

**PRESERVING DUE PROCESS AND THE  
RULE OF LAW: EXAMINING THE STATUS  
OF OUR NATION'S IMMIGRATION COURTS**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION,  
CITIZENSHIP, AND BORDER SAFETY

OF THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

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# **PRESERVING DUE PROCESS AND THE RULE OF LAW: EXAMINING THE STATUS OF OUR NATION'S IMMIGRATION COURTS**

**WEDNESDAY, OCTOBER 18, 2023**

UNITED STATES SENATE,  
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,  
AND BORDER SAFETY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:03 a.m., in Room 226, Dirksen Senate Office Building, Hon. Alex Padilla, Chair of the Subcommittee, presiding.

Present: Padilla [presiding], Klobuchar, Hirono, Booker, Welch, Cornyn, Tillis, and Blackburn.

## **OPENING STATEMENT OF HON. ALEX PADILLA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Chair PADILLA. Good morning, everybody. I'd like to call to order this hearing of the Senate Judiciary Subcommittee on Immigration, Citizenship, and Border Safety.

Before beginning today's hearing, I do want to take a moment simply to acknowledge the settlement between the Biden administration and the plaintiffs in the *Ms. L* family separation litigation that was announced earlier this week.

While nothing can fully undo the harms that the zero-tolerance created, this settlement will provide critical safeguards against future family separation policy.

It's not the specific issue at hand today, but I think relevant enough—noteworthy enough to reference in this morning's hearing as we begin.

But we are gathered here for what is the second hearing of the Subcommittee this year. I want to thank Ranking Member Cornyn for prioritizing today's hearing, all the staff who made this hearing possible, and everybody's flexibility with the timing of the hearing, given other matters before the Senate today.

We're here to examine the current state of our Nation's immigration courts, which are charged with adjudicating immigration cases by fairly, expeditiously, and uniformly interpreting immigration laws.

Every day, judges like Judge Tsankov, who is here with us to testify today, hear cases in immigration court and determine whether to grant relief to respondents who qualify or to issue removal or-

ders, which, in other words, is to deport non-citizens from the United States.

It's no exaggeration to say that in many cases the outcomes of these hearings are a matter of life or death. Yet, as we'll hear today, there are mounting challenges that threaten non-citizens' right to due process and a meaningful opportunity to be heard by an independent arbiter.

Today we'll hear about an immigration court system struggling to deliver timely and fair decisions, due, in large part, to a growing backlog of cases pending before the Executive Office for Immigration Reform, also known as EOIR.

We'll hear about children without counsel, sometimes as young as 1 or 2 years old, who appear before immigration judges clutching toys, holding back tears, barely being able to reach a court microphone, but who are, nevertheless, under current law, largely expected to make their case for asylum alone.

We'll hear about immigration judges who are asked to shoulder impossible workloads of tens of thousands of cases as they face shifting priorities and deadlines, all with little to no support staff.

You know, sadly, these experiences are all too common, representative of a larger, outdated, and overburdened immigration court system that leads to years-long waiting times for removal cases and increasing threats to due process. The head of EOIR recently stated that the case backlog was, quote, "The largest single issue facing the immigration courts today."

As of August of 2023, there were more than 2.6 million cases pending before the courts. The backlog means that some respondents must wait years to have their cases adjudicated.

Now, I want to be clear, this is not a Republican or a Democratic issue. The backlog grew every year under President Obama. It grew every year under President Trump. And it continues to grow today.

Additionally, because the immigration court system remains housed with the Department of Justice, political appointees from both Republican and Democratic administrations have interfered with the independence of the court.

This means that with each new administration, the immigration courts and the attorneys appearing before them experience a whiplash of policy changes and political decisions.

Under the prior administration, we witnessed explicitly political appointments and promotions of biased judges, overturned precedent that made it harder for victims of domestic violence and gang violence to qualify for asylum, and case dockets reshuffled to serve a political agenda.

Now, unlike in criminal proceedings, respondents in immigration courts also lack the right to a Government-appointed counsel if they can't afford representation.

Right now, less than half of all people with cases before the immigration courts have attorneys, and an estimated 80 percent of detained respondents lack representation.

And we know that legal representation has a direct and profound impact, not just on a respondent's likelihood to win their case, but in increasing the efficiency of the courts.

But rather than guarantee representation, we force non-citizens, including children, to navigate through this complex labyrinth of constantly shifting laws, which even immigration lawyers have a hard time keeping up with.

The result is that whether from excessive case backlogs, ongoing political influence, or the lack of guaranteed legal representation, our immigration courts risk denying immigrants due process. It's clear that our immigration court system is in desperate need of reform.

Now, I can also anticipate some of what my colleagues will share during this hearing, "But what about the border?" Addressing challenges on our southern border, of course, has to be part of that solution, but it is not the whole solution.

As we know, surging resources to enforcement agencies like Border Patrol and ICE, without providing necessary resources to EOIR for it to keep up, will only further increase the backlog of cases—a natural cause and effect of our immigration court system.

Now, as you can see on the chart behind me——

[Poster is displayed.]

Chair PADILLA [continuing]. The stark resource disparities between immigration enforcement agencies and the immigration courts over the course of the last 20 years, EOIR'S budget up a little bit. ICE and CBP budget up a big amount. The most effective change we can make in Congress to address the critical issues facing our courts is one of resources, but also one where we can pass legislation establishing Article I immigration courts.

This, too, would go a long way to restoring judicial independence, due process, and the rule of law in an immigration system. But we also have to make smart investments in immigration courts, including funding for support staff for immigration judges, for legal counsel to boost representation, and for funding much-needed process and technological improvements with the courts.

My hope for today's hearing is that my colleagues will come to the table with an open mind that we can put aside partisan talking points and that we can focus on what steps we can take together to fix our immigration courts.

And to do that, I'm looking forward to hearing from all of our witnesses—from your personal experiences, and what steps you believe can be taken to improve the efficiency of our courts while preserving due process.

And with that, looking forward to today's hearing, I now turn it over to Ranking Member Cornyn for his opening statement.

**OPENING STATEMENT OF HON. JOHN CORNYN,  
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman. You and I get along very well together. We've done a lot of important work together, but I couldn't disagree more about the priorities that you've discussed in your opening statement.

Just since President Biden has been in office, there've been roughly 7 million people across our border. Many of them turned themselves in, claiming asylum. Others are released on humanitarian parole in huge numbers. There've been a million and a half got-aways, is what the Border Patrol calls them.

Of course, if you're evading law enforcement, it tells me that maybe you're doing something you might not should be doing, like smuggling fentanyl and other drugs into the United States.

The administration has the audacity to claim that all of the illegal drugs that come into our country come across the ports of entry. That's just not true.

They have no idea what's happening between the ports of entry with all of the got-aways that come across. And, of course, there's a fact that 108,000 Americans died of drugs mainly that crossed the southern border, certainly the fentanyl. The 71,000 Americans who are dead as a result of fentanyl poisoning from last year alone. Those came across the border from Mexico, made out of chemical precursors from China.

And then really the untold story of the status quo under the Biden administration is the 300,000 children who've been placed with sponsors in the interior of the United States.

And, as The New York Times has documented recently in an investigative story, 85,000 wellness calls were made by the U.S. Government to these sponsors 30 days after the child was placed with a sponsor, and there was no answer.

And so the Biden administration cannot tell you what the status of those children is. We do know that, as documented in some of these investigative stories, that some of these children have been in—put into forced labor, dangerous jobs that they should not be performing.

We don't know whether they're being trafficked for sex. We don't know whether they're being neglected, abused.

The Biden administration can't tell you because they don't frankly care. And if they did care, they would actually do something about it.

So I just hold a very different view that this particular matter, as important as it is, and I agree it's important—independence of the courts is something that's near and dear to my heart, having served on the State court bench for 13 years.

But the courts can only do so much when the Biden administration has opened the spigot at the border, and, as you know, there's roughly, according to one count, 2.6 million cases pending.

Our immigration judges can't do their job just being flooded with this—these huge numbers. And so what does the Biden administration do? Well, they end up basically taking cases off of the docket on the back end, which make the numbers actually look better, but do not actually enforce U.S. law.

So I agree with you that, that some of the measures people like to talk about, like physical infrastructure, is not an end-all be-all. It is a piece of the puzzle. Certainly technology and boots on the ground are important.

But policy changes are important, too. As I suggested, there are people who literally come to the United States and turn themselves in and claim asylum, knowing that they can beat the system, that they will be—if they are given a Notice to Appear at all, it may be for years in the future. And who knows whether they decide to show up or not for that hearing.

There's no consequences associated with not showing up unless, of course, they happen to get arrested for a crime in a local juris-

diction and somebody actually checks to see what their immigration status should be.

But we also know that there are, in addition to the 2.6 million cases pending, in about 1.3 million cases, these migrants are given a Notice to Appear, or—not a Notice to Appear, a Notice to Report, I guess it's called, to an ICE facility in the interior of the United States. And then to start the process once they turn themselves in.

Again, you know, you might ask yourself how many people will, if they haven't complied with our laws otherwise, why in the world would you think that they're going to turn themselves in to ICE so they can get in the line for an immigration hearing where roughly 80 percent of the people can't qualify for asylum?

And to me, one of the tragedies of this is, I believe that asylum should be available to people who can meet the standard. But we have literally millions of people in line waiting for a hearing in an immigration court, clogging the courts, overburdening the courts when only 15, maybe 20 percent can qualify.

So that means that the 15 to 20 percent who can qualify can't get to court on a timely basis, because of the other 80 percent that are in line.

So this is an unmitigated disaster. And while I do, as I said earlier, believe in the importance of independence of the courts, and will listen closely, I just think this is a—this is not the top priority.

If you look at the public polling on President Biden's approval rating on how he's dealing with what's happening at the border now—which happens to be 1,200 miles of my State—I think about 28 percent, if I'm recalling correctly, approve—28 percent.

I keep hoping that something will bring my Democratic colleagues, including the administration, to the table so we can engage in practical problem solving. That's what needs to happen.

So thank you for giving me the opportunity to express my views, and look forward to hearing from the witnesses and asking some questions. Thank you.

Chair PADILLA. Thank you, Senator Cornyn. While I would normally turn to Senator Durbin for opening remarks at this point, he could not be here today. Instead, he has shared a statement for the record with me that I will enter into the record, without objection.

[The prepared statement of Chair Durbin appears as a submission for the record.]

I also see that the Ranking Member is unable to join us this morning, and so we'll proceed to our witness introductions and to hear their testimony.

After I introduce and swear in the witnesses, they'll each have 5 minutes to make their opening remarks, and we'll then begin our first round of questions, and during which each Senator will have 5 minutes. And I ask that colleagues try to remain within their allotted time. We'll have a second round if there's interest and time allows.

Introductions.

I will start now with Mr. McKinney. Jeremy McKinney is the founder of McKinney Immigration Law. He's also the immediate past president of the American Immigration Lawyers Association and a recognized expert in immigration law, particularly on the

topic of the immigration court system and the need for an independent immigration judiciary.

He previously taught immigration law at Elon University School of Law as an adjunct professor, and served on the North Carolina State Bar's Specialization Committee. He is a former captain and trial counsel in the North Carolina Army National Guard, as well as a U.S. Army veteran. We appreciate your service, sir.

I'd also like to introduce Judge Mimi Tsankov. An immigration judge and the president of the National Association of Immigration Judges. She was appointed to the bench in 2006 and is seated today at the New York Federal Plaza Immigration Court in Manhattan. She previously presided at immigration courts in New York, Colorado, and California.

She has served as an Immigration and Naturalization Service assistant district counsel, a special assistant U.S. attorney, and as an asylum officer. Judge Tsankov is actively involved with the legal and non-legal community, and serves in various leadership roles at the Federal Bar Association, the American Bar Association and Judicial Division, National Conference of Administrative Law Judges.

She also has an ABA Presidential appointment to the United Nations Department of Global Communications in her capacity as president of the NAIJ. She's appearing today in her capacity as the president of NAIJ and not as a representative of the Department of Justice. Just wanted to make that abundantly clear.

We also have Mr. Stimson with us, and I will turn now to Ranking Member Cornyn to introduce him.

Senator CORNYN. We're pleased to have Charles "Culley" Stimson here, who's the deputy director of the Edwin Meese III Center, manager of the National Security Law Program, and senior legal fellow and senior advisor to the president of the Heritage Foundation.

Mr. Stimson writes, lectures, and testifies on a wide range of—wide range of policy issues, such as law of armed conflict, terrorist detainee policy, military commissions, criminal law, and the death penalty, of course, immigration, and the war on drugs. We're pleased to have you here today, Mr. Stimson. Thank you. Look forward to your responses and your statement. Thank you.

Chair PADILLA. Welcome, Mr. Stimson.

And finally, we're joined by Rebecca Gambler, Director in the U.S. Government Accountability Office's Homeland Security and Justice Team, where she leads GAO's work on border security, immigration, and elections issues. Ms. Gambler joined GAO in 2002 and has worked on a wide range of issues related to Homeland Security and Justice.

Prior to joining GAO, Ms. Gambler worked at the National Endowment for Democracy's International Forum for Democratic Studies. Ms. Gambler has an M.A. in national security and strategic studies from the United States Naval War College, an M.A. in international relations from Syracuse University, and an M.A. in political science from the University of Toronto. She was a Fulbright fellow to Canada and has a B.A. in political science from Messiah College. Thank you for being here, as well.

At this point, let me ask each of you to stand and raise your right hands.



[Witnesses are sworn in.]

Chair PADILLA. Thank you. Please be seated. Let the record reflect all witnesses have responded in the affirmative.

And with that, we'll begin with witness testimony. Mr. McKinney, please begin.

**STATEMENT OF JEREMY MCKINNEY, ATTORNEY AND NORTH CAROLINA BOARD-CERTIFIED SPECIALIST IN IMMIGRATION LAW; IMMEDIATE PAST PRESIDENT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION; AND FOUNDER, MCKINNEY IMMIGRATION LAW, GREENSBORO, NORTH CAROLINA**

Mr. MCKINNEY. Thank you, Chairman Padilla, Ranking Member Cornyn, and the Members of the Subcommittee. Thank you for inviting me to testify today.

My name is Jeremy McKinney. I'm the immediate past president of the American Immigration Lawyers Association, or AILA, the National Bar Association of 17,000 immigration attorneys. For the past 25 years, I have practiced regularly before the immigration courts.

Let's paint the picture. My office is in Greensboro, North Carolina, and my immigration court is in Charlotte. My clients typically travel from 2 to 5 hours to appear in court.

I want to tell you about two children, a brother and sister from Central America, that I represented in immigration court proceedings. They were sold by their father into domestic servitude and then abused by the people who bought them.

The children escaped and reached the U.S. It became my job to prove they qualify for asylum.

This meant that I need to tell their stories. The brother was so young, he struggled to articulate the horrors he had experienced, while his older sister bore the deep scars of trauma—so severe that she attempted to take her own life while her immigration proceedings were pending.

They ultimately won asylum, but not before they faced a bewildering array of legal challenges. Their Notices to Appear lacked any hearing date, leaving them confused about when to appear. Immigration judges frequently order people removed for not appearing.

Before filing their asylum applications, I had to send a copy to USCIS to trigger biometrics appointments for ICE's criminal, and security background checks. Some judges have ordered people removed for not having their biometrics done, even though it's typically beyond their control.

So errors at any of these stages could have resulted in them losing their asylum case—a devastating consequence, and really a matter of life or death.

Prior to hearing, I tried to contact the ICE attorney to narrow down the legal issues. But the ICE attorney never responded, which is unfortunately common. In fact, ICE has recently instructed their attorneys that they don't even need to appear in court.

Ultimately, these siblings won their case because at the time, fear of persecution on account of kinship and domestic abuse was recognized as a valid basis for asylum.

But years later, after they won, the Attorney General changed asylum law using his unusual power to override immigration court decisions and try to block kinship and abuse cases. This was reversed by Attorney General Garland.

Each hurdle posed significant challenges that were rather typical for anyone navigating our immigration court system. These children could not have navigated it if they had not been represented by an attorney.

It begs the question, if they had been unrepresented, like most people in immigration court, would they still be here today?

This is the short and simple truth. Immigration courts are not real courts. The Executive Office for Immigration Review, or EOIR, is an arm of the Department of Justice headed by a political appointee, the Attorney General.

The AG has total authority over EOIR, including the power to hire judges and readjudicate any case they decide. In an appeal, the AG represents the Government in seeking to deport the person, instead of remaining the neutral decisionmaker.

The courts, as such, are not fair, and yet they exercise enormous power over the people appearing before them. Because immigration courts are part of the Department of Justice, they are exceptionally vulnerable to interference from the executive branch.

Every—I want to be clear—every administration has interfered with the courts. This undermines the court's integrity and many of the executive branch's manipulations of judges and their dockets simply backfire.

When we curtail a person's right to a full and fair hearing, I can say, as a lawyer, you increase, not decrease litigation, and that increases wait times.

In AILA's view, the only way to restore integrity and fairness to the immigration court system, is for Congress to create an independent immigration court pursuant to Article I of the Constitution. And within this system, the Federal Government should fund legal representation for those facing removal who cannot afford counsel.

The process should match the high stakes. But until this time comes, we have specific recommendations and commonsense reforms to ease the backlog and improve fairness: expanding electronic filing, directly accepting filing fees, setting clear standards from when a hearing is in person or virtual. And EOIR must require ICE to appear at hearings, and—in no other court is opposing counsel allowed to skip out on trial.

While there's symptomatic problems, AILA wants to recognize the good things that the current EOIR leadership is doing to ease backlogs and restore IJ discretion, but much work needs to be done.

ALA stands ready, sir, to work with your Subcommittee and the administration to make immigration courts fair and independent. Thank you for your time.

[The prepared statement of Mr. McKinney appears as a submission for the record.]

Chair PADILLA. Thank you very much. Judge Tsankov.

**STATEMENT OF HON. MIMI TSANKOV, PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, NEW YORK, NEW YORK**

Judge TSANKOV. Good morning, Members of the Subcommittee. Thank you for the opportunity to testify today.

As Senator Padilla said, I am an immigration judge seated in New York, and I've been on the bench for almost 17 years.

I want to highlight today how the many challenges the court system is facing has led us to have over 2.6 million cases now waiting to be heard. I also want to explain why the only real solution is to create an independent Article I immigration court.

Let me walk you through some of the difficulties that I've observed.

There are about 700 immigration judges at the roughly 70 courts around the country, and that works out to be about 3,700 cases per judge.

Each day I start my first trial at 8:30 in the morning, and I generally hold four hearings a day before I leave for the day. We're short staffed in New York City, much like the rest of the country, so I share a legal assistant with another judge. And staffing shortages, as you heard, do cause delays. I have very limited judicial law clerk support, and that restricts the help I can get resolving complicated questions of law, another cause for delay.

With the recent high levels of migration at the border related to migrants bypassing the lawful pathways rule, many judges are being pulled from their home court dockets to handle border matters.

These special assignments, brought on by real need, nevertheless wreak havoc on our home court dockets. Cases languish and are rescheduled to new dates far into the future.

The consequence is a ballooning backlog. In Charlotte, North Carolina for example, the judges are resetting cases into 2027.

This summer I volunteered to work at the border in Laredo, Texas, on a detained docket where I handled credible fear review cases. I worked long hours and weekends hearing cases, and during that time, my home docket sat idle. My cases needed to be rescheduled to the end of my docket up to a year down the road.

We have reached this point, in large part, because our courts are housed within the Department of Justice, and that control over the courts has resulted in extreme pendulum swings across subsequent administrations. Our judges must navigate their judicial responsibilities on the one hand, and heavy political scrutiny on the other. And these swings have significant operational impact.

The ever-shifting political priorities result in dockets being shuffled and reprioritized. For the respondents who've been waiting years for their day in court, it's disheartening. Justice delayed is justice denied.

As long as I can remember, the court has been poorly resourced. The budget for interpreters dries up. Plans for critical IT system improvements get put on the back burner. Training conferences are canceled. Staffing levels stagnate. Space needs aren't addressed.

For example, we have years' worth of paper files sitting in our hallways waiting to be scanned. These are not just my views. Both

the GAO and the Inspector General have released numerous reports critical of EOIR management.

We know that the stakes are very high for those in proceedings before us, especially the many unrepresented individuals. Finding counsel is difficult and pro bono providers are overwhelmed. All of this results in court delays.

Now, this administration has enhanced access to pro bono attorneys, but many vulnerable respondents, including children, remain unrepresented. I've decided many children's cases in the past. It is heartbreaking to see a young, unrepresented child in court, and I can tell you we need to take more time to address those cases properly.

Only an independent Article I immigration court can fix the problems that plague the immigration court. This is not a political solution, it's a good Government solution. It maintains the Presidential prerogative to enforce immigration laws while separating out case adjudication. It would reduce the backlog because it would eliminate the DOJ bureaucracy. The judges would be responsible for managing their own resources and dockets like they do in Federal and State courts around the country.

Of course, it is not the only fix that's needed to repair our system. But if Congress takes the necessary steps to remove the court from the executive branch, an independent court would begin the process of healing this broken system.

An Article I court would ensure judicial independence, protect due process, and help us fulfill our mission as judges. Thank you for your attention. I'm happy to answer any questions.

[The prepared statement of Judge Tsankov appears as a submission for the record.]

Chair PADILLA. Thank you, Judge. Mr. Stimson.

**STATEMENT OF CHARLES D. "CULLY" STIMSON, DEPUTY DIRECTOR, EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES, AND MANAGER, NATIONAL SECURITY LAW PROGRAM, THE HERITAGE FOUNDATION, WASHINGTON, DC**

Mr. STIMSON. Chairman Padilla, Ranking Member Cornyn, and Members of the Committee, thank you for the honor of testifying today.

My testimony today will rely on my experiences as an assistant U.S. attorney, a criminal defense lawyer, and 30 years in the Navy JAG Corps, where I retired as a captain and served for 5 years as a military trial judge.

First, I want to make three interrelated points.

First, unlike all Federal and most State court judges, immigration judges cannot dismiss a case for failure to state a claim.

Second, immigration judges cannot render judgment on the pleadings, even in patently frivolous cases.

And third, even though Congress passed a law 26 years ago giving immigration judges contempt authority, no administration has actually implemented that rule. Which means immigration judges don't have contempt authority.

The bottom line is this. Immigration judges, wherever they're housed, must have these common judicial tools to manage their crushing caseloads.

Let me put a finer point on it. You've heard that there's over 2.6 million cases pending before the courts. That's up from 876,000 in 2019. If Congress does nothing, it deprives immigration judges of the common judicial tools, their caseloads will climb into the millions.

But if you give them 12(b)(6) authority, and the ability to render a judgment on the pleadings and then arm them with contempt authority, their caseloads, by some estimates, would be cut by 75 percent. This is not and should not be a partisan issue. This is a good governance issue as the judge said, pure and simple.

My first point, summary judgment. We all know that it's a bed-rock principle of civil litigation in both Federal and State courts that a plaintiff must plead a viable legal claim. But that's not the case in immigration court. Whereas all State and Federal courts have tools they can use to dispose of meritless cases at the early stages of litigation, the immigration courts do not. That makes no sense at all.

Immigration judges are handcuffed managing tens of thousands of patently meritless cases from filing to final judgment. On average, an immigration case takes 3-plus years, from filing to final judgment. By contrast, Federal judges are empowered by 12(b)(6) to dismiss claims that are inadequately pleaded or legally baseless. The courts in all 50 States also have this authority.

To determine whether a claim is legally baseless, the court assumes that the facts alleged are true. The court then considers whether those facts satisfy the elements of a viable claim. If the facts, as pleaded, do not give rise to a viable claim, then the court can dismiss the case. Courts need not wait for a motion to dismiss a meritless case, but in most cases, they must give the party whose claims are dismissed an opportunity to be heard.

My second point, judgment on the pleadings. Federal Civil Procedure 12(c) gives Federal district courts the power to grant judgment to a party based solely on the pleadings. Typically, this tool is used when the parties agree on the underlying facts of a case, but disagree about their legal effect. Alternatively, as with a dismissal under 12(b)(6), a court may assume that the facts alleged are true and consider whether they give rise to a viable claim.

The courts then apply the law to those facts to determine whether a party is entitled to early judgment. Typically, a party must move for judgment on the pleadings before a court can enter an early judgment.

Immigration judges lack both of these tools to prune their dockets. This means that when a plainly meritless case—and there are a lot of them—comes before them, they have no choice but to retain it, manage it, hold hearings on it, and only after the judicial process is exhausted, enter the inevitable judgment.

The result is judicial gridlock. Meritorious cases stall behind a tsunami of baseless ones. Here's a fact. In FY22, EOIR granted only 14 percent of asylum claims.

In my written testimony, I propose legislative tweaks to existing immigration statutes that would add 12(b)(6) and judgment on the pleading of this authority to immigration judges.

My third point, contempt power. In 2019, the ABA wrote, quote, “Immigration courts are facing an existential crisis,” and are, quote, “irredeemably dysfunctional,” unquote.

And it’s only gotten worse. Twenty-six years ago, Congress passed a law giving immigration judges civil contempt authority, but it delegated it to the U.S. Attorney General to draft the implementing regulations. No administration has done so.

As a result, as you’ve heard, litigants before the immigration courts, Government attorneys and private counsel alike, can’t be held accountable to the judge with respect to matters such as timelines, docketing dates, or even court orders.

Counsel who often carry other cases before non-immigration judge courts put a priority on cases where the court has actual power to enforce its own orders, with either civil or criminal contempt.

Counsel who appear before immigration judges know these judges can only wag their fingers and raise their voices if counsel defies a court order, but nothing more.

As a result, immigration court judges are treated as second-class judges, taking a backseat to all other judges who have the contempt power over parties and lawyers who knowingly violate court orders.

In summary, immigration judges need the same tools that all judges have. First, to trim their dockets of meritless cases, and then to manage their existing caseloads and control their courtrooms. Thank you.

[The prepared statement of Mr. Stimson appears as a submission for the record.]

Chair PADILLA. Thank you. Ms. Gambler.

**STATEMENT OF HON. REBECCA GAMBLER, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC**

Ms. GAMBLER. Good morning, Chair Padilla, Ranking Member Cornyn, and Members of the Subcommittee. I appreciate the opportunity to testify at today’s hearing to discuss GAO’s work on the immigration courts.

Within the Department of Justice, the Executive Office for Immigration Review, or EOIR, is responsible for conducting immigration proceedings. EOIR is facing an extremely large case backlog and that backlog is growing.

As of July 2023, EOIR had a backlog of nearly 2.2 million pending cases. This is more than 4 times the number of pending cases at the start of Fiscal Year 2017.

EOIR officials have identified resource shortages and increasing caseloads as contributing to the backlog. The effects of the case backlog are significant. Some respondents wait years to have their cases heard, and we’ve reported that the backlog can contribute to immigration judges being able to spend less time considering cases.

GAO has issued numerous reports on the immigration courts, and today I’d like to focus my remarks on GAO’s most recent report on EOIR management issues.

In particular, I'll discuss our findings on, one, EOIR's workforce planning practices, two, the performance appraisal program for its judges, and three, EOIR's electronic filing system.

First, over the years, EOIR has taken some steps to improve its workforce planning. For example, in recent years, EOIR filled its previously vacant human resource officer position and signed a contract with the Office of Personnel Management for strategic workforce planning support.

While these are positive steps, significant gaps remain in EOIR's workforce planning efforts. Specifically, the agency has not yet developed a strategic workforce plan, which is a recommendation that GAO first made in 2017. This plan should include a determination of needed critical skills and competencies, strategies to address those skill and competency gaps, and a way to monitor and evaluate the agency's progress.

EOIR also has not had an agency-wide strategic plan since 2013. Setting an agency strategic direction is an important first step in establishing an effective workforce planning practice. EOIR officials have told us that they are drafting an updated strategic plan, but they haven't provided a schedule for completing it. We recommended that EOIR develop such a schedule with target timeframes.

Second, regarding performance appraisals for judges, EOIR has a program that evaluates how immigration judges perform their duties using performance plans.

However, EOIR has not evaluated its overall judge performance appraisal program, and some judges we interviewed raised concerns about the program, including that performance plans are not specific enough, or that expectations for the frequency of meetings between judges and their supervisors are not realistic in large courts with many judges.

We recommended EOIR implement a process to periodically evaluate the performance appraisal program for judges.

Finally, regarding EOIR's electronic filing system. The agency historically relied upon a paper-based system for filing case documentation.

However, in 2018, EOIR began implementing an e-filing system at immigration courts, and as of November 2021, all courts have access to it. The system consists of several applications that are available to different types of stakeholders in the court system. For example, judges and court staff used the judicial tools application to access case information and create decisions on cases.

Court staff that we interviewed expressed overall positive views of the e-filing system.

However, court staff also told us they experienced system outages and delays while using the judicial tools application. While EOIR headquarter officials were aware of these issues, EOIR does not have a process to regularly assess whether the application is meeting the needs of its users.

We recommended that EOR develop and implement a process to regularly reassess whether judicial tools is meeting the needs of its users.

In closing, as EOIR continues to face a significant and growing backlog of immigration cases, effective management practices are

critical to ensuring that EOIR is well positioned to fulfill its mission to adjudicate cases efficiently and effectively.

