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To the Subcommittee on Border and Immigration
United States Senate
Committee on the Judiciary

For A Hearing Titled:

“Strengthening and Reforming America’s Immigration Court System”

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Room 226, Dirksen Senate Office Building
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Chairman Cornyn, Ranking Member Durbin, and Members of the Subcommittee, I thank you for inviting me here today to discuss this issue, which is not only critical to our national security, but also to our system of justice.

The Executive Office for Immigration Review (EOIR), an office within the Department of Justice (DOJ), is headed by a Director “who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals [BIA], the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3.”¹ The 334 Immigration Judges (IJs)² in the nation’s 58 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA.³

¹ *Office of the Director*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated May 30, 2017, available at: <https://www.justice.gov/eoir/office-of-the-director>.

² Joseph Tanfani, *Judges say Sessions’ plan to speed up immigration courts won’t work*, VIRGINIAN-PILOT, Apr. 12, 2018, available at: https://pilotonline.com/news/government/nation/article_1c52bb04-d893-5ada-83a0-15856a28bf7b.html.

³ See *Office of the Chief Immigration Judge*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 22, 2016, available at: <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>. That

The immigration courts are not the only tribunals within EOIR. That office also has jurisdiction over the Office of the Chief Administrative Hearing Officer (OCAHO).⁴ As its website explains:

[OCAHO] is headed by a Chief Administrative Hearing Officer who is responsible for the general supervision and management of Administrative Law Judges who preside at hearings which are mandated by provisions of law enacted in the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990. These acts, among others, amended the Immigration and Nationality Act of 1952 (INA).

Administrative Law Judges hear cases and adjudicate issues arising under the provisions of the INA relating to: (1) knowingly hiring, recruiting, or referring for a fee unauthorized aliens, or the continued employment of unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (employer sanctions); (2) immigration-related unfair employment practices in violation of section 274B of the INA; and (3) immigration-related document fraud in violation of 274C of the INA. Complaints are brought by the Department of Homeland Security, the Immigrant and Employee Rights Section in the Civil Rights Division of the Department of Justice (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices), or private individuals or entities as prescribed by statute.

I am personally and professionally familiar with each of these tribunals. From June 1992 to September 1994, I served as a law clerk to the late Hon. Joseph E. McGuire, Jr., an administrative law judge in OCAHO. From November 2006 to January 2015, I served as an IJ at the York Immigration Court in York, Pennsylvania. I also appeared before both the San Francisco and Baltimore Immigration Courts as an Assistant District Counsel for the former Immigration and Naturalization Service (INS). In addition, I performed oversight of EOIR as counsel to the House Judiciary Committee's Subcommittee on Immigration and Claims from July 2001 until I was appointed to the bench in November 2006. I also performed oversight of that office as Staff Director for the National Security Subcommittee in the House Committee on Oversight and Government Reform, from January 2015 until September 2016.

As EOIR's website⁵ states:

The primary mission of the [EOIR] is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.

⁴ *Office of the Director*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated May 30, 2017, available at: <https://www.justice.gov/eoir/office-of-the-director>.

⁵ *Executive Office for Immigration Review*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: <https://www.justice.gov/eoir>.

Unfortunately, and for various reasons that I will discuss below, EOIR has failed to live up to at least one aspect of its mission as it relates to the immigration courts: the expeditious administration of the Nation's immigration laws, as the Government Accountability Office (GAO) detailed in great depth in a June 2017 report.⁶ The backlogs identified by GAO affect each of the parties appearing before the immigration courts, both the alien respondents and the government, which is represented by attorneys from U.S. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security.

With respect to the aliens, delays of years awaiting a hearing on removability and applications for relief can mean that evidence will be lost or unavailable, and that witnesses may die or become unavailable before their cases can be heard. The Supreme Court has held that “in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”⁷ While this is true in many if not most cases, it is not true in the case of an alien whose due process rights have been affected by delays, or true in the case of an alien seeking relief for which the alien is eligible. In particular, aliens who are eligible for asylum must await adjudication on those applications before they are able to obtain status for their relatives abroad.

These delays affect the government, for many of the same reasons. In order for our immigration system to be credible, removable aliens who are not eligible for relief must be removed from the United States in an expeditious manner, consistent with due process. In addition, as with the alien respondents, government evidence and witnesses may be unavailable at a hearing set years in the future.

These backlogs also affect the immigration courts themselves. It is difficult as a judge to fairly adjudicate a case that is subject to multiple continuances over a period of years. The court's record is known as the Record of Proceedings (ROP). As the parties file evidence, those ROPs can become quite voluminous, sometimes running hundreds of pages in length. The judges must familiarize themselves with those ROPs for each individual hearing. Multiple continuances, and massive dockets, make this a daunting proposition, particular given the fact (as I detail below) that IJs have only limited case-preparation time.

To put the immigration-court backlogs into context, I will summarize and detail the findings of GAO in its June 2017 report, and offer my perspective on the reasons for those backlogs. Put simply, however, the immigration courts have suffered from neglect for years, and have also been adversely affected by failed immigration policies and convoluted federal court decisions, issues that the present administration is attempting to address.

⁶ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017 available at:

<https://www.gao.gov/assets/690/685022.pdf>

⁷ *INS v. Doherty*, 502 U.S. 314, 323 (1992), available at:

https://scholar.google.com/scholar_case?case=8707621299668215514&hl=en&as_sdt=6&as_vis=1&oi=scholar.

