] on the one hand, and the prosecution of all illegal entries at the US-Mexico border on the other (Office of the Attorney General 2018).

Its lack of discipline did not result in more impactful enforcement. Instead, the number of newly initiated removal cases spiked, the court backlog grew by 250 percent, and the percentage of pending cases in which the most serious charge was illegal entry or another immigration violation (as opposed to a criminal or security charge) rose to 98.2 percent (TRAC 2021).

The Biden administration's enforcement priorities have largely tracked those of the Obama administration, falling into three categories:

- National security threats.
- Public safety threats, primarily due to "serious criminal conduct," based on a "totality of the facts and circumstances" assessment that weighs aggravating and mitigating factors.
- Border security threats, defined as those attempting to enter illegally and those who enter illegally after November 1, 2020 (recent entrants) based on the "totality of the facts and circumstances" (DHS 2021).

On June 10, 2022, a federal judge in the US District Court for the Southern District of Texas vacated the memorandum that set forth these guidelines. On June 11, 2021, EOIR issued a policy memorandum that directs IJs and BIA personnel to take a pro-active approach to assessing whether cases remain an enforcement priority for ICE and whether OPLA attorneys wish to exercise PD. The memorandum averred that DHS enforcement priorities affect virtually every decision related to removal proceedings, including:

> . . . deciding whether to issue, reissue, serve, file, or cancel Notices to Appear; to oppose or join respondents' motions to continue or to reopen; to request that proceedings be terminated or dismissed; to pursue an appeal before the Board of Immigration Appeals (BIA); and to agree or stipulate to bond amounts or other conditions of release (EOIR 2021b).

The memorandum also directed IJs "to inquire, on the record . . . as to whether the c remains a removal priority for ICE and whether ICE intends to exercise some form o prosecutorial discretion, for example by requesting that the case be terminated or dismissed, by stipulating to eligibility for relief, or, where permitted by case law, by agreeing to the [case's] administrative closure." (ibid.). It urged IJs to "use all docketing tools available . . . to ensure the fair and timely resolution of cases." (ibid.).

In an April 3, 2022 memorandum, Kerry Doyle, ICE Principal Legal Advisor, directed OPLA attorneys to defer to the DHS "component" that issued the NTA on whether the noncitizen met an enforcement priority (ICE 2022b). However, the "Doyle memorandum" stated this presumption could be overcome by "readily available case information" or "persuasive evidence of mitigating factors" indicating the case is "a non-priority case." (ibid.). The memorandum refers to PD as "an inherent part of what OPLA attorneys do every day, a reality that is particularly acute in an era of increasingly constrained resources. (citation omitted)." (ibid.)

Prosecutorial discretion refers to the responsibility of law enforcement agencies to ensure that the laws under their jurisdiction are "faithfully executed"[36] and to determine how most effectively to enforce them. All effective law enforcement agencies must decide what legal violations they will prioritize and which they will investigate and prosecute. Federal agencies enjoy both implicit and explicit authority to decide whether to enforce the law in particular cases and categories of cases. Immigration agencies can exercise discretion through:

> . . . humanitarian parole; the setting of bonds; the authority to suspend or cancel deportation or waive grounds for inadmissibility based on evidence of hardship; the exercise of prosecutorial discretion on whether to commence removal proceedings; the granting of 'deferred action' status to the sick or elderly; release from detention under "orders of supervision;" and waiving non-immigrant visa requirements for citizens from countries with a history of low visa fraud. (Wheeler 2014, 70–71).

PD is rooted in the reality of limited law enforcement resources, compared to the large numbers of laws and offenders, the desire to pursue the most serious and impactful violations, and the fact it would be impossible and even unjust to attempt to punish every legal violation, no matter how inconsequential (ICE 2021).[37]

PD is a hallmark of effective law enforcement. It represents a safeguard against random, scattershot enforcement. It also allows law enforcement agencies to pursue larger enforcement goals by relying on the cooperation of persons who have committed le serious offenses (ibid.). It speaks to the categories of offenses that law enforcement strategically prioritizes (and does not) and the factors it considers in exceptional cases, such as infirmity, age, disability, family ties, the offense's severity, the lapse of time, and other circumstances (ibid.).

Recommendations

Between FY 2017 and FY 2022, immigration case terminations grew by 86 percent, many of them old cases in which the circumstances of respondents had changed, including due to the approval of USCIS applications (TRAC 2022b). Immigration court case completions nearly tripled in FY 2022 — from 115,855 in FY 2021 to 313,849 in FY 2022 (EOIR 2023a).[38] Yet DHS inundated the court system with 706,640 new cases (an historically high number) in FY 2022, more than double the number EOIR could accommodate (ibid.), making progress on backlog reduction an impossibility.

Each administration should establish and implement enforcement priorities that allow EOIR to complete more cases than it receives in a given year and thus reduce the backlog. Incoming administrations should err in favor of continuity of enforcement priorities, if conditions permit, in order to avoid IJ reassignments and disruption to the immigration courts. As discussed previously, DHS should screen cases before serving them on the courts and should limit those served to a number that the courts can reasonably accommodate. DHS should apply enforcement priorities and PD at every stage of the immigration enforcement and removal adjudication process. As part of this process, DHS should conduct "sufficiency reviews"; that is, determine the legal sufficiency of potential removal cases and their readiness for prosecution.

OPLA trial attorneys should move to dismiss non-priority cases and those meeting PD guidelines.[39] IJs, in turn, should continue to move non-priority cases from their active to inactive dockets by deferring their adjudication.[40] The Biden administration should restore the authority of IJs to close cases over the objection of DHS. The Attorney General should withdraw the Trump–era Attorney General decision in *Matter of S-O-G- & F-D-B-*, which held that IJs and the BIA lack inherent authority to terminate removal proceedings.[41] This latter step would promote backlog reduction by allowing practitioners to seek termination of proceedings directly from the immigration court.