We have reported that EOIR is facing management challenges and continues to need improvement in areas such as workforce planning.

Our recommendations are intended to help position EOIR to address those challenges, and we'll continue to monitor actions to implement them.

This concludes my oral statement and I'd be pleased to answer any questions.

[The prepared statement of Ms. Gambler appears as a submission for the record.]

Chair PADILLA. Thank you very much. Thank you, to all of our witnesses.

We'll now turn to questions from the Committee. To begin with, I want to explore the importance of legal representation. Representation rates in immigration court have been low for years. According to EOIR data, just 44 percent of the 5.6 million people who appeared in immigration courts between 2002 and 2022 had an attorney.

And currently, out of more than 2 million immigrants with cases pending before the immigration courts, fewer than half have representation. These rates are even lower for immigrants in detention.

However, attorneys have a significant impact in every stage of removal proceedings. Individuals with representation are more likely to show up for their court cases, and are significantly more likely to be successful in obtaining relief in immigration court.

In fact, since 2001, EOIR data shows that only 6 percent of immigrants who were unrepresented were successful in winning their cases. Whereas having representation makes detained individuals more than 10 times more likely to prevail.

Question's for Mr. McKinney. Can you just elaborate further on why having an attorney makes such a difference in outcomes for individuals, and how having representation impacts court efficiencies generally?

Mr. MCKINNEY. Thank you for the question, Chairman Padilla. As our written testimony indicates, there's a 2016 study from the American Immigration Council that indicates that represented respondents in immigration courts are 5 times more likely to gain relief.

TRAC, a non-partisan organization whose numbers we all rely on, points out that those that apply for asylum affirmatively and then had to defend that asylum application immigration court, they saw their approval rates go to almost 76 percent because they were nearly all represented.

Now, I do want to point out that that's still—that 76 percent only still represents a very small number of total grants in our system.

But the point is, is that representation ensures due process. But it also makes the system more efficient. When all the parties know the rules and know how to present a case, cases move faster.

Chair PADILLA. Thank you. And that's certainly my take, which should not be misinterpreted. The goal here isn't simply to grant more for the sake of granting more.



The point here is true due process and an added benefit of improved efficiency of the court.

Now I do want to go back to Mr. Stimson's testimony, his argument—or recommendations about contempt authority, ability to dismiss, the reference to 12(b)(6).

Judge Tsankov, interested in your response to those statements and recommendations, and Mr. McKinney after that.

Judge TSANKOV. The first—I'll take the first one, which was the discussion about dismissal for failure to state a claim, and the statement of 75 percent of the cases would be reduced—removed from the docket.

I'm not quite sure where that number 75 percent has come from, but to me, that seems like a very large number and a very large percentage that I can't quite imagine how that could happen.

But let me explain what's the concern. Most of the people that appear before us don't have representation. So how a judge would be able to get them in a position so that they could state their claim and then the judge simply decide the case without them having had an adequate opportunity to present their claim, not quite sure how we would be able to do that.

Fortunately, the administration has put in place—and we could consider expanding it—opportunities for pretrial conferences because at those pretrial conferences, the Department of Homeland Security can certainly say, we support this case and it won't require a full and complete hearing.

But the vast majority of the cases that I see that appear before me have sufficient documentation within them, and the Department has security questions they want to ask, I would need to put it, at least, for a hearing. Thank you.

Chair PADILLA. Mr. McKinney?

Mr. MCKINNEY. I appreciate Mr. Stimson's comments and reading his written testimony, I found myself agreeing with much of it, if Immigration court was a real court. But it's not.

Most of these respondents are unrepresented, the rules of evidence, Senator Padilla, literally do not apply. The rules of evidence do not apply in immigration court.

I had this actually happen to me a couple of years ago on a gender-based claim. The immigration judge dismissed it without hearing testimony. As I indicated in my earlier remarks, I appealed. I won that appeal. That case is still pending. It's been pending now for 6 years.

So curtailing a person's right to a full and fair hearing does not speed things up. It slows things down.

Chair PADILLA. Thank you. I'll have further questions in the next round, but at this point, Senator Cornyn.

Senator CORNYN. Mr. McKinney, you say that immigration courts are not real courts. You are, I'm sure, aware of the fact that the executive branch agencies employ administrative law judges across broad, broad sectors of the Federal Government. For example, the Department of Labor houses the Office of Administrative Law Judges. The Office of Administrative Law Judges also do similar work at the Drug Enforcement Administration, among others.

If immigration courts aren't real courts and lack the basic due process and independence that you think is necessary, does that

raise your concerns? Does your concerns apply equally to the other functions that these administrative laws, the other subject matter areas that they operate in?

Mr. MCKINNEY. Well, thank you so much for the question, Senator Cornyn. I don't want to claim to be an expert in those other fields. But from my review in working on this issue, it—other—in other settings, administrative law judges simply have more power to act like judges.

Senator CORNYN. They're not—they're not independent though.

Mr. MCKINNEY. They're not—they are—in some cases, they are not fully independent—

Senator CORNYN. But, none of the cases are they fully independent. They're part of the executive branch. Right?

Mr. MCKINNEY. Correct. Ultimately there is—ultimately it's the administration that is in control that is running the Federal Government.

Senator CORNYN. Judge, do you—I don't know how you handle what comes at you, and the volume that comes at you. I can't imagine having to do that day in and day out. It just seems overwhelming.

And maybe we need to look at some of the inputs that cause people to end up in front of you. But right now, if somebody is, let's say, detained at the border and claims asylum, how long will it take them to get a hearing in your court?

Judge TSANKOV. In my court, if the case—if they had been issued a Notice to Appear, and they would probably get a hearing within maybe 5 months for their initial master calendar hearing, at which time I'd provide them with some information about their rights, then they'd want to probably find some—have some time to seek representation.

Senator CORNYN. And so, do you agree—I think somebody mentioned the typical time period for adjudication of these immigration cases could be up to 3 years?

Judge TSANKOV. I think that's fair.

Senator CORNYN. And I've seen actually some reports in New York newspapers that some immigration courts have backlogs of up to 10 years. Is that accurate?

Judge TSANKOV. I can't—I can say that I agree that there are some courts, because it's a different distribution of cases around the—

Senator CORNYN. Right.

Judge TSANKOV [continuing]. Country and different numbers of judges, some of them do have very extensive delays.

Senator CORNYN. I noticed that according to the Executive Office for Immigration Review adjudication statistics for the third quarter, that the median asylum grant rate is 12 percent. The mean court asylum grant rate is 16 percent.

So, and I noted in your court, if I'm reading this correctly, the grant rate is roughly 30 percent. But my question is really about the 70 percent in your court, or the 86 percent in courts across the country, that are clogging the system.

That people who ultimately will have no legitimate legal basis to claim asylum that are—that are impeding access to the courts by people who actually have legitimate claims.

I think we all agree that people with legitimate claims should be heard and should be granted asylum. So—but don't the people who don't qualify make that hard?

Judge TSANKOV. When the system is as overburdened as it is, it takes time to find and get to those cases that are meritorious. But we do re—we are required by the Constitution to provide due process even to those individuals that don't have ultimately a meritorious claim.

Senator CORNYN. Well, I understand that, and it is—I'm not criticizing you, by any means. I'm just saying that the current system, for lack of a better word, there's really no system. It's just helter-skelter. But it does create a situation where there's backlog because of the sheer volume.

Mr. Stimson, you know, years ago, maybe 2 years ago now, maybe less, 30—in a town, little sleepy town in south Texas, Del Rio, Texas, 15,000—it's 35,000 people, 15,000 Haitian migrants showed up and claimed asylum. They'd been living in South America for the past previous few years. And so clearly they had transited a safe third country.

Would eliminating the ability of individuals to transit a safe third country to qualify for asylum in the United States, would that help address some of the—just the sheer volume that we're seeing these days and act perhaps as a deterrent that would discourage people without legitimate claims from showing up at the border?

Mr. STIMSON. Thank you for your question, Senator Cornyn. Yes, of course. And I would add that 12(b)(6) and judgment on the pleadings is due process, as I explained at length in my written testimony.

And so the notion that a case with no merit whatsoever needs to languish for 3 years in a court system where people with legitimate asylum claims—who we can all agree need to have their cases heard and they need to be granted asylum—it's not fair to them.

And so, 12(b)(6) and judgment on the pleadings is part of the due process that we afford in all State and Federal courts.

Chair PADILLA. Thank you. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman, for holding this hearing.

Before I proceed with my opening, I just would like to clarify a few things. For example, according to the Cato Institute, U.S. citizens were 89 percent of those convicted of fentanyl trafficking in 2022—93 percent of fentanyl seizures happened at legal crossings or interior checkpoints.

In other words, none of the fentanyl coming into our country are not by so-called illegal immigrants, but by U.S. citizens.

Also, this whole notion of all these people who don't even qualify for asylum clogging the system, the fact is detained individuals with attorneys, with attorneys—that is the critical point here—that people who have attorneys are 10.5 times more likely to be granted relief. So it is when they have attorneys that they can proceed with their asylum claims.

Our immigration system is complicated enough as it is. How are people who have language issues and other issues even supposed

to come forward with their legitimate asylum claims if they can't even figure out what's supposed to happen?

So this idea that there are all these people clogging the system, you know, we should be more concerned, I would say, with providing lawyers for these claimants.

And I particularly want to focus on what happens to unaccompanied children who don't have lawyers. And I've witnessed immigration proceedings and led a bipartisan congressional delegation to border facilities in Texas.

While there, I saw that the Government is always represented by counsel in these proceedings. Or maybe not if they don't bother to even show up anymore.

But there is no guarantee that children will also have a lawyer. And this is alarming because children are some of the most vulnerable people in our immigration system.

I've heard from advocates, including Mr. McKinney today, who've shared stories of children going through the process, including a 4-year-old child whose attorney had to describe the immigration process using a comic book. As a 4-year-old, the child wasn't able to sign his name to the documents and instead had to make a squiggle mark.

Or a 2-year-old who was so young that when the lawyer visited her, the child was in a playpen. When the 2-year-old saw the lawyer, she tried to give the attorney her teddy bear. The attorney tried to use a cartoon book to explain what was happening, but eventually had to use toys instead.

Were it not for the many volunteer attorneys who represented them, these children or these babies often would've been expected to represent themselves in court with the rest of their lives hanging in the balance.

It is objectively ludicrous. Not to mention, I would say, inhumane. These are just the stories we're aware of. Nearly half of all unaccompanied children go into the immigration court without a lawyer. For every child who is lucky enough to be represented by an attorney, another is left to fend for themselves.

But setting aside the principles of due process, fairness, or even the fact that giving children an attorney is just a humane thing to do, the data itself supports the idea that children should be given lawyers. And that's why we should increase the chances of children being granted relief by providing them attorneys at an earlier point.

It reduces waste by streamlining proceedings. It presents clear materials to the court, and ensures that children show up for their hearings. Children cannot represent themselves in court. It's that simple. And to give the judges more authority to just basically toss out hundreds of thousands of cases, is not the answer.

And that's why I have introduced the Fair Day in Court for Kids Act, which would provide unaccompanied children with legal representation when they go through the process earlier in the process.

So Mr. McKinney, why is having an attorney so crucial for unaccompanied children?

MR. MCKINNEY. Thank you, Senator Hirono, and thank you for your efforts in this arena. Briefly put, because many, most of these

children have viable claims before the immigration courts and/or other agencies, from what I see, unaccompanied children have often been neglected, abused, or abandoned by one or both biological parents, and could qualify for relief, called Special Immigrant Juvenile Status, in this country.

But navigating that often requires a State custody proceeding as a prerequisite to seeking that relief. If you're unrepresented, the children—child's not going to know about this. And not to mention the asylum claims coming from our hemisphere right now, it's just horrific. So we need to do more to make sure those kids are represented.

Senator HIRONO. So I heard the number 300,000 unaccompanied children are in the system. It's just pretty horrifying to me that they are expected to go through a very complicated, complex—I'm repeating myself—system without lawyers. Thank you, Mr. Chairman.

Chair PADILLA. Thank you. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. And thank you, to each of you, for being here.

I think everyone's been horrified by what we have seen in Israel over the last few days, and we've also recognized that there is a direct threat to the Homeland when you look at what is happening at that southern border. And I had pulled some numbers.

Border agents apprehended 19 Iranians and 17 Syrians since last Monday. That's absolutely astounding. That is since last Monday.

And there are over 260 individuals on the Terrorist Watch List that have been apprehended at the southern border. And there can be no doubt that President Biden's open border has created the perfect storm for terrorists because it makes for easy entry.

So, Mr. Stimson, I want to come to you on that, given that you've had a role previously in your life over at DOD. And when you look at these persons, the thousands of persons of interest that have come to the border, when you look at the ones that are on the Terrorist Watch List, when you look at individuals that are in that unknown got-away category, I—I want you to talk for a little bit about what you see as the concern on the stark rise of individuals coming across that border that are on that Terrorist Watch List.

I—when you look at the fact that in 2019, we had zero come across, and then in 2021, the number upped, and it's upped again. If you'll address that, please.

Mr. STIMSON. Thank you, Senator Blackburn. You're referring to my time as Deputy Assistant Defense Secretary—

Senator BLACKBURN. Yes.

Mr. STIMSON [continuing]. In charge of detainee policy in the Bush administration. And I've been in the room in the same facility as Khalid Sheikh Mohammed, the mastermind of 9/11, and the formerly held CIA detainees who are now currently housed at Gitmo.

They have a saying, "We have"—"You have watches, we have calendars." They take a long view of how they're going to destroy this country. And I'm gravely concerned with this porous border. We don't know what we don't know. We don't know how many we didn't catch who came to this country.

We've seen this rise of anti-Zionism and anti-Semitism in this country, after the Hamas savages did what they did to the people and children and women in Israel.

And so there's no doubt in my mind—this is based on my hunch, I have no classified information or access to that anymore in my current job—that there are bad actors in this country, and they came through the border. And so I think we should be open-eyed and clear-eyed about that going forward.

Senator BLACKBURN. Well, and I think that Director Wray's warning potential Hamas attacks on the Homeland should be something that causes us all pause as we look at what is happening here.

I want to touch with you on the trafficking of children at the southern border and the crisis that that has presented us with.

I have been appalled that this administration removed DNA testing at the border—45-minute test. And when we did it, we found that a third of the children were being trafficked. And now we find out that the children that DHS has in cus—or should have had in custody out of the 335,000, they've lost 85,000 of those children. They do not know where they are. They don't know if they are dead or alive, and/or if they're being placed into sex trafficking, labor, gangs, things of that nature.

We also know that DOJ indicated that over a 10-year period, 46 percent of the UACs disappeared before their hearings, and they failed to fulfill that Notice to Appear. And that's over half of the almost 50,000 children given Notices to Appear that have gone missing before their court date. So isn't it possible, or even likely that a number of these children who have failed to appear in court have been trafficked or exploited?

Mr. STIMSON. I think it's hard to disagree with that statement. And, you know, I, like everyone here to the left and my right, think that young kids in any court proceeding, whether it's criminal or otherwise, should have an attorney, especially one trained in forensic speaking at a child appropriate level.

The question is, who pays? And I think we have differences of opinion on that. But I think the fate of many of these children is not good.

Senator BLACKBURN. Thank you.

Chair PADILLA. Thank you.

Senator BLACKBURN. Thank you, Mr. Chairman.

Chair PADILLA. Thank you. I do want to acknowledge other Members have come and gone, with other Committees in meetings this morning. So not sure whether or not Senator Tillis, Senator Booker, Senator Klobuchar, or others will return.

But in the meantime, we do have additional questions. We'll start with the second round here.

Now, over the years, Attorneys General from both parties have used a procedure called self-certification to influence and change immigration law.

The Trump administration used self-certification a record 17 times, including to restrict asylum eligibility and strip immigration judges of authority to decide when to put an end or to pause a case.

In fact, former Attorney General Barr even used self-certification to reopen a 14-year-old asylum case, and, as if that wasn't con-

cerning enough, self-referred and immediately reviewed a case relevant to oral arguments taking place before the Supreme Court, just 5 days later.

After the Biden administration took office, Attorney General Garland has used self-certification to vacate or reverse decisions that did not fit with its policy objectives.

Question for Judge Tsankov. Can you discuss how self-certification cases can affect non-citizens trying to navigate the process, and also how self-certification impacts your work as a judge?

Judge TSANKOV. Thank you for that question.

So as we know, immigration judges decide their cases based on precedent decisions. And the precedent that we follow is issued by the Board of Immigration Appeals, any Attorney General decisions, and the Federal courts.

So when a new Attorney General comes into office, they have the authority to certify cases to themselves and essentially rewrite the presiding law that we then all apply.

One Attorney General might interpret a clause expansively, another restrictively. So the IJs are then bound by that new precedent.

Now, this creates uncertainty throughout all of the parties—throughout the entire system, and all of the parties that are appearing before us.

It also creates incentives to appeal unfavorable rulings, because an unfavorable ruling today, based on the law as it stands today, might be more favorable a few years down the road when a new Attorney General is appointed. This results in remands, which burdens the court and expands the backlog.

Chair PADILLA. Thank you. I also want to bring in Ms. Gambler here for a minute on issues of management and the backlog.

Now, thanks in large part, to persistent under-resourcing, as compared to other immigration enforcement agencies, the courts have long struggled to keep up with the number of cases referred to them by DHS.

The court backlog has grown consistently since 2007, as you've laid out. It doubled under the previous administration, and further increased during the COVID-19 pandemic, while many courts were physically closed.

Despite a record couple of years of case completions under the current administration, the court backlog is now a little over 2 million cases and growing. I want to afford you an opportunity to share what steps could EOIR take to help address the backlog.

Ms. GAMBLER. Thank you, Chair. We think it's critically important for EOIR to address the recommendations that GAO has made to it over the years. Those recommendations are really designed to help improve the management and thus help EOIR improve the efficiency of court operations.

And there's a particular recommendation that I would like to highlight that, that is long-standing.

And that is the need for EOIR to develop a strategic workforce plan. That is important because that type of workforce planning efforts helps an agency identify what gaps and skills they need to have in their workforce, how they're going to fill any skill and competency gaps they have, and then monitor progress in doing that.

A strategic workforce plan also helps an agency be positioned then to speak with Congress about what the resource needs are and how the agency will go about meeting those resource needs.

So this is a long-standing recommendation that GAO has made to EOIR—we made it back in 2017. It's actually a priority recommendation, and we think it's critically important that EOIR take action to address that and work on getting a strategic workforce plan in place.

Chair PADILLA. Okay. And in the spirit of trying to address the backlog, you know, I keep coming back to the recommendation Mr. Stimson has offered. The reference to the, whether it's 30-to-70, the 20-to-80, the ratio of successful versus unsuccessful claims. It can change over time. It changes region to region, across the country.

But to suggest that, well, it's just simply a clogged system. You know, if you can quickly, easily just remove cases without merit and be able to focus the system on those that have more merit.

Question, actually, for Judge Tsankov, you're a natural judge. You deal with this. Are unsuccessful cases all meritless, frivolous? Are there maybe a percentage that are sort of close calls and tougher to distinguish? How could you, with the magic wand just get rid of 70, 80 percent? Or is there a true due process here that we need to keep in mind?

Judge TSANKOV. Senator Padilla, you raise such a good point, and the way you've articulated, I think, is very, very helpful.

As the judge, you have to look at all of the evidence that's been provided. Now, for example, a case may end up being denied because a respondent filed their application for relief a year and 1 day later than the application was required to be filed. You know, you must file within 1 year of arrival. But they want to make a valid argument as to why they missed that deadline.

You, as the judge, might in the end decide it's not valid, but they have the right to make that—to present that argument. And those are, you know, they're sincere, sincere arguments that have to be addressed. That is the way that we run our system. Thank you.

Chair PADILLA. Thank you. Senator Cornyn.

Senator CORNYN. Mr. McKinney, I mean, the story you told about the two young children from South America, right, is certainly heartbreaking. How did they get here? Did their parents have to pay money for them to make their way to the border, to the United States?

Mr. MCKINNEY. Honestly—it's Central American, Senator Cornyn.

I honestly don't remember, but I would concede this point, I assume so. I—I assume—

Senator CORNYN [continuing]. These—the cartels—

Mr. MCKINNEY [continuing]. Not—and I don't—

Senator CORNYN [continuing]. The cartels don't—

Mr. MCKINNEY [continuing]. And not the parents—

Senator CORNYN [continuing]. The cartels don't work for free. Do they?

Mr. MCKINNEY. No.



Senator CORNYN. I mean, they're the ones who are participating in the smuggling of people to the border, including these unaccompanied children.

Mr. MCKINNEY. Yes, as—

Senator CORNYN. The parents—or somebody's paying money to get them here. My point is, it is heartrending to consider the circumstances of those children. But let's say of the 300,000 children that are currently in the United States unaccompanied, are taxpayers supposed to pay the tab?

Mr. MCKINNEY. For their representation, Senator?

Senator CORNYN. Yes.

Mr. MCKINNEY. It's AILA's position that the Federal Government should provide representation—

Senator CORNYN. That's the taxpayer. Right?

Mr. MCKINNEY. That is the taxpayer where, where the respondent is indigent. So we don't carve out children, although we appreciate and believe that all children should have representation. To us, to the American Immigration Lawyers Association, the key distinction is indigency.

Senator CORNYN. Well, if the parents or an adult pays a human smuggler \$5,000 to get them to the border, I guess you could say the child is indigent and taxpayers should pay for a lawyer. But it seems a little—a little odd to me that the taxpayers should be on the hook for that.

Let me just ask Ms. Gambler. I think there's just a lot of confusion about the numbers of people showing up at the border and what the different status is. You authored an excellent report called, "The Notice to Report in Parole + ATD Processes." What's ATD?

Ms. GAMBLER. That stands for Alternatives to Detention, Senator.

Senator CORNYN. Okay. So let me just see if I can summarize, and you can tell me if I'm close or I'm off the target. So people—there are people who show up and they claim asylum at the border. Correct?

Ms. GAMBLER. Right. At the border, they could be making a claim to fear.

Senator CORNYN. And there's another category of people who show up who make no claim—credible claim of fear, but who are being released into the interior of the United States under something called parole. Is that correct?

Ms. GAMBLER. That's right. According to our report, for a period of time, the Department of Homeland Security was processing some individuals who were encountered at the border under a program called Parole + ATD. So they were—those individuals were paroled into the United States and placed into the Alternatives to Detention program, which is a program to monitor individuals who are not being detained, and who will be in immigration proceedings.

Senator CORNYN. And those are—those are people who haven't made an asylum claim at that point. Correct?

Ms. GAMBLER. They—it—I think it was for individuals who were being—for whom DHS was making the decision to parole them into the country as sort of their processing pathway.

Senator CORNYN. Yes, yes. And they're given an—are they told to appear at an ICE office or something for a legal proceeding? Or are they just released into the countryside?

Ms. GAMBLER. So when we issued that report, Senator, we were looking at the use of the Parole+ATD program for family units. And under that program, the head of the family, the head of household, was enrolled in the Alternatives to Detention program. And then the members of the family were instructed to report to an ICE field office at a later date to be further processed and get that Notice to Appear to be enrolled in immigration proceedings.

Senator CORNYN. So those people haven't even started the process in the judge's court yet.

Ms. GAMBLER. For individuals who have not yet reported to an ICE office or for whom ICE has not yet issued a Notice to Appear, they have not been charged and thus are not in immigration proceedings.

Senator CORNYN. And you're aware of the fact that the Biden administration has said, if you come from 4 Central American countries, up to 30,000 people will be admitted each month from those 4 countries under sort of a preferential pro—under a parole program. Right?

Ms. GAMBLER. We are aware of that, but those——

Senator CORNYN. That's——

Ms. GAMBLER [continuing]. Parole programs were not the subject of our review.

Senator CORNYN [continuing]. 360,000 people a year, potentially. Right?

Ms. GAMBLER. Right. We're aware of those programs, but those weren't the subject of our review.

Senator CORNYN. Right. Well, and that's really my point. There's a whole lot of different sort of buckets to look at here. Some people claiming asylum who get a Notice to Appear in front of the judge's court, people who show up and are told to go report to ICE in the interior of the United States, and then to begin that process, even though they haven't claimed asylum at the time they're at the border.

And so the numbers that we've heard about overwhelming the immigration judges, their dockets, don't even include those people who have not been given a Notice to Appear. The ones that you wrote your report about.

Ms. GAMBLER. That's right. Individuals who have not been issued to—a Notice to Appear, which is the charging document, would not be in formal removal proceedings.

Senator CORNYN. And eventually they'll end up, if they show up, which many of them do not, if they show up and actually do report to an ICE office, then you'd have to add those numbers on top of the numbers that we've talked about earlier that will be added to the judges and other judges' immigration court dockets. Right?

Ms. GAMBLER. That's right. Once they're issued a Notice to Appear, then they would be formally placed in removal proceedings and be part of the pending caseload for EOIR.

Senator CORNYN. Thank you very much. Thanks for your indulgence, Mr. Chairman. Thank you.

Chair PADILLA. Every chance I get. Senator Welch.

Senator WELCH. Thank you, Mr. Chairman. I'm going to thank the panel of witnesses, as well.

We'll start with you, Judge Tsankov. The backlog is—the numbers are enormous right now, and Senator Cornyn was pointing out that it doesn't even include some folks who, because of the special program, don't go to court. But what effect would it have if Congress increased funding for border enforcement without meaningful increase for the judicial function?

Judge TSANKOV. I think that would just grow the backlog further. Because the more cases that are placed in proceedings, if you don't have a judge there to schedule the hearing within a few months, or, you know, within a year, the cases really are—the docket's just going to expand.

And I also think that it has a severe impact on the quality of due process that we're providing. Because if parties can't actually have their case heard in an expeditious manner, I don't think they have confidence in the system—

Senator WELCH. Mm-hmm.

Judge TSANKOV [continuing]. That their cases will be heard and treated fairly.

Senator WELCH. Can you just outline for me, since I haven't been in immigration court, from start to finish, how long a case takes once it does get on the docket, or get on your schedule?

Judge TSANKOV. So I have about maybe 3,700 cases or so on my docket.

And the case will initially be scheduled through a round robin by the court administrator onto my docket, or one of the other 40 or so judges at my court.

And they'll be scheduled for a master calendar hearing. It's usually the intake day where maybe 40, 50, 80, 90, 100 people will come into the courthouse and I'll provide them with information about their rights and advise them they can seek representation.

The case will then—they frequently will say, I'd like some additional time to have representation. We reset their case to another hearing, usually about 4 months or 5 months away. And at that hearing, they're usually represented.

Sometimes—unfortunately, this happens quite often—sometimes people do retain outside counsel. The attorney will then handle the pleadings by paper and tell the court, here's the application for relief, do away with that second hearing, just schedule me for my merits hearing, which we then do.

And so—and if it's in the fast format like that, I'd say it might take a year and a half. If it's in a slower format, with a few delays to seek representation, maybe that's 2½ to the 3 years.

Senator WELCH. So then, when you actually have the hearing, how long does the hearing take?

Judge TSANKOV. The actual hearing—it depends on how—well, let's say it—I always set hearings for about an hour and a half. Many cases can be finished in that period of time, and I find that's efficient to do 4 trials.

But if they need more time, I just reset—I code it a 13, and reset it to another day for additional testimony.

Senator WELCH. Okay. But the average actual “in court before you” time, once you get to the hearing, is about an hour and a half?

Judge TSANKOV. I'd say that's, that's fair.

Senator WELCH. Mr. McKinney, you do a lot of this. Does that sound about right?

Mr. MCKINNEY. Thank you, Senator. Yes, it does sound right—right on the money. The immigration judges in Charlotte typically schedule hearings for about 90 minutes. That takes care of most of my cases.

But there are several cases with more complex issues, legal issues that require additional time——

Senator WELCH. Okay. Let me ask you——

Mr. MCKINNEY [continuing]. And they drag on.

Senator WELCH. Let me move to another question. You know, there's a—it takes a long time. You come in here and the backlog means that people are here for a long time, and you have been dealing with clients who have to be in this limbo period.

And some folks think it's really important to let people get to work right away. A lot of folks who oppose that or are apprehensive that that's just encouraging more people to come in and put the additional burden on.

Just—can you tell me what challenges your clients face to just make it through the day and the week and the month, and what, if anything, you'd recommend that would help in that interim between when they arrive and when they get their hearing?

Mr. MCKINNEY. A key part of the resource problem and representation problem, to your point, Senator, is at the very beginning.

Now the law provides that an asylum seeker cannot obtain employment authorization for 6 months. There are also extensive delays within USCIS right now regarding the issuance of work permits for those parolees.

Senator WELCH. So how long does it take for somebody to get that period? Is it 6 months or does it actually take a lot longer?

Mr. MCKINNEY. It is, as of late, it's getting down to about 6 months, but it has, over the last year, been much, much longer, Senator.

Senator WELCH. Okay. So what would help there?

Mr. MCKINNEY. The administration stepping up its efforts to get these applications processed and get those cards issued. Because that's a win-win, not just for the asylum seeker or the respondent, but also for those local communities that are supporting these numbers.