Summary of Immigration Court Backlogs as identified by GAO

On June 1, 2017, GAO issued a long-awaited report on the management of the immigration-court system by EOIR.⁸

In particular, GAO found:

- The immigration courts’ “case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [(FY)] 2006 through 2015 . . . primarily due to declining cases completed per year.”⁹
- The courts’ backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.¹⁰
- “[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015,”¹¹ and “[IJ]-related continuances increased by 54 percent from about 47,000 continuances issued in [FY] 2006 to approximately 72,000 continuances issued in [FY] 2015.”¹² Department of Homeland Security (DHS) attorneys and others complained that the “frequent use of continuances [by IJs] resulted in delays and increased case lengths that contributed to the backlog.”¹³
- The number of cases the immigration courts “completed annually declined by 31 percent between [FY] 2006 and [FY] 2015 -- from 287,000 cases completed in [FY] 2006 to about 199,000 completed in [FY] 2015”.¹⁴
- Total case completions declined, even though the number of IJs increased 17 percent.¹⁵

There are a number of reasons for the increase in the backlog:

- Resources. There are too few judges and support staff to do the job adequately.
- Increases in benefits and leave. IJs are government employees, and as they get more seniority, they receive more leave. This limits the amount of time that is spent hearing cases.

⁸ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017 available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁹ *Id.* “Highlights.”

¹⁰ *Id.* at 22.

¹¹ *Id.* “Highlights.”

¹² *Id.* at 68.

¹³ *Id.* at 27.

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 23.

- The “surge.” The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.¹⁶ EOIR responded by “prioritizing” certain “cases involving migrants who ha[d] recently crossed the Southwest border and whom DHS ha[d] placed into removal proceedings.”¹⁷ This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also more complicated¹⁸ than cases involving single adult males, requiring more courtroom time (and continuances) per case.
- Case law: Recent federal court decisions have complicated IJs removal decisions¹⁹, slowing proceedings and requiring additional continuances. In addition, until reversed by the Supreme Court²⁰, recent decisions from the Ninth Circuit Court of Appeals²¹ increased the number of aliens who were eligible for bond, requiring the scheduling of bond hearings and rescheduling of cases when aliens are released from custody.
- Obama administration immigration policies. Policies instituted in the last administration led to numerous continuances, as aliens sought counsel and applied for relief or discretionary closures, release, or termination based on those policies.
- IJ burnout. A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This, in turn, results in more reversals and remands, adding even more cases to the backlog.

Policies of the current administration will, if properly implemented and supported by Congressional appropriations, ease and begin to reduce the backlogs:

- The Attorney General has stated that he will hire significantly more IJs in the next two years, and streamline the hiring of IJs.²²
- Changes in border enforcement policies will limit the number of new cases that are added to the immigration courts’ dockets.
- Changes to interior enforcement policies will reduce the incentives for aliens to remain in the United States and fight meritless cases.

¹⁶ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated Oct. 18, 2016, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

¹⁷ *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated July 9, 2014, available at: <https://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

¹⁸ See *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 23, available at: <https://www.gao.gov/assets/690/685022.pdf>.

¹⁹ *Id.* at 27-28.

²⁰ *Jennings v. Rodriguez*, ___ U.S. ___ (2018), available at: https://scholar.google.com/scholar_case?case=14215050066188926450&hl=en&as_sdt=6&as_vis=1&oi=scholarr

²¹ See *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015), cert. granted sub nom. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>.

²² “Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”, U.S. Department of Justice, Office of Public Affairs, dated Apr. 11, 2017, available at: <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

- Rescission of policies from the previous administration will also reduce the incentives for aliens to remain in removal proceedings.

There is more that the administration can do, however:

- The Attorney General must continue to use his certification authority to set bright-line standards for IJs to follow in adjudicating cases.
- The Department of Justice (DOJ) must vigorously litigate cases in the federal circuit courts to provide the IJs with more workable rules to follow in deciding cases, and to limit variations in the law among the 11 circuits that handle immigration cases.

Findings of the GAO Report

GAO “is an independent, nonpartisan agency that works for Congress. Often called the ‘congressional watchdog,’ GAO investigates how the federal government spends taxpayer dollars.”²³ The impetus for the June 2017 report was a request from Congress that GAO “review EOIR’s management and oversight of the immigration court system, as well as options for improving EOIR’s performance, including through restructuring.”²⁴

EOIR, an office within DOJ, is headed by a Director “who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals [BIA], the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3.”²⁵ The some 334 IJs in the nation’s 58 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA.²⁶

GAO determined that EOIR’s “case backlog—cases pending from previous years that remain open at the start of a new fiscal year—more than doubled from fiscal years [FY] 2006 through 2015 . . . primarily due to declining cases completed per year.”²⁷ Specifically, GAO found that backlog rose from “about” 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.²⁸ Because of this backlog, GAO noted:

²³ *About GAO*, GOVERNMENT ACCOUNTABILITY OFFICE, undated, available at: <https://www.gao.gov/about/index.html>.

²⁴ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 3 available at: <https://www.gao.gov/assets/690/685022.pdf>.

²⁵ Office of the Director, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated May 30, 2017, available at: <https://www.justice.gov/eoir/office-of-the-director>.

²⁶ See Office of the Chief Immigration Judge, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, updated September 22, 2016, available at: <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

²⁷ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, Highlights, available at: <https://www.gao.gov/assets/690/685022.pdf>.

²⁸ See *id.* at 22.