Administrative reforms will need to be supplemented by additional policy tools. To reduce the backlog, Congress should pass legislation to legalize long-term residents. In part, it should advance the admission cut-off date for "registry."[42] Registry is a form of legal status open to long-term residents with good moral character. Congress should benchmark the arrival cut-off date (for eligibility for registry) — as part of a rolling registry program — to allow undocumented persons in the country for five years or more to legalize their status

(Boswell 2010, 205), and to prevent the growth of another large "permanent" undocumented population.

Lack of Finality in Immigration Cases

The immigration court system encounters a significant percentage of the same non-citizens multiple times. This can occur, when a non-citizen ordered removed, fails to leave the country and ICE does not execute a removal order. There remains a lack of consistent information about unexecuted final orders. DHS's Office of Immigration Statistics analyzed 3.5 million CBP "encounters" between southwest POEs and at POEs from FY 2014–2019. Of these encounters, 1.7 million had "no confirmed departure" (Rosenblum and Zhang 2020, 19). Of the 1.7 million, 313,466 had received a final order of removal or voluntary departure and, of this group, 304,601 fell within the category of unexecuted removal orders (ibid.). The percentage of unexecuted orders is likely to be higher in cases of ICE apprehensions in the interior of the country. Many of these cases involve *in absentia* orders.

If a non-citizen illegally re-enters the country following removal or voluntary departure, they can file a motion to reopen within 90-days (from the removal order) based on new material facts or evidence that was "not available and [that] could not have been discovered or presented at the former hearing."[43] Immigration law provides exceptions to the 90-day filing deadline for motions to-re-open:

- To request asylum, withholding of removal or withholding under the Convention Against Torture based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered";
- In cases of *in absentia* orders when an applicant's "failure to appear was because of exceptional circumstances" beyond their control or they "did not receive notice" of the hearing or were imprisoned and could not appear through no fault of their own;
- In the rare cases when ICE supports and jointly files a motion to re-open with the applicant.[44]

In addition, noncitizens subject to reinstatement of removal[45] — that is, those previ ordered removed or deported and who illegally reentered the United States — can undergo screening to determine if they possess a "reasonable" fear of torture or persecution.[46] If so, they can seek "withholding of removal" before an IJ. Like motions to reopen, this process can lead to IJs adjudicating the cases of non-citizens more than once.[47]

The paper does not argue against relief from removal based on changed circumstances or against a second chance for persons deported *in absentia* because they did not understand the place, time, or date of their hearing. These laws deserve support for protecting those at risk of torture or persecution. In describing these legal standards and processes, the paper simply seeks to explain one source of the workload of IJs and, thus, of the backlog. To that end, EOIR reports that from FY 2018 through March 10, 2023, IJs granted motions to reopen, to recalendar, or to reconsider in 134,225 cases, creating new proceedings in cases in which there had previously been an EOIR decision (on file with authors).

The Lack of Standard Judicial Authorities for IJs and the "Exceptional" Nature of the Immigration Court System

IJs lack the discretion and authority possessed by criminal courts and administrative law judges to manage their dockets and complete cases. These limitations negatively affect their ability to reduce the backlog. The "exceptional" features of the immigration court system also perpetuate the backlog. Several of these challenges are outlined below.

Limited Discretionary Relief and One-Year Asylum Filing Rule

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[48] limited the ability of IJs to complete cases by granting discretionary relief based on equitable considerations (Kerwin 2018, 194–5). Prior to IIRIRA, IJs could grant "suspension of deportation" to persons with good moral character who had lived continuously in the United States for seven years and who could demonstrate that their removal would cause "extreme hardship" to themselves or to a US citizen or LPR spouse, parent, or child. IIRIRA replaced suspension of deportation with cancellation of removal, which is available to non-LPRs (primarily undocumented residents) with good moral character, but only if:

- They have been continuously present for at least 10 years preceding the application date;
- Their removal would cause "exceptional and extremely unusual hardship" to a US citizen or LPR spouse, parent, or child (but not the respondent); and,
- They have not been convicted of any of an exhaustive range of crimes.[49]

IJs can grant cancellation to LPRs who have been continuously present for seven years following admission, who have been permanent residents for five years, and who have no aggravated felony convictions.[50]

IIRIRA also required asylum seekers to file their claims within one year of admission, with narrow exceptions for "extraordinary circumstances" that cause the deadline to be missed and "changed circumstances" that "materially affect" asylum eligibility.[51] Schrag et al. (2010, 688) found that more than 30 percent of the affirmative asylum cases over an 11-year period failed to meet the one-year deadline, and many more were undoubtedly discouraged from seeking asylum. Acer and Byrne (2017, 358) similarly concluded that the one-year filing rule does not operate as an effective "tool for weeding out fraudulent asylum cases," but blocks and delays protection for "legitimate asylum seekers."

There are exceptions to this bar and, if an exception is available, courts adjudicate the asylum claim on the merits. More commonly, the bar works hardship on both the court system (by lengthening hearings) and on asylum-seekers.

Recommendation

Congress should pass legislation that expands the discretionary relief available for noncitizens in removal proceedings. It should, among other measures, restore the pre-IIRIRA standards for "suspension of deportation" and establish an affirmative cancellation/suspension program that allows USCIS adjudicators to provide LPR status to long-term residents based on the same or similar criteria.