Senator WELCH. Okay. Thank you. I yield back. Thank you, Mr. Chairman.

Chair PADILLA. Thank you, Senator Welch. Senator Cornyn.

Senator CORNYN. Mr. Kinney, I just wanted to ask you, maybe in your individual capacity or on behalf of the Immigration Lawyers Association that you represent, what would be your position if Congress said, "If you transit a safe third country, that you can't qualify for asylum in the United States"? Because the whole premise, it seems to me, of asylum is that you have a credible fear of persecution based on some classification or some condition. And if you're living or transiting through a safe third country, it would seem logically that you would not be able to prove you have a credible fear at that location. What's your view?

Mr. MCKINNEY. Thank you, Senator. That is already part of the law. So when I've met with, to your point earlier with Haitians that have lived in Brazil, when Brazil extended a lifeline to Haiti about 10 years ago or so, we've had several Haitians go from Haiti to Brazil, but encounter their own problems there and then make it to our shores requesting relief.

So—

Senator CORNYN. They lack the credible proof—

Mr. MCKINNEY [continuing]. The fact that they lived in Brazil was already a problem. It's a problem for temporary protective status. It's a problem for asylum. Re—settling in a third country creates a major, major obstacle to asylum relief.

Senator CORNYN. Assuming that that is being enforced.

Mr. MCKINNEY. And that's why we have our courts, Senator. Because they do just that.

Senator CORNYN. Well, if you're lucky enough to wait around 10 years, or 3, or 4, or 5 years to get a hearing. Thank you for that.

Chair PADILLA. And that's sort of a good reminder of the point of the hearing today.

Yes, a lot of elements to our immigration system working, not working, that's an ongoing debate and frustration. The focus today have been on this court's process, and we can talk about the inputs, we can talk about the backlogs, and the wait times, etc.

We have focused a lot on the need for additional capacity. We've talked a lot about the need—the judges' workload. And I just want to remind us that from Fiscal Year 2014 to Fiscal Year 2023, we actually more than doubled the number of judges from 249 to more than 650. Thanks, in large part, to EOIR's repeated asks to Congress for additional judges.

But at the same time, EOIR has been criticized for failing to hire sufficient numbers of support staff for those judges. And from today's testimony we hear that that support staff is also desperately needed.

Judge Tsankov, just briefly, I've asked a lot of very long questions, but just briefly, why are support staff so critical to you, your role, and your job, and the efficiency of the courts?

Judge TSANKOV. I could not do my job without the few support staff that I do have. They're phenomenal working so hard. I sometimes get messages from them at 8 o'clock at night.

We need our legal staff, legal assistants to notify the parties when hearings are scheduled to make sure that the hearing notices get sent out to Mr. McKinney, so he comes to court on that day at the right time.

We need them to, when Mr. McKinney files documents before the court, to make sure that those documents get put in the right file, so I see them when I hold my hearing a few months down the road.

We need them to send out their judicial orders. You know, we have a lot of paper files, so that means that those orders have to be sent out by mail. They take care of all of that.

We also need them to be there to answer the phone when unrepresented litigants call with questions, "How do I file this document?"

We also need our judicial law clerks to assist us with legal research on the very difficult questions. Not maybe the cases that are

just—that take 90 minutes, but the ones that are highly complex with novel questions of law. So we need them.

Chair PADILLA. These are great examples, and descriptive of what true courts should be.

We've talked earlier in the hearing about the independence or the need to strengthen the independence of immigration courts.

We referenced how both Democratic and Republican administrations have used immigration courts to influence immigration law and implement—change or implement immigration policy and priorities.

You know, we've heard over the years the creation of accelerated or dedicated or rocket dockets to prioritize certain types of cases. The imposition of case quotas. We've talked already about self-certification.

Judge, back to you. Why are immigration courts so vulnerable to political interference? And how would truly independent immigration courts address some of these concerns?

Judge TSANKOV. I think that the source of the challenge that we have, in terms of this vulnerability regarding independence, is the fact that we're housed within the U.S. Department of Justice. Successive Attorney Generals have the authority to recertify cases to themselves. It changed the law. All of that results in expanded case dockets.

But in addition, when the Attorney General has that power to essentially implement the law enforcement agenda of the executive branch, that impacts our dockets, and creates concerns in terms of lengthy delays for hearings that need to be handled in an expeditious manner and due process provided to them.

But also, it causes real challenges for perceptions about fairness in our system.

And so, the other thing that we see quite often is that each new administration has different docketing priorities. And that shuffling of the docket results in judges being, in one administration, sent to the border and their home court dockets languish for extended periods of time.

So it's the docket shuffling and the issue with the changing caselaw that I think is the most problematic for our court.

Chair PADILLA. Thank you. Now before moving to close today's hearing, I do want to end with one last question to put to the human element back, front and center—question for Mr. McKinney. We talked about the backlogs, causes of the backlogs, recommendations how to address the backlogs. What impact does the backlog, as it exists today, have on you and your clients?

Mr. MCKINNEY. It's significant, Senator. Because I think everyone here involved, all the stakeholders involved are searching to strike the right balance.

Speeding up leads to conveyor belt judges—I mean, excuse me, conveyor belt justice. Judges are not machine operators and my clients are not cogs. If we go too fast, you end up with respondents that are unrepresented with too few resources to put on a meaningful case. If we go too slow, the evidence gets stale and witnesses disappear.

And that's why the immigration court system that we have, EOIR, needs to be given sufficient resources to meaningfully and fairly dispose of this huge backlog that we're facing.

Chair PADILLA. Thank you, thank you.

Before I begin our close of today's hearing, I do want to take a moment to respond to the statistics on the number of people who qualify for asylum. We've heard a lot of different numbers today, but I want to enter into the record data from EOIR that shows that in Fiscal Year 2022 and 2023, immigration judges granted asylum in actually more than 40 percent of cases.

And I also just want to reaffirm the bedrock principle of due process and the fact that seeking asylum is legal under the law—not automatically granted, but it is lawful to seek asylum.

Also, everyone who comes to claim asylum deserves a fair shot to prove whether they qualify under the laws, including safe third country provisions.

However, the only country with which the U.S. has a safe third agreement currently is Canada.

So before we conclude, I also want to submit a couple of documents into the record, including statements from the Federal Bar Association, KIND, and the AFL-CIO. We will do so, without objection.

[The information appears as submissions for the record.]

Chair PADILLA. Others can be submitted. The deadline for submitting statements will be 1 week from today. The record will close 1 week from today.

And so, as we move to conclude this hearing, I want to, again, thank Senator Cornyn, as well as today's witnesses, for being with us. Did you have any closing statements here before I—okay.

So the testimony heard today paints a picture of an immigration court system that is at risk of failing both the non-citizens in the removal proceedings, as well as the American people having an independent judiciary, one that delivers timely and fair decisions to all those who come before it, is a bedrock principle of our American democracy.

Yet, as we heard today, by failing to come together to help relieve our overburdened immigration courts, Congress is guaranteeing immigration courts continue to see mounting cases, extended wait times, and a lack of due process. There's a clear need for reform.

Over the last several years, I've been encouraged to see the Biden administration take several steps to reduce case backlogs, to return autonomy to immigration judges, and to provide counsel for non-citizens in removal proceedings.

But administrative action alone is not enough. As we know, in many instances, an efficient and fair American immigration court can truly be the difference between life and death.

Just look at the mass exodus of Venezuelans fleeing severe economic hardship and repression in their home country. Based on a disappointing decision by this administration, the fate of Venezuelans who risk being deported to a country our own Government has labeled unsafe, now hangs in the balance of our immigration courts.

It's our moral responsibility to give these courts the resources that they need. But to begin with, it's clear that fixations on solely our southern border won't solve our problems. Yes, it's part of the overall process, but that alone will not solve our problems.

And avoiding the problem at hand by investing in other immigration enforcement agencies won't cut down the backlogs.

For years, funding for ICE and CBP has grown dramatically while the immigration courts have remained underfunded and understaffed. The results—backlogs continue to grow. It's not that complicated. It's simple cause and effect.

It's clear we must surge resources to hire support staff for immigration judges, and invest in technology and resources needed to bring our courts into the 21st century.

And in order to limit further political interference in our immigration courts, again, by both Republican and Democratic administrations, we also have to begin to think about more comprehensive reforms.

We can create an independent immigration arbiter by establishing Article I immigration courts—just as Congress has established independent courts for specialized areas of Federal law, like the U.S. Tax Court.

And finally, we cannot have a truly fair immigration court system until every respondent has a right to legal representation. Not only will universal representation give immigrants the best chance to receive fair adjudication, as we've heard today, it also increases attendance rate at hearings and increases efficiency in court proceedings. And it's the right thing to do.

Now, I don't suggest that any of this will be easy. Years' worth of inaction in Congress has created the uphill battle before us. But preserving those inherently American principles of fairness, timeliness, and independence in our court systems, relies on our ability to come together, Republicans and Democrats, to improve this system for everyone.

I look forward to working with my colleagues to do just that. Once again, I want to thank you all for being here. And with that, this hearing is adjourned.

[Whereupon, at 11:40 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]



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**Senate Judiciary Committee Chair Richard J. Durbin—Statement for the Record  
Senate Judiciary Subcommittee on Immigration, Citizenship, and Border Safety Hearing  
on “Preserving Due Process and the Rule of Law: Examining the Status of Our Nation’s  
Immigration Courts”  
October 18, 2023**

I thank Chair Padilla for holding today’s important hearing, and I thank you the witnesses for their testimony. I look forward to working with my colleagues on a bipartisan basis to address this critical issue.

Our immigration courts are essential to a functional and orderly immigration system, but they are in desperate need of reform and improvements. As of August 2023, there were more than 2.6 million pending cases before the nation’s immigration courts. As a result, many immigrants must wait for years until their cases are decided.

While the Department of Justice has made significant progress in hiring more immigration judges, reducing this backlog will require additional efforts. For example, similar advances have not yet been made in hiring the support staff that judges need to help efficiently manage their daily dockets, reduce the backlog, and stay on top of new cases.

The Trump Administration played a significant role in the growth of the backlog, due to the Administration’s efforts to restrict the ability of immigration judges to manage their dockets. For example, they restricted the use of administrative closure (when a case is temporarily removed from the active docket, often to allow the respondent time for USCIS to adjudicate their application for immigration relief). I was pleased to see the Department of Justice’s proposal to reverse those harmful Trump Administration changes and codify administrative closure in regulation. This will permit immigration judges to better manage their dockets and be more efficient.

Access to legal counsel in immigration court also contributes significantly to court efficiency. Unlike in criminal proceedings, noncitizens in removal proceedings have no right to counsel at government expense. Noncitizens in removal proceedings generally show up for their hearings, and having a lawyer actually further increases the rates at which immigrants show up. Improving access to counsel thus is a win-win proposition, making courts more efficient, increasing appearance rates, and helping ensure meritorious cases are successful.

Of course, there are other reasons why the backlog has increased. One is the large increase in asylum seekers over the last several years. Because of the immigration court backlog, new asylum seekers can wait years to have their cases processed. There is evidence that many of these asylum seekers will follow the law and succeed in their claims. We should all be able to agree that we must improve our immigration court system to ensure efficient and humane processing of asylum seekers. Those who have meritorious claims should be able to get on with their new lives in America, and those who do not should receive a prompt ruling so they are not stuck in limbo for years.

The immigration court backlog has been building over the past 15 years across both Democratic and Republican Administrations. As with so many aspects of our immigration system, we need legislation to fix this problem.

To reduce the backlog, we must work together on a bipartisan basis to adequately fund the hiring of additional judges and support staff, and improvements in technology. Congress must also act to ensure that immigration courts are not subject to the political whims of any administration.

I welcome this opportunity to have a bipartisan discussion on how we can improve our immigration court system.



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United States Government Accountability Office

Testimony  
Before the Subcommittee on  
Immigration, Citizenship, and Border  
Safety, Committee on the Judiciary,  
U.S. Senate

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For Release on Delivery  
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## IMMIGRATION COURTS

### Actions Needed to Address Workforce Planning and Other Management Challenges

Statement of Rebecca Gambler, Director,  
Homeland Security and Justice

## GAO Highlights

Highlights of [GAO-24-107046](#), a testimony before the Subcommittee on Immigration, Citizenship, and Border Safety, Committee on the Judiciary, U.S. Senate

### Why GAO Did This Study

Each year, EOIR issues decisions for hundreds of thousands of cases regarding foreign nationals charged as removable under U.S. immigration law. EOIR is facing a substantial and growing backlog of pending cases. In July 2023, EOIR had nearly 2.2 million pending cases—more than four times the number of pending cases at the start of fiscal year 2017. In 2017 and 2023, GAO reported on EOIR's management practices, including how it oversees workforce planning and IT management.

This statement addresses EOIR's (1) workforce planning practices; (2) performance appraisal program for immigration and appellate immigration judges; and (3) implementation of its electronic filing system.

This statement is based on GAO's 2017 and 2023 reports on EOIR's management functions ([GAO-17-438](#) and [GAO-23-105431](#)). For those reports, GAO analyzed EOIR documents and data and interviewed EOIR officials at headquarters and at immigration courts. As of October 2023, GAO is awaiting updates from EOIR on its efforts to address prior GAO recommendations.

### What GAO Recommends

GAO made 17 recommendations in the two reports covered by this statement. As of October 2023, EOIR has fully addressed nine of these recommendations. EOIR identified ongoing and planned steps to address the recommendations not yet implemented. GAO continues to coordinate with EOIR to obtain updates and monitor its actions.

View [GAO-24-107046](#). For more information, contact Rebecca Gambler at (202) 512-8777 or [gambler@gao.gov](mailto:gambler@gao.gov).

October 18, 2023

## IMMIGRATION COURTS

### Actions Needed to Address Workforce Planning and Other Management Challenges

#### What GAO Found

Within the Department of Justice, the Executive Office for Immigration Review (EOIR) is responsible for conducting immigration proceedings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws and regulations. EOIR has taken several steps to improve its management practices since GAO's 2017 report. This includes revising its hiring process and increasing the number of immigration judges from 338 in fiscal year 2017 to 659 as of July 2023. However, EOIR also continues to face several challenges. Specifically:

- **Workforce planning.** In April 2023, GAO reported that EOIR had taken some steps to improve its workforce planning, which is the process of aligning human capital with mission needs and goals. However, GAO found that EOIR's practices did not fully align with key principles for strategic workforce planning.
  - In 2017, GAO recommended that EOIR develop a strategic workforce plan that addresses the key principles of workforce planning to better position EOIR to address staffing needs. These include identifying critical skills, developing strategies to address skills gaps, and monitoring progress. In 2023, GAO found that EOIR had not yet developed a strategic workforce plan or set workforce planning goals consistent with GAO's prior recommendation. Developing and implementing a strategic workforce plan would better position EOIR to address current and future staffing needs.
  - In 2023, GAO found that EOIR does not have a governance structure to guide its workforce planning efforts and hold leadership accountable for progress on workforce goals. Specifically, EOIR had not assigned and documented roles and responsibilities for workforce planning and implementation of a strategic workforce plan. Given its longstanding challenges in this area, establishing a documented governance structure for workforce planning would better position EOIR to institutionalize improvements moving forward.
- **Immigration judge performance appraisal program.** In 2023, GAO found that EOIR evaluated how immigration judges perform their duties but had not evaluated its overall judge performance appraisal program. EOIR revised the criteria against which it evaluates judges but it had not assessed judges' satisfaction with the program's equity, utility, and accuracy. Implementing a process to periodically evaluate its performance appraisal program for judges can better position EOIR to determine the program's effectiveness.
- **Electronic filing system.** As of November 2021, all immigration courts had access to an electronic filing system and, overall, court staff GAO interviewed expressed positive views of it. However, despite reporting benefits, staff stated they experience outages and delays while using one application within the system—Judicial Tools—that disrupt their work. Judges and court staff use Judicial Tools to access case information and create case orders and decisions. In 2023, GAO found that EOIR did not have a process to regularly assess whether Judicial Tools was meeting users' needs. Developing and implementing a process to regularly reassess whether Judicial Tools is meeting users' needs would help EOIR ensure that the application continues to serve the agency's needs.

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Chair Padilla, Ranking Member Cornyn, and Members of the Subcommittee:

I am pleased to be here today to discuss our work on the U.S. immigration court system. Each year, the Department of Homeland Security (DHS) initiates hundreds of thousands of removal cases with the U.S. immigration court system.<sup>1</sup> Within the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR) is responsible for conducting immigration proceedings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws and regulations. As of July 2023, EOIR had 69 immigration courts, 597 courtrooms, and 659 immigration judges across the country.

EOIR is facing a substantial case backlog that continues to grow.<sup>2</sup> In July 2023, EOIR had a backlog of nearly 2.2 million pending cases—more than four times the number of pending cases at the start of fiscal year 2017. EOIR officials have identified resource shortages as contributing to the backlog, alongside increases in caseloads. EOIR completed a record high number of cases in the first three-quarters of fiscal year 2023 (about 376,000); however, DHS also initiated a record high number of new cases during that time (747,000). As a result, the backlog increased by about 371,000 cases in the first three-quarters of fiscal year 2023. As we previously reported, the effects of the case backlog are significant and wide-ranging from some respondents waiting years to have their cases heard, to immigration judges being able to spend less time considering cases.<sup>3</sup>

In recent years, EOIR has taken several steps to improve court operations and address management challenges we have previously

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<sup>1</sup>DHS is responsible for identifying, detaining, initiating removal proceedings and litigating administrative immigration charges against, and executing removal orders for individuals who are suspected and determined to be in the U.S. in violation of U.S. immigration laws.

<sup>2</sup>The backlog refers to the number of cases pending before immigration courts at a given point in time.

<sup>3</sup>GAO, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, [GAO-17-438](#) (Washington, D.C.: June 1, 2017).

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identified.<sup>4</sup> For example, beginning in 2017, EOIR implemented a new hiring process for immigration judges in response to our recommendation. Specifically, EOIR assessed its process for hiring immigration judges; identified areas to increase efficiency; and began to track vacancies caused by retirements, separations, and transfers. As a result of these efforts, EOIR is better positioned to address its immigration judge staffing needs. In particular, EOIR increased the number of immigration judges on board from 338 in fiscal year 2017 to 659 as of July 2023. EOIR has also taken steps to address other management challenges we have previously identified, such as improving its workforce planning processes and implementing an electronic filing system at all immigration courts.<sup>5</sup>

My statement today addresses the extent to which: (1) EOIR's workforce planning practices align with key principles for workforce planning; (2) EOIR has evaluated the performance appraisal program for immigration and appellate immigration judges; and (3) EOIR has implemented an electronic filing system that meets the needs of court staff. This statement is based on two reports on EOIR's management of the immigration courts that we issued in April 2023 and June 2017.<sup>6</sup> For these reports, we analyzed EOIR documents and data and interviewed EOIR officials at headquarters and at immigration courts across the country. More detailed information on our objectives, scope, and methodology can be found in each of the reports. As of October 2023, we are awaiting updates from EOIR about the status of its actions in response to recommendations we made in these two reports. We will continue to coordinate with EOIR to obtain updates on its actions.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards

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<sup>4</sup>GAO, *Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges*, [GAO-23-105431](#) (Washington, D.C.: Apr. 26, 2023); [GAO-17-438](#). In our 2017 and 2023 reports on EOIR's management challenges, we made a total of 17 recommendations to EOIR. Among other things, we recommended EOIR improve various practices such as workforce planning, performance management for judges, and IT management, as we discuss later in this statement. As of September 2023, EOIR has taken actions to fully implement nine of our recommendations. For further information on these recommendations and the status of EOIR's actions to address them, see <https://www.gao.gov/products/gao-23-105431> and <https://www.gao.gov/products/gao-17-438>.

<sup>5</sup>E-filing is a means of transmitting documents and other information to immigration courts through an electronic medium, rather than on paper. As of February 2022, e-filing is mandatory for all new cases.

<sup>6</sup>GAO-23-105431 and [GAO-17-438](#).

require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

### EOIR Has Taken Some Steps to Improve Workforce Planning but its Practices Do Not Align with Key Principles

In April 2023, we found that EOIR had taken some steps to improve its workforce planning—a systematic process to align an agency’s human capital with its mission needs and goals. However, its practices did not fully align with key principles for strategic workforce planning.<sup>7</sup> In addition, we found that EOIR has been without an agency-wide strategic plan since 2013 and did not have a schedule with time frames to produce such a plan. Further, we found that EOIR had not established a governance structure—consisting of assigned and documented roles and responsibilities—to guide its workforce planning efforts and hold leadership accountable for progress on workforce goals.<sup>8</sup>

**Workforce planning.** In 2017, we found that EOIR did not have a strategic workforce plan that would help it better address staffing needs.<sup>9</sup> Specifically, we found that EOIR used an informal approach to estimate staffing needs, which did not account for needs beyond the next fiscal year, reflect EOIR’s performance goals, or systematically account for workforce risks such as impending retirements.

As a result, we recommended that EOIR develop and implement a strategic workforce plan that addresses key principles of effective strategic workforce planning, including:

- determining critical skills and competencies needed to achieve current and future programmatic results;
- developing strategies that are tailored to address gaps in number, deployment, and alignment of human capital approaches for enabling and sustaining the contributions of all critical skills and competencies; and

<sup>7</sup>GAO-23-105431. See also GAO, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, GAO-04-39 (Washington, D.C.: Dec. 11, 2003).

<sup>8</sup>GAO-23-105431. In general terms, a governance structure refers to the framework of project management, especially regarding rules, procedures, roles, and the division of responsibilities within the decision-making process, which we discuss in more detail later in this statement.

<sup>9</sup>GAO-17-438.



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- monitoring and evaluating of the agency's progress toward its human capital goals and the contribution that human capital results have made toward achieving programmatic results.

EOIR agreed with our recommendation and took some steps to improve its workforce planning, as we found in April 2023.<sup>10</sup> For example, EOIR:

- contracted with a private firm from 2016 to 2017 to assess EOIR's workforce needs and create a staffing model;<sup>11</sup>
- filled its previously vacant Human Resource Officer position; and
- signed a contract with the Office of Personnel Management (OPM) in June 2022 for strategic workforce planning support.

However, we also found that EOIR's workforce planning practices did not fully meet GAO's key principles for strategic workforce planning, consistent with the intent of our 2017 recommendation. For example, EOIR had not developed a strategic workforce plan or set workforce planning goals.

As we reported in 2017, and reiterated in 2023, developing and implementing a strategic workforce plan that addresses key principles for effective strategic workforce planning, such as including a determination of critical skills and competencies, strategies to address skill and competency gaps, and monitoring and evaluating progress made, would better position EOIR to address current and future staffing needs. We will continue to monitor EOIR's efforts to address our 2017 recommendation.

**Strategic planning.** In April 2023, we reported that setting an agency's strategic direction is an important first step in establishing effective workforce planning practices.<sup>12</sup> According to key principles for workforce planning, agency leadership should set the agency's strategic direction and ensure that its workforce goals, plans, and practices are aligned with that direction.<sup>13</sup> In addition, an agency's strategic plan should articulate its

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<sup>10</sup>GAO-23-105431.

<sup>11</sup>GAO-17-438. In 2017, we reported that EOIR had contracted with a private firm to determine the critical skills and competencies used in the immigration courts, particularly at the legal assistant level, and to then produce a workforce staffing model to achieve current and future operational and programmatic results.

<sup>12</sup>GAO-23-105431.

<sup>13</sup>GAO-04-39.

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fundamental mission and lay out its long-term goals for implementing that mission, including resources needed to reach its long-term goals. However, we found that EOIR has not had an agency-wide strategic plan since 2013.<sup>14</sup>

In November 2021, EOIR officials told us that they had paused updates to the strategic plan to ensure it would align with the updated DOJ strategic plan under the new administration, which was not finalized at that time. In July 2022, DOJ issued its new strategic plan, covering fiscal years 2022 through 2026. In October 2022, EOIR officials stated that they were drafting an updated strategic plan to cover fiscal years 2023 through 2027, but they could not provide a schedule with time frames for when they would complete it. Therefore, we recommended that EOIR develop such a schedule with target time frames.

In commenting on a draft of our April 2023 report, EOIR noted that it recognized the importance of strategic planning and that it was continuing efforts to finalize an updated strategic plan. We will continue to monitor EOIR's efforts to address this recommendation. Without a strategic plan, EOIR cannot ensure its activities support its objectives or measure progress on agency goals. Further, in the context of its human capital systems and needs, without a strategic direction as set forth in a strategic plan, EOIR is not well positioned to create an effective strategic workforce plan or ensure its workforce planning and human capital processes will support its organizational goals.

**Governance structure to guide workforce planning.** In April 2023, we found that EOIR did not have a governance structure to guide its efforts and hold leadership accountable for progress on workforce-related

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<sup>14</sup>EOIR's previous strategic plan covered fiscal years 2008 through 2013.

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goals.<sup>15</sup> OPM's Human Capital Framework calls for agency and human capital leadership to engage key leadership and stakeholders to establish the necessary governance structure for implementation of any strategic plans, hold senior management accountable for organizational progress, and identify metrics to determine effectiveness in achieving goals, among other actions.<sup>16</sup>

We found that EOIR had signed a contract with OPM in June 2022 for strategic workforce planning support. The contract directed OPM to:

- assess EOIR's current workforce and develop a vision for the future of its workforce;
- conduct workshops with EOIR leadership on workforce principles and best practices; and
- work with EOIR to design policies and procedures for a regular and repeatable workforce planning process.

EOIR's June 2022 contract with OPM is a positive step and has the potential to address key workforce planning principles. However, we found that EOIR had not documented which officials will be responsible for workforce planning or be accountable for its implementation following the conclusion of the OPM contract. At the time of our April 2023 report, it was too soon to assess EOIR's ability to successfully implement results

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<sup>15</sup>GAO-23-105431. OPM does not specifically define a governance structure but states that senior leadership should establish a governance structure for workforce planning implementation. According to federal internal control standards, an agency's organizational structure provides management's framework for planning, directing, and controlling operations to achieve agency objectives. Management develops an organizational structure with the understanding of overall responsibilities and assigns these responsibilities to discrete units to enable the organization to operate in an efficient and effective manner. See: GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 2014). For the purposes of our April 2023 report, we used the term "governance structure" as the framework that agency leaders should develop to implement a workforce plan. This framework should include at least two things: (1) assigned and documented roles and responsibilities for workforce planning, including implementation of the plan, across all levels at the agency; and (2) measurable and observable targets and metrics to determine effectiveness in achieving strategic or organizational goals.

<sup>16</sup>OPM's Human Capital Framework provides comprehensive guidance on strategic human capital management in the federal government. The framework consists of four interconnected and adaptive systems: strategic alignment and planning, talent management, performance culture, and evaluation. See: <https://www.opm.gov/policy-data-oversight/human-capital-framework/>.

from the OPM contract; however, we noted that EOIR had missed opportunities in past efforts to improve its workforce planning efforts.

Given its longstanding challenges in workforce planning, we recommended that the Director of EOIR involve key leadership and stakeholders in establishing a documented governance structure for workforce planning that includes:

- assigned and documented roles and responsibilities for workforce planning and implementation across all levels of EOIR, and
- measurable and observable targets and metrics to determine effectiveness in achieving strategic or organizational goals.

In commenting on a draft of our April 2023 report, EOIR noted efforts underway that it believed would help the agency address our recommendation. For example, EOIR noted that it had developed a new council within the human resources office to streamline hiring that included representatives from various EOIR offices. We will continue to monitor EOIR's efforts. Establishing a documented governance structure for workforce planning would better position EOIR to institutionalize improvements moving forward.

### EOIR Assesses How Judges Perform but Has Not Evaluated its Overall Judge Performance Appraisal Program

In April 2023, we reported that EOIR has a performance appraisal program that evaluates how immigration judges perform their duties.<sup>17</sup> However, we found that EOIR had made changes to the program in recent years, but some EOIR judges raised concerns with the program and EOIR had not evaluated it consistent with OPM guidance.

Under its performance appraisal program, EOIR evaluates judge performance using different performance plans for each type of judge—immigration judge, assistant chief immigration judge, and appellate immigration judge (see table 1).

<sup>17</sup>GAO-23-105431. According to OPM, an appraisal program establishes specific procedures for appraising individual employees and operates within the parameters established by an agency's appraisal system. An agency may have a single program to cover all of its non-Senior Executive Service employees, or it may have multiple programs, each covering a specific group of employees with no employee covered by more than one program.

**Table 1: Executive Office for Immigration Review (EOIR) Description of Judge Employee Performance Plans, as of Fiscal Year 2022**

Judge type	Performance cycle	Performance elements in the employee performance plan
Immigration judge	2 years	Legal ability, professionalism, and accountability for organizational results.
Assistant chief immigration judge <sup>a</sup>	1 year	Core competencies: communication; teamwork; accountability; and stakeholder relations. Job specific results elements: managing change and court management operations.
Appellate immigration judge <sup>b</sup>	1 year	Adjudicatory performance; professionalism/interpersonal leadership; and accountability for organizational results.

Source: GAO analysis of EOIR documentation. | GAO-24-107046

<sup>a</sup>Assistant chief immigration judges serve as liaisons between courts and EOIR headquarters. They also have supervisory authority over immigration judges, court administrators, and legal support staff.