[S]ome immigration courts were scheduling hearings several years in the future As of February 2, 2017, half of courts [sic] had master calendar hearings scheduled as far as January 2018 or beyond and had individual merits hearings, during which [IJ]s generally render case decisions, scheduled as far as June 2018 or beyond. However, the range of hearing dates varied; as of February 2, 2017, one court had master calendar hearings scheduled no further than March 2017 while another court had master calendar hearings scheduled in May 2021—more than 4 years in the future. Similarly, courts varied in the extent to which individual merits hearings were scheduled into the future. As of February 2, 2017, one court had individual hearings scheduled out no further than March 2017 while another court had scheduled individual hearings 5 years into the future—February 2022.²⁹

Interestingly, however, the increase in the case backlog did not directly result from an increase in new case receipts. GAO found that:

[T]otal case receipts remained about the same in fiscal years 2006 and 2015 but fluctuated over the 10-year period, with new case receipts generally decreasing and other case receipts generally increasing. Specifically, there were about 305,000 total case receipts in fiscal year 2006 and 310,000 in fiscal year 2015. The number of new cases filed in immigration courts decreased over the 10-year period but fluctuated within this period. New case receipts increased about four percent between fiscal year 2006 and fiscal year 2009, from about 247,000 cases to about 256,000 cases, but declined each year after fiscal year 2009, with the exception of an increase in fiscal year 2014. Overall, new case receipts declined by 20 percent after fiscal year 2009 to about 202,000 during fiscal year 2015.³⁰

While the number of new cases received fell, the number of “other” case receipts by the court, including motions to reopen, reconsider, or recalendar, and remands by the BIA, increased by 86 percent over this 10-year period, from 58,000 cases in FY 2006 to 108,000 cases in FY 2015.³¹

As new case receipts fell, and other case receipts rose, the immigration courts were completing fewer cases annually. Incredibly, GAO found, “the number of immigration court cases completed annually declined by 31 percent from fiscal year 2006 to fiscal year 2015—from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015,” even as the number of IJs increased by 17 percent over that 10-year period.³²

Even those statistics do not tell the whole story, according to the GAO: During this 10-year period, the number of cases that were decided on the merits declined from 95 percent of all cases

²⁹ *Id.*

³⁰ *Id.* at 21.

³¹ *Id.*

³² *Id.* at 22.

completed in FY 2006 to 77 percent completed in FY 2015, while the number of cases administratively closed increased.³³

A case is decided on the merits when the IJ resolves all of the outstanding matters in the case—that is, whether the alien is removable (or, in some cases an alien) and whether the alien should be granted any benefit or relief from removal that he or she seeks.³⁴ “Administrative closure,” on the other hand, “is a docket management tool that is used to temporarily pause removal proceedings.”³⁵ As GAO [noted](#):

*An [IJ] may grant administrative closure for various reasons, including in cases for which DHS exercises prosecutorial discretion and requests a case to be administratively closed because the respondent does not meet enforcement priorities A judge may also administratively close a case where the respondent plans to apply for certain immigration benefits under the jurisdiction of USCIS, such as an unaccompanied alien child’s initial asylum claim, or other forms of relief due to specific circumstances such as being the victim of a severe form of trafficking in persons or certain qualifying crimes. An [IJ] can return an administratively closed case to the calendar at his or her discretion or at the request of the respondent or DHS attorney. The primary consideration for an [IJ] in evaluating whether to administratively close or recalendar proceedings is whether the party in opposition has provided a persuasive reason for the case to proceed and be resolved on the merits; and in considering administrative closure, the judge cannot review whether an alien falls within DHS’s enforcement priorities.*³⁶

(Internal citations omitted).

The major driver in the backlog appears to be a significant increase in the amount of time that it is taking IJs to complete cases. In particular, GAO found that “[i]nitial case completion time,” that is, “the time period between the date EOIR receives the [removal case charging document, the Notice to Appear [(NTA) from the Department of Homeland Security] and the date an [IJ] issued an initial ruling on the case”³⁷ grew “more than fivefold,”³⁸ between FY 2006 and FY 2015, with the “median initial completion time for cases” increasing “from 43 days in FY 2006 to 286 days in FY 2015.”³⁹

³³ *Id.* at 24.

³⁴ See *Immigration Court Practice Manual*, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, at 75-78, available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf>.

³⁵ See *Matter of W-Y-U-*, 27 I&N Dec. 17, at 17-18 (BIA 2017) (citations omitted), available at: <https://www.justice.gov/eoir/page/file/958526/download>. That

³⁶ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 24 n. 48, available at: <https://www.gao.gov/assets/690/685022.pdf>.

³⁷ *Id.* at 25, n. 50.

³⁸ *Id.* at 25.

³⁹ *Id.*

One of the main reasons why IJs are taking more time to complete cases today than they did 10 years ago is an increase in the number of continuances that IJs have granted over that period. As the GAO noted (logically): “[C]ases that experience more continuances take longer to complete.”⁴⁰ After reviewing 3.7 million continuance records from FY 2006 through FY 2015, GAO concluded that continuances increased by 23 percent⁴¹ from FY 2006 to FY 2015 with “the percentage of completed cases which had multiple continuances”⁴² also increasing during that period. Most critically, the cases in which the largest number of continuances that GAO identified, those with “four or more continuances,” increased from nine percent of cases completed in FY 2006 to 20 percent of cases completed in FY 2015.⁴³ Those continuances made an impact, as GAO found: “[C]ases that were completed in [FY] 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete” that year.⁴⁴

Reasons for the Increased Backlog

Why was there such a stark increase in the backlog of cases, and decrease in the percentage of cases completed? A variety of factors, some of them susceptible to analysis, others less so, contributed to what has become a vicious circle of backlog, delay, and continuance.