Congress should also pass legislation to eliminate the one-year asylum filing rule. This rule contributes to the backlog by increasing the time and effort it takes to adjudicate affected cases. The rule requires IJs to assess whether asylum claims have arisen within one year and, if not, whether a case qualifies for an exception to the bar. If the one-year bar blocks consideration of the claim, IJs must typically still consider related, time-consuming withholding of removal and Convention Against Torture claims. Above all, the law punishes asylum-seekers, including those with good reasons not to request asylum within one-year. It can bar consideration of asylum claims even when DHS fails to serve an NTA on the immigration courts in a timely way, or when the backlog in pending cases results in court delays.

Lack of Statute of Limitations for Civil Immigration Offenses

Another exceptional feature of the immigration system is that there is no statute of limitations for (civil) immigration violations (Ordonez 2022, 1822–4), such as for illegal entries, which are not priority cases under current PD guidelines. By way of contrast, the Internal Revenue Service cannot seek civil penalties for tax violations beyond a 10-year

statute of limitations (ibid., 1823). Statutes of limitations promote timely "application of the law," "finality and predictability," and the availability of evidence (ibid., 1822). As it stands, DHS can initiate removal proceedings, no matter how much time has elapsed since commission of the offense that gave rise to the grounds of removal. Thus, undocumented immigrants can be removed for an illegal entry committed 50 years in the past. A refugee can be removed for a decades-old shoplifting offense or drug possession crime for which they served no prison time. An LPR can be removed in proceedings that occur well beyond the statute of limitations for the *criminal* conviction that underlies the civil grounds for their removal.

One scholar notes that in its early years, deportation "was limited to those who committed fraud at entry or committed an offense *within the first few years after entry*" (italics added) (Benson 2017, 348). As deportable offenses proliferated, however, the idea of a statute of limitations for immigration offenses was mostly lost, and removal came to resemble a criminal punishment, more than "a civil sanction" (ibid.).

Recommendations

Congress should pass legislation establishing a five-year statute of limitations for ordinary civil immigration violations, such as illegal entry, illegal re-entry, overstaying temporary visas, and misdemeanor criminal offenses. Legislation of this kind could significantly reduce the backlog. As of March 10, 2023, 731,149 removal cases had been pending for three years, 277,412 for five years, and 41,360 for 10 years. These numbers speak to the time cases have been pending. They would be far larger if they included the time since the commission of the underlying immigration offense.

Resolving Cases through Pre-Hearing Conferences

Former US Supreme Court Justice Anthony Kennedy referred to plea bargaining, which leads to "nearly 95% of all criminal convictions," not as "some adjunct to the criminal justice system," but as the "criminal justice system" itself.[52] In contrast, IJs operate under a legal regime that makes it far more difficult to "settle" removal cases.

To make up for that deficiency, in the fall of 2022 EOIR began piloting pre-hearing conferences in two courts as a tool to "narrow issues, obtain stipulations, exchange information, and organize the proceedings," with the goal of resolving cases more efficiently (EOIR 2022b). At present, it is in the process of expanding this initiative to all its immigration

courts. EOIR has limited pre-hearing conferences to represented, non-detained cases, and has urged IJs in selecting cases for pre-trial conferences to consider whether:

- An application for relief has been filed.
- The respondent has an application or petition pending with USCIS.
- The case has been pending for a protracted period.
- The case is complex.
- The case is "long-pending" and "evidence may be stale, facts may have changed, and new forms of relief may be available to the respondent." (ibid.)

These criteria may make cases ripe for closure, dismissal, or termination. Pre-hearing conferences have the advantage of informing OPLA attorneys of respondents' eligibility for relief and equitable considerations that argue for PD. Yet they are hampered as a backlog reduction tool by the lack of third options between removal or voluntary departure on the one hand, and the ability to remain indefinitely on the other. Pre-hearing conferences cannot, for example, result in a *less* severe sanction, as would typically occur in plea bargaining.

Complicating matters, OPLA trial attorneys have large caseloads and some resist participating in pre-trial conferences due to resource constraints. Thus, the viability of this process may turn on the availability of law clerks or other legal professionals. In addition, OPLA attorneys have not traditionally seen their role as reaching a settlement. Instead, they seek to "win" removal cases, meaning to secure an order of removal. Moreover, OPLA has not historically viewed its attorneys primarily as officers of the court, devoted to assisting judges to reach the appropriate outcome under the law, but as prosecutors seeing removal.[53] In that regard, it is revealing that OPLA describes itself as "the exclusive representative of DHS in immigration removal proceedings" charged with "litigating all removal cases including those against criminal aliens, terrorists, and human rights abusers" (ICE 2022a). This description ignores asylum seekers, ordinary status violators, and l residents with minor criminal records.

EOIR has also launched a specialized docket in all its immigration courts that would cover cases "ready" for dismissal, termination, and closure,[54] as well as cases in which the parties stipulate to all or part of the case in a way that allows for a grant of relief from removal.

Recommendation

ICE should direct OPLA trial attorneys to participate in pre-hearing conferences and agree to the dismissal of cases that will not lead to removal, do not fall within an enforcement priority, or qualify for PD. However, this will require a shift — which the Biden administration has attempted to effect — in how OPLA attorneys manage their workload and view their responsibilities. To that end, the Doyle memorandum describes OPLA as "the government's representative in removal proceedings" and, thus, responsible "to proactively alert the immigration judges to potentially dispositive legal issues and viable relief options they have identified in the course of case preparation or a proceeding, that then may be combined with elements of PD (such as stipulations) to resolve cases before EOIR" (ICE 2022b).

The memorandum characterizes OPLA attorneys as "officers of the court and DHS representatives in helping to ensure that immigration proceedings meet all legal and constitutional standards." It directs them to do "their part to improve and enhance the removal process by using their knowledge and authorities so that, to the greatest extent possible, every noncitizen has the opportunity to have their case fairly heard and correct outcomes are achieved" (ibid.). It also directs them "to exercise discretion at all stages of the enforcement process" and, as possible, "at the earliest moment practicable to best conserve prosecutorial resources." (ibid.). This attempted "reset" of OLAP's culture and role deserves broad support.