<sup>b</sup>Appellate immigration judges sit on the Board of Immigration Appeals. They hear and issue decisions regarding appeals of decisions made by immigration judges and, in some cases, by the Department of Homeland Security.

Each performance cycle is to include a formal progress review for each judge, generally halfway through the appraisal cycle. This is a formal meeting with the judges and their supervisors about their performance compared to the performance elements. Finally, the performance cycle ends with a summary rating for each judge.<sup>18</sup>

In recent years, EOIR has revised its performance plans for two types of judges: assistant chief immigration judges and appellate immigration judges.<sup>19</sup> For example, in May 2022, EOIR made changes to performance elements for assistant chief immigration judges.<sup>20</sup> Additionally, EOIR

<sup>18</sup>According to OPM, a rating means evaluating employee performance against the performance elements in the employee performance plan and assigning a summary rating of record. The rating is based on work performed during the entire appraisal period.

<sup>19</sup>EOIR has used the same performance elements for immigration judges—legal ability, professionalism, and accountability for organizational results—since at least 2007. From 2018 through 2021, EOIR included other performance metrics. Specifically, during this time, EOIR included case completions (700 per year), remand rate (less than 15 percent), and various benchmark goals as performance metrics for immigration judges but suspended these in October 2021.

<sup>20</sup>Among other changes, EOIR officials told us the updated performance elements provided more specificity about the level of communication expected between assistant chief immigration judges and the immigration judges they supervise. Additionally, EOIR added court performance measures to the plan so that the assistant chief immigration judge's rating includes an assessment of court performance. EOIR officials stated that the purpose of adding court performance measures to the performance work plan was to put the burden of court operations on the assistant chief immigration judges.

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moved appellate immigration judges onto a new performance plan in fiscal year 2021.<sup>21</sup>

Some EOIR judges we interviewed raised concerns about the judge performance appraisal program. For example, three judges we spoke with in two immigration courts stated the performance elements in the immigration judge performance plan are not specific enough. However, one assistant chief immigration judge we spoke with stated that changes to the performance plan in 2022 resulted in the plan going from too general to too specific. The judge also stated that the changes are not easily applied to all courts. For example, the performance work plan states that assistant chief immigration judges should meet with every immigration judge in their court every 2 weeks. According to the judge, this can be done in a small court with a small number of judges, but it is difficult to do in a large court with many judges.

We found that while EOIR evaluates how judges perform, it has not evaluated its overall judge performance appraisal program consistent with OPM guidance. For example, OPM's Human Capital Framework states that agencies should periodically evaluate their performance appraisal system and plan for ongoing evaluation.<sup>22</sup> EOIR officials stated that they do not have a process to periodically evaluate their overall judge performance appraisal program because they believed changes the agency made to some of the specific judge performance plans were sufficient for ensuring that the work plans are appropriate. According to OPM guidance on evaluating performance appraisal programs, agencies are to assess, for example, if employees and managers are satisfied with equity, utility, and accuracy of the program. However, in deciding whether to make changes to each of the judge performance plans in recent years, EOIR did so without such an assessment.

To better position EOIR to determine whether judge performance plans are effective, we recommended EOIR implement a process to evaluate, on a periodic basis, the performance appraisal program for adjudicative staff (immigration judges, assistant chief immigration judges, and appellate immigration judges), consistent with OPM guidance.

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<sup>21</sup>The new performance plan for appellate immigration judges includes performance elements to assess the appellate workload, and in circumstances when a judge may be detailed to hear cases at an immigration court.

<sup>22</sup>See: <https://www.opm.gov/policy-data-oversight/human-capital-framework/>.

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In commenting on a draft of our April 2023 report, EOIR noted that it appreciated the value of institutionalizing an ongoing, periodic review of the agency's performance appraisal program. EOIR further described plans to coordinate periodic reviews of the performance appraisal program. Among other things, EOIR stated this review would include an analysis of how performance plans promote the effectiveness of staff performance. We will continue to monitor the status of EOIR's planned actions. To fully address this recommendation, EOIR should implement a process to evaluate, on a periodic basis, the performance appraisal program for immigration judges, assistant chief immigration judges, and appellate immigration judges, consistent with OPM guidance.

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### EOIR Implemented an Electronic Filing System but Court Staff Reported that Outages Disrupt Their Work

As we reported in 2017 and 2023, EOIR encountered delays and performance issues in meeting its goal to transition from a paper-based case management system to its e-filing system, known as known as the EOIR Courts and Appeals System (ECAS). EOIR historically relied upon a paper-based system for filing case documentation but has had a longstanding goal to phase out the paper-based system, in favor of retaining all records in electronic format. In addition, EOIR must convert its paper case files into digital records by June 2024 to comply with federal requirements for electronic recordkeeping. However, as of January 2023, EOIR officials reported that about 850,000 cases remained on paper.<sup>23</sup>

In 2017, we found that EOIR had begun developing ECAS but had missed its goals for implementation. For example, we reported that EOIR initially hoped to fully implement ECAS in 2003. As of 2016, EOIR had initiated ECAS, but we found that it had not designated an oversight entity or documented a plan for overseeing ECAS during critical stages of its development and implementation. As a result, it was unclear how EOIR would oversee the system's deployment. Therefore, we recommended that EOIR: (1) identify and establish the appropriate entity for exercising oversight over ECAS through full implementation, and (2) document and implement an oversight plan that is consistent with best practices for overseeing IT projects. EOIR agreed with these recommendations and, among other things, designated an oversight body through the lifecycle of ECAS implementation. EOIR also provided documents that, according to

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<sup>23</sup>See Office of Management and Budget, *Transition to Electronic Records*, Memorandum M-19-21 (Washington, D.C.: June 28, 2019), and Office of Management and Budget, *Update to Transition to Electronic Records*, Memorandum M-23-07 (Washington, D.C.: Dec. 23, 2022).

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EOIR, collectively served as its oversight plan for ECAS.<sup>24</sup> We determined that these actions addressed the intent of our recommendations.

In 2018, EOIR began implementing ECAS at immigration courts and, as of November 2021, all immigration courts had access to the system. ECAS consists of several web-based applications that are available to different types of stakeholders in the immigration court system. For example, as part of ECAS, immigration judges and court staff use the Judicial Tools application to access case information and documentation, such as motions and evidence filed by parties, and to create orders and decisions on cases. Judges and court staff also use the Electronic Record of Proceedings application to scan and upload paper documents to electronic case files.

In April 2023, we found that, overall, court staff we interviewed expressed positive views of ECAS. For example, eight out of 12 court staff we spoke with said the system makes information more accessible. One court administrator and one assistant chief immigration judge told us they found the system beneficial for allowing attorneys to instantly transmit documents to the court at any time of day. This eliminated delays associated with waiting for paper documents to arrive by mail. Another court administrator said the implementation of e-filing was timely because the court had paper files stacked to the ceiling and had run out of space to store additional files.

Despite reporting benefits associated with ECAS, staff from all four courts we interviewed also told us they experienced system performance issues—specifically outages and delays—while using the Judicial Tools application. Ten of the 12 court staff we interviewed cited outages and delays as a disadvantage of ECAS. For example, because of system outages, court staff were sometimes unable to access case information during the workday, including during hearings, they said. In addition, delays cause slowdowns in completing basic tasks, court staff told us. One assistant chief immigration judge told us that master calendar

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<sup>24</sup>In particular, EOIR provided a copy of its Investment Review Guidance, a document that outlines the process, roles and responsibilities, and criteria it uses to assess selected IT investments, including ECAS. EOIR also provided documentation illustrating assessment of the ECAS investment performance towards expected schedule and benefits, and identification of areas where performance was not deemed very good or excellent.



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hearings for electronic cases take roughly three times as long as they did when cases were on paper, due to slow response times in Judicial Tools.

Officials from EOIR's Office of Information Technology told us they were aware of the performance issues associated with Judicial Tools and had taken some steps to address them. For example, EOIR officials told us they had been working with the vendor to examine the infrastructure underlying Judicial Tools to determine how to improve its performance.

However, we found that EOIR did not have a process to regularly assess whether Judicial Tools was meeting the needs of its users using qualitative and quantitative methods, as called for in EOIR documentation. Specifically, EOIR's *Office of Information Technology Strategic Plan* for fiscal years 2019 through 2024 included a goal to establish formal evaluation mechanisms to monitor the performance of its products and services on an ongoing basis after they have launched. Though EOIR officials told us they take some steps to determine whether their IT resources, including Judicial Tools, meet agency needs, EOIR did not provide us with documentation on qualitative and quantitative methods it uses to gather user feedback on Judicial Tools, as called for in the strategic plan.

As we noted in our April 2023 report, Judicial Tools outages and delays created inefficiencies for court staff. We further noted that, if not resolved, these inefficiencies may adversely affect EOIR's ability to meet its case processing goals, such as reducing the backlog of pending cases. To ensure that the application continues to serve EOIR's needs moving forward, we recommended that EOIR develop and implement a process to regularly reassess, using quantitative and qualitative methods, whether Judicial Tools is meeting the needs of its users. In commenting on a draft of our report, EOIR stated that it would include assessing user experience as part of its ongoing efforts to evaluate its technology. We will continue to monitor EOIR's efforts. To fully implement this recommendation, EOIR should develop and implement a process to regularly reassess whether Judicial Tools is meeting the needs of its users.

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Chair Padilla, Ranking Member Cornyn, and Members of the Subcommittee, this concludes my prepared remarks. I would be pleased to respond to any questions that you may have at this time.

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**GAO Contact and  
Staff  
Acknowledgments**

If you or your staff have any questions about this testimony, please contact Rebecca Gambler at (202) 512-8777 or [gambler@ga.gov](mailto:gambler@ga.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Kathryn Bernet (Assistant Director), Kathleen Donovan, Emily Hutz, Sasan J. "Jon" Najmi, and Amanda Miller. Key contributors for the previous reports on which this testimony is based are listed in each product.



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**Statement of Jeremy L. McKinney  
Immediate Past President and Member of the Board of Governors  
American Immigration Lawyers Association**

**Submitted to the U.S. Senate Committee on the Judiciary  
Hearing on “Preserving Due Process and the Rule of Law: Examining the Status of Our  
Nation’s Immigration Courts”**

**October 18, 2023**

Thank you, Chairman Durbin, Ranking Member Graham, Subcommittee Chairman Padilla, and Subcommittee Ranking Member Cornyn for the invitation to speak before you all today.

My name is Jeremy McKinney, I practice immigration law and am a North Carolina Board Certified Immigration Law Specialist. I taught immigration law at Elon University School of Law and have litigated immigration matters before the Board of Immigration Appeals, and Federal District Courts in North Carolina, South Carolina, and Georgia, and before the Fourth, Fifth, Seventh, and Eleventh Circuit Courts of Appeal. I am also the immediate past president of the American Immigration Lawyers Association (AILA) and continue to serve on its national Board of Governors. My views represent those of AILA, the national bar association of 17,000 attorney and law professors who practice, research, and teach immigration law.

Today’s hearing offers the opportunity to examine systemic problems of due process that are widespread in current immigration court proceedings. I come before you to urge immediate action to reform the immigration courts to ensure that core principles of judicial independence and due process are restored and protected.

**I. Independent Immigration Court**

A necessary component of ensuring fair adjudications in cases that determine life or death for some immigrants, permanent family unity or separation for others, is to tackle the glaringly inadequate independence from political interference of immigration trial and appellate judges. Separation of powers is understood in bipartisan fashion to be a cornerstone of our republic, underpinned by the distinct roles of three federal-government branches.

Many lawyers outside the immigration field echo members of the public in expressing shock when I explain that in immigration cases judges are *not* insulated from executive branch interference. Rather, those judges are exposed to constant meddling by the very federal officials whose administration is also one side of purportedly adversarial proceedings occurring before them.

To remedy this flaw, AILA urges Congress to enact legislation that would create an independent immigration court system under Article I of the Constitution. The establishment of an independent immigration court would separate it from the Department of Justice (DOJ), which currently exercises authority over its operations, personnel, and legal decisions. There is an inherent conflict of interest built into the current immigration court system. Simply put, the chief prosecutor oversees the judges that hear the cases. The creation of an Article I immigration court system is the best way to ensure the courts are fair and independent.

## II. The Government Must Provide Legal Counsel for Indigent Respondents

While federal law ensures the right to legal counsel in removal proceedings, the law still does not guarantee the government will pay for counsel if the person is unable to afford one. Having legal counsel is among the most decisive factors in determining whether someone will obtain legal relief in removal proceedings. According to a 2016 study by the American Immigration Council, people were five times more likely to obtain legal relief if they were represented by counsel.<sup>1</sup> People who were detained were ten-and-a-half times more likely to succeed.<sup>2</sup> In the absence of a universal right to counsel, a significant portion of people in removal proceedings — over 75 percent<sup>3</sup> — had no legal representation in non-detained cases.<sup>4</sup> The representation rate is much lower for people held in detention.<sup>5</sup> In 2022, the ACLU published a report detailing how severely access to counsel is limited in ICE detention facilities.<sup>6</sup> During the fiscal year of 2022, about 79 percent of detained people in removal proceedings did not have access to counsel.<sup>7</sup>

In addition to making proceedings fairer, providing legal representation advances the government's interest in ensuring due process and efficiency in the legal system, reducing the detention of immigrants, and reducing the court backlog.<sup>8</sup> Ensuring legal representation would dramatically reduce the government's costs for detention and court proceedings. One study found that motions to reopen cases that were ordered *in absentia* will likely rise as *pro se* Respondents find counsel later.<sup>9</sup>

AILA urges Congress and the Biden administration to establish federally funded legal representation programs for people facing removal. Critical to the success of this effort is the appropriation of funding for legal counsel programs. Only by ensuring legal counsel for everyone facing removal will the Biden administration be able to fulfill its commitment to fairness and due process.

<sup>1</sup> Ingrid Eagly and Steven Shafer, *Access to Counsel In Immigration Court* (Washington, DC: American Immigration Council, September 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf).

<sup>2</sup> Other studies have found that legal representation increases a person's likelihood of winning relief by 11 times, and for women with children by as much as 14 times. Jennifer Stave et al., *ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY*, 28, Vera Institute of Justice, 2017, <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation>; TRAC, *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court 'Women with Children' Cases*, July 15, 2015, <https://perma.cc/7NBM-BNXX>.

<sup>3</sup> This data was collected from October 2022 to April 2023, TRAC Immigration, *Despite Efforts to Provide Pro Bono Representation, Growth Is Failing to Meet Exploding Demands*, May 12, 2023, <https://trac.syr.edu/reports/716/>.

<sup>4</sup> *Id.*

<sup>5</sup> TRAC, *Who Is Represented in Immigration Court?*, October 16, 2017 (finding that detained individuals were represented at a rate of about 30 percent from 2015 to 2017), <https://trac.syr.edu/immigration/reports/485/>.

<sup>6</sup> American Civil Liberties Union, *No Fighting Chance*, ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers, (June 9, 2022), [https://www.aclu.org/sites/default/files/field\\_document/no\\_fighting\\_chance\\_aclu\\_research\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf).

<sup>7</sup> *Id.* at 10.

<sup>8</sup> TRAC, *Historical Immigration Court Backlog Tool*, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) (last updated through Jan. 2023).

<sup>9</sup> Ingrid Eagly and Steven Shafer, *Measuring In Absentia Removal In Immigration Court*, Vol 168, U. Pa. L. Rev. 817 (2020), [https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer\\_Final.pdf](https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf).

### **III. Executive Reforms to Restore Integrity and Fairness to the Immigration Court**

In the past, nearly, three years, AILA and EOIR have engaged in open and productive stakeholder dialogues; these engagements have helped make important strides to reform and improve immigration courts. Still, until Congress creates an Article I immigration court, the Executive Branch should take immediate steps to restore the integrity and fairness of the court. Stakeholders have long expressed concerns about issues such as inadequate staffing and training, lack of transparency in the court's practices, a shortage of technological resources, perceived bias, and, perhaps most frequently, the ever-growing backlog of cases which is estimated at 2,097,244 cases as of fiscal year 2023.<sup>10</sup> With mounting pressure on the executive branch to reduce the excessively high case backlog and manage cases more expeditiously, the courts have been and will continue to compromise the protection of due process.

#### **A. The Court Should Publish Procedures to Ensure Transparency and Fairness**

AILA recommends EOIR provide greater transparency regarding court practices and procedures. Improvements in these practices will not only enable courts to run more efficiently for the courts and all parties but also greatly improve fairness and overall access in the judicial process.

##### **1. EOIR Should Inform Practitioners on All Available Specialized Dockets**

Since 2021, EOIR has implemented additional docketing tools intended to manage judges' caseloads and ultimately reduce the backlog.<sup>11</sup> AILA supports the use of docket tools to shift cases off the court's calendar when they are not suitable for adjudication.<sup>12</sup> EOIR, however, has not published guidance explaining the procedures for the dockets and which types of dockets are implemented across jurisdictions. In some cases, AILA attorneys have found specialized dockets unhelpful because immigration judges have applied the same legal analysis to multiple cases without specific consideration of the facts unique to each case.

##### **2. EOIR Should Terminate the Family Dedicated Dockets**

AILA is deeply concerned about the current administration's implementation of expedited dockets such as dedicated dockets that accelerate the court process without taking steps to ensure proceedings are fair. People with cases on these dockets who are unable to afford counsel are not guaranteed counsel paid for by the government and nonetheless face expedited time frames in their cases.<sup>13</sup> AILA recommends DOJ end the use of dedicated dockets for families.

##### **3. EOIR Needs to Clarify Virtual and In-person Hearing Procedures**

Another area of court practice that lacks transparency and consistency is whether the hearing will be conducted in-person or virtually. Since the COVID-19 pandemic, immigration courts have expanded

<sup>10</sup> TRAC Immigration, *Immigration Court Backlog Tool*, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/), (last visited on Oct. 4, 2023).

<sup>11</sup> Press Release, Dep't of Homeland Security, DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021), <https://www.dhs.gov/news/2021/05/28/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

<sup>12</sup> AILA & Cardozo Law School recommendations for removing non-priority cases from the Immigration Court Backlog (February 11, 2021), <https://www.aila.org/infonet/remove-non-priority-cases>.

<sup>13</sup> TRAC Immigration, *A National Assessment of the Biden Administration's Dedicated Docket Initiative*, Dec. 2, 2022, <https://trac.syr.edu/reports/704/>.

their use of virtual hearings.<sup>14</sup> Currently the court lists the default practice for each judge – for in-person hearing or a virtual hearing -- but frequently this list is not accurate. Moreover, practitioners receive contradictory information when they call immigration courts to verify this information. If Respondent or Respondent's counsel attends a hearing in an incorrect medium, there can be serious consequences, including an order of removal *in absentia*. If a hearing is scheduled with little notice, this requires the Respondent and their counsel to travel, potentially, great distances to appear in person for a hearing.

Next, the court does not provide instructions regarding whether a Respondent must file a motion to appear in a different medium to obtain such a change. This lack of guidance leaves counsel and Respondents in an untenable position if a judge does not rule on a motion in a timely manner. In cases where a judge does not rule timely on a motion to appear virtually, Respondents and counsel are forced to travel to the physical immigration court to appear for the hearing. Immigration practitioners accept cases to represent noncitizens all over the country. The cost of traveling for many hours to attend a hearing, which lasts only minutes, is unsustainable for practitioners and Respondents. For *pro se* Respondents this presents a greater challenge. After entering the United States, many noncitizens move while their cases stay at immigration courts in cities where they entered. This means being prepared to spend hundreds of dollars to travel to appear in person for a hearing that could also be completed virtually. The lack of transparency is also an issue in cases when they appear at immigration courts for their hearings, only to be told that they will be held virtually instead.

My own experience confirms this reality: I have been scolded by an immigration judge for not appearing in person after being told by the judge's clerk I could appear virtually. Conversely, I have prepared a client to travel and appear before an immigration court only to be told by the judge's clerk that the client could appear virtually. To be clear, the incorporation of virtual appearances for most master calendar hearings and some individual hearings is a positive development which makes the process more efficient and less costly for Respondents. The stakeholders simply need clear rules and clear communication.

#### **4. EOIR Should Expand Its Technology to Include More Cases and Accept Filing Fees**

In 2018, EOIR introduced a system called ECAS (Electronic Case Access System). It was designed "to phase out paper filing and processing, and to retain all records and case-related documents in electronic format."<sup>15</sup> Five years later, many pending removal matters are not included in ECAS, limiting Respondents and their attorneys to paper filing. Paper filings limit Respondents' ability to timely obtain copies of their administrative record, especially when the immigration judge does not work out of a physical immigration court. For example, I have had cases where I needed to review

<sup>14</sup> Fredric I. Lederer & Center for Legal & Court Technology, "Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings" (2021). *Faculty Publications*.  
<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3081&context=facpubs>.

<sup>15</sup> Dep't of Justice, Frequently Asked Questions, Attorneys and Accredited Representatives,  
<https://www.justice.gov/eoir/ecas/attorney-and-ar-FAQs#:~:text=Q%3A%20What%20is%20the%20EOIR,related%20documents%20in%20electronic%20format> (last updated Oct. 5, 2022).



the charging document, called a Notice to Appear (NTA), prior to entering pleadings on behalf of my client. Because the NTA was not in ECAS, I was unable to timely obtain it, resulting in a needless continuance of the hearing.

Additionally, EOIR could follow the example of the Public Access to Court Electronic Records (PACER) system. Federal courts utilize PACER to port a user from PACER to “pay.gov” for payment of filing fees. ECAS has no such portal even though most application forms and motions require a filing fee; immigration courts do not accept filing fees.<sup>16</sup> Therefore, stakeholders need a robust ECAS and payment system, especially during this unprecedented EOIR case backlogs.

## **B. ICE OPLA Should Elevate Their Level of Preparation for Cases and Hearings**

The tools EOIR has implemented to reduce the backlogs require greater cooperation from OPLA attorneys. While we appreciate the efforts which ICE OPLA have made to reduce EOIR dockets, the unprecedented size of the current docket requires additional effort.

### **1. ICE OPLA Should Be Prepared for Hearings**

In my experience and that of other AILA attorneys, OPLA attorneys frequently are not fully prepared for substantive hearings and even worse, do not appear for the hearings. In fact, OPLA issued a memorandum to attorneys indicating that appearances are not required at hearings and that their lack of appearance is of no consequence to their position in the case.<sup>17</sup> This is unacceptable. If the government deems a case worthy of bringing before the court, its attorneys must actively engage in hearings and pre-trial conferences<sup>18</sup> and be prepared to stipulate undisputed matters and negotiate toward a resolution of the case the case. These OPLA practices are inefficient, waste the Respondent’s and government’s resources, and erode the integrity of the court system.

AILA appreciates the September 2023 memorandum<sup>19</sup> EOIR issued to trial and appellate judges to clarify how it will prioritize cases in light of the Department of Homeland Security’s (DHS) prosecutorial discretion policies. Importantly, the guidance specifies that *both* parties – Respondent and government’s counsel -- should come prepared for hearings and must be clear in their positions. The memorandum bears the promise of elevating the practice by all parties before the courts, which will facilitate fairer proceedings. AILA urges OPLA to issue similar instructions to its attorneys requiring they appear at hearings and come prepared.

### **2. ICE Should Improve the Biometrics and Security Background Checks**

The lack of interagency coordination on biometrics is causing severe delays and hardship for people appearing before the immigration courts. All relief applications before the Court require the completion of security and criminal background checks.<sup>20</sup> Even though ICE is the agency

<sup>16</sup> Dep’t of Justice, 3.4 – Filing Fees, <https://www.justice.gov/eoir/reference-materials/ic/chapter-3/4> (last updated Jun. 27, 2023).

<sup>17</sup> Memorandum from Kerry E. Doyle, Principal Legal Advisor, DHS, ICE, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_guidanceApr2022.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf).

<sup>18</sup> U.S. Dep’t of Justice, *Pre-hearing Conferences in Immigration Proceedings Program*, AILA Doc. No. 22061608 (June 3, 2022), available at <https://www.aila.org/infonet/eoir-issues-guidance-on-pre-hearing-conferences>.

<sup>19</sup> Memorandum from David L. Neal, Director, EOIR, DOJ, *Dep’t of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives* (Sept. 28, 2023), <https://www.justice.gov/eoir/book/file/1596081/download>.

<sup>20</sup> 8 C.F.R. § 1003.47.

representing the government and running the background checks, USCIS collects the biometrics. Respondents must request biometric appointments from USCIS, but USCIS does not consistently schedule and send out appointment notices.<sup>21</sup> ICE OPLA is also inconsistent in "refreshing" checks on prints already provided—even though there is a 2016 agreement between ICE and USCIS addressing this procedure.<sup>22</sup>

The unfortunate reality is Respondents have no power to make a biometrics appointment or refresh a security check, yet when the agencies fail to execute these steps, the Respondents suffer. In many cases, immigration judges determine that applications for relief are abandoned because the Respondent did not comply with the biometrics requirement. Immigration judges have also postponed hearings because ICE OPLA did not "refresh" prints or did not inform the Respondent to reappear before USCIS for fingerprinting.

For example, I have one complex removal matter that has been pending since 2012; my client submitted his relief application and submitted biometrics that same year. After more than a decade of litigation, the case was finally on for individual hearing. At hearing, the ICE OPLA attorney claimed background checks could not be refreshed because my client had not provided biometrics *again*. Over my objection, the immigration judge agreed with the ICE OPLA attorney and continued proceedings. That case is still pending.

ICE should establish improved procedures to implement timely biometrics appointments to remedy the hardships caused by these delays.

### C. Attorney General Certification Authority

Under the Immigration and Nationality Act, the Attorney General has authority to re-open and adjudicate cases previously decided by the Board of Immigration Appeals.<sup>23</sup> Known as "certification," this process allows the Attorney General to render precedent-setting decisions that govern both immigration judges and the BIA. To be clear, this precise power creates an inherent conflict of interest which can only be remedied by the creation of an independent immigration court. However, it remains part of our system and so long as it remains, AILA urges the Attorney General to issue opinions on the following:

- ***Matter of L-A-B-R-***: Rescind *L-A-B-R-*, *et al.*, 27 I&N Dec. 405 (A.G. 2018) issued by former Attorney General Sessions which severely limited the circumstances that are

<sup>21</sup> Even worse, some forms of removal relief do not require an application be filed with USCIS and therefore there is no event triggering the creation of a biometrics appointment. The waiver of removability at INA § 237(a)(1)(H) is a perfect example. Some ICE OPLA attorneys and immigration judges have suggested Respondents file Form I-601 with USCIS to trigger the creation of a biometrics appointment. This is a waiver of inadmissibility form not designed for a waiver of removability. A § 237(a)(1)(H) waiver also has no filing fee whereas Form I-601 has a \$1,015 filing fee with biometrics.

<sup>22</sup> U.S. Immigr. and Customs Enforcement, Frequently Asked Questions (FAQs), *Agreement between U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration Customs and Enforcement (ICE): Fingerprint Check Refresh Requests*, AILA Doc. No. 16052303 (May 19, 2016), available at <https://www.aila.org/infonet/ice-faq-uscis-ice-on-fingerprint-refresh-request>.

<sup>23</sup> 8 U.S.C. § 1103(g)(2) ("The Attorney General shall establish such regulations ... [and] review such administrative determinations in immigration proceedings ...").

appropriate for immigration judges to grant continuances. Continuances are vital to ensure due process and enable judges to effectively manage their dockets.<sup>24</sup>

- ***Matter of Thomas & Thompson***: Rescind *Thomas & Thompson*, 27 I&N Dec. 674, 674 (A.G. 2019) which holds that state court clarifications or modifications of sentences will not be recognized for immigration purposes, except in narrow circumstances. This decision breaks with a century of precedent that gives full effect to state court sentencing.<sup>25</sup>
- ***Matter of Negusie II***: Vacate *Negusie*, 28 I&N Dec. 120 (A.G. 2020) (*Negusie II*) which held that asylum adjudicators may not consider duress as a defense to the persecutor bar to asylum and withholding of removal. *Negusie II* has led immigration officers and courts to deny protection to refugees based on acts for which they are not legally or morally culpable.<sup>26</sup>
- **False Claims to Citizenship** - Issue an opinion clarifying the rule defining what constitutes a false claim to citizenship. The lack of guidance results in inconsistent results and causing unfair and unintended consequences. Thousands of noncitizens are denied admission every year because of this bar.<sup>27</sup>

#### IV. Conclusion

The immigration court system, as it is currently functioning, is overburdened and cannot deliver fair and consistent decisions in the thousands of cases that come before it each year. To ensure an immigration court system that meets today's needs, Congress must enact legislation that moves the courts outside of the DOJ and under the Judiciary Branch where they can function as an independent court. In the short term, the Executive Branch should implement commonsense reforms designed to ensure that every individual appearing before the immigration courts receives a fair hearing.

<sup>24</sup> *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), <https://www.justice.gov/coir/page/file/1087781/download>.

<sup>25</sup> *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), <https://www.justice.gov/coir/page/file/1213201/download>.

<sup>26</sup> *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020), <https://www.justice.gov/coir/page/file/1334881/download>.