Resources

The first is resources. There are, simply put, too few judges (and complementary staff) to adequately do the job. There are approximately 350 IJs, including Assistant Chief IJs in the field who hear some cases.⁴⁵ According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, through February 2018, there were 684,583 pending cases in the nation’s immigration courts.⁴⁶ This means that there are approximately 2,005 pending cases per IJ. GAO determined that the average IJ completed 807 cases in FY 2015.⁴⁷ Therefore, even if no new cases were filed, it would take the immigration courts more than two years to complete their pending cases.

IJs are not the only human resource in short demand. In June 2009, TRAC reported that there were just under four IJs for each judicial law clerk (JLC).⁴⁸ As TRAC noted, JLCs “perform

⁴⁰ *Id.* at 68.

⁴¹ *Id.*, Highlights.

⁴² *Id.* at 69.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Executive Office for Immigration Review: An Agency Guide 2017*, EXEC. OFFICE FOR IMMIGRATION REVIEW, Dec. 2017, available at: https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

⁴⁶ *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Court*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), Feb. 2018, available at: http://trac.syr.edu/phptools/immigration/court_backlog/.

⁴⁷ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 23, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁴⁸ *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, SYRACUSE UNIVERSITY, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), Jun. 18, 2009, available at: <http://trac.syr.edu/immigration/reports/208/>. But

many functions that can help [IJ]s handle their caseload . . . [and] are hired each year for temporary one-to-two year positions from recent law school graduates through the Attorney General's Honors Program.”⁴⁹ The fewer hours of a JLC’s time that an IJ can draw upon, the more time an IJ must spend doing research on unique issues and drafting opinions. GAO also found that a lack of “other support staff” (including clerical workers and legal technicians) was a “contributing factor” in the backlog.⁵⁰

Increasing Seniority of IJs

Second, the number of hours that those IJs actually spend hearing cases is, on average, shrinking as the judges gain seniority. According to GAO, 39 percent of all IJs are eligible for retirement,⁵¹ which means that many are senior government employees, at the high end of the pay and leave scale. Senior government employees, those who have 15 or more years of federal government service, are entitled to eight hours of leave each pay period, about 208 hours or 23 (nine-hour) days per year.⁵² There are also 10 federal holidays per year when court is not in session.⁵³ Finally, many if not most IJs are on a “flex schedule,” or “alternative work schedule” (AWS), meaning that they work eight nine-hour days and one eight-hour day per pay period, and get one extra day off, for an additional 26 “working” days off per year. Assuming that there are 260 working days in a year (five days in a work week times 52 weeks in the year), any potential IJ entitled to the full rate of leave receiving each federal holiday with AWS may only be working 201 of them (260-23-10-26), or just more than 40 work weeks per year. In addition, IJs receive one-half day every two weeks for case preparation (far too little time for this purpose), another 13 “working” days per year not spent in court.

As a result, as IJs work their way up the federal employment ladder, they may spend fewer and fewer actual hours in court hearing cases. This likely explains in part why, as GAO [found](#), continuances for “unplanned immigration judge leave—sick or annual leave” were up by 95 percent between FY 2006 and FY 2015.⁵⁴

The Surge

Third, the “surge” in families across the Southwestern border has also contributed to the backlogs and delays in completion of cases in the immigration courts.

The number of unaccompanied alien children apprehended along the border increased by 76 percent (to 68,541) between FY 2013 and FY 2014, while the number of “family units”

⁴⁹ *Id.*

⁵⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 27, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁵¹ *Id.* at 34.

⁵² See [Fact Sheet: Annual Leave \(General Information\), Annual Leave Entitlement](#), U.S. OFFICE OF PERSONNEL MANAGEMENT, undated.

⁵³ [2017 Holiday Schedule](#), U.S. OFFICE OF PERSONNEL MANAGEMENT, undated, available at: <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/>

⁵⁴ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, available at: <https://www.gao.gov/assets/690/685022.pdf>.

increased by 360 percent (to 68,445) during the same period, according to U.S. Customs and Border Protection (CBP).⁵⁵ EOIR responded on July 9, 2014 by “prioritizing” certain “cases involving migrants who have recently crossed the Southwest border and whom DHS has placed into removal proceedings” in order to ensure “that these cases [were] processed both quickly and fairly to enable prompt removal in appropriate cases, while ensuring the protection of asylum seekers and others.”⁵⁶ Those “new priority” cases consisted of “unaccompanied children who [had] recently crossed the southwest border; families who [had] recently crossed the border and [were] held in detention; families who [had] recently crossed the border but [were] on ‘alternatives to detention;’ and other detained cases.”⁵⁷ Specifically, “[t]o allocate resources with these priorities, EOIR [] reassign[ed IJs] in immigration courts around the country from their current dockets to hear the cases of individuals falling in these four groups,” and “rescheduled [c]ases not falling into one of these groups . . . to accommodate higher priority cases.”⁵⁸

This is likely a major contributing factor for the 112 percent increase between FY 2006 (3,296 cases) and FY 2015 (6,983 cases) in continuances for “[u]nplanned immigration judge leave — detail or other assignment” identified by GAO.⁵⁹

In addition, as “experts and shareholders” told GAO:

*[T]he nature of cases resulting from the surge exacerbated the effects of the backlog. Specifically, many of the surge cases were cases of unaccompanied children, which may take longer to adjudicate than other types of cases because, for example, such a child in removal proceedings could apply for various forms of relief under the jurisdiction of USCIS, including asylum and Special Immigrant Juvenile Status. In such cases the [IJ] may administratively close or continue the case pending resolution of those matters. Therefore, these experts and stakeholders told us that the surge not only added volume to the immigration court’s backlog, but resulted in EOIR prioritizing the cases of unaccompanied children over cases that may be quicker for EOIR to resolve.*⁶⁰

Increasing Legal Complexity

⁵⁵ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, dated October 18, 2016, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

⁵⁶ *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, dated July 9, 2014, available at: <https://www.justice.gov/opa/pr/departments-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

⁵⁷ *Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, undated, available at: <https://www.justice.gov/iso/opa/resources/214201479112444959.pdf>.