In a June 11, 2021 policy memorandum, EOIR's Acting Director Jean King urged IJs and the BIA to take a proactive approach to resolving cases by exploring whether they fit within DHS enforcement priorities or merit an exercise of discretion. In particular, the memorandum instructed IJs "to inquire, on the record, of the parties appearing before them . . . as to whether the case remains a removal priority for ICE and whether ICE intends to exercise some form of PD, for example by requesting that the case be terminated or dismissed, by stipulating to eligibility for relief or, where permitted by case law, by agreeing to the administrative closure of the case" (EOIR 2021b). The current and future administrations should prioritize coordination between EOIR and OPLA in setting and adhering to m[illegible] enforcement priorities and exercising PD.

Lack of Contempt Powers

IJs lack contempt powers, impeding their ability to resolve cases fairly and efficiently. They cannot, for example, effectively "address trial counsel's lack of preparation, lack of substantive or procedural knowledge or other conduct that impedes the court's op[illegible]

(ACUS 2012). They cannot hold accountable respondent's counsel or OPLA trial attorneys "with respect to matters such as timelines, docketing dates, or even court orders" (Stimson and Canaparo 2019). They have no recourse, for example, when an attorney fails to file a necessary form, does not brief an issue at the court's request, or refuses to bring a witness or respondent to court to assess their competency.

Recommendation

In 1996, Congress passed the Omnibus Consolidated Appropriations Act for 1997.[55] This Act amended the INA to vest IJs with "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 . . ."[56] In the ensuing 25 years, no Attorney General has issued regulations to effectuate the contempt authority envisioned by this legislation. The Attorney General should issue regulations to this effect. IJs need contempt powers to administer US immigration laws effectively, to reduce unnecessary delays in removal proceedings, and to contribute to backlog reduction.

Trump Era Administrative Restrictions on IJs

In *Matter of Castro-Tum*, former Attorney General Sessions divested IJs of the authority to close cases administratively, except in narrow circumstances.[57] Attorney General Garland vacated this decision.[58] The Trump administration also "limited the court's authority to terminate cases,[59] continue them,[60] and accept the parties' stipulations on the elements of an asylum claim."[61] (Slavin and Scholtz 2021). Collectively, these restrictions made it harder for persons in removal proceedings to secure relief and they restricted the ability of judges to manage their dockets, thus contributing to the backlog's significant growth (Preston and Calderón 2019).

Recommendation

At this writing, Attorney General Garland has vacated one of these decisions,[62] and should continue to restore authority to IJs to manage their dockets.

The Effective Use of Technology

Immigration courts bring together an extraordinarily diverse mix of respondents — by language, culture, gender, age, nationality, and race. In addition, removal proceedings take place in many different contexts and locations, including prisons, jails and detention centers,

and (during the Trump administration) in standalone courts DHS built in border communities (DOJ 2022b, 14).

Technology can be an essential tool in the administration of a court system that operates in such a diverse environment. Its effective use has the potential to benefit respondents, legal counsel, and the immigration court system overall. It can allow unaccompanied children, for example, to check in with the courts from a convenient location without missing school. IJs can preside over cases remotely in response to public health imperatives or in situations of courtroom shortages when the parties do not request in-person hearings. DAR-enabled laptops allow select IJs to conduct hearings from their home offices, which can be an important tool in an expanding court system. Overtaxed pro bono and charitable legal immigration attorneys will be more likely to assume representation in difficult-to-reach locations if they can work remotely. Remote interpreters can assist respondents that speak uncommon languages.

Technology, however, should facilitate due process and the ability to make claims for relief. It should not lead to the disengagement of respondents from proceedings, serve to undermine their credibility, or interfere with attorney-client communications. Video conferencing is not appropriate in every circumstance. Respondents, legal counsel, and judges will be more supportive of remote hearings in relatively straightforward matters than in merits hearings. Attorneys and respondents are more likely to support video hearings before judges whom they view as scrupulously fair. Technology and core services (particularly interpretation) must also be technically sound and in good working order (Barak 2021).

Recommendations

EOIR should expand its use of technology to adjudicate cases, help manage IJ dockets, and increase the efficiency of judges, but only when technology increases access to justice and due process. EOIR's ability to make reasonable judgments on the use of technology argues for the kind of evidence-based and independent court system that prioritizes due process and sound operations, which this paper endorses. Overall, technology should serve the core mission of the court system — to ensure the best decisions are made under the law — not simply to expedite hearings or promote efficiency.

Legal Representation

IJs recognize the importance of counsel to the efficient administration of the courts: Many IJs credit legal representation with honing the issues before the court, obviating the need for

large numbers of continuances, identifying viable claims for relief, counseling clients when relief is not available, and allowing for well-informed decision-making. Several studies have confirmed that legal representation contributes to higher appearance rates, fewer continuances, more focused testimony, and better- prepared cases (Ramji-Nogales, Schoenholtz, and Schrag 2007, 384; ABA 2010, 5-3; Eagly and Shafer 2016; ABA 2019, 5-4). Legal representation also strongly contributes to the likelihood of relief from removal.

Legal representation contributes to four features of a reformed immigration adjudication system — accuracy, efficiency, acceptability, and consistency (Legomsky 2010, 1645–50). Counsel promotes accuracy by bringing forth evidence and the applicable law; efficiency by contributing to the appropriate use of resources and division of labor in the removal adjudication system and by "minimizing elapsed time"; acceptability to all parties that "justice was carried out both substantively and procedurally"; and consistency by ensuring that "similarly situated parties . . . receive similar treatment." (ibid.)