<sup>27</sup> Policy Alert, U.S. Citizenship and Immigr. Services, *False Claim to U.S. Citizenship Ground of Inadmissibility and Matter of Zhang*, AILA Doc. No. 20042433, Apr. 24, 2020, available at <https://www.aila.org/infonet/uscis-issues-policy-alert-on-false-claim-to-us>.

RESPONSES OF JEREMY L. MCKINNEY TO QUESTIONS  
SUBMITTED BY SENATOR KLOBUCHAR

For Jeremy McKinney, Attorney & Immediate Past President, American  
Immigration Lawyers Association (AILA)

In your testimony, you mentioned that many children would be eligible for special relief in this country, but they would have no way of knowing about it without legal representation. You also relayed that studies have shown that those who are represented are five times more likely to get relief and shared the story of two children you personally worked with.

- Can you speak to the unique challenges that children, and especially young children, face in the U.S. immigration system without an attorney?
- Can you describe ways in which providing a right to counsel for children might also improve the efficiency of the immigration system broadly?

**Can you speak to the unique challenges that children, and especially young children, face in the U.S. immigration system without an attorney?**

Young children face exceptionally difficult circumstances in immigration court; children under the age of 12 make up about one third of all new cases in immigration court, as of February 2022.<sup>1</sup> Many of these children face a common language barrier issue, which is a basic necessity for anyone to understand the U.S. immigration system. Furthermore, many of these children faced and escaped inexplicable abuse, violence, and trauma, which further affects their ability to process and understand their environment.<sup>2</sup> This trauma shapes their ability to understand, think clearly, and process new information.<sup>3</sup> Simply put, they cannot comprehend what is happening to them and the consequences of their case in removal proceedings.

All these issues are compounded by the complexity of immigration law. This makes it all the more urgent that all children have access to counsel, provided by the government, as a right. Because children do not have the capacity to understand immigration proceedings, they cannot understand the implications of their decisions or lack of decisions. Some children cannot even read yet, let alone in English. Abused and neglected children will not share key details about their experiences, which can help their immigration case, out of guilt, shame, or fear of further mistreatment by a family member or abuser.<sup>4</sup> They also are not likely to remember dates, addresses, understand the concept of time, or the names of people – all of which can be instrumental in building their cases and are required by USCIS and EOIR adjudicators.<sup>5</sup>

Children, especially young children, are not able to help themselves in key aspects of their case preparation, such as: drafting affidavits, preparing for testimony, gathering evidence and even understanding the consequences of failing to appear for their immigration court hearings, without the guidance of an attorney. In many of my cases involving children, I rely on the expertise of psychologists and counselors who use professional and child sensitive methods to interview my child clients about what they suffered. Asylum Officers and EOIR adjudicators rely on and give weight to these expert witness testimonies to understand how a child respondent was harmed in the past. Young children are highly likely to be triggered and distracted by their trauma reminders, which happens often while preparing for an Asylum Office interview or an individual merits hearing in court; without an attorney they will likely not even present a case.<sup>6</sup>

Our legal systems, including the immigration system, strive to ensure due process, both procedurally and substantively. A significant aspect of due process protection involves subjective consideration for the respondent. Though a child under the age of five will not understand why they are in immigration court, what it means to be removed from the United States, and what

<sup>1</sup> TRAC Immigration, *One-Third of New Immigration Court Cases Are Children; One in Eight are 0-4 years of Age*, Mar. 17, 2022, <https://trac.syr.edu/immigration/reports/681/>.

<sup>2</sup> The National Child Traumatic Stress Network, *Effects*, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects> (last visited Nov. 2, 2023).

<sup>3</sup> *Id.*

<sup>4</sup> Kids In Need of Defense, *Representing Children In Immigration Matters*, <https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf> (last visited Nov. 2, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> The National Child Traumatic Stress Network, *supra* note 2.

asylum entails - their chances of obtaining safety and security in the United States are greater if they are represented by an attorney. Without an attorney, they will suffer long lasting consequences, even death, without ever knowing the stakes.

**Can you describe ways in which providing a right to counsel for children might also improve the efficiency of the immigration system broadly?**

Children with attorneys improve the efficiency of the immigration system in several ways: there is better communication between all parties, children have higher rates of appearing for their court dates, and cases are adjudicated timely and in the appropriate venue.

To start, all parties will have better communication including USCIS and EOIR. The child's attorney will be able to communicate with Asylum Offices, EOIR adjudicators, and Government attorneys on behalf of the child. Immediately, this improves the efficiency of the proceedings between all parties. Furthermore, having counsel in the immigration system ensures that the child can meet all of the strict filing rules required throughout the life of an immigration case. It is wholly unrealistic to expect a child to file applications timely, communicate with multiple government parties, and present legal arguments and evidence against trained immigration professionals, including lawyers, on their own.<sup>7</sup>

Next, children's attorneys can appear on their behalf for immigration court appearances, which prevents children from being ordered removed *in absentia* or resulting in a continuance of the case, further delaying the final hearing.<sup>8</sup> Understanding how to appear at immigration court or at an Asylum Office can be particularly difficult for young children, who depend on other adults to provide transportation for them. It is not uncommon that, in immigration court, if a child appears for their first hearing before a judge with counsel, the judge may waive the child's presence at future hearings (apart from the final hearing, where it is required) and allow counsel to appear on their behalf. This can ensure that the child continues to stay in school while being represented in court.

Children's attorneys will also present other legal pathways for their clients if they are eligible. This can include SIJS, U-Visa, or VAWA relief. A child can apply for these types of relief with an application and pursue this benefit before USCIS – removing their case from immigration court proceedings altogether. This greatly improves the efficiency of the immigration court system as it specifically does not add to the already swollen immigration court case backlog. Children have no way of knowing that they are eligible for these other forms of relief unless they consult with an attorney. Furthermore, it reduces the government's costs in court proceedings because cases will not be continued or delayed as they may be if children are unprepared to proceed.

<sup>7</sup> Erica Bryant, et al., VERA (Jan. 28, 2020), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone>.

<sup>8</sup> Ingrid Eagly and Steven Shafer, Measuring In Absentia Removal In Immigration Court, Vol 168, U. Pa. L. Rev. 817 (2020), [https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer\\_Final.pdf](https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf).

In all other aspects of our legal system, the government extends its interest in protecting children through the process.<sup>9</sup> The immigration system should be no different. Like it does in other legal systems, having counsel ensures that processes are practiced more efficiently and with consideration for fairness to the child in proceedings.

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<sup>9</sup> Dept. of Justice, *Children's Rights in the Juvenile Justice System*, <https://www.justice.gov/crt/rights-juveniles> (updated July 22, 2016).

**Written Testimony**  
**Charles D. Stimson**  
**Senate Judiciary Committee**  
**Subcommittee on Immigration, Citizenship and Border Security**  
**“Preserving Due Process and the Rule of Law: Examining the Status of Our Nation’s**  
**Immigration Courts”**  
**10/18/23**

Chairman Padilla, Ranking Member Cornyn, and Members of the Subcommittee, thank you for the honor of testifying today. My name is Charles D. Stimson. I am Deputy Director of the Edwin Meese III Center for Legal Judicial Studies, Manager of the National Security Law Program, and Senior Legal Fellow at The Heritage Foundation.<sup>1</sup>

I have written that, unlike all federal and most state court judges, immigration judges cannot dismiss a case for failure to state a claim, nor can they render judgment on the pleadings, even in patently frivolous cases.<sup>2</sup> I have also written about the need for immigration judges to be given contempt authority.<sup>3</sup> My written and oral testimony today will focus on this scholarship and the need for immigration judges to have these common judicial tools to manage their crushing caseloads.

This is not and should not be a partisan issue. This is a good-governance issue, pure and simple.

#### **Introduction**

Immigration policy has been, more or less, a challenge for every United States President in the modern era.<sup>4</sup> Congress has legislated on the issue at least 238 times in the 20th century,<sup>5</sup> passing sweeping reforms of our nation’s immigration laws in 1952, 1965, 1986, 1996 and 2012.<sup>6</sup>

In the past few decades, since the Simpson–Mazzoli Act of 1986,<sup>7</sup> major immigration policy issues have included how best to secure the border,<sup>8</sup> whether to grant amnesty for illegal aliens living in the United States,<sup>9</sup> birthright citizenship,<sup>10</sup> whether to keep the visa lottery and what to do about visa overstays,<sup>11</sup> chain migration,<sup>12</sup> the economic impact of lawful and illegal immigration,<sup>13</sup> whether the states and businesses have a role in enforcing federal immigration law,<sup>14</sup> the impact of illegal immigration on crime,<sup>15</sup> the degree to which local law enforcement can or should cooperate with federal immigration authorities,<sup>16</sup> the benefits to which illegal immigrants should be entitled,<sup>17</sup> and more.<sup>18</sup>

Some states have allowed illegal immigrants to have state driver’s licenses.<sup>19</sup> They defend those laws by arguing that since illegal immigrants will drive with or without a license, allowing them to have driver’s licenses enhances public safety and increases state and federal revenue.<sup>20</sup> Despite a federal law that prohibits state colleges and universities from giving in-state tuition to illegal aliens (unless they offer in-state tuition to everyone), some states have defied federal law and offer in-state tuition to illegal immigrants.<sup>21</sup>



More than 170 cities and counties across the United States have passed sanctuary laws that protect illegal immigrants from U.S. Immigration and Customs Enforcement (ICE).<sup>22</sup> California and seven other states are now sanctuary states, meaning that they prohibit local law enforcement from cooperating with ICE.<sup>23</sup> Some cities in those sanctuary states have pushed back, vowing to defy state law and cooperate with federal immigration authorities as they (and their states) had for decades.

Yet as our national immigration debate rages on, we remain an immigrant-friendly country, giving legal status to more foreigners every year than is given by any other country.<sup>24</sup> The United States offers lawful permanent residency (LPR) to over a million people a year, even as the estimated number of illegal aliens in this country has climbed from 2 million in 1984<sup>25</sup> to 12 million in 2015.<sup>26</sup> The number of asylum claims jumped from 48,321 in 2012 to 65,218 in 2018.<sup>27</sup> Today, the number of pending asylum claims at DHS's Citizenship and Immigration Services is over 920,000.

Overseeing the adjudication of asylum and other immigration-related cases are the federal immigration judges. Appointed by the Attorney General of the United States, immigration judges serve within the executive branch and, unlike Article III federal judges, do not require Senate confirmation. Like state and federal judges, immigration judges sit in courtrooms, handle cases, rule on motions, and render judgments. They also are required to follow U.S. Supreme Court and federal Circuit Court precedent.

But immigration judges lack many of the tools that all federal and most state judges have that enable them to manage their dockets efficiently and effectively. Immigration judges don't have contempt authority, cannot dismiss a case for failure to state a claim, and cannot render a judgment on the pleadings.

As a result, the immigration court caseload has exploded in size, from no cases in 1984, to 260,000 in 2011, to 876,552 in 2019, to 2.6 million today. Cases with merit, which deserve the court's time and attention, are lumped in with meritless cases, creating a chaotic and unmanageable docket. This inures to the benefit of those whose cases lack merit but drag on for years and delays justice for those whose cases have merit.

It is time for immigration judges to get contempt authority. Furthermore, giving immigration law judges the ability to dismiss a case for failure to state a claim and the ability to render judgments on the pleadings—as their robed brothers and sisters have in other courts—would arm the immigration judiciary with the ability to manage their dockets effectively and efficiently, help eliminate the backlog of cases, and prune the docket.

August 2023 saw a record number of new deportation cases arrive at the Immigration Court. A total of 180,065 new Notices to Appear (NTAs) were issued during August.<sup>28</sup> This was a jump of 19 percent in just one month; July filings had reached a previous high of 151,910.<sup>29</sup> While the growth rate of 19 percent is large, it was moderate compared to the 28 percent jump from June to July.

Thus far, more than 1,230,000 new deportation cases have been added to the Immigration Court's docket during fiscal year (FY) 2023.<sup>30</sup> All these immigrants received NTAs issued by Department of Homeland Security (DHS) officials requiring them to appear in Immigration Court and defend themselves against the government's efforts to deport them. For many, these individuals will need to establish that they should be granted asylum or an alternative form of relief from removal if they are to be allowed to stay in the country.

Based on discussions I have had with seasoned immigration judges, if they had the ability to dismiss a case for failure to state a claim and the ability to render judgments on the pleadings, they believe that their caseloads would shrink by up to 75 percent.

### **Overview of the Immigration Courts**

The immigration courts are part of the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR).<sup>31</sup> As such, they are part of the executive branch and do not fall under Article III of the Constitution. The EOIR oversees the immigration courts through the Office of the Chief Immigration Judge.<sup>32</sup> The EOIR also oversees the Board of Immigration Appeals (BIA), which hears appeals from the immigration courts.<sup>33</sup> Appeals of BIA decisions are taken up by the Federal Circuit Courts of Appeals, and appeals of their opinions can be made to the United States Supreme Court.<sup>34</sup>

The immigration courts have jurisdiction to make determinations about removal and deportation, adjudicate asylum applications, adjust status, review credible fear determinations made by the Department of Homeland Security, and conduct removal proceedings initiated by the Office of Special Investigation, among other related activities.<sup>35</sup>

Unlike the federal courts, the immigration courts do not have a flexible set of procedural rules designed to "secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>36</sup> The Immigration Court Practice Manual is the closest analog, but it does little more than provide a set of standardized practices for a procedure that is strictly governed by regulations. Unlike the Federal Rules of Civil Procedure, the Practice Manual gives the immigration judges almost no authority to manage a case independently.<sup>37</sup>

### **Crippled by the Numbers**

The immigration courts are inundated with more cases than they can handle effectively. In 1984, they had no case backlog. By 2011, their backlog exceeded 260,000 cases.<sup>38</sup> In 2019, they were drowning under 876,552 pending cases.<sup>39</sup> Today, that number is over 2.6 million cases. Meanwhile, the average length of time that a migrant spends waiting for a final decision has exploded: 324 days in 1998 to 726 days in 2019.<sup>40</sup> Today, the wait time is over three years.

Despite the immigration courts' limited subject matter, their caseload far surpasses the caseload of most, if not all, of the nation's federal district courts. In 2019, there were 424 immigration judges managing 876,552 pending immigration cases.<sup>41</sup> Today, there are 734 immigration judges spread across 69 courts and three adjudication centers managing more than 2,620,591 cases. Some immigration judges, like those in Miami, have a caseload of 10,000 cases each.

By comparison, in 2019, there were 677 federal district judges who managed 458,988 cases.<sup>42</sup> As of June 30 this year, that same number of judges was managing 692,219 cases. Put another way, the average immigration judge has 3,570 pending cases, while the average federal district court judge (who also benefits from a staff of several full-time law clerks) has 1,022, up from 678 in 2019.

The majority of claims or defenses raised by migrants in their immigration cases are not meritorious. In the second quarter of 2019, 68 percent of removal and deportation cases resulted in removal orders.<sup>43</sup> Notably, on a small percentage of asylum claims, applications are granted.<sup>44</sup> In FY 2022, EOIR granted only 14 percent of asylum claims.

Unfortunately, there is little that immigration judges can do to eliminate meritless cases early in the process. Immigration judges are limited to two rulings for most cases—relief or removal—and these decisions are made only at the end of proceedings.<sup>45</sup> With few exceptions, an immigration judge cannot dispose of a meritless or improperly prosecuted case.<sup>46</sup>

This allows immigration judges no room to meet special circumstances with flexibility as federal judges can. Additionally, the Department of Justice has never issued regulations under the Immigration and Nationality Act that would give immigration judges control of a disorderly courtroom. Simply put, immigration judges have no mechanism for enforcing their judgments. Nor do they have a mechanism to dismiss meritless cases or summarily grant judgement to the government as other courts can. Immigration judges must hear cases from start to finish, even if it is obvious from the outset that a case lacks legal merit. Predictably, the docket is clogged with meritless cases.

These failures are widespread and harmful to aliens and citizens alike. Aliens are not afforded a speedy trial in any reasonable sense of the word given the exorbitant number of pending cases in the docket. Another concern involves the large percentage of aliens who file for relief but support their application with meritless victimhood claims. Immigrants whose claims are clearly meritless end up effectively denying timely relief to aliens who have legitimate claims. If the DOJ's goal is to incentivize illegal immigration, it is succeeding.

#### **Grant Immigration Courts Two Tools Common to the State and Federal Courts**

It is a bedrock principle of civil litigation in both federal<sup>47</sup> and state courts that a plaintiff must plead a viable legal claim.<sup>48</sup> Not so in immigration court.<sup>49</sup> Whereas all state and federal courts have tools they can use to dispose of meritless cases at the early stages of litigation, the immigration courts—the sole exception being those rare instances where an alien admits that he or she is subject to removal<sup>50</sup>—do not.

Federal and state court judges have two important tools that allow them to dismiss meritless cases soon after they are filed: dismissal for failure to state a claim and judgment on the pleadings. These tools ensure that legally deficient cases do not waste scarce judicial resources. These tools are not, however, available to immigration judges who must manage thousands of meritless cases from filing to final judgment.<sup>51</sup>

By contrast, federal judges are empowered by Federal Rule of Civil Procedure 12(b)(6) to dismiss claims that are inadequately pleaded or legally baseless.<sup>52</sup> The courts of all 50 states also have this authority.<sup>53</sup> To determine whether a claim is legally baseless, the court assumes that the facts alleged are true.<sup>54</sup> The court then considers whether those facts satisfy the elements of a viable claim. If the facts as pleaded do not give rise to a viable claim, then the court can dismiss the case.<sup>55</sup> Courts need not wait for a motion to dismiss a meritless claim, but in most cases, they must give the party whose claims are dismissed an opportunity to be heard.

The federal courts and all but three of the states' courts have another tool they can use to eliminate meritless cases early in the judicial process: judgment on the pleadings.<sup>56</sup> Federal Rule of Civil Procedure 12(c) gives federal district courts the power to grant judgment to a party based solely on the pleadings. Typically, this tool is used when the parties agree on the underlying facts of a case but disagree about their legal effect.<sup>57</sup> Alternatively, as with a dismissal under 12(b)(6), a court may assume that the facts alleged are true and consider whether they give rise to a viable claim.<sup>58</sup> The court then applies the law to those facts to determine whether a party is entitled to early judgment. Typically, a party must move for judgment on the pleadings before a court can enter an early judgment, but one Circuit Court of Appeals permits district courts to grant judgment on the pleadings without a motion if one party is plainly assured of victory as a matter of law.<sup>59</sup>

Immigration judges lack both of these tools. This means that when a plainly meritless case comes before them, they have no choice but to retain it, manage it, hold hearings in it, and only after the judicial process is exhausted enter the inevitable judgment. The result is judicial gridlock. Meritorious cases stall behind a backlog of baseless ones.

Giving immigration courts these two tools would help to alleviate the gridlock. Asylum petitions provide a clear example. The law sets out the elements of a valid claim to asylum in precise language.<sup>60</sup> An applicant for asylum must demonstrate that he is unwilling to return to his home country because he is likely to face persecution, or fear of persecution, on account of race, religion, nationality, membership in a particular social group, political opinion, or other special circumstances as the President may specify.<sup>61</sup> Nothing else provides a basis for asylum. Thus, if an applicant appears before an immigration judge and applies for asylum on the grounds that he fears gang violence in his home country, he is ineligible for asylum. Nevertheless, the immigration judge cannot dismiss the case or grant judgment in the government's favor until the applicant has filled out the appropriate forms and had a hearing. The time and effort the judge must spend on that plainly meritless case is time the judge cannot spend on a potentially meritorious one.

The federal courts have long recognized that "judicial resources better spent on meritorious claims [are] wasted on frivolous ones."<sup>62</sup> It is time to give immigration courts the powers employed by the federal and state courts to prioritize meritorious cases and quickly dispose of meritless ones.

### **The Legislative Solution**

To effect this change, the regulations should be amended to grant immigration judges the ability to dispose of petitions that do not rise to the pleading standards required by Federal Rule 12(b)(6).

The proposed changes are set forth below; additions are underlined and removals are stricken through.

First, 8 C.F.R. § 1240.11(c)(1) should be amended as follows:

- (1) If the alien expresses fear of persecution or harm on account of a protected statutory basis under section 208 of the Act upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:
  - (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;
  - (ii) Make available the appropriate application forms; and
  - (iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

Additionally, 8 C.F.R. § 1240.11(c)(3) should be amended as follows:

- (3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute ~~unless the factual matter is accepted as true~~. An evidentiary hearing extending beyond issues related to the basis for a ~~mandatory~~ denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

Furthermore, 8 C.F.R. § 1208.14 should be amended as follows:

- (a) By an immigration judge. Unless otherwise prohibited in § 1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations. An immigration judge may deny any application for relief if it lacks sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.
- ~~(d) Applicability of § 103.2(b) of this chapter. No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter.~~

Finally, 8 C.F.R. § 1240.12(b) should be amended as follows:

(b) Summary decision. Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal. An immigration judge may deny any application for relief if it lacks sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

### **Immigration Judges Need Contempt Authority**

Twenty-six years ago, the United States Congress passed a law giving immigration judges civil contempt authority, but it delegated to the U.S. Attorney General the duty to draft the implementing regulations. Five U.S. Presidents and several U.S. Attorneys General later, immigration judges still don't have contempt power. Why? Because, in defiance of a congressional statute, the Justice Department has failed to issue an implementing regulation.

There is, to be sure, ample criticism of the immigration court system and of immigration judges in particular.<sup>63</sup> In 2019, the American Bar Association (ABA) wrote in a comprehensive study that the “immigration courts are facing an existential crisis” and are “irredeemably dysfunctional.”<sup>64</sup> The state of those courts has grown much worse since the ABA study a mere four years ago.

Calls for wholesale structural realignment of the immigration court system are not uncommon and include recommendations to place the court under Article I, like the U.S. Tax Court,<sup>65</sup> or to eliminate the “trappings” of courts and replace them with less adversarial bureaucratic processes like those used by the Social Security Administration.<sup>66</sup> Others question the independence of immigration judges themselves, since they are part of the U.S. Department of Justice,<sup>67</sup> are hired by the Executive Office for Immigration Review, which is accountable to the Attorney General,<sup>68</sup> and don't enjoy the protections afforded to federal judges.<sup>69</sup> One organization even suggested that the immigration courts are designed to fail.<sup>70</sup>

Some of the constructive criticism of the immigration court, its structure, and the roles and responsibilities of immigration judges merit further study, debate, congressional scrutiny, and possible thoughtful reform. But this type of effort would require a concerted effort by congressional leaders from both parties, thoughtful dialogue, and an open mind without political maneuvering—an effort that, for the time being, seems out of reach.

In the meantime, as noted above, immigration judges are swamped by a crushing caseload, are burdened by a backlog of over two million cases, and lack the tools to dismiss a case for failure to state a claim and to render a judgment on the pleadings.<sup>71</sup> Immigration judges also lack contempt authority, even though Congress recognized this deficiency more than two decades ago and passed a statute giving them that power. As a result, litigants before the immigration courts, government attorneys and private counsel alike, can't be held accountable to the judge with respect to matters such as timelines, docketing dates, or even court orders. Counsel, who often carry other cases

before other (non-immigration judge) courts, put a priority on cases where the court has actual power to enforce its own orders with either civil or criminal contempt. Counsel who appear before immigration judges know that those judges can wag their fingers and raise their voices if counsel defies a court order—but nothing more.

As a result, immigration court judges are treated as second-class judges, taking a back seat to all other judges who have the contempt power over parties and lawyers who knowingly violate court orders. Moreover, immigration dockets, which are already overburdened with cases, continue to expand because of the inability of judges to manage their dockets (or even the counsel before them) effectively.

Immigration judges needed contempt authority 26 years ago when Congress passed the statute, and they need it more today than ever before. The Department of Justice can fix this issue quickly, but if it is unwilling to do so, Congress ought to step in once and for all to give immigration judges commonsense tools to manage their dockets and the counsel before them as all other judges do.

### **Contempt Power Matters**

The contempt power is the power to deter and punish contempt for the court's authority. It is a critical tool in the judicial toolkit. Contempt is any act of disobedience or disrespect toward a judicial body.<sup>72</sup> To put it another way, contempt power is the power of a judicial body to coerce compliance or summarily punish (with monetary fines or imprisonment) noncompliance with the court's orders or standards of acceptable behavior.<sup>73</sup> This power is "inherent in all courts."<sup>74</sup>

The contempt power is ancient. In fact, the power is "as ancient as the laws themselves."<sup>75</sup> Historical examples of courts wielding their inherent contempt powers abound.<sup>76</sup> Sir William Blackstone explained that courts must have the power to punish contempt because "without a competent authority to secure their administration from disobedience and contempt, [laws] would be vain and nugatory."<sup>77</sup>

Mirroring Blackstone, the Supreme Court has held that "[i]f a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."<sup>78</sup> Accordingly, courts have "no more important duty" than to enforce their orders and punish disobedience.<sup>79</sup> Without a contempt power, courts of law devolve into "boards of arbitration whose judgments and decrees would be only advisory."<sup>80</sup>

In 1948, Congress enacted 18 U.S.C. § 401, which sets the outer bounds of the federal courts' contempt power.<sup>81</sup> It provides:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;

- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Federal Rules of Civil Procedure also provide for the use of the contempt power in specific situations. The federal courts can, for example, use the contempt power to punish a party or attorney for failure to obey a scheduling order,<sup>82</sup> a discovery order,<sup>83</sup> a subpoena,<sup>84</sup> or a judgment.<sup>85</sup>

Related to but separate from the contempt power, federal courts also retain a rule-based authority to sanction misleading, vexatious, harassing, or unsupported factual representations and legal arguments.<sup>86</sup> They also retain a narrow inherent authority to impose monetary sanctions on lawyers even in the absence of contempt.<sup>87</sup>

Contempt may be either civil or criminal.<sup>88</sup> The same punishments (fines and imprisonment) apply to both.<sup>89</sup> Whether contempt is civil or criminal depends on the purpose of the sanction—civil is remedial; criminal is punitive.<sup>90</sup> Put another way, a contempt proceeding is civil if its purpose is to coerce compliance but criminal if its purpose is to punish the wrongdoer.<sup>91</sup>

The contempt power is not, however, unlimited.<sup>92</sup> The federal courts are obligated to use “the least possible power adequate to the end proposed.”<sup>93</sup> Moreover, that power is limited by the First Amendment’s protection of free speech,<sup>94</sup> the Fifth Amendment’s Due Process Clause,<sup>95</sup> the protection against double jeopardy,<sup>96</sup> the protection against self-incrimination,<sup>97</sup> and the Eighth Amendment’s protection against cruel and unusual punishments.<sup>98</sup> The Supreme Court has also said, in *dicta*, that the Sixth Amendment’s guarantees of speedy trial and compulsory process apply to the contempt power.<sup>99</sup>

Whatever its limits, the contempt power is an essential tool for any court. Without it, the courts would be powerless to fulfill their duties of administering public justice and enforcing the rights of litigants.<sup>100</sup>

### **Congress Authorized the Contempt Power for Immigration Judges**

It is no surprise that Congress saw fit to give immigration judges the contempt power. At the end of 1996, Congress passed the Omnibus Consolidated Appropriations Act for 1997 by wide bipartisan majorities in both chambers.<sup>101</sup> That act included an amendment to the Immigration and Nationality Act of 1952, which reads:

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (*under regulations prescribed by the Attorney General*) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.<sup>102</sup>

At first glance, this statute appears to give immigration judges the ability to punish contempt. In fact, the statute is conditional. It gives immigration judges permission to wield whatever contempt



power the Attorney General determines they should have, but as written, the statute gives them no authority to punish contempt *until* the Attorney General publishes regulations giving them that authority.

It has been 26 years since Congress enacted §1229a(b)(1), and no Attorney General has ever finalized implementing regulations. As a result, immigration judges still lack contempt authority, §1229a(b)(1) is toothless, and the DOJ has thwarted Congress's intent to correct a long-standing problem.

Several Attorneys General have at least paid lip-service to drafting a contempt regulation, but none has ever done so. For example, in 2006, Attorney General Alberto Gonzales issued a memorandum instructing the Director of EOIR and others within the DOJ to "draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority."<sup>103</sup> No such rule was implemented.

Every year from 2006 through 2016, the DOJ said in its Semiannual Agendas that it intended by the following year to draft a regulation giving immigration judges contempt authority.<sup>104</sup> No such regulation was implemented, and the proposed contempt rule disappeared from the agenda in 2017.<sup>105</sup> Since then, the DOJ has given no indication that it intends to draft an implementing regulation.

The DOJ has not explained why it has refused to promulgate a contempt regulation, but commentators suppose that it is because the DOJ does not want its trial lawyers to be subject to discipline by its immigration judges.<sup>106</sup>

When I discussed this matter with senior officials in the previous Administration, they indicated that DHS did not want their immigration attorneys held in contempt for not complying with judicial orders. When I asked why DHS immigration attorneys should be treated with kid gloves compared to other federal government attorneys like Assistant United States Attorneys, they could not answer my question.

It is my understanding that DHS still holds the same opinion: They do not want DOJ immigration judges to be able to hold DHS immigration attorneys in contempt.