⁵⁸ *Id.*

⁵⁹ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 131, Appendix III, Table 15, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁶⁰ *Id.* at 27.

Fourth, federal court decisions have complicated the task facing IJs in deciding issues in removal cases in recent years, slowing the issuance of decisions. For example, GAO cited “EOIR officials” and IJs who:

[H]ighlighted increasing legal complexity as a contributing factor to longer cases and a growing case backlog. In particular, EOIR officials cited Supreme Court decisions in 2013 and 2016, which define analytical steps a judge must complete in determining whether a criminal conviction renders a respondent removable and ineligible for relief.⁶¹

The cases highlighted⁶² by the referenced “EOIR officials” did, in fact, complicate courts’ application of the “categorical approach” that IJs are required to apply in determining removability on many criminal grounds (*Mathis v. U.S.*⁶³ and *Descamps v. U.S.*⁶⁴), as well as the standard for determining whether a drug offense is “illicit trafficking in a controlled substance” and therefore an “aggravated felony” under section 101(a)(43)(B) of the Immigration and Nationality Act (INA) (*Moncrieffe v. Holder*⁶⁵). In certain instances, those decisions would have mandated remands from the BIA and federal circuit courts, and may have rendered otherwise-ineligible aliens eligible for relief; either scenario would have extended the length of removal proceedings for IJ review and briefing by the parties.

More directly, however, the Ninth Circuit’s decision in *Rodriguez v. Robbins*⁶⁶, both increased the number of cases on the immigration courts’ dockets in the Ninth Circuit, and gave aliens in that circuit cause to continue to litigate otherwise meritless cases. In that decision, the Ninth Circuit held that aliens in detention for more than six months must receive individualized bond hearings before an IJ to justify their continued detention, and be provided bond hearings every six months thereafter.⁶⁷

Under *Rodriguez*, an alien was entitled to a bond hearing wherein the **government** bore the burden of showing by **clear and convincing evidence** that the alien posed a risk of flight or a danger to the community.⁶⁸ This is a higher burden of proof than the “preponderance of the evidence” standard, “which only requires a showing that something is more likely than not to be

⁶¹ *Id.* at 27-28.

⁶² *Id.*

⁶³ *Mathis v. United States*, 136 S. Ct. 2243 (2016), available at: https://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf

⁶⁴ *Descamps v. United States*, 133 S. Ct. 2276 (2013), available at: <https://www.law.cornell.edu/supremecourt/text/11-9540>.

⁶⁵ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), available at: https://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

⁶⁶ *Rodriguez v. Robbins*, 804 F.3d 1060, 1078-85 (9th Cir. 2015) available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>, reversed and remanded sub nom. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

⁶⁶ *Rodriguez v. Robbins*, 804 F.3d 1060, 1086-87 (9th Cir. 2015), available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/10/28/13-56706.pdf>.

⁶⁷ *Id.* at 1078-85.

⁶⁸ *Id.* at 1086-87.

true.”⁶⁹ Moreover, unlike an initial bond hearing, where the alien bears the burden⁷⁰ of showing that he or she is not a danger or flight risk, as noted, under *Rodriguez*, the government bore that burden for continued detention past six months. This decision logically encouraged aliens with questionable cases to continue to fight their cases, knowing that they had a greater chance to be released after six months. That decision was reversed and remanded by the Supreme Court in February 2018.⁷¹

In addition, as GAO noted:

*[T]he percentage of completed cases which had multiple continuances increased from fiscal year 2006 to fiscal year 2015 and that, on average, cases with multiple[] continuances took longer to complete than cases with no or fewer continuances. Specifically, 9 percent of cases completed in fiscal year 2006 experienced four or more continuances compared to 20 percent of cases completed in fiscal year 2015. Additionally, cases that were completed in fiscal year 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete in fiscal year 2015.*⁷²

There has been, however, significant pressure from federal courts and the BIA on IJs to grant continuances, and little downside for the IJs in doing so.

By regulation, an IJ “may grant a motion for continuance for good cause shown.” Despite this permissive standard, a number of recent decisions have limited IJs discretion when it comes to denying continuances.⁷³

For example, in *Matter of Hashmi*⁷⁴, the BIA held:

In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise

⁶⁹ Michael Kaufman and Michael Tan, *Bond Hearings for Immigrants Subject to Prolonged Immigration Detention, in the Ninth Circuit*, AMERICAN CIVIL LIBERTIES UNION, December 2015, at 8, available at: https://www.aclu.org/sites/default/files/field_document/2015.12.11_rodriguez_advisory.pdf.

⁷⁰ *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016), available at: <https://www.justice.gov/eoir/file/881776/download>.

⁷¹ See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), available at: https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf.

⁷² *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁷³ 8 C.F.R. § 1003.29 (2017), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-33983.html>.