In 1999, Senator Daniel Patrick Moynihan (D-NY) introduced an amendment to immigration reform legislation that would have created a pilot, government-funded, appointed counsel program for persons in removal proceedings. Moynihan argued for this program primarily from the perspective of government efficiency: "The law now provides that an alien is entitled to counsel if he can afford to retain one. In reality, this has created great expense and delay for the Federal government because cases are often continued for lengthy periods while aliens try to find pro bono counsel or counsel they can afford."[63] As it stands, EOIR provides representation to persons in removal proceedings in very limited circumstances (EOIR 2022c). By contrast, Congress significantly funds OPLA, whose trial attorneys "prosecute" removal cases from 25 field locations (ICE 2022a). For these reasons, commentators have proposed expanding government-appointed legal counsel, including through a federal defender-type system (Kerwin 2005; Ramji-Nogales, Schoenholtz, and Schrag 2007, 384).

Recommendations

Congress should fund legal representation for indigent immigrants in removal proce who cannot otherwise obtain it. Legal representation promotes the integrity of thes adversarial, highly consequential, and legally and procedurally complex proceedings.[64] It represents a pillar of due process that assists IJs in making informed decisions and contributes to court efficiency. The following recommendations would complement a

federally funded system of legal representation, but would not individually or collectively replace such a system.

First, states and localities should expand funding for universal representation programs for noncitizens in removal proceedings. EOIR should support and facilitate these efforts. Universal representation programs seek to secure representation for every person in removal proceedings or persons in particular categories of cases, depending on the jurisdiction.

Second, EOIR should expand its legal orientation, education, and representation initiatives (EOIR 2022d), which promote access to justice in the immigration court system (Kerwin 2020). EOIR's National Qualified Representative Program (NQRP), for example, furnishes representatives to persons who are not competent to represent themselves, typically persons with severe mental illness. The NQRP program should be expanded to cover additional categories of respondents in cases in which due process cannot be realized without representation.

Third, Congress should appropriate sufficient funding to EOIR for all its myriad needs, including more judges, other court-related staffing and resources, and complementary programs, such as the "recognition" and "accreditation" program.[65] Under this program, EOIR adjudicates applications by charitable organization for "recognition" and their qualified non-attorney staff for "accreditation" to represent immigrants before USCIS (partial accreditation) and in immigration court (full accreditation).[66] Recognized agencies and accredited representatives play an oversized role in providing legal representation and support to low-income immigrants and constitute the lion's share of the nation's more than 1,800 charitable legal programs for immigrants (Kerwin and Millet 2022).

An Article 1 Immigration Court

Many of the problems set forth in this report argue for vesting immigration judges with greater independence and authority to manage their dockets and to complete cases. They also argue for far greater funding to EOIR. These widely-recognized needs support a restructured immigration court system.

Article 1, Section 8 of the US Constitution confers on Congress the power to "constitute Tribunals inferior to the supreme Court." Congress has established Article 1 or "legislative" courts for a variety of purposes, including to provide legal oversight of the administrative decisions of federal agencies. In 1981, the Select Commission on Immigration and Refugee

Policy proposed that Congress establish an immigration court under its Article I powers.[67] Since then, bills have regularly been introduced in Congress to create such a court, including the Real Courts, Rule of Law Act of 2022.[68]

The American Bar Association, the American Immigration Lawyers' Association, Appleseed, the Federal Bar Association, the National Association Immigration Judges, and many individual commentators and policymakers have championed this idea (Appleseed 2009; Family 2018; ABA 2010 and 2019). They argue that an Article 1 immigration court system would increase the independence of the court system, permit its principled management, immunize it from political demands, enhance its prestige, help it attract and retain talented judges, and lead to increased funding and resources. Many commentators attribute the escalating court backlog to DHS's excessive influence on the court system and EOIR's location within a law enforcement agency. They argue that the backlog is largely rooted in enforcement decisions made by the White House and DHS, and implemented by DOJ (through EOIR) over successive administrations.

Others have opposed Article 1 and similar court proposals based on the belief that this reform would solidify the positions of large numbers of IJs who were appointed for ideological reasons and not because of their legal competence or integrity. Similarly, the selection of judges for an Article 1 court could prove politically rancorous and exacerbate the backlog, at least in the short-term.

Recommendation

While the establishment of an Article 1 immigration court would not be a panacea, it would likely be a significant improvement to the status quo. It offers the possibility of a more independent and better-supported court system, and has the potential to respond to the conditions that have created and perpetuate the backlog. Congress should establish and generously fund an Article 1 immigration court.

Conclusion

EOIR occupies an untenable position in the US immigration system. It is located with[in] nation's pre-eminent law enforcement agency and viewed (incorrectly) as an adjunct [to] its homeland security agency. It seeks to uphold the nation's commitment to the rule of law and due process in the immigration system. However, it has been denied the resources and

authorities commensurate with this role and, as a result, cannot accommodate its vast workload. The court backlog has been one result of this state of affairs.

This paper identifies as central drivers of the backlog the court system's insufficient funding, lack of control over its caseload and operations, and the limited authority of IJs to bring cases to closure. The paper discusses promising approaches by DHS and EOIR — rooted in enforcement priorities and the exercise of prosecutorial discretion — for reducing the volume of cases entering the court system and increasing those leaving it. These strategies must be coupled with exponentially more funding, broad immigration reform legislation, an affirmative "suspension of deportation" program, and (as a temporary measure) the robust use of the many "special status" programs available through executive and administrative action (Kerwin, Pacas, and Warren 2022). The paper recognizes the political and bureaucratic realities of immigration reform. At the same time, it does not serve the immigration debate to understate the significant systemic problems that underlie the backlog and the dramatic measures needed to reverse its growth and eliminate it, including immigration reform legislation.