Immigration judges put orders on DHS attorneys routinely asking for the criminal history ("rap sheet") of a particular alien, but those attorneys refuse to do so. Since DHS attorneys don't have the burden of proof in hearings, many immigration judges I have spoken to note that DHS attorneys have become lazy. The respondent has the burden of proof. All DHS attorneys do is cross examine people to see whether they can catch them in a lie. These same immigration judges told me that many DHS attorneys don't know how to put a case together.

DHS attorneys engage in charge sheet review. They review the "Notice to Appear" to make sure that it's factually sufficient and legally correct. That's not actively working a case.

One of the biggest problems immigration judges are having now is getting DHS attorneys to actually show up in the courtroom. They want to show up by WebEx or phone it in. It has become so bad that recently, a DHS attorney assigned to a hearing appeared via WebEx in a hoodie and sweatpants and laying down in his bed. I'm told he was admonished by his superiors for this unprofessional behavior.

Contempt power is like a nuclear weapon: Once you have it, you don't want to use it, but it deters others from bad behavior. If the Congress gave contempt authority to immigration judges, those judges would likely use it sparingly once counsel for the government or respondent's counsel realized that they could be subject to being held in contempt. That's what happens in federal and state courts, and there is no reason to think it would play out any differently in immigration courts.

### **Immigration Judges Need Contempt Authority**

The lack of contempt authority hinders the immigration courts' ability to manage their ever-increasing caseloads. Without it, judges have no ability to cajole or punish attorneys and litigants who refuse to comply with orders, deadlines, or rules of decorum. As a result, immigration courts are powerless to combat incompetence and gamesmanship that delay speedy resolution of their cases, which happens quite frequently. As the ABA noted in its 2019 report, "absent such authority, immigration judges are again rendered powerless to control their own courtrooms and enforce compliance with potential time saving programs."<sup>107</sup>

In 2018, Judge Ashley Tabaddor, an immigration judge and President of the National Association of Immigration Judges, summed up the problem to the Senate Border Security and Immigration Subcommittee:

One of the most egregious and long-standing examples of the structural flaw of the Courts' placement in the DOJ is that Immigration Judges have never been able to exercise the congressionally mandated contempt authority statutorily authorized by Congress in 1996. This is because the DOJ has never issued implementing regulations in an effort to protect DHS attorneys (who it considers to be fellow federal law enforcement employees). However, as Congress recognized in passing contempt authority, misconduct by both DHS and private attorneys has long been one of the great hindrances to adjudicating cases efficiently and fairly. For example, it is not uncommon for cases to be continued due to private counsel's failure to appear or be prepared for a hearing, or DHS' failure to follow the Court's orders, such as to conduct pre-trial conferences to narrow issues or file timely documents and briefs. Just a couple of months ago, when I confronted an attorney for his failure to appear at a previous hearing, he candidly stated that he had a conflict with a state court hearing, and fearing the state court judge's sanction authority, chose to appear at that hearing over the immigration hearing in my court. Similarly, when I asked a DHS attorney why she had failed to engage in the Court mandated pre-trial conference or file the government's position brief in advance of the hearing, she defiantly responded that she felt that she had too many other work obligations to prioritize the Court's order. These examples represent just a small fraction of the problems faced by Immigration Courts, due to the failure of the DOJ, in over 20 years, to implement the Congress approved even-handed contempt authority.<sup>108</sup>

In short, immigration judges are not masters of their own courtrooms. They, their caseloads, and (most importantly) the hundreds of thousands of immigrants whose cases they decide are held captive by the uncheckable behavior of a few misbehaving or incompetent lawyers and litigants.

In the press release accompanying his memorandum of Immigration Court reforms, Attorney General Gonzales recognized that “[b]y better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past.”<sup>109</sup> It’s past time to take that statement seriously.

### **Language of the Regulation**

There are two ways to fix this problem and finally give immigration judges the contempt power that Congress authorized 26 years ago: the easy way and the harder way.

The easy way is for the DOJ to finally draft a regulation. The harder way is for Congress to amend §1229a(b)(1) to include an explicit contempt power and thereby deprive the DOJ of any discretion in the matter. Regardless of which approach is taken, immigration judges’ contempt authority should substantially mirror federal judges’ contempt authority.

The regulation could be codified at 8 C.F.R. §1003.112 (presently nonexistent) and read:

8 C.F.R. 1003.112 *Contempt proceedings in Immigration Court.*

(a) *Contempt.* Pursuant to 8 U.S.C. § 1229a(b)(1), an immigration judge may punish by fine such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful process, order, rule, decree, or command.

(b) *Method of disposition.*

(1) *Summary disposition.* When conduct constituting contempt is directly witnessed by the immigration judge, the conduct may be punished summarily.

(2) *Disposition upon notice and hearing.* When the conduct apparently constituting contempt is not directly witnessed by the immigration judge, the alleged offender shall be brought before the court and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

(c) *Procedure.* The immigration judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The immigration judge shall also determine when the contempt proceedings shall be conducted. The immigration judge may punish summarily under subsection (b)(1) only if the immigration judge recites the facts for the record and states that they were directly witnessed by the

immigration judge in the actual presence of the court participants. Otherwise, the provisions of subsection (b)(2) shall apply.

- (d) *Record; review.* A record of the contempt proceedings shall be part of the record of the proceedings during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and filed with the Board of Immigration Appeals for review within seven (7) days of the contempt proceedings. The Board of Immigration Appeals may approve or disapprove all or part of the sentence.
- (e) *Punishment.* A fine does not become effective until ordered executed by the Board of Immigration Appeals no more than thirty (30) days after a disposition is entered and filed by the immigration judge. The immigration judge may delay announcing the punishment after a finding of contempt to permit the person involved to continue to participate in the proceedings.
- (f) *Informing person held in contempt.* The person held in contempt shall be informed by the Board of Immigration Appeals in writing of the holding and punishment, if any, of the immigration judge and of the final action of the Board of Immigration Appeals after its own review.

If Congress decides that after 26 years it is time to take the matter out of the DOJ's hands, then its job is simple: Congress should amend §1229a(b)(1) to give immigration judges the same contempt authority it permits federal courts in 18 U.S.C. § 401. The amended §1229a(b)(1) would read as follows (deletions are struck through and additions underlined):

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority ~~(under regulations prescribed by the Attorney General)~~ to sanction by civil money penalty such contempt of its authority as may a court of the United States sanction pursuant to 18 U.S.C. § 401.

If Congress enacted that amendment, the immigration courts would have a functional contempt power even if the DOJ promulgated no further regulations. Regardless of whether the DOJ implements a contempt regulation or Congress amends §1229a(b)(1) to do so itself, it is high time to add this tool to the immigration courts' toolbox.

Giving immigration judges the authority to punish contempt is not partisan: Congress voted overwhelmingly to give them that authority 26 years ago. The ABA has called for the implementation of contempt authority as well. Neither is it a panacea; it is simply one small tool that immigration judges need to manage their enormous caseloads efficiently.

For 26 years, immigration judges have been waiting for this authority. But for 26 years, the DOJ has refused to give it to them in both Republican and Democratic Administrations. Either the DOJ should immediately implement a regulation like the one proposed here, or Congress should take the question out of the DOJ's hands. As long as we have our current immigration court system, it should work as well as it is able to work. That means ending regulatory self-capture and giving immigration judges the authority to hold lawyers and litigants in contempt when appropriate.

## Conclusion

Giving immigration law judges these tools is not a partisan or political act; it is a matter of fairness and common sense. If they had these common judicial management tools, they would be able to trim their dockets, focus on cases of merit, and dispose of meritless cases.

These proposals are also not unique: Every federal district court judge in the country has these tools, as does almost every single state and local judge across the land.

The issue of how best to solve immigration policy in the United States is complex. Regardless of whether you endorse comprehensive immigration reform or a commonsense, step-by-step approach, this proposal makes sense. Furthermore, it can be put into place immediately if Congress decides to put aside partisan differences and focus on commonsense, apolitical solutions to at least one aspect of immigration reform.

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<sup>1</sup> The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is the most broadly supported think tank in the United States. During 2021, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2021 operating income came from the following sources: Individuals 82 percent; Foundations 12 percent; Corporations 1 percent; Program revenue and other income 5 percent. The top five corporate givers provided The Heritage Foundation with 1 percent of its 2021 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

<sup>2</sup> See Charles Stimson and GianCarlo Canaparo, *Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 247, Jul. 18, 2019, <https://www.heritage.org/immigration/report/expanding-the-toolkit-giving-immigration-judges-authority-summarily-dispose>.

<sup>3</sup> See Charles Stimson and GianCarlo Canaparo, *Authority Delayed Is Authority Denied: Giving Immigration Judges Contempt Authority*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 249, Aug. 8, 2019, <https://www.heritage.org/immigration/report/authority-delayed-authority-denied-giving-immigration-judges-contempt-authority>.

<sup>4</sup> For Franklin Delano Roosevelt, the issue was the internment of Japanese Americans. With Executive Order 9066, he gave the Secretary of War power to intern anyone he deemed a potential espionage threat. Exec. Order 9066, 7 Fed. Reg. 1,407 (February 25, 1942). The Supreme Court upheld the order in *Korematsu v. United States*, 323 U.S. 214 (1944), but that opinion was repudiated in *dicta* in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018). Presidents Truman through Reagan contended with mounting domestic concern that illegal immigration was a threat to the U.S. job market. As a result, Congress passed a number of bills starting with the Immigration and Nationality Act of 1952 (called the McCarran–Walter Act), which established a system of preferences based on professional skills and family ties, and culminating in the Immigration Reform and Control Act of 1986 (also called the Simpson–Mazzoli Act), which imposed penalties on American businesses for employing illegal immigrants. See USCIS History Office and Library, *Overview of INS History*, 2012, <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>. George H.W. Bush signed the Immigration Act of 1990 that, among other things, increased immigration quotas, provided family-based immigration visas, and created categories of occupation-based visas. See Warren R. Leiden *et al.*, *Highlights of the U.S. Immigration Act of 1990*, 14 Fordham Int'l L.J. 328 (1990). Bill Clinton dealt with the fallout of the Mariel Boatlift and came to an agreement with the Cuban government that

would come to be known as the “wet foot, dry foot policy.” Justin Wm. Moyer, *The forgotten story of how refugees almost ended Bill Clinton's Career*, WASH. POST, Nov. 17, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/17/the-forgotten-story-of-how-refugees-almost-ended-bill-clintons-career/>; U.S. Department of State, Archive: Cuba, *Migration*, March 16, 2000, <https://1997-2001.state.gov/regions/wha/cuba/migration.html>. George W. Bush attempted but failed to secure passage of the Comprehensive Immigration Reform Act of 2007. Donna Smith, *Senate kills Bush immigration reform bill*, Reuters, June 28, 2007, <https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629>. Finally, Barack Obama implemented a policy of deferred action for childhood arrivals (DACA) and deferred action for parents of Americans (DAPA), although the latter was enjoined by the courts. See Adam Liptak *et al.*, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES, June 23, 2016, <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html>.

<sup>5</sup> See U.S. Citizenship and Immigration Services, Legislation from 1901–1940, <https://www.nps.gov/elis/learn/education/upload/Legislation-1901-1940.pdf>; U.S. Citizenship and Immigration Services, Legislation from 1941–1960, <https://www.nps.gov/elis/learn/education/upload/Legislation-1941-1960.pdf>; U.S. Citizenship and Immigration Services, Legislation from 1961–1980, <https://www.nps.gov/elis/learn/education/upload/Legislation-1961-1980.pdf>; U.S. Citizenship and Immigration Services, Legislation from 1981–1996, <https://www.nps.gov/elis/learn/education/upload/Legislation-1981-1996.pdf>.

<sup>6</sup> These are just the major federal acts passed since 1900. There have been scores of amendments to each of these laws, notably including the 1990 Immigration Act, the INA Amendments, and the Immigration Reform and Control Act of 1986.

<sup>7</sup> 8 U.S.C. 1101, the Immigration Reform and Control Act of 1986. See also Edwin Meese III, *I Recall the 1986 Immigration Act Rather Differently*, THE HERITAGE FOUNDATION, June 13, 2013, <https://www.heritage.org/immigration/commentary/i-recall-the-1986-immigration-act-rather-differently>.

<sup>8</sup> See THE HERITAGE FOUNDATION, *Solutions 2018, The Policy Briefing Book: Border Security*, <https://solutions.heritage.org/provide-for-a-strong-defense/border-security>.

<sup>9</sup> See David Inzerro, “*Amnesty First*” Breaks Faith with the American People, THE HERITAGE FOUNDATION, May 24, 2018, <https://www.heritage.org/immigration/commentary/amnesty-first-breaks-faith-the-american-people>.

<sup>10</sup> See Hans A. von Spakovsky, *Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment*, THE HERITAGE FOUNDATION, Oct. 30, 2018, <https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment>.

<sup>11</sup> See Diem Nguyen *et al.*, *Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 2358, Jan. 25, 2010, <https://www.heritage.org/homeland-security/report/biometric-exit-programs-show-need-new-strategy-reduce-visa-overstays>.

<sup>12</sup> See James Jay Carafano, *The Border Is in Disarray, but Change May Be Coming*, THE HERITAGE FOUNDATION, April 11, 2019, <https://www.heritage.org/immigration/commentary/the-border-disarray-change-may-be-coming>.

<sup>13</sup> See Robert Rector *et al.*, *The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer*, THE HERITAGE FOUNDATION SPECIAL REPORT NO. 133, May 6, 2013, <https://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer>.

<sup>14</sup> See *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). See also Charles Stimson, *States Get A License to Enforce Immigration Laws*, THE HERITAGE FOUNDATION WEBMEMO NO. 3342, Aug. 22, 2011, [http://thf\\_media.s3.amazonaws.com/2011/pdf/wm3342.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/wm3342.pdf).

<sup>15</sup> See Hans A. von Spakovsky, *Crimes by Illegal Aliens, Not Legal Immigrants, Are the Real Problem*, THE HERITAGE FOUNDATION, June 4, 2017, <https://www.heritage.org/immigration/commentary/crimes-illegal-aliens-not-legal-immigrants-are-the-real-problem>.

<sup>16</sup> See James Carafano, *Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement*, THE HERITAGE FOUNDATION WEBMEMO NO. 1212, Sep. 14, 2006, <https://www.heritage.org/immigration/report/build-section-287g-the-immigration-and-nationality-act-boost-state-and-local>.

<sup>17</sup> See Rector *et al.*, *supra* note 14.

<sup>18</sup> See, Kay Cole James, *et al.*, *An Agenda for American Immigration Reform*, Heritage Foundation Special Report No. 210 (Feb. 20, 2019), available at [https://www.heritage.org/sites/default/files/2019-02/SR210\\_0.pdf](https://www.heritage.org/sites/default/files/2019-02/SR210_0.pdf); see also Olivia Enos *et al.*, *The U.S. Refugee Admissions Program: A Roadmap for Reform*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 3212, July 5, 2017, <https://www.heritage.org/sites/default/files/2017-07/BG3212.pdf>; Charles Stimson *et al.*, *States Are Violating Federal Law to Benefit Illegals*, THE HERITAGE FOUNDATION, Nov. 30, 2011, <https://www.heritage.org/immigration/commentary/states-are-violating-federal-law-benefit-illegals>.

<sup>19</sup> See Gilberto Mendoza, *States Offering Driver's Licenses to Immigrants*, NATIONAL CONFERENCE OF STATE LEGISLATURES, November 30, 2016, <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> (noting that 12 states and the District of Columbia allow illegal immigrants to obtain a driver's license); AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *ACLU Supports Drivers Licenses for Immigrants, Urges Vigilance*, Oct. 3, 2013, <https://www.aclunc.org/news/aclu-supports-drivers-licenses-immigrants-urges-vigilance>.

<sup>20</sup> After California passed a bill permitting illegal immigrants to obtain driver's licenses, Governor Edmund G. ("Jerry") Brown Jr. said, "[t]his bill will enable millions of people to get to work safely and legally. Hopefully, it will send a message to Washington that immigration reform is long past due." Press Release, Office of Governor Edmund G. Brown Jr., *Governor Brown Issues Statement Following Passage of AB 60* (Sep. 12, 2013), <https://www.ca.gov/archive/gov/39/2013/09/12/news18203/index.html>.

<sup>21</sup> See Hans A. von Spakovsky *et al.*, *Providing In-State College Tuition for Illegal Aliens: A Violation of Federal Law*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 74, Nov. 22, 2011, [http://thf\\_media.s3.amazonaws.com/2011/pdf/lm\\_0074.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/lm_0074.pdf).

<sup>22</sup> See Center for Immigration Studies, *Maps: Sanctuary Cities, Counties, and States* by Bryan Griffith and Jessica M. Vaughan, Apr. 16, 2019, <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

<sup>23</sup> See Center for Immigration Studies, *Sanctuary Cities*, November 7, 2018, <https://cis.org/Fact-Sheet/Sanctuary-Cities>.

<sup>24</sup> See Department of Homeland Security, *Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2015 to 2017*, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table6> (last accessed June 10, 2019).

<sup>25</sup> See ProCon.org, *US Undocumented Immigrant Population Estimates, 1969–2016*, [https://immigration.procon.org/view\\_resource.php?resourceID=000844#1983](https://immigration.procon.org/view_resource.php?resourceID=000844#1983).

<sup>26</sup> See Department of Homeland Security Office of Immigration Statistics, *Population Estimates*, December 2018, [https://www.dhs.gov/sites/default/files/publications/18\\_1214\\_PLCY\\_pops-est-report.pdf](https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf).

<sup>27</sup> See U.S. Department of Justice, *Executive Office for Immigration Review, Office of Planning, Analysis, and Technology's Immigration Courts Report: Asylum Statistics FY 2012–2016*, <https://www.justice.gov/eoir/file/asylum-statistics/download>.

<sup>28</sup> See Transactional Records Access Clearinghouse (TRAC) Immigration Report, *Record Number of New Immigration Court Cases Arrive in August; Destinations for Asylum Seekers Shifting*, Sep. 20, 2023, <https://trac.syr.edu/reports/729/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *IMMIGRATION COURT PRACTICE MANUAL* (2018), <https://www.justice.gov/eoir/page/file/1084851/download>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL* (2018), <https://www.justice.gov/eoir/page/file/1103051/download>.

<sup>35</sup> IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

<sup>36</sup> See *Fed. R. Civ. P. 1*.

<sup>37</sup> See IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

<sup>38</sup> See TRACIMMIGRATION REPORT 242, *AS FY 2010 ENDS, IMMIGRATION CASE BACKLOG STILL GROWING* (Oct. 21, 2010), <https://trac.syr.edu/immigration/reports/242/>. Although the baffling growth in the case backlog can be credited primarily to the ineffective court system, prior to 2017, the Executive Office for Immigration Review (EOIR) unlawfully closed over 300,000 cases, which the Trump Administration added back in to the backlog queue. TRACIMMIGRATION REPORT 536, *IMMIGRATION COURT BACKLOG SURPASSES ONE MILLION CASES* (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536/>.

<sup>39</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: PENDING CASES (Apr. 23, 2019), <https://www.justice.gov/eoir/page/file/1060836/download>.

<sup>40</sup> TRACIMMIGRATION, IMMIGRATION COURT BACKLOG TOOL (Apr., 2019), [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>41</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: IMMIGRATION JUDGE HIRING (Apr., 2019), <https://www.justice.gov/eoir/page/file/1104846/download>.

<sup>42</sup> UNITED STATES COURTS, CASELOAD STATISTICS DATA TABLES: U.S. DISTRICT COURTS—COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (Mar. 31, 2019), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0331.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2019.pdf).

<sup>43</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: FY 2019 SECOND QUARTER DECISION OUTCOMES (Apr. 23, 2019), <https://www.justice.gov/eoir/page/file/1105111/download>.

<sup>44</sup> *Id.*

<sup>45</sup> IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

<sup>46</sup> See, e.g., *id.* Chapter 3.1(d)(ii) (providing that if an application for relief is untimely, the alien's interest in that relief is deemed waived or abandoned).

<sup>47</sup> Where this paper mentions "federal courts" and "federal judges," it refers exclusively to those courts established under Article III of the Constitution.

<sup>48</sup> See *Fed. R. Civ. P. 8*.

<sup>49</sup> See *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) ("In the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, **without first having to establish prima facie eligibility for the requested relief.**") (emphasis added).

<sup>50</sup> See 8 C.F.R. §§ 1240.12(b), 1240.10(c). It should be noted that there is an apparent drafting error in § 1240.12(b) in that it cross-references to § 1240.10(b) when it plainly is intended to cross reference to § 1240.10(c).

<sup>51</sup> See, e.g., 8 C.F.R. § 1240.11(c)(1) (providing that if an alien expresses any fear of harm upon returning to the country to which he or she might be removed, the immigration judge must provide the alien with an application for relief, grant a continuance on that application, hold a hearing on the merits, and issue a decision); see also *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (although the immigration judge found that the alien was not entitled to asylum based on a general fear of the violence in Guatemala, the BIA ruled that the judge should have granted the alien a continuance to find a lawyer and then apply for relief from removal).

<sup>52</sup> See generally 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1356, 1357 (3d ed. 2019) [hereinafter *FEDERAL PRACTICE AND PROCEDURE*].

<sup>53</sup> AL ST RCP RULE 12; ALASKA R. CIV. P. 12; ARIZ. R. CIV. P. 12; AR R RCP RULE 12; CA CIV PRO § 430.50; CO ST RCP RULE 12; CT ST § 52-91; DE R SUPER CT RCP RULE 12; FL ST RCP RULE 1.110; GA ST § 9-11-12; HI R RCP RULE 12; ID R RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1.421; KS ST 60-212; KY ST RCP RULE 12.02; LA C.C.P. ART. 927; ME R RCP RULE 12; MD R RCP CIR CT RULE 2-322; MA ST RCP RULE 12; MI R RCP MCR 2.116; MN ST RCP RULE 12.02; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NH R SUPER CT CIV RULE 9; NJ R SUPER TAX SURR CTS CIV R.



4:6-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3211; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OK ST T. 12 § 2012; OR R RCP ORCP 21; PA ST RCP RULE 1032; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(b); TN R RCP RULE 12.02; TX R RCP RULE 91a; UT R RCP RULE 12; VT R RCP RULE 12; VA ST § 8.01-273; WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.

<sup>54</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

<sup>55</sup> See, e.g., Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1365 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 F. App'x 769 (Fed. Cir. 2014); White v. Monohan, 326 Fed. Appx. 385, 386 (7th Cir. 2009); Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008); Insomnia Inc. v. City of Memphis, Tennessee, 278 Fed. Appx. 609 (6th Cir. 2008); MM&S Financial, Inc. v. National Ass'n of Securities Dealers, Inc., 364 F.3d 908 (8th Cir. 2004).

<sup>56</sup> FEDERAL PRACTICE AND PROCEDURE, *supra* note 53, § 1367; See also AL ST RCP RULE 12; ALASKA R. CIV. P. 12; ARIZ. R. CIV. P. 12; AR R RCP RULE 12; CA CIV PRO § 439; CO ST RCP RULE 12; DelVecchio v. DelVecchio, 146 Conn. 188, 148 A.2d 554 (Conn. 1959) (recognizing a motion for judgment on the pleadings even though Connecticut's rules do not provide for it); DE R SUPER CT RCP RULE 12; FL ST RCP RULE 1.140; GA ST § 9-11-12; HI R RCP RULE 12; ID R RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1.954; KS ST 60-212; KY ST RCP RULE 12.03; LA C.C.P. ART. 965; ME R RCP RULE 12; MA ST RCP RULE 12; MI R RCP MCR 2.116; MN ST RCP RULE 12.03; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NJ R SUPER TAX SURR CTS CIV R. 4:6-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3212; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OR R RCP ORCP 21; PA ST RCP RULE 1034; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(c); TN R RCP RULE 12.03; Pat H. Stanford, Inc. v. Franklin, 312 S.W.2d 703 (Tex. Civ. App. 1958) (recognizing a motion for judgment on the pleadings as a creation of the common law); UT R RCP RULE 12; VT R RCP RULE 12; Kelly v. Carrico, 256 Va. 282, 287, 504 S.E.2d 368, 371 (Va. 1998) (permitting a motion for judgment on the pleadings even though Virginia's rules do not provide for it where the opposing party did not object); WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *Flora v. Home Fed. Sav. & Loan Ass'n*, 685 F.2d 209 (7th Cir. 1982).

<sup>60</sup> 8 U.S.C. § 1158(b)(1)(A) (limiting asylum to those who qualify as "refugees"); 8 U.S.C. § 1101 (defining "refugee").

<sup>61</sup> 8 U.S.C. § 1101.

<sup>62</sup> *Smith v. State of S.C.*, 882 F.2d 895, 898 (4th Cir. 1989).

<sup>63</sup> See, e.g., Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261 (2019); Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315, 333-36 (2015); Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 706-16 (2012); Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 317-20 (2011); Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1569-78 (2011); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 546-89 (2011); David L. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 794-805 (2011); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1685-1720 (2010); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 403-08 (2006); see also Elizabeth J. Stevens, *Making Our 'Immigration Courts' Courts*, in FED. LAWYER 17, 18 (Mar. 2018); Am. Immigration Lawyers Ass'n (AILA) Board of Governors, *Resolution on Immigration Court Reform 1-2* (Jan. 29, 2018), [https://www.naij-usa.org/images/uploads/publications/AILA\\_Resolution\\_Passed\\_2.3\\_2018\\_.pdf](https://www.naij-usa.org/images/uploads/publications/AILA_Resolution_Passed_2.3_2018_.pdf).

<sup>64</sup> Am. Bar Ass'n, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, at UD 2-3 (2019),

[https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_2.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf) [hereinafter Am. Bar. Proposals].

<sup>65</sup> See, e.g., Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 15-21 (2008); Stevens, *supra* note 1 at 17-18; Nat'l Ass'n of Immigration Judges, *NAIJ Blueprint for Immigration Court Reform 2013 2*, [https://www.naij-usa.org/images/uploads/publications/NAIJ-BLUEPRINT-FOR-REFORM-Revised\\_4-13-13-1\\_2.pdf](https://www.naij-usa.org/images/uploads/publications/NAIJ-BLUEPRINT-FOR-REFORM-Revised_4-13-13-1_2.pdf); Am. Bar Proposals, *supra* note 2 at ES 44.

<sup>66</sup> See, Jain, *supra* note 1 at 320-22 (not explicitly endorsing the idea but exploring the relative pros and cons).

<sup>67</sup> See, e.g., Am. Bar Proposals, *supra* note 64 at 6-34; Am. Immigration Lawyers Ass'n, Issue Paper: The Importance of Independence and Accountability in Our Immigration Courts (2006), <http://www.aila.org/content/default.aspx?docid=8382>.

<sup>68</sup> Board of Immigration Appeals, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. §§ 1, 3, 100).

<sup>69</sup> See Am. Bar. Proposals, *supra* note 64 at 2-24-2-26. When this paper mentions "federal courts" or "federal judges" it refers exclusively to those courts and judges that derive their authority from Article III of the Constitution. In so doing, it specifically exempts immigration judges and administrative law judges.

<sup>70</sup> See Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, CENTER FOR IMMIGRATION STUDIES REPORT (Oct. 2011), <https://cis.org/sites/cis.org/files/articles/2011/built-to-fail-full.pdf>.

<sup>71</sup> See Charles Stimson and GianCarlo Canaparo, *Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases*, The Heritage Foundation Legal Memo No. 247, Jul. 18, 2019, <https://www.heritage.org/immigration/report/expanding-the-toolkit-giving-immigration-judges-authority-to-summarily-dispose>.

<sup>72</sup> Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. Q. 1, 1 (1961) [hereinafter *History of Contempt*]; see also Ronald K. Ingoe, *Civil Contempt in Federal Courts*, 24 WASH. & LEE L. REV. 119 (1967).

<sup>73</sup> *History of Contempt*, *supra* note 72.

<sup>74</sup> *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

<sup>75</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*282; see also *History of Contempt*, at 6, *supra* note 10 ("The power of courts to punish contempts is one which wends historically back to the early days of England the crown.").

<sup>76</sup> For a thorough examination of the history of the contempt power, see *History of Contempt*, at 4-5, *supra* note 72 (citing, *inter alia*, 1 Campbell, *The Lives of the Chief Justices of England* 125-42 (1894)) and Sir John Fox, *The Nature of Contempt of Court*, 37 LQ. REV. 191 (1921) (tracing the contempt power in England back to the 10th century). The earliest example that Goldfarb provides occurred in the late 14th century. Prince Hal of England (who would later become King Henry IV) was held in contempt by Chief Justice Gascoigne when he repeatedly flew into a rage during the criminal trial of one of his servants. The judge reminded the prince that the court kept the king's peace, and even the prince owed allegiance to the king. When the prince continued to make a scene (some sources say he struck the judge) the judge sentenced him for contempt and ordered him imprisoned. Incidentally, the king was pleased that Justice Gascoigne was bold enough to hold the prince to account.