⁷⁴ *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3640.pdf>.

of discretion; and (5) the reason for the continuance and other procedural factors.

The BIA made clear, however, that while “[the IJ] may also consider any other relevant procedural factors . . . [c]ompliance with an [IJ]’s case completion goals . . . is not a proper factor in deciding a continuance request, and [IJs] should not cite such goals in decisions relating to continuances.”⁷⁵ Nor, the BIA held, were “[t]he number and length of prior continuances . . . alone determinative.”⁷⁶

Similarly, in *Simon v. Holder*⁷⁷, the Court of Appeals for the Third Circuit held that the BIA erred in denying a motion to reconsider a case in which an alien had been granted four continuances (over a period of almost two years), including a six-month continuance to seek adjustment of status. When, at the fifth hearing, there was no visa number available to the alien, alien’s counsel “sought a further continuance or administrative closure of the removal case until a visa number was available.”⁷⁸ The government attorney refused to agree, and the IJ ordered the alien deported.⁷⁹ The alien’s appeal to the BIA was dismissed, and the alien filed a motion to reconsider with the BIA that was denied.⁸⁰

In his motion to reconsider, the alien “argu[ed] that the BIA committed error by failing to address *Hashmi*,” in its denial, the BIA held “that the *Hashmi* factors were not applicable because [the alien] could not establish prima facie eligibility for adjustment: i.e., he could not establish that a visa was immediately available.”⁸¹ The Third Circuit held (more than five years after the case started) that the BIA erred in relying solely on “the remoteness of visa availability,” and remanded the case.⁸²

Cases involving pending visas are not the only ones in which IJs feel pressure to grant continuances. If an alien is unrepresented, the court will generally grant at least one continuance to find counsel. If the court subsequently goes ahead thereafter, notwithstanding the request of the alien for an additional continuance to find counsel, the case will likely be remanded, and the IJ runs the risk of being accused of denying due process. Similarly, an IJ who refuses to grant multiple continuances to an alien to file an application for relief, or to submit evidence in a case, may be accused by a reviewing court of violating due process. In such an instance, the IJ’s reputation would be besmirched, and the BIA or circuit court would simply remand the case, in essence granting the continuance requested.

If an IJ grants a continuance, on the other hand, there has traditionally been little downside for the court. Attorneys for the government (who work for U.S. Immigration and Customs

⁷⁵ *Id.* at 793-94.

⁷⁶ *Id.* at 794.

⁷⁷ *Simon v. Holder*, 654 F. 3d 440 (3d Cir. 2011), available at:

https://scholar.google.com/scholar_case?case=8844616972290064841&hl=en&as_sdt=6&as_vis=1&oi=scholarAr

e the non

⁷⁸ *Id.* at 441-42.

⁷⁹ *Id.* at 442.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 443.

Enforcement (ICE)) have in the past been limited by policy in the number of appeals that they are allowed to take. Moreover, an appeal from a continuance would be “interlocutory” in any case, that is, it “asks the [BIA] to review a ruling by the IJ before the IJ issues a final decision.”⁸³ As the BIA has often held, however: “To avoid piecemeal review of the myriad questions that may arise in the course of proceedings . . . [it does] not ordinarily entertain interlocutory appeals.”⁸⁴ For these reasons, and to conserve resources, ICE attorneys rarely appeal continuance grants, even if they do not like them: as GAO noted, government attorneys to whom it spoke told it “that granting multiple continuances in cases resulted in inefficiencies and wasted resources such as [those] attorneys having to continually prepare for hearings that continued multiple times.”⁸⁵

Past Administration Policies

Fifth, Obama administration policies exacerbated the backlog and increased the number of continuances. One example of such a policy is “Deferred Action for Childhood Arrivals” (DACA).⁸⁶ As U.S. Citizenship and Immigration Services (USCIS) explains DACA:

*On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.*⁸⁷

To be granted DACA, an alien has to have been born after June 14, 1981, have come to the United States before age 16, and “have continuously resided in the United States since June 15, 2007, up to the present time.”⁸⁸ USCIS states that even aliens in “removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA.”⁸⁹ In fact, many DACA-eligible aliens were in proceedings at the time that DACA was announced, and many sought (or were granted) continuances to apply for that relief. As one immigration practitioner has put it: “Requesting prosecutorial discretion or seeking time to have a DACA application adjudicated can serve as a

⁸³ *Board of Immigration Appeals Practice Manual*, § 4.14, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, dated July 27, 2015, at 69, available at: <https://www.justice.gov/eoir/file/431306/download>.

⁸⁴ See *Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007), available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3561.pdf>.

⁸⁵ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, Jun. 2017, at 69, available at: <https://www.gao.gov/assets/690/685022.pdf>.

⁸⁶ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Feb. 14, 2018, available at: <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca/>

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, updated Mar. 8, 2018, available at: <https://www.uscis.gov/archive/frequently-asked-questions#evidence>.

basis to seek a continuance. In other words, making such a request can serve as the ‘good cause’ required by the regulations.”⁹⁰

Another Obama administration policy that adversely affected the completion of removal proceedings is the aforementioned “prosecutorial discretion.” Generally, “[p]rosecutorial discretion’ is the authority of an agency or officer to decide what charges to bring and how to pursue each case.”⁹¹ Explaining early prosecutorial actions of the Obama administration, the Immigration Policy Council stated in a May 26, 2011 fact sheet:

[M]any community groups . . . called for exercising prosecutorial discretion in individual cases by declining to put people in removal proceedings, terminating proceedings, or delaying removals in cases where people have longstanding ties to the community, U.S.-citizen family members, or other characteristics that merit a favorable exercise of discretion.