The paper views a strong immigration court system as an essential component of the US immigration system. It supports a well-resourced and independent court system devoted to producing the right decisions under the law. The immigration courts should model — for immigrants, their progeny and other nations — the nation's commitment to the rule of law, access to justice, and due process. A principled backlog reduction strategy would be a step in the right direction. To that end, the paper makes the following topline recommendations:

- Congress should benchmark EOIR's budget at 6 percent of the combined budgets of CBP and ICE, roughly double the current ratio.
- DHS should not issue or serve NTAs in cases that do not meet immigration enforcement priorities or that might qualify for an exercise of prosecutorial discretion.
- DHS should issue formal guidance that vests responsibility for screening NTAs with a specially trained corps of attorneys from ICE's Office of the Principal Legal Adviso
- DHS should limit the NTAs served each year to a number below what the court sy can reasonably accommodate until the backlog's growth is reversed and its size meaningfully reduced.

- DHS and DOJ should issue a joint policy directive that voids NTAs if they are not filed with the immigration courts in 30 days and that removes them from the court system, unless the respondent opposes this step.
- DHS should automatically inform EOIR whenever a person in removal proceedings has a pending USCIS petition, application, or request for immigration benefits.
- EOIR administrators should minimize IJ reassignments and, if strictly necessary, should reassign judges only to locations with sufficient access to counsel and support services.
- The current and future administrations should minimize the use of priority dockets, which require a reshuffling of resources, pose challenges for the court system, and exacerbate backlogs.
- Congress should direct the US Government Accountability Office to produce a study on the extent to which IJ reassignments have contributed to court backlogs and have accomplished their policy aims (i.e., to deter illegal entries and expedite the removal of recent entrants).
- Each incoming administration should establish and implement enforcement priorities that are broad enough to reduce the backlog in a meaningful way and, as conditions permit, that provide for continuity of enforcement priorities across administrations.
- DHS should apply enforcement priorities and exercise prosecutorial discretion at every stage of the immigration enforcement and removal adjudication process.
- DHS should conduct legal sufficiency reviews of pending cases and OPLA trial attorneys should move to dismiss non-priority cases and those meeting prosecutorial discretion guidelines.
- Immigration Judges should continue to move non-priority cases from their active to inactive dockets by deferring their adjudication.[69]
- The Biden administration should restore the authority of IJs to close cases administratively over the objection of DHS.
- The Attorney General should withdraw the Trump–era Attorney General decision in Matter of S-O-G- & F-D-B-, which held that IJs and the BIA lack inherent authority to terminate removal proceedings.

- Congress should pass legalization,[70] legal immigration reform, and visa backlog reduction legislation.
- Congress should advance the admission cut-off date for the "registry" program and benchmark this date — as part of a "rolling" registry program — to allow undocumented persons in the country for five years to legalize their status (Boswell 2010, 205).
- Congress should create a program that would permit noncitizens with strong equitable ties to the United States to apply affirmatively for "suspension of removal" under the former eligibility criteria for this relief.
- Congress should pass legislation that expands the discretionary relief available for noncitizens in removal proceedings.
- Congress should pass legislation establishing a five-year statute of limitations for ordinary civil immigration violations.
- DHS and EOIR should continue the Biden era "reset" of the immigration courts by directing IJs and OPLA attorneys to support the dismissal of cases of persons with pending applications, petitions, and requests for immigration benefits before USCIS.
- ICE should direct OPLA trial attorneys to participate in pre-hearing conferences and to agree to the dismissal of cases that do not fall within an enforcement priority, that qualify for an exercise of prosecutorial discretion, or that cannot lead to removal.
- The Attorney General should issue regulations that vest IJs with contempt authority.
- EOIR should expand its use of technology to adjudicate cases and manage its court dockets, but only when technology increases access to justice and due process.
- Congress should fund a system of legal representation, akin to a federal public defender system, for indigent immigrants in removal proceedings.
- States and localities should increase funding for universal representation of nonc removal proceedings in their jurisdictions.
- EOIR should expand the reach of its legal orientation, education, and representation programs.

- Congress should appropriate sufficient funding to cover EOIR's many needs, including far more Immigration Judges, other court-related staff and resources, and its legal access, representation, recognition and accreditation, and other programs that promote due process, efficiency, and better informed stakeholders.
- Congress should establish and generously fund an Article 1 immigration court system.

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Footnotes

1 During this period, the United States has granted parole to large numbers of arrivals at the US-Mexico border (378,000 in FY 2022), Afghans through Operation Allies Welcome

70,000) and Ukrainians through the Uniting for Ukraine program (102,000). It has also established special parole programs for Venezuelans, Cubans, Haitians, and Nicaraguans (Chishti and Bush-Joseph 2023). It will ultimately fall to the immigration courts to adjudicate these cases, absent legislation that offers parolees a path to permanent residence.

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2 Immigration and Nationality Act (INA) of 1965, Pub. L. No. 89–236, 79 Stat. 911 (1965).

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3 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

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4 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (Nov. 6, 1986).

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5 US Senate, Development, Relief and Education for Alien Minors Act (DREAM Act), S. 291, 107th Cong. (2001–2002). https://www.congress.gov/bill/107th-congress/senate-bill/1291/actions

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6 OPLA represents DHS in removal proceedings and provides "legal services to ICE programs and offices." (ICE 2022a). EOIR is a distinct agency within DOJ with responsibility to adjudicate removal cases "by fairly, expeditiously, and uniformly interpreting and administering Nation's immigration laws" and conducting "immigration court proceedings, appella reviews, and administrative hearings." (DOJ 2022a).

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7 Space procurement can be a cumbersome and slow process and immigration courts will likely continue to experience infrastructure needs in some locations.