In the United States, in 1814, Major General Andrew Jackson was famously held in contempt and fined \$1,000 after he used his declaration of martial law in New Orleans to have a journalist, a federal district judge, and the United States Attorney thrown in prison. He threw the journalist in prison after he wrote an article critical of Jackson. He threw the judge in prison after he granted the journalist's petition of habeas corpus. And he threw the U.S. Attorney in prison when he brought habeas corpus proceedings on behalf of the judge.

<sup>77</sup> *Id.*

<sup>78</sup> *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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<sup>81</sup> See 3A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 702 (3d ed. 2019) [hereinafter FEDERAL PRACTICE AND PROCEDURE]. To be clear, this statute is not the source of the federal courts' contempt power. As both Blackstone and the Supreme Court have recognized, the contempt power is inherent in the courts. See *Ex parte Robinson*, 86 U.S. at 510. One court has even held that any statute that seeks to limit the courts' inherent contempt power is not binding. See *Bradley v. State*, 36 S.E. 630 (Ga. 1900).

<sup>82</sup> Fed. R. Civ. P. 16(f).

<sup>83</sup> Fed. R. Civ. P. 37(b).

<sup>84</sup> Fed. R. Civ. P. 45(g).

<sup>85</sup> Fed. R. Civ. P. 70(e).

<sup>86</sup> Fed. R. Civ. P. 11(c).

<sup>87</sup> See, e.g., *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (recognizing the "well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices.") (internal quotations omitted); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1447 (11th Cir. 1985); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985); *In re Cordova Gonzalez*, 726 F.2d 16 (1st Cir. 1984); *Matter of Baker*, 744 F.2d 1438 (10th Cir. 1984); *Barnd v. City of Tacoma*, 664 F.2d 1339 (9th Cir. 1982); *Flaksa v. Little River Marine Const. Co.*, 389 F.2d 885 (5th Cir. 1968).

<sup>88</sup> FEDERAL PRACTICE AND PROCEDURE § 703, *supra* note 82; see also *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947).

<sup>89</sup> *Id.*

<sup>90</sup> *United Mine Workers of Am.*, 330 U.S. at 303; *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

<sup>91</sup> FEDERAL PRACTICE AND PROCEDURE § 703, *supra* note 82.

<sup>92</sup> The precise contours of the limits addressed here are beyond the scope of the immigration courts.

<sup>93</sup> *Spallone v. U.S.*, 493 U.S. 265, 276 (1990) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

<sup>94</sup> See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

<sup>95</sup> See, e.g., *Roadway Express*, 447 U.S. at 767; *Blackmer v. United States*, 284 U.S. 421 (1932); *Hovey v. Elliott*, 167 U.S. 409 (1898).

<sup>96</sup> See *In re Bradley*, 318 U.S. 50 (1943).

<sup>97</sup> See *Gompers*, 221 U.S. at 444.

<sup>98</sup> See *United Mine Workers of Am.*, 330 U.S. at 364 n. 30.

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., *Gompers*, 221 U.S. at 451; *Bessette v. W. B. Conkey Co.*, 194 U.S. 324 (1904).

<sup>101</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of the U.S.C.).

<sup>102</sup> 8 U.S.C. §1229a(b)(1) (emphasis added).

<sup>103</sup> Memorandum from the Attorney General to the Deputy Attorney General, Assistant Attorney General for Legal Policy, Director of the Executive Office for Immigration Review, and Acting Chief Immigration Judge (Aug. 9, 2006), <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf>.

<sup>104</sup> 83 NO. 48 Interpreter Releases 2716 (Dec. 18, 2006); 84 NO. 26 Interpreter Releases 1552 (July 9, 2007); 85 NO. 20 Interpreter Releases 1382 (May 12, 2008); 86 NO. 21 Interpreter Releases 1509 (May 22, 2009); 87 NO. 19 Interpreter Releases 975 (May 10, 2010); 88 NO. 3 Interpreter Releases 231 (Jan. 17, 2011); 89 NO. 5 Interpreter Releases 274 (Jan. 30, 2012); 90 NO. 28 Interpreter Releases 1555 (July 29, 2013); 91 NO. 22 Interpreter Releases

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971 (June 9, 2014); 92 NO. 48 Interpreter Releases 2281 (Dec. 21, 2015); 93 No. 24 Interpreter Releases Art. 16 (June 20, 2016).

<sup>105</sup> 94 No. 30 Interpreter Releases Art. 19 (Aug. 7, 2017).

<sup>106</sup> See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1674 (2010); Marks, *supra* note 63 at 10.

<sup>107</sup> See Am. Bar Proposals, *supra* note 66, at UD 2-17.

<sup>108</sup> *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Security and Immigration of the S. Judiciary Comm.*, 115 Cong. (2018) (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges).

<sup>109</sup> See, e.g., Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Reviews (Aug. 9, 2006), [https://www.justice.gov/archive/opa/pr/2006/August/06\\_ag\\_520.html](https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html).



Statement of Hon. Mimi Tsankov  
President, National Association of  
Immigration Judges

October 18, 2023

*Preserving Due Process and the Rule of Law:  
Examining the Status of Our Nation's  
Immigration Courts*

Hearing Before the  
U.S. Senate,  
Judiciary Committee  
Immigration, Citizenship, & Border Safety  
Subcommittee



Statement of Judge Mimi Tsankov  
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*Preserving Due Process and the Rule of Law:  
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## INTRODUCTION

I am Mimi Tsankov, President of the National Association of Immigration Judges (NAIJ).<sup>1</sup> For nearly 17 years I have served as an Immigration Judge and am currently seated at the New York Federal Plaza Immigration Court. Chairman Padilla, Ranking Member Cornyn and members of the Subcommittee, thank you for the opportunity to testify.

I am pleased to represent the NAIJ, a non-partisan, non-profit, voluntary association of immigration judges. The NAIJ has represented immigration judges since its founding in 1979, and for much of that time served as its recognized collective bargaining unit. Our mission is to promote the independence of immigration judges and enhance the professionalism, dignity, and efficiency of the immigration courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our immigration court system by educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating for the integrity and independence of the immigration courts and immigration court reform. We also promote the judicial independence of immigration judges through regular communications with the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) management and representation of immigration judges before the agency.

I am here today to discuss urgently needed immigration court reform and the unprecedented challenges facing the immigration courts and immigration judges. The immigration courts have

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<sup>1</sup> I am speaking in my capacity as President of the NAIJ and not as an employee or representative of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). The views expressed here do not necessarily represent the official position of the U.S. Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent my personal opinions, which were formed after extensive consultation with the membership of the NAIJ.

faced structural deficiencies, crushing caseloads, and unacceptable backlogs for many years.<sup>2</sup> Many of the “solutions” that have been attempted to address these challenges have in fact exacerbated the problems and undermined the integrity of the courts by compounding the backlog, encroaching on the independent decision-making authority of immigration judges, and compromising the integrity of immigration court proceedings overall through improperly influencing case outcomes. I will be focusing my discussion on the structural defects inherent in the immigration court system and the DOJ’s ineffective and counterproductive attempts to solve the immigration court backlog. To fix the backlog and other problems, Congress should remove the immigration courts from the DOJ and create an independent, Article I immigration court.

**DOJ’S INEFFECTIVE AND POLITICIZED  
MANAGEMENT OF THE IMMIGRATION COURTS IS A  
PRIMARY CAUSE OF THE CURRENT IMMIGRATION COURT CRISIS**

Four and a half years ago, my former colleague Immigration Judge Ashley Tabaddor testified before this subcommittee and explained how the immigration court suffers from an inherent conflict because it is housed within the DOJ— the nation’s preeminent law enforcement agency. That problem still exists, but the urgency with which we must address it is even more pronounced today than it was then. In early January 2020, the backlog was a little over 1 million cases.<sup>3</sup> Today, it has swelled to over 2.6 million cases and is increasing daily.<sup>4</sup> I am here to tell you that the immigration courts are in crisis.

Today, approximately 700 Immigration Judges are responsible for adjudicating these cases. That works out to be, on average, over 3,700 cases per judge. Some of my colleagues have so many cases in the queue at their courts that they could be setting trials into 2027 as they simply don’t have earlier space on their dockets. This increase in the backlog comes even as our judges have completed an astonishing 68% more cases as compared to the last fiscal year. At current staffing levels, the math is clear – the courts simply cannot bring down that backlog number under the current system for years into the future.

The placement of the immigration courts within the DOJ has created two fundamental problems, both of which have contributed to the backlog. First, because the DOJ is a law enforcement agency, it lacks the institutional expertise to manage an independent court and understandably prioritizes its law enforcement functions at the expense of the immigration courts. Second, the politics of immigration enforcement are routinely interjected into the adjudicatory functions of the immigration court system itself through the direct management of the immigration courts by

<sup>2</sup> Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings*, June, 2022, OIG Recommendation 12 at 36, available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>; Hon. Ashley Tabaddor, Hearing on “Strengthening and Reforming America’s Immigration Court System,” April 18, 2018, available at <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

<sup>3</sup> Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *Pending Cases, New Cases, and Total Completions* (data generated October 19, 2021), available at <https://www.justice.gov/eoir/page/file/1242166/download>.

<sup>4</sup> See TRAC Immigration, *Immigration Court Backlog*, August 2023, available at <https://trac.syr.edu/phptools/immigration/backlog/>.

the Office of the Deputy Attorney General, to which the EOIR Director reports.

The DOJ's management of the immigration courts during the pandemic is a clear example of its inability to effectively lead. The pandemic forced state and federal courts across the country to quickly pivot to online hearings to ensure they could continue to meet their missions. The immigration courts did not. It took seven months before the immigration courts began to allow even a handful of judges to conduct hearings remotely. When faced with the crisis of the pandemic, the DOJ appeared to have neither the ability nor the will to adjust.

Even aside from the court's pandemic failures, the immigration courts' technology failings have substantially contributed to the backlog. The DOJ has failed in its court technology modernization. In 2000, EOIR stated that the immigration courts would be implementing electronic filing by 2001.<sup>5</sup> The reality for immigration court is that to this day, electronic filing using EOIR's ECAS (EOIR Courts & Appeals System) has yet to materialize for a substantial portion of the pending cases because they are still paper files and the system simply cannot accommodate the sheer number of cases and users accessing it. Further, ECAS does not fully interface with the agency's back-end legacy systems, requiring intensive and costly staff support.

The limited electronic systems currently in place fail on a regular basis, with judges frequently unable to enter orders or access electronically filed documents. The system's public-facing ECAS filing system likewise has substantial down time,<sup>6</sup> resulting in delays and frustrating judges and the practitioners interfacing with it.

The agency had previously made great progress in enabling judges to conduct hearings outside the courthouse through the acquisition of special laptop computers that could create an electronic record of immigration court hearings. These computers were used extensively during COVID and worked well. Unfortunately today, EOIR is reversing the initiative rather than expanding the program contravening an Office of Inspector General (OIG) recommendation.<sup>7</sup>

The immigration court's technology failings are particularly egregious because from 2001 to 2016, EOIR spent over \$80 million to modernize its paper-based case management system.<sup>8</sup> Yet, the Office of Inspector General found that EOIR failed to comply with proper oversight techniques in violation of the Federal Acquisition Regulation (FAR), DOJ policies, and the

<sup>5</sup> Government Accountability Office, Homeland Security and Justice, *Immigration Courts: Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges*, Statement of Rebecca Gambler, Director (April 18, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Gambler%20Testimony.pdf>.

<sup>6</sup> Department of Justice, Executive Office for Immigration Review, *ECAS Outage Log*, available at <https://www.justice.gov/eoir/ecas-outage-log>.

<sup>7</sup> Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings* (June, 2022), OIG Recommendation 12 at 36, available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>.

<sup>8</sup> Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards* (November 2022), available at <https://oig.justice.gov/sites/default/files/reports/23-003.pdf>.



contract award terms and conditions.<sup>9</sup>

In sharp contrast, by 2007, our nation's independently managed federal district courts had almost universally adopted an electronic case filing and docketing system called PACER and Case Management/Electronic Case Files.

DOJ's management failures have also included its inability to anticipate the demand for immigration court services and submit budget requests for the needed staffing.<sup>10</sup> The backlog is also a function of budgeting imbalances for immigration law enforcement which for years was not accompanied by concomitant resources for the immigration courts. With the immigration courts relegated to the proverbial basement office for years, the DOJ ignored congressional directives to hire immigration judge teams, and the critical shortage of support staff impedes the court's ability to get the backlog under control.

Democrat and Republican administrations share the failure of the DOJ's immigration court management. On the one hand, we are statutorily recognized as "immigration judges," wear judicial robes, and are charged with conducting ourselves consistent with canons of judicial ethics and conduct, in order to ensure our role as impartial decision-makers in the cases over which we preside. In every sense of the word, on a daily basis, when presiding over cases, we are judges: we rule on the admissibility of evidence and legal objections, make factual findings and conclusions of law, and decide the fate of thousands of individuals appearing before us each year. Last year, our decisions were final and unreviewed in 91% of the cases we decided.<sup>11</sup>

On the other hand, the DOJ considers immigration judges to be attorneys acting on behalf of the Attorney General, and has created layers of management judges and personnel who eventually report to the Deputy Attorney General. With multiple layers of management oversight and many manager judges even lacking in judicial experience, the trial immigration judges are not free to adopt effective streamlining techniques tailored to their particular jurisdictions and dockets. The immigration courts are run in a hierarchical fashion, and the trial immigration judges themselves have been marginalized by an agency that employs top-down edicts. Intense management-driven docket shuffling furthers shifting law enforcement "priorities," which change from one administration to the next. Some administrations prioritize recent arrivals, such as unaccompanied minors and adults with children, over pending cases involving criminal convictions. One administration uprooted approximately one third of all immigration judges in a calendar year to assign them temporarily to "border immigration courts" to create the "optics" of a full commitment to law enforcement measures, even at the expense of delaying thousands of cases at each home court. Other administrations have done just the opposite, prioritizing "aged" cases that had been pending for many years. Regardless of the priorities and rationales behind

<sup>9</sup> Id. at i.

<sup>10</sup> Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review's Fiscal Year 2019 Financial Management Practices* (June 9, 2020), available at <https://oig.justice.gov/sites/default/files/reports/a20068.pdf>.

<sup>11</sup> Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *New Cases, and Total Completions* (data generated July 13, 2023), available at <https://www.justice.gov/eoir/page/file/1060841/download>. Department of Justice, Executive Office for Immigration Review Adjudication Statistics, *Case Appeals Filed, Completed, and Pending* (data generated July 13, 2023), available at <https://www.justice.gov/eoir/page/file/1248501/download>.

them, such docket shuffling tactics have been a hallmark of successive administrations and have exacerbated the backlog of cases pending before the immigration court system as a whole. The DOJ's ineffective management of the immigration court has been documented in multiple OIG<sup>12</sup> and Government Accountability Office (GAO)<sup>13</sup> investigations, not to mention the almost doubling of the backlog despite significant increases in the number of immigration judges.

This political control over immigration court proceedings yields extreme pendulum swings that leaves apolitical judges overwhelmed as they navigate judicial responsibilities amid heavy political scrutiny. For example, for the period October 2018 to October 2021, a primary focus of the EOIR management judges was overseeing a flawed performance evaluation model which emphasized a dashboard displaying production quotas and time-based deadlines over judicial competence. A negative performance review due to failure to meet quotas and deadlines could have resulted in termination of employment despite the legal duty of immigration judges, codified by regulation, to exercise independent judgment and discretion in each of the matters before them. This conflict enables political priorities to seep into the very fabric of our judicial process as a focus on quotas at the expense of due process is code for speed over fairness. For the more than 350 judges, approximately 75% of the immigration judge corps, that were on probation during the use of these metrics, we know it weighed heavily on them as they made decisions on the bench - "Should I grant a continuance and risk termination?"<sup>14</sup> Those are the types of considerations that should never be contemplated in a judicial model. While these measures are no longer explicitly mentioned as points for evaluation, the dashboard is still in use capturing data under this flawed system of evaluation, and judges have been reminded at the end of the fiscal year to record their data for future reference. This is not to say the immigration court should not use metrics to monitor progress. Metrics play an important role in efficiently managing a court. Metrics, however, can not interfere with due process and a judge's ability to fairly hear cases, and the flawed metrics still in use continue to undermine the independent judgment of immigration judges across the country. This is particularly problematic for the over 200 judges who have been hired in the past two years and therefore have no protections from termination whatsoever.

Politics cannot be a factor in appointments, promotions, or judicial decision-making. Politics has no place in a discussion about adjudication if our system is to be considered apolitical and fair. In short, the mission of the DOJ does not align with the mission of a court of law that mandates independence from all other external pressures, including those of law enforcement priorities. It seriously compromises the very integrity of the immigration court system.

<sup>12</sup> Department of Justice, Office of Inspector General, *Limited-Scope Review of the Executive Office for Immigration Review's Response to the Coronavirus Disease 2019 Pandemic* (April 22, 2021), available at <https://oig.justice.gov/reports/limited-scope-review-executive-office-immigration-reviews-response-coronavirus-disease-2019>; Department of Justice, Office of Inspector General, *Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards* (November 2022), available at <https://oig.justice.gov/sites/default/files/reports/23-003.pdf>; Department of Justice, Office of Inspector General, *Limited-Scope Inspection and Review of Video Teleconference Use for Immigration Hearings* (June 2022), available at <https://oig.justice.gov/sites/default/files/reports/22-084.pdf>.

<sup>13</sup> Government Accountability Office, *Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges* (April 26, 2023), available at <https://www.gao.gov/products/gao-23-105431>.

<sup>14</sup> See TRAC Immigration, *More Immigration Judges Leaving the Bench* (July 13, 2020), available at <https://trac.syr.edu/immigration/reports/617/>.

## THE ENDURING SOLUTION OF AN INDEPENDENT IMMIGRATION COURT

*An Article I Immigration Court is the Clear Consensus Solution that is Urgently Needed*

The solution to the crisis at the immigration courts is to remove the courts from the DOJ and create an independent, Article I immigration court. Under an Article I formulation, the immigration courts could more effectively and nimbly manage their own dockets, tackle their caseloads and implement an effective information technology system. This new immigration court would separate the politics of immigration enforcement from the needs of immigration adjudication.

Creating an independent, Article I immigration court is a good government solution. It will legitimize the integrity of immigration court outcomes and support the rule of law. An independent immigration court will refocus authority to the immigration judges hearing the cases so they can manage their own dockets. It will allow the immigration court to fulfill the role contemplated by Congress in the carefully crafted immigration enforcement structure, which created the immigration courts as a neutral balance between the interests of the individuals impacted by those laws and the American public. No longer will vacillating political priorities interfere with case adjudication, and the public that we serve will have greater confidence in the integrity of the process.

Band-Aid solutions cannot solve the persistent problems facing our immigration court. Experience has shown piecemeal solutions are inadequate. The problems compromising the integrity and proper administration of the immigration court underscore the need to remove it from the political sphere of a law enforcement agency and assure its judicial independence. Structural reform can no longer be put on the back burner. The DOJ has been provided years of opportunity to forestall the impending implosion at the immigration courts. Instead of finding long-term solutions to our problems, the DOJ's political priorities and law enforcement instincts have led our courts to the brink of collapse. With the misguided initiative to frequently shuffle dockets and to impose immigration judge production quotas and deadlines, the DOJ put accelerant on the fire and the integrity of the immigration courts has been significantly compromised.

The idea of creating an Article I immigration court, similar to the U.S. Tax Court, has been advanced as far back as the 1981 Select Commission on Immigration and Refugee Policy. Such a structure solves myriad problems which now plague our court: reducing the impact of policy swings on docket management; separating the decision makers from the parties who appear before them; protecting immigration judges from the cronyism of too close an association with immigration enforcement by DHS; assuring a transparent funding stream instead of obscured general budget items buried within a larger agency with competing needs; and eliminating top-heavy agency bureaucracy. In the last 40 years, a strong consensus has formed supporting this structural change. For years, experts debated the wisdom of far-reaching restructuring of the immigration court system. Now there is broad agreement that the long-term solution to the problem is to restructure the immigration court system. Examples of those in support include the American Bar Association, the Federal Bar Association, the National Association of Women

Judges, and the American Immigration Lawyers Association. These are the recognized legal experts and representatives of the public who appear before us. Their voices deserve to be heeded.

NAIJ urges you to take immediate steps to protect judicial independence and efficient resolution of cases at the immigration courts by enacting Article I legislation. Our nation's immigration courts are often the only face of American justice with which noncitizens interact. Our courts need to be an example of impartiality and due process which we would be proud for other countries to replicate. Failure to act will result in irreparable harm to the implementation of our nation's immigration laws as we know them.

RESPONSES OF HON. MIMI TSANKOV TO QUESTIONS  
SUBMITTED BY SENATOR KLOBUCHAR



October 30, 2023

Sent via email to: [record@judiciary-dem.senate.gov](mailto:record@judiciary-dem.senate.gov)

Senator Richard J. Durbin  
Chair  
United States Senate, Judiciary Committee  
Washington, D.C.

RE: Formal request from the Senate Committee on the Judiciary, Subcommittee on Immigration, Citizenship, and Border Safety for answers to attached questions for the record of the hearing entitled “Preserving Due Process and the Rule of Law: Examining the Status of Our Nation’s Immigration Courts” on Wednesday, October 18, 2023.

Dear Chair Durbin,

Thank you for the opportunity to answer additional questions following the Senate Committee on the Judiciary, Subcommittee on Immigration, Citizenship, and Border Safety hearing entitled “Preserving Due Process and the Rule of Law: Examining the Status of Our Nation’s Immigration Courts” on Wednesday, October 18, 2023.

**Question 1: During your testimony, you discussed some of the unique challenges with presiding over immigration cases. In your experience, how often are immigrants coming before your court adequately informed of their legal rights and options?**

It is my observation that the unrepresented respondents who appear on my docket have very limited understanding of the complexities of immigration law, immigration court proceedings,

how to complete applications for relief, and how to represent themselves in immigration court proceedings. They often do not speak or understand the English language, the dockets are very heavy with limited court time, and nearly all respondents request additional time to seek representation which causes delays in adjudication. Presiding over cases with unrepresented non-citizens are resource-intensive and require the court to expend additional resources.

The Department of Justice, Executive Office for Immigration Review, maintains a Legal Orientation Program (LOP), at which representatives from nonprofit immigration legal service organizations provide explanations about immigration court procedures. However, this resource is available to adult individuals who *are in* U.S. Department of Homeland Security (DHS) custody. Because the parties that appear on my docket at New York Federal Plaza Immigration Court are not in DHS custody, they do not benefit from the vast majority of the LOP resources including group and individual orientations, interactive general overviews of immigration removal proceedings and forms of relief, and access to self-help workshops. Of the nearly 2.8 million cases in the backlog nationwide,<sup>1</sup> only about one percent of the non-citizens are in custody and are able to access LOP resources.<sup>2</sup>

On most Tuesdays, the Catholic Charities Archdiocese of New York operates a ‘Helpdesk’ program (ICH) at the New York Federal Plaza Immigration Court on a ‘first come, first served - registration required’ basis. The purpose of the program is to educate non-detained respondents about the court process with the aim of helping them make more informed decisions about their cases. These free services are offered in a wide range of languages, and registrants gain access to individual information sessions, self-help workshops, *pro bono* outreach, and group information sessions. In addition, the New York Federal Plaza Immigration Court provides some limited self-help written materials, presented on a courthouse wall display, such as ‘How to File a Motion to Change Venue’, which assist individuals in learning about the immigration court process and their responsibilities.

**Question 2: The Legal Orientation Program (LOP) provides information to detained immigrants about their rights and the immigration court process. Have you presided over cases where an immigrant has received information or education from the LOP?**

I have presided over thousands of cases where the parties are in DHS custody who have had access to LOP program resources. Since I joined the bench in November 2006, I have presided at immigration courts in detention facilities located at Lancaster Immigration Court (California),

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<sup>1</sup> TRAC Immigration, Immigration Court Backlog, September 2023, *available at* <https://trac.syr.edu/phptools/immigration/backlog/>.

<sup>2</sup> TRAC Immigration, Immigration Detention Quick Facts, September 24, 2023, *available at* [trac.syr.edu/immigration/quickfacts/detention.html#detention\\_held](https://trac.syr.edu/immigration/quickfacts/detention.html#detention_held).

Tacoma Immigration Court (Washington), Aurora Immigration Court (Colorado), Varick Immigration Court (New York), Laredo Immigration Court (Texas), and San Francisco Immigration Court (California). It is my observation that the adjudicative process benefits from the LOP program because access to its resources enables non-citizens to make informed decisions about their cases, and enables the court to conserve limited resources and support efficiency and judicial economy.

Sincerely,



Mimi Tsankov  
President  
National Association of Immigration Judges  
c/o New York Federal Plaza Immigration Court  
26 Federal Plaza, Room 1237  
New York, NY 10027



**STATEMENT OF MARY SMITH  
on behalf of the  
AMERICAN BAR ASSOCIATION**

to the

**SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,  
AND BORDER SAFETY  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

for the hearing on

**"Preserving Due Process and the Rule of Law: Examining the  
Status of Our Nation's Immigration Courts"**

**October 18, 2023**

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036  
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Chair Padilla, Ranking Member Cornyn, and members of the Subcommittee:

On behalf of the American Bar Association (ABA), I appreciate the opportunity to submit this statement for the record of the Subcommittee on Immigration, Citizenship, and Border Safety's October 18, 2023 hearing on "Preserving Due Process and the Rule of Law: Examining the Status of Our Nation's Immigration Courts."

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As a national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

The health of all our nation's court systems is of paramount importance to the ABA. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, may be a matter of life and death. Yet, the immigration court system lacks many basic structural and procedural safeguards that we take for granted in other areas of our justice system.

Our perspectives on the state of the immigration court system are informed in part by the first-hand experiences of ABA staff and volunteer lawyer members who provide legal services to individuals in immigration proceedings. The ABA has two longstanding pro bono projects that provide direct legal services. The South Texas Pro Bono Asylum Representation project (ProBAR), located in Harlingen, Texas, provides legal services to immigrants and asylum-seekers, adults and children, particularly in detention. It is the largest provider of legal services for unaccompanied immigrant children in the country. The Immigration Justice Project (IJP), located in San Diego, provides legal orientation for adult detainees as well as legal counsel for detained and non-detained adult migrants, many who are mentally incompetent to represent themselves.

The ABA's views are also informed by extensive studies and reports undertaken by our various sections, commissions, and committees. In 2010, the ABA Commission on Immigration published a comprehensive report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*.<sup>1</sup> In early 2019, the Commission released an update<sup>2</sup> to this report which examined developments over the period of 2010-2018. The updated report found that the state of the immigration court system had worsened considerably since the

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<sup>1</sup> American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010). [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf).

<sup>2</sup> American Bar Association Commission on Immigration, *2019 Update Report, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2019). [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_2.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf).

initial 2010 report. At that time, we identified numerous issues hindering due process and the fair administration of justice in the immigration court system. Unfortunately, the number of cases pending before the immigration courts (about 262,000 cases at the time of the 2010 report) has increased an unprecedented backlog of more than 2,000,000 cases<sup>3</sup>, indicating that most of these issues continue today.<sup>4</sup>

While the backlog and increased wait times negatively affect the fairness and effectiveness of the immigration system, some current policies that aim to accelerate case resolution are further imperiling due process and the viability of the immigration courts.<sup>5</sup> While there are incremental reforms that could be implemented within the current structure, we ultimately believe the only way to resolve the serious system issues within the immigration adjudication system is through transferring the immigration court functions from the Department of Justice (DOJ) to a newly-created independent Article I court and ensuring that all individuals appearing in the courts have access to legal representation.

### **Establishing an Independent Immigration Court System**

One of the distinctive hallmarks of our democracy is an independent judiciary – the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake.

The immigration court system is currently housed within the DOJ. Immigration judges serve as career DOJ attorneys with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. They have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. In addition, under the current certification process, the Attorney General can refer cases to him or herself for consideration, essentially acting as chief judge.

Judicial independence in immigration courts also has been undermined by ever-changing directions from the executive branch. Administrations of both parties have used the immigration courts as an extension of immigration enforcement mechanisms by adjusting priorities to align with the prevailing enforcement agenda. Executive orders and policies that reshuffle immigration judges' dockets without input or reference to the status of any other pending matters are disruptive and counterproductive to the independence of the courts and the administration of justice. This approach undermines judges' ability to independently manage their courtrooms and to administer their dockets in a fair and efficient manner, as well as the public's perception of judicial neutrality and independence.

<sup>3</sup> U.S. Government Accountability Office, "U.S. Immigration Courts See a Significant and Growing Backlog," (Oct. 19, 2023), <https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog#:~:text=More%20than%202%20million%20cases,backlog%20are%20significant%20and%20widespread.>

<sup>4</sup> American Immigration Lawyers Association, "American Needs a Fair and Independent Immigration Court," (Oct. 20, 2023), <https://www.aila.org/advo-media/issues/immigration-courts>.

<sup>5</sup> National Association of Immigration Judges, "The Immigration Court- In Crisis and in Need of Reform," (Aug. 2019), [https://www.naij-usa.org/images/uploads/publications/Immigration\\_Court\\_in\\_Crisis\\_and\\_in\\_Need\\_of\\_Reform.pdf](https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf).