Over the course of the summer [of 2011], the Obama Administration began to address these requests [and requests from Congress], relying on its ability to exercise prosecutorial discretion in deportation decisions. On June 17, 2011, [ICE] Director John Morton issued a memorandum directing ICE staff to consider many of these same factors when deciding whether or not to exercise prosecutorial discretion. On August 18, 2011, in a response to the letter from Senator Durbin and others, DHS Secretary Janet Napolitano declined to grant deferral of removal to DREAM Act students across the board, but indicated a willingness to re-examine individual cases. She announced a two-pronged initiative to implement the June 2011 Morton memo across all DHS divisions to ensure that DHS priorities remained focused on removing persons who are most dangerous to the country.

The new initiative involve[d] the creation of a joint committee with [DOJ to] review each of the nearly 300,000 pending removal cases to assess whether each case me[t] the high priority factors set forth in the June 2011 Morton memo. In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases [were to be] administratively closed following this review – that is, they [would] be removed from the active docket of the immigration courts.⁹²

⁹⁰ Miley & Brown, P.C., “Removal Proceedings – Practical Tips In A Post DACA/DAPA World”, undated, available at: <https://www.mileypbrown.com/Articles/Removal-Proceedings-Practical-Tips-In-A-Post-DACA-DAPA-World.shtml>.

⁹¹ “Understanding Prosecutorial Discretion in Immigration Law”, AMERICAN IMMIGRATION COUNCIL, May 26, 2011, available at: <https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law>.

⁹² *Understanding Prosecutorial Discretion in Immigration Law*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, dated September 2011, available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf.

As the ICE Acting Principal Legal Advisor stated in a memorandum (OPLA memo) describing the agency's actions during this period: "In late 2011 and 2012, [ICE] attorneys performed a complete review of all cases pending on the [EOIR] court dockets, exercising prosecutorial discretion as appropriate."⁹³

Thereafter, on November 20, 2014, then-Secretary of Homeland Security Jeh Johnson issued a new memorandum on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,"⁹⁴ also known as the "Enforcement Memo." The Enforcement Memo set the following immigration priorities for DHS:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

(a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

(b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;

(c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;

(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and

(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the [INA] at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

⁹³ Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Apr. 6, 2015, at 1-2, available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

⁹⁴ Jeh Johnson, Secretary of Homeland Security, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants", Nov. 20, 2014, available at: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;

(b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);

(c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and

(d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.⁹⁵

As the Enforcement Memo stated:

⁹⁵ *Id.* at 3-4.

*In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; **whether to settle, dismiss, appeal, or join in a motion on a case**; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.*⁹⁶

(Emphasis added). Providing guidance to ICE attorneys on the implementation of these policies, the OPLA memo directed ICE attorneys to:

*[C]ontinue to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of the enforcement priorities. OPLA should generally seek administrative closure or dismissal of cases it determines are not priorities. [ICE] attorneys should also review available information in incoming cases to determine whether, in a case that falls within an enforcement priority, unique factors and circumstances are present that may warrant the exercise of prosecutorial discretion. Understanding that these factors and circumstances may change as the case progresses, if further prosecutorial discretion review is requested by the respondent, the case should be reviewed again in light of any changed facts and circumstances. Keep in mind that prosecutorial discretion may encompass actions beyond offers for administrative closure or dismissal of the case, including waiving appeal, not filing Notices to Appear, and joining in motions.*⁹⁷

As a whole, these policies required IJs to consider numerous motions to continue and administratively close cases, adding to the burden on their dockets. These policies are likely the reason that, as GAO found, continuances based on a joint request to continue by both parties increased by 518 percent between FY 2006 (1,319 cases) and FY 2015 (8,615 cases).⁹⁸

These policies likely had another effect that is not quantifiable. Taken as a whole, DHS's purported "prosecutorial discretion" policies made it clear that most cases involving non-criminal aliens were not a priority for the Obama administration, and it would have been only natural for IJs to have placed a lower priority on completing those cases. It does not call the diligence of the IJ corps into question to suggest that many of the judges would have concluded that there was no reason to work overtime to complete matters that the president did not consider important, or to keep a docket of such cases on track.

⁹⁶ *Id.* at 2.

⁹⁷ Riah Ramlogan, Acting Principal Legal Advisor, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, dated April 6, 2015, at 2, available at: https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf.

⁹⁸ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 126, Appendix III, Table 13, available at: <https://www.gao.gov/assets/690/685022.pdf>.

This is especially true in light of the fact that the Enforcement Memo made clear that, as of November 20, 2014, final orders of removal issued before January 1, 2014 were not a priority.⁹⁹ Given the lack of emphasis on enforcement that memo represented, it would have been reasonable for any given IJ in a non-detained court to conclude that a removal order in today's case would soon no longer be tomorrow's priority, either.

IJ Burnout

This leads to the final factor: IJ burnout. A 2009 study found “many [IJs] adjudicating cases of asylum seekers are suffering from significant symptoms of secondary traumatic stress and job burnout, which, according to the researchers, may shape their judicial decision-making processes.”¹⁰⁰ IJs' working conditions have only gotten worse as the backlogs have grown.¹⁰¹ A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This would, in turn, result in more reversals and remands, adding even more cases to the backlog.