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8 EOIR's FY 2023 budget, which is subject to review by the Office of Management and Budget (OMB), requests five support positions (attorneys, legal clerks or assistants, and support staff) for each immigration judge (DOJ 2022b, 25).

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9 By way of comparison, the Congressional Research Service estimated that even with an additional 500 IJs, the backlog would persist from FY 2022 to FY 2030 (CRS 2022, CRS-33).

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10 8 CFR §239.1.

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11 Prior to 2016, USCIS issued comparatively low numbers of NTAs per year (Table 6), mostly of asylum seekers following negative "credible" or "reasonable" fear determinations (ABA 2019, I-27).

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12 Initial case completions overwhelmingly occur through orders of removal, termination, voluntary departure, or relief from removal (CRS 2022, 9–10).

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13 These respondents received notices to report (NTRs) to ICE offices within 60 days and reportedly had not done so (Montoya-Galvez 2021).

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14 The most common cases in this category include applications for adjustment of status, removal of conditions on residence, and asylum. Adjustment of status requests (to permanent residence) under INA §245(a) or 245(i) come before the immigration court either: (1) after a denial of adjustment by USCIS and issuance of an NTA, or (2) as a defense to removal, commonly after proceedings are reopened (by a joint motion). In the latter case, the parties typically move to reopen and terminate so the adjustment application can be filed with USCIS. Removal of conditions requests come to the immigration court after a denial of the I-751 (Petition to Remove Conditions on Residence) by USCIS, which is then required to issue an NTA. The IJ has *de novo* review. The USCIS denial may be based on the merits or a denial of a request to file a late application. The IJ has exclusive jurisdiction over those matters. The other way conditional residents end up in proceedings is if they fail to submit a timely I-751 and the conditional residency is terminated. In these circumstances, the applicant has to file a late I-751 with USCIS before the IJ can rule on it — and then only if the USCIS denies the petition or denies the request to accept a late application. Asylum applications come before the immigration court because: (1) the applicant applied for asylum affirmatively with the USCIS Asylum Office and was effectively denied and referred to the courts; or (2) the asylum applicant is in removal proceedings. IJs cannot terminate a "defensive" asylum case to allow USCIS Asylum Officers to (first) weigh in on it.

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15 CMS's estimates based on EOIR case data as of November 1, 2022 roughly align with EOIR's figures. CMS found that 839,251 cases were pending for more than three years and 308,672 cases for more than five years, as of November 1, 2022 (EOIR 2022d). The universe of pending cases in EOIR's case data include all *Removal, Exclusion, Deportation, Asylum Only, and Withholding Only* cases that do not have a completion date (in the field "comp_date" in the table "b_tbl_Proceeding"). CMS calculated the cases pending for at least five- and three-years by identifying those with a Notice to Appear (NTA) filed date on or before November 1, 2017 and November 1, 2019 (respectively), using EOIR's "osc_date" field in its "B_TblProceeding" table.

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16 The EOIR estimates are on file with the authors.

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17 Based on EOIR's case data as of November 1, 2022 and employing Markowitz and Noroña's (2021) methodology, CMS identified 614,491 cases in this category. To make this calculation, CMS began with pending cases without a completion date (see prior note). It then identified the following application types that could be adjudicated by USCIS from EOIR's field "appl_code" in table "tbl_Court_Appln": (1) NACARA (Nicaraguan Adjustment and Central American Relief Act) adjustment; (2) removal of conditions; (3) adjustment of status; (4) registry; (5) Haitian Refugee Immigration Fairness Act, and; (6) asylum or asylum/withholding. It did not include asylum applications initiated affirmatively in this calculation, as USCIS would already have acted on them (field "c asy type" in the table "A TblCase").

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18 As of mid-2020, ICE classified 13 countries as recalcitrant or uncooperative because they "systematically" delayed or refused to accept the return of their citizens and it deemed 17 countries at risk of noncompliance (ARON) (Wilson 2020). Under one proposal, DHS could issue NTAs to respondents from countries that were previously recalcitrant or ARON.

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19 For a full explanation of immigration court docketing, scheduling, and the constituent parts of removal proceedings, see EOIR's extensive docketing manual (EOIR 2018b).

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20 "For the Rule of Law, an Independent Immigration Court," Hearing before the US House of Representatives, Judiciary Committee, Immigration and Citizenship Subcommittee, 1 Congress (Statement of Hon. Mimi Tsankov, President, National Association of Immi Judges) (January 20, 2022). https://docs.house.gov/meetings/JU/JU01/20220120/114339/HHRG-117-JU01-Wstate-TsankovM-20220120.pdf.

GO TO FOOTNOTE

21 In FY 2020, 59,000 appeals were filed with the BIA and in FY 2021 31,000 (DOJ 2022b, 5).

GO TO FOOTNOTE

22 DOJ/EOIR does not count administratively closed cases as completed for backlog purposes (DOJ 2022b, 19). Instead, it moves them from its active to its inactive docket.

GO TO FOOTNOTE

23 Build Back Better Act, HR 5376, 117th Cong. (2021–2022). https://www.congress.gov/event/117th-congress/house-event/114202?s=1&r=58.

GO TO FOOTNOTE

24 The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013) would have reformed the INA to include as immediate relatives the spouses and minor children, but not parents of LPRs.

GO TO FOOTNOTE

25 Build Back Better Act, HR 5376, 117th Cong. (2021–2022). https://www.congress.gov/event/117th-congress/house-event/114202?s=1&r=58.

GO TO FOOTNOTE

26 INA §240A(a) and (b).

GO TO FOOTNOTE

27 "For the Rule of Law, An Independent Immigration Court," Hearing Before the US House of Representatives, Judiciary Committee, Immigration and Citizenship Subcommittee, 117th Congress (Statement of Hon. Mimi Tsankov, President, National Association of Immigration Judges) (January 20, 2022), https://docs.house.gov/meetings/JU/JU01/20220120/114339/HHRG-117-JU01-Wstate-TsankovM-20220120.pdf.