The immigration adjudication system has evolved numerous times in recent history, but there has been no major structural change since 1983, when EOIR was established.<sup>6</sup> The immigration court's continued existence within DOJ, with its personnel and operations subject to direct control by the Attorney General, who is also the chief law enforcement officer for the Federal government, is a fatal flaw to the reality, and perception, of independence. While incremental improvements might be made within the current structure, the immigration courts will not be, nor be perceived as, truly independent until the system is restructured to remove the courts from DOJ.

Proposals to create an Article I court system to replace the current immigration adjudication system are not new or novel. In 1981, the congressionally-created Select Commission on Immigration and Refugee Policy made such a recommendation in its final report. Several bills were introduced in the House of Representatives in the late 1990s.<sup>7</sup> More recently, many experienced and respected organizations have reached a similar conclusion. These include, among others, the American Immigration Lawyers Association, the Federal Bar Association, and the National Association of Immigration Judges. The ABA in 2006 urged that immigration judges and courts not be subject to the control of any executive branch cabinet officer. In 2010, we adopted a position specifically calling for the creation of an Article I court.<sup>8</sup>

In our view, any major court system restructuring should be aimed at attaining the following goals: (1) Independence – Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions without any improper influence, particularly where that influence makes the judges fear for the job security; (2) Fairness and perceptions of fairness – Not only must the system actually be fair, it must appear fair to all participants; (3) Professionalism of the immigration judiciary – Immigration judges should be qualified and experienced lawyers representing diverse backgrounds; and (4) Increased efficiency – An immigration system must process immigration cases efficiently without sacrificing quality, particularly in cases where noncitizens are detained.

The ABA believes that the establishment of an independent Article I court which includes a trial level and appellate level tribunal is the best option for meeting the goals and needs of the system. The Article I model is likely to be viewed as more independent in that it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government.

The primary benefit of establishing an Article I court system is to provide a forum for

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<sup>6</sup> DOJ EOIR, *Evolution of U.S. Immigration Court System: Post-1983*. <https://www.justice.gov/eoir/evolution-post-1983>.

<sup>7</sup> See H.R. 185, United States Immigration Court Act of 1999, 106th Cong. (1999); H.R. 4107, United States Immigration Court Act of 1998, 105th Cong. (1998); H.R. 4258, United States Immigration Court Act of 1996, 104th Cong. (1996).

<sup>8</sup> [https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010\\_my\\_114f.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010_my_114f.pdf).

adjudication that is independent from any executive branch department or agency. Removing the adjudication system from the DOJ, whose primary function is a law enforcement agency, is vital to assuaging concerns about fairness and the perception of fairness. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication.

An Article I court also should attract highly-qualified judicial candidates and help to further professionalize the immigration judiciary. History has shown the potential for the politicization of the hiring process and an inherent bias toward the hiring of current or former government employees. Removing the hiring function from the DOJ may also increase the diversity of experience in the candidate pool. Providing for a set term of sufficient length, along with protections against removal without cause, will similarly protect decisional independence and make Article I judgeships more attractive.

By attracting and selecting the highest quality lawyers as judges, an Article I court is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal. When appeals *are* taken, more articulate decisions would enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands requesting additional explanations of fact-finding.

These improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.

The ABA recognizes that restructuring alone would not immediately resolve all the challenges facing the immigration courts. Regardless of the structure of the system, the immigration courts will have to deal with challenges faced by all courts, such as funding, hiring personnel, technology, and day-to-day management. However, we believe that transitioning the system to an Article I court will bring long-term benefits to the government and those in the system.

#### **Ensuring Access to Counsel and Legal Information**

Ensuring due process in the immigration court system is fundamentally linked to access to counsel and legal information. The ABA has consistently emphasized the importance of increased access to legal services and legal information for noncitizens in immigration proceedings given that these services help noncitizens to navigate the complicated area of the law which, in turn, assists courts in making better informed and more efficient decisions.

The presence of competent counsel helps to clarify the legal issues, allows courts to make informed decisions, and can speed the process of adjudication.<sup>9</sup> Immigration judges

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<sup>9</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV.

otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens would thus facilitate the more efficient processing of claims and lessen the burden on the immigration courts. Moreover, whether a person has legal representation also has been shown to significantly impact the outcome of proceedings.

For these reasons, the ABA supports the right to appointed counsel for vulnerable populations, such as unaccompanied children and the mentally ill and disabled, as well as for those who are indigent. However, until such a policy is put in place, it is critically important to retain and expand services such as the Legal Orientation Program (LOP). The LOP is administered by EOIR, which contracts with non-profit organizations to provide information about the court process and basic legal information to individuals in immigration detention through group orientations, individual orientations, self-help workshops, and pro bono screenings and referrals. We appreciate Congress' past support for LOP through the provision of increased funding and urge your continuing support for and oversight of this vital program.

### **Conclusion**

The core principle of any fair adjudication system must be that independent and impartial judges decide cases on the merits, evaluating the facts and the law in each case, after a hearing that fully comports with due process. The current immigration court system fails to meet those goals in many respects. It is time for Congress to establish a truly independent Article I court and to address the need for improving access to counsel and legal information for individuals in the system.

Thank you for this opportunity to share our views.

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PA. L.REV. 1, 2 (2015), (finding that "involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody, and, once released, were more likely to appear at their future deportation hearings.").

# AFL-CIO

## STATEMENT FOR THE RECORD

Senate Judiciary Subcommittee on Immigration, Citizenship and Border Safety  
HEARING: *Preserving Due Process and the Rule of Law: Examining the Status of Our Nation's  
Immigration Courts*  
Wednesday, October 18, 2023

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 60 unions that represent 12.5 million working people, including immigrants and those who adjudicate their cases in court. We strive to ensure that every person who works in this country receives decent pay, good benefits, safe working conditions, fair treatment, and full due process.

Immigration judges work within the Executive Office of Immigration Review (EOIR) at the Department of Justice (DOJ) and are represented by the National Association of Immigration Judges, an affiliate of the International Federation of Professional and Technical Engineers, AFL-CIO. As individuals, immigration judges are limited from speaking out publicly, lobbying Congress, or providing feedback to DOJ on the performance of the Immigration Court. However, through their union, immigration judges speak independently of DOJ and advocate for NAIJ members' interests.

The union's current priorities include enhancing resources for our severely under-resourced courts in order to support the mission of adjudicating cases fairly and issuing decisions without delay. NAIJ has consistently advocated for hiring immigration judge teams that include adequate support staff for judges, which the agency has failed to do, despite clear directives from Congress. DOJ's neglect and poor execution of meeting courtroom infrastructure needs, from interpretation services to electronic filing technology to inadequate space for courts, has heightened the dysfunction in the immigration court. Insufficient and unequal access to representation for people who appear in the immigration court only increases processing delays, especially when cases involve vulnerable populations. While EOIR did successfully implement remote hearings during the pandemic – which helped facilitate representation for respondents and improved efficiency for EOIR – the agency is now scaling back remote hearings.

The NAIJ has long criticized the structural arrangements that house the immigration court within DOJ, a law enforcement agency. AFL-CIO joins NAIJ, the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association in calling for the immigration court to be made independent of DOJ in order to ensure due process, fairness, impartiality, and judicial independence.

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**American Federation of Labor and Congress of Industrial Organizations**

815 Black Lives Matter Plaza NW • Washington, DC 20006 • 202-637-5000 • [aflcio.org](http://aflcio.org)

**ELIZABETH H. SHULER**  
PRESIDENT

**FREDRICK D. REDMOND**  
SECRETARY-TREASURER

Over recent decades, NAIJ members have endured mismanagement and political interference in the immigration court system by DOJ leadership. Immigration judges have faced the imposition of arbitrary quotas, deadlines, and expedited hearing dockets that run contrary to judicial principles and treat courtrooms like assembly lines. Through successive administrations, EOIR has reassigned immigration judges away from their home dockets and directed them to hear cases at unsustainable rates.

When NAIJ raised concerns about their eroding judicial integrity during the Trump administration, DOJ took the extraordinary step of decertifying their union. This was a direct attack not only on federal employees' bargaining rights, but also on the independence of the immigration court. Attempting to silence the voices of immigration judges by busting their union coincided with broader efforts to remove due process and resources from the immigration court and strip adjudication authority, all of which must now be intentionally and thoughtfully reestablished. Immigration judges' expertise on the inner workings of these high stakes courts is critical to informing much-needed reforms.

NAIJ continues to serve as a critical public voice on behalf of immigration judges and restoring their collective bargaining rights is necessary to promote judicial efficiency and ensure accountability for DOJ. NAIJ seeks to restore productive labor-management relations and union rights for immigration judges so that frontline immigration court employees can better serve EOIR's mission, engage with DOJ to proactively identify and solve problems, and perform their duties in a manner that respects the due process rights of all parties who appear in the immigration court.

The disparate missions of DOJ and the immigration court create an inherent conflict that hobbles the daily functioning of the system and contributes to the ballooning backlog of cases, which now number an astonishing 2.6 million and climbing. Administering a court system is incongruous with DOJ's role as a law enforcement agency. This inherent conflict of interest precludes the judicial independence of immigration judges and ultimately compromises due process for the parties appearing before the court. The solution to this problem is the establishment of an independent immigration court that operates outside the DOJ.

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**ELIZABETH H. SHULER**  
PRESIDENT

**FREDRICK D. REDMOND**  
SECRETARY-TREASURER

**Statement of the Federal Bar Association****Senate Judiciary Subcommittee on Immigration, Citizenship, and Border Safety  
October 18, 2023 Hearing  
“Preserving Due Process and the Rule of Law: Examining the Status of Our Nation’s  
Immigration Courts”**

The Federal Bar Association (FBA) appreciates the opportunity to submit this statement for inclusion in the hearing record. The FBA is the foremost professional association for attorneys engaged in the practice of law in the federal courts and federal agencies. Over 15,000 members of the legal profession – including approximately 2,000 federal judges – belong to the FBA through affiliation with nearly 100 local chapters around the country.

Today, the Executive Office for Immigration Review (EOIR) in the United States Department of Justice (DOJ) is a poor substitute for the professionally administered adjudicative system that Congress and the American people are entitled to expect. Accordingly, since 2013, the FBA has advocated replacing EOIR with an independent Article I “United States Immigration Court” to serve as the principal adjudicative forum under title II of the Immigration and Nationality Act.

This position reflects the FBA’s determination, after significant research and consideration of alternatives, that an independent Article I court would best provide more timely and effective adjudication without making changes to substantive immigration law. As part of its advocacy, key members of the FBA Immigration Law Section and other FBA members have worked for several years to draft model legislation that formed the basis for the “Real Courts, Rule of Law” legislation introduced in 2022 by Rep. Zoe Lofgren (H.R. 6577) and reported favorably by the House Judiciary Committee in the 117<sup>th</sup> Congress.

Congress has successfully established Article I courts in other areas of federal program administration that involve quasi-judicial decision making as well as executive policymaking and priority setting. The United States Tax Court, United States Court of Appeals for Veterans Claims, and United States Court of Appeals for the Armed Forces each perform an adjudicative function that originated within a civilian or military agency. In response to concerns about the agencies’ ability to adjudicate with fairness and impartiality, Congress established independent Article I courts to perform such functions with no impact on executive prerogatives. This history demonstrates Congress’s repeated recognition that independent review by a “real” court outside the program agency is the sine qua non of faithfully adjudicating rights and responsibilities in matters governed by public law.

With those precedents in mind, it is noteworthy that, despite disagreements about other elements of immigration policy, there is broad consensus that the current system for adjudicating immigration matters is dysfunctional and deserves a complete overhaul. As currently structured, the system undermines efficient adjudication, denies due process, politicizes a necessarily impartial function, and deprives adjudicators of effective authority and autonomy. In reality, no mere “bandage” can fix this broken system and address an ever-growing backlog of two million cases. Only “major surgery” can restore it to full and proper functionality. The FBA believes that Congress should act as it has in other contexts to solve the problem.



This is not a partisan issue: both political parties have from time to time raised concerns about the current system. It is simply a matter of good government that has nothing to do with substantive law or policy. Whatever other changes might be considered in the immigration context, it is long past time to abandon the “halfway there, not-quite” court in favor of a true Article I court that can do the job.

The FBA has identified certain problems with the existing structure on which the Subcommittee should focus. First, the EOIR is a top-heavy bureaucracy in which headquarters programs largely duplicate functions already performed in the government, thus draining resources that should be devoted to adjudication. Second, as you will hear from Judge Tsankov, EOIR affords immigration judges little control over their dockets and has failed to grant them the contempt authority authorized by Congress decades ago. These defects have helped produce a backlog estimated at over two million cases, with a multi-year delay on average between charging and hearing.

Third, the current system does not comport with what Americans generally consider “due process.” The DOJ views immigration judges and members of the Board of Immigration Appeals (BIA) merely as “attorneys representing the United States in litigation,” not as independent judicial officers. Subject to discipline if the Attorney General disagrees with their decisions, they lack the independence to decide cases solely according to the facts and the law. Given a broad perception that the immigration courts and BIA merely rubber-stamp the government’s enforcement actions, individuals often either do not pursue available relief or, conversely, appeal more frequently to the Article III courts, thus postponing finality and undermining the credibility of the system.

Though an Article I court would not single-handedly fix the backlogs or improve perceptions overnight, it would improve the situation considerably. Managed by the judges themselves rather than bureaucrats, an Article I immigration court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect. While some have proposed making EOIR a separate executive agency or placing responsibility for immigration adjudication within the regular federal court system, the former would simply relocate the bureaucratic problems, and the latter has been long opposed by the Judicial Conference of the United States. In the FBA’s view, the best option is an independent Article I immigration court that would not add or duplicate jobs but would best ensure decisional independence and promote timely, efficient justice.



**Statement for the Record by Kids in Need of Defense (KIND)**

**“Preserving Due Process and the Rule of Law:**

**Examining the Status of Our Nation’s Immigration Courts”**

**U.S. Senate Judiciary Committee, Subcommittee on Immigration, Citizenship, and Border Safety**

**October 18, 2023**

Kids in Need of Defense (KIND) is the leading national organization working to ensure the safety and well-being of unaccompanied children at every phase of their migration journey. KIND was founded by the Microsoft Corporation and former United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 57,000 attendees in pro bono representation of these children, and formed pro bono partnerships with over 700 corporations, law firms, law schools, and bar associations. KIND’s social services program facilitates the coordinated provision to unaccompanied children of counseling, educational support, medical care, and other services. Additionally, the organization’s programs in Mexico and Central America work to address the root causes of forced migration and help protect children who return to their country of origin.

Through our work, KIND attorneys witness areas where the immigration law and court structure has fallen short of achieving the standards of due process and rule of law that are vital to ensuring legal protection for unaccompanied children and seeking to navigate the immigration system. In order to improve due process for unaccompanied children in immigration proceedings, we recommend that Congress and the Executive branch work together to ensure the provision of lawyers to all unaccompanied children, create specialized children’s dockets in each immigration court for the adjudication of unaccompanied children’s cases, and work to insulate the immigration courts from inappropriate political interference.

**Guaranteeing legal representation for unaccompanied children is essential to achieving due process and well-functioning immigration courts.**

KIND was founded on the belief that no child should be forced to appear in immigration court alone. As our work has expanded across the United States and through the region, we have seen that legal counsel is essential to ensuring due process for unaccompanied children in their immigration proceedings. Indeed, it is virtually impossible for children to navigate protection systems without lawyers to assess their eligibility for humanitarian protection, assist with case preparation, and advocate for them during adversarial hearings. Attorneys have a dramatic impact on children’s cases; recent data show that immigration judges were almost 100 times more likely to grant legal relief to unaccompanied children with counsel than to those without.<sup>1</sup>

This data demonstrates how much attorneys mean the difference between relief and deportation, and by extension, safety and danger for vulnerable children, but counsel for children is also essential for the immigration courts to function in an orderly and fair way. Attorneys help reduce waste of judicial resources by screening out inapplicable forms of protection, explaining the proceedings to children,

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<sup>1</sup> Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 17, Sept. 2021.

presenting clear materials and arguments to the court, potentially conferring with opposing counsel ahead of hearings, and ensuring that children appear for their hearings. These essential functions reduce strain on the courts by avoiding using court time unnecessarily and reduce burdens on judges and court staff.

As a matter of both fairness and efficiency, therefore, the U.S. government should ensure that all unaccompanied children in U.S. immigration proceedings have attorneys. To realize this vision, the Executive branch and Congress must ensure greater appropriation of funding for children's counsel; allocation of a larger proportion of existing funding to the provision of counsel; postponement of children's immigration court hearings until they obtain lawyers; and ultimately the passage and enactment of legislation, such as the Fair Day in Court for Kids Act, mandating counsel for every unaccompanied child.

Counsel for children is widely supported by the American public. A 2021 national survey of registered voters commissioned by KIND found that 77 percent of the electorate, including 86 percent of liberals, 80 percent of moderates, and 68 percent of conservatives, believe that unaccompanied children in immigration proceedings should be provided an attorney if they cannot afford one.<sup>2</sup> At present, many if not most unaccompanied children lack representation. Far from a novel problem, though, underrepresentation of unaccompanied children is a chronic one. In Fiscal Year 2013, for example, only 46 percent of unaccompanied children in removal proceedings had attorneys—in the following fiscal year, just 14 percent. Given the dire consequences of unaccompanied children facing removal proceedings alone, one child without a lawyer is too many. The U.S. government must finally and fully confront this systemic due process failure.

#### **Creating a Specialized Children's Docket for Unaccompanied Children's Cases**

As part of a holistic vision to create a child-centered approach to the processing of children's cases, KIND supports the establishment of a children's court or children's division of an independent immigration court to adjudicate children's cases that would focus on the best interests of children, including prioritizing child safety, permanency, and well-being. Until such a court is established, KIND is calling upon the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ) to renew and expand specialized children's dockets within each immigration court that would be dedicated to handling unaccompanied children's claims. Children's dockets should focus on ensuring due process, expanding child-friendly court practices, and streamlining applications for applicable legal relief for unaccompanied children's immigration cases.

The unique vulnerability of unaccompanied migrant children demands a unique system to adjudicate their claims. Often alone, these children face daunting obstacles in navigating the complex U.S. immigration system and obtaining potentially life-saving legal protection, and children's dockets could help ease part of this complexity. EOIR's Director David Neal recognized the value of children's dockets in a recent Policy Memorandum in which he writes: "Immigration Judges are reminded to employ the child-friendly practices described in other agency guidance, such as scheduling dedicated juvenile dockets, employing child-sensitive questioning, and allowing the use of a Friend of the Court, among other practices."<sup>3</sup> In

<sup>2</sup> Kids in Need of Defense, Public Support for Legal Representation of Unaccompanied Children, Oct. 2021, available at <https://supportkind.org/resources/national-polling-finds-overwhelming-public-support-for-ensuring-legal-representation-of-unaccompanied-children/>.

<sup>3</sup> EOIR, Policy Memorandum 21-08, Encouraging and Facilitating Pro Bono Legal Services, Nov. 2021, available at: <https://www.justice.gov/eoir/book/file/1446651/download>.

order to maximize fairness for unaccompanied children and efficiencies for the immigration courts, children's dockets should consistently utilize several elements:

- Training: Children's dockets should be overseen by a specially trained corps of judges who have experience working with children. Their training should include headquarters-level training in which non-governmental experts in children's cases and protection participate, and it should cover methods for explaining the proceeding to children; encouraging children to freely discuss the elements of their claims; child-sensitive questioning techniques, including trauma-informed interviewing and adjudication methods; and an understanding of the limits of a child's ability to provide testimony. Department of Homeland Security (DHS) attorneys representing the government in these cases should also be trained in child-sensitive practices and children's unique claims for immigration relief.

Specialized judges and attorneys steeped in considerations and procedures affecting the adjudications of children's cases would create new efficiencies that will streamline the court's operations in addition to strengthening due process. For example, personnel expert in children's issues would be better able to identify claims for relief and potential non-adversarial procedures that may be both less traumatic for children and less resource-intensive for courts, such as applications for relief that could be completed entirely through USCIS.

- Child-focused Adjudications: Specialized children's dockets should employ a less adversarial approach than immigration court proceedings designed for adults, and they should utilize a model that places children at the center of the proceedings. Judges, DHS attorneys representing the government, USCIS, and the child's representatives should operate with the goal of identifying options available to the child consistent with the law. This approach will reduce the burden on EOIR, DHS, and USCIS by limiting duplication of efforts. It will also increase the likelihood of a just result in the child's case.
- Coordination with Legal Services Organizations: Judges and administrators overseeing children's dockets should coordinate with the legal service providers and pro bono attorneys that serve unaccompanied children in their jurisdiction with the goal of ensuring that every unaccompanied child has representation. Opportunities for collaboration include calendaring children's cases on consistent days so that attorneys can be present at court to meet unrepresented children; providing space for nonprofit organizations and pro bono attorneys to meet with children; and closing children's cases until and unless they are able to secure a lawyer. Specialized children's dockets could also help ensure that children are connected to needed services that are responsive to the outcome of their immigration case, including education, health, or counseling services, and reintegration services for children who will be returning to their country of birth. By helping ensure legal counsel for children, these dockets would minimize unneeded court time and, in many cases, prevent delays in proceedings that would otherwise be necessary to afford children an opportunity to obtain counsel in the first place.

#### **Insulating the immigration courts from the political branches.**

The current structure of the immigration courts—housed within DOJ—leaves the courts too susceptible to political interference that reduces judicial independence and has been used to harm unaccompanied children and others with proceedings before the courts. This includes Attorney General authority to issue precedential decisions and changes to policy governing immigration judges and courts. KIND supports

the establishment of an independent, Article I immigration court in order to improve due process, reduce political influence, and increase judicial independence. This new court should include a separate children's division with specially trained judges and government attorneys to address the unique needs of children in immigration court.

#### Certification authority

Under current law, the Attorney General has "certification" authority to transfer cases before the Board of Immigration Appeals (BIA) to him or herself. The Attorney General can also reopen and self-refer cases that were previously decided by the BIA. The Attorney General's decisions in these cases have precedential and binding effect on immigration judges and the BIA. This broad authority has been misused to alter immigration law in the past, and it almost certainly will be misused in the future. Creating an independent court housed outside DOJ would remove this problematic authority.

For example, in some certification decisions in the past, the Attorney General limited immigration judges' authority to administratively close cases, grant continuances, or terminate proceedings. These precedents forced judges to proceed with cases even where the individual was likely to receive legal relief from USCIS if given enough time, an especially important avenue of relief for unaccompanied children who have a right to seek asylum in the first instance from USCIS and many of whom qualify for Special Immigrant Juvenile status (SIJS), which is a form of relief that requires children to appear before USCIS and/or state family courts. Continuances are also a valuable tool to delay a case while an unaccompanied child tries to obtain a lawyer.

Other certification decisions in the past limited those who could qualify for asylum in ways that were particularly harmful to unaccompanied children, by for example, limiting claims pertaining to domestic violence or gang violence perpetrated by non-governmental actors and those based on membership in a family unit.

Certification authority also highlights an inherent conflict of interest in the current structure of the immigration courts. Although trial-level immigration prosecutors are housed at DHS, DOJ's Office of Immigration Litigation defends immigration cases on behalf of the government when the cases go to federal court. When decisions rendered under certification authority are reviewed in circuit courts of appeals, the Attorney General, who acted as judge in the decisions, supervises the government attorneys who are then playing the role of prosecutor.

#### Policy Changes

EOIR can alter their agency policies and practices in ways that have beneficial or detrimental impact on unaccompanied children's cases. In the past, EOIR's General Counsel issued a memorandum that stripped the status of "unaccompanied alien child" from some children and the corresponding legal protections that are owed to children with that status.<sup>4</sup> The memorandum advised that immigration judges are not bound by DHS's prior determinations that children meet the statutory definition of an "unaccompanied alien child" and may terminate their unaccompanied status. When children are stripped of this status, they lose the protections afforded to unaccompanied children by Congress under the Trafficking Victims Protection

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<sup>4</sup> Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), <https://cliniclegal.org/file/download/download/public/4778>.

Reauthorization Act of 2008 (TVPPRA),<sup>5</sup> which codified heightened legal procedures designed to uphold fairness for unaccompanied children in the U.S. immigration system and to prevent their return to danger.

Another EOIR memorandum titled “Guidelines for Immigration Court Cases Involving Juveniles” further impairs due process protections for unaccompanied children.<sup>6</sup> This memorandum replaced and weakened longstanding guidelines that directed the use of child-friendly practices, such as child-sensitive questioning techniques, to improve the ability of children to attend and meaningfully participate in immigration proceedings that may determine their safety and future. Specifically, the guidance, while referencing the potentially complicated and sensitive nature of children’s cases, restricts judges’ discretion to consider children’s best interests in creating child-appropriate courtroom environments and advances a skeptical tone toward claims by unaccompanied children. The guidelines also dilute measures designed to address the unique developmental needs of children, including by narrowing children’s opportunities to gain familiarity with hearing environments before they are required to deliver often painful and difficult testimony in support of their legal claims.

As noted above, immigration judges have at times been stripped of their ability to control their dockets, but other agency policy changes further eroded immigration judges’ independence and discretion. In the past, the agency worked to rush cases by implementing case completion quotas as part of immigration judges’ performance reviews. This change, which has since been revised, compelled judges to decide cases under strict deadlines or face potential discipline. The resulting pressure to rush through cases often deprived unaccompanied children of opportunities to secure essential legal representation and to obtain humanitarian protection. At times, it also led to nonsensical outcomes in which USCIS approved children’s applications for humanitarian protection, yet as those children waited for the visas associated with that relief to become available, judges knowingly ordered them removed from the United States. Immigration judges should have roles that prioritize their independence and recognize the significance of their duties. They should be evaluated on their ability to fairly administer the law, not simply the speed with which they can rush through cases.

These policy changes made at the agency level have significant legal and due process consequences for children. An independent immigration court would be insulated from the political agenda of the President and could not be as easily manipulated to remove such protections.

### **Conclusion**

The changes outlined above are part of the solution to greatly advancing due process and rule of law in unaccompanied children’s proceedings. KIND stands ready to work with Congress and federal agencies to implement these and other recommendations that move the courts toward fairer and more orderly operations.

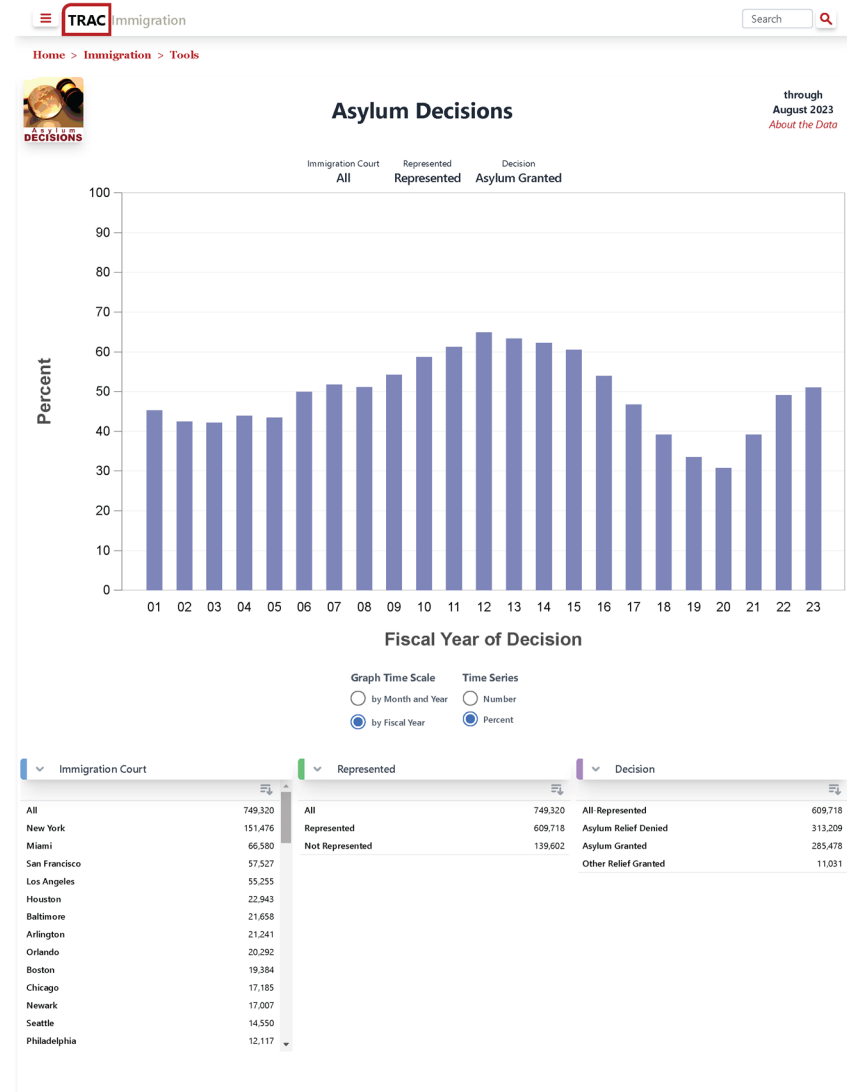
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<sup>5</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

<sup>6</sup> Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download>.

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