GO TO FOOTNOTE

28 EOIR subsequently relaxed the timeline for the initial master calendar hearing for unaccompanied children.

GO TO FOOTNOTE

29 EOIR selected a slightly different mix of cities to participate in this program — Denver, Detroit, El Paso, Los Angeles, Miami, Newark, New York City, San Diego, San Francisco, and Seattle — than those chosen for the Trump era dedicated docket.

GO TO FOOTNOTE

30 "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18078 (March 29, 2022).

GO TO FOOTNOTE

31 From FY 2009 to FY 2021, asylum officers made credible fear findings at annual rates between 67 and 85 percent, with the exception of FY 2020 when they found credible fear in only 38 percent of the cases completed (DHS 2022a).

GO TO FOOTNOTE

32 "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," 87 Fed. Reg. 18078 (March 29

2022).

GO TO FOOTNOTE

33 DHS can exercise PD to decide whether to arrest or place an immigrant in removal proceeding, and at any stage in an immigration case.

GO TO FOOTNOTE

34 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

GO TO FOOTNOTE

35 Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

GO TO FOOTNOTE

36 US Const. art II, §3, cl. 5.

GO TO FOOTNOTE

37 By way of analogy, if the US criminal justice system adopted zero tolerance enforcement policies for jaywalking or speeding violations, it would grind to a halt.

GO TO FOOTNOTE

38 TRAC counts as case completions removal orders, relief granted, termination/dis administrative closure based on PD, and a growing number of cases in which DHS did not file NTAs with the court.

GO TO FOOTNOTE

39 8 CFR §239.2(c).

GO TO FOOTNOTE

40 8 CFR §10003.00(b)(1)(ii).

GO TO FOOTNOTE

41 27 I&N Dec. 462 (AG 2018).

GO TO FOOTNOTE

42 INA §249.

GO TO FOOTNOTE

43 8 CFR §1003.23(b)(3).

GO TO FOOTNOTE

44 8 CFR §1003.23(b)(4).

GO TO FOOTNOTE

45 INA §241(a)(5).

GO TO FOOTNOTE

46 8 CFR §§ 208.31 and 241.8.

GO TO FOOTNOTE

47
Overall, the great majority of removals take place through summary, expedited or administrative processes that typically do not lead to a hearing before an IJ (ACLU 2014; Kerwin 2015, 182–3). These include:

- Administrative removals by DHS of non-LPRs convicted of an aggravated felony under INA §238(b), who do not receive an immigration court hearing.
- Expedited removal of arriving "aliens" without proper documents. Under INA §235(b)(1), asylum-seekers must pass a "credible fear" interview to avoid expedited removal and pursue asylum in removal proceedings.

GO TO FOOTNOTE

48 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

GO TO FOOTNOTE

49 INA § 240A(b).

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50 INA §240A(a).

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51 INA § 208(a)(2)(B) and (D).

GO TO FOOTNOTE

52 *Missouri v. Frye*, 566 U.S. 134 (2012), citing Scott & Stuntz, Plea Bargaining as Cont
Yale L. J. 1909, 1912 (1992).

GO TO FOOTNOTE

53 It will be important to the success of pre-trial conferences to make decisions by OPLA attorneys on narrowing issues in a case binding on successor OPLA attorney in the same case.

GO TO FOOTNOTE

54 In the model developed in the Dallas court (sometimes called the "ready docket"), volunteer attorneys identify cases ripe for dismissal or closure, and present them to the Chief Judge and OPLA for consideration.

GO TO FOOTNOTE

55 Omnibus Consolidated Appropriations act, 1997, Pub. L. No. 104-208, 110 Stat. 3009.

GO TO FOOTNOTE

56 INA §229a(b)(1).

GO TO FOOTNOTE

57 *Matter of Castro Tum*, 27 I&N Dec. 271 (AG 2018).

GO TO FOOTNOTE

58 *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (AG 2021).

GO TO FOOTNOTE

59 *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018).

GO TO FOOTNOTE

60 *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018).

GO TO FOOTNOTE

61 *Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020).

GO TO FOOTNOTE

62 Matter of A-C-A-A, 28 I&N Dec. 351 (AG 2021).

GO TO FOOTNOTE

63 145 Cong. Rec. S603-04 (daily ed. Jan. 19, 1999), https://www.congress.gov/congressional-record/volume-145/issue-8/senate-section/article/S554-1.

GO TO FOOTNOTE

64 For a broader set of ideas and recommendations taken from a special collection of papers on prioritizing the rule of law and due process in the US immigration system, see Kerwin (2017, 557–60).

GO TO FOOTNOTE

65 Partially accredited representatives can represent immigrants before USCIS and fully accredited representatives can provide representation in removal proceedings.

GO TO FOOTNOTE

66 INA §292.

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67 Congress Select Commission on Immigration and Refugee Policy. "US Immigration Policy and the National Interest. The Final Report and Recommendations of the Select Commission on immigration and Refugee Policy with Supplemental Views by Commissioners." (March 1. 1981). Submitted to Congress and the President Pursuant to Public Law 95-412. https://files.eric.ed.gov/fulltext/ED211612.pdf.

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68 Real Courts, Rule of Law Act of 2022. H.R. 6577, 117th Cong., H.R. 6577 (February 3, 2022), https://www.congress.gov/bill/117th-congress/house-bill/6577/text.

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69 8 CFR §10003.00(b)(1)(ii).

GO TO FOOTNOTE

70 A broad legalization program should include a path to permanent residence for Afghan, Ukrainian, and other populations granted humanitarian parole in the first two years of the Biden administration.

GO TO FOOTNOTE

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