Solutions to the Backlog

Although the problem of the backlog in the immigration courts may seem insurmountable, and the causes of that backlog may appear intractable, in reality, solutions to most of these problems can be found, assuming that the president has the will to enforce the immigration laws and Congress has the will to provide adequate resources to do the job.

More Resources

If the Attorney General is to be believed, more resources will soon be available to the immigration courts.

In [remarks](#) to U.S. Customs and Border Protection (CBP) Officers in Nogales, Arizona on April 11, 2017, Attorney General Jeff Sessions “revealed that [DOJ] will add 50 more [IJs] to the bench this year and 75 next year,” and “highlighted the Department [of Justice's] plan to streamline its hiring of judges, reflecting the dire need to reduce the backlogs in our immigration courts.”¹⁰²

⁹⁹ Jeh Johnson, Secretary of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, U.S. DEPARTMENT OF HOMELAND SECURITY, Nov. 20, 2014, at 4, available at: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

¹⁰⁰ See Kirsten Michener, *Stress and burnout found among nation's immigration judges*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO, Jun. 25, 2009, available at: <https://www.ucsf.edu/news/2009/06/4258/stress-and-burnout-found-among-nations-immigration-judges>.

¹⁰¹ See Rachel Glickhouse, *Immigration judges are burning out faster than prison wardens and hospital doctors*, QUARTZ, Aug. 3, 2015, available at: <https://qz.com/469923/there-are-only-250-immigration-judges-in-the-united-states/>. And

¹⁰² *Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, Apr. 11, 2017, available at: <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal>.

It should be noted, however, that simply hiring more judges is not enough. EOIR must position those judges where the need is greatest, and support those judges with enough staff, including clerks, to enable those IJs to discharge their duties efficiently. That said, more judges are better than fewer.

As an added benefit, those judges will also (in many if not most instances) come in with less seniority than the IJs they join. This means that they will receive fewer hours of leave per pay period, and will therefore be available to hear more cases on an annual basis.

Change in Border Policy and Its Effect

A change in policy and rhetoric from the executive branch on immigration enforcement at the border and the interior will, however, likely be the biggest driver in lowering the number of incoming cases and shrinking the backlog.

Throughout the campaign, then-candidate Donald Trump made it clear that he intended to enforce the immigration laws if elected.¹⁰³ Backing up this rhetoric as it pertained to those entering illegally, on January 25, 2017, President Trump issued Executive Order 13,767, captioned “Border Security and Immigration Enforcement Improvements.”¹⁰⁴ While each of the sections of that order enhance immigration enforcement, four in particular will (if fully implemented) reduce the number of aliens who are placed into removal proceedings by reducing the number of aliens entering the United States illegally.

First, section 2 of that order makes it clear that it is the policy of the executive branch to:

(a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;

(b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;

(c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;

¹⁰³ See Miriam Valverde, *Compare the candidates: Clinton vs. Trump on immigration*, POLITIFACT, dated July 15, 2016 (“Presidential candidates Donald Trump and Hillary Clinton have taken opposite roads on their quest for immigration reform. Trump calls for mass deportations, migrant bans and a wall to keep away people from coming into the country, while Clinton wants a pathway to citizenship, immigrant integration and protection from deportation.”), available at: <http://www.politifact.com/truth-o-meter/article/2016/jul/15/compare-candidates-clinton-vs-trump-immigration/>.

¹⁰⁴ E.O. 13,767, “Border Security and Immigration Enforcement Improvements”, THE WHITE HOUSE, Jan. 25, 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

(d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; [and]

*(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.*¹⁰⁵

Section 5 of that order, captioned “Detention Facilities,” stated:

(a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

*(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign [IJs] to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.*¹⁰⁶

Section 6 of that order, captioned “Detention for Illegal Entry,” specified that the Secretary of Homeland Security:

*[S]hall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.*¹⁰⁷

Section 13 of that order, captioned “Priority Enforcement,” provided:

¹⁰⁵ *Id.* at section 2.

¹⁰⁶ *Id.* at section 5.

¹⁰⁷ *Id.* at section 6.

*The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.*¹⁰⁸

The theory behind these provisions appears to be that, if a foreign national considering illegal entry into the United States knows that he or she will be arrested and detained (and possibly prosecuted) pending a determination of removability and relief, that foreign national will be less likely to try to enter illegally. If this is true, the order ostensibly has had the intended effect, in part.

The number of aliens apprehended along the Southwest border dropped precipitously after the election and the issuance of this order, at least in the short term. Specifically, according to CBP, the number of apprehensions along the border and of inadmissible persons at ports of entry declined from 66,712 in October 2016 to 63,364 in November 2016, 58,426 in December 2016, 42,473 in January 2017, 23,563 in February 2017, 16,600 in March 2017, and to 15,780 in April 2017.¹⁰⁹ They began to increase in May 2017 (19,940), reaching a post-inauguration high of 40,511 (in December 2017) before declining again in January 2018 (35,822), with a slight uptick in February 2018 (36,695).¹¹⁰

Unfortunately, after Congress began to discuss amnesty for DACA beneficiaries (and others)¹¹¹, the number of apprehensions and inadmissible aliens skyrocketed, reaching 50,308 in March 2018.¹¹²

Of these numbers, CBP states Southwest border apprehensions in FY 2017 dropped 76 percent from a high of 47,211 aliens in November 2016 to 11,126 aliens in April 2017, before ticking up in May (to 14,535 aliens), and increasing to 22,537 in September 2017.¹¹³ Those apprehensions increased to 29,077 (in November 2017), before dropping slightly in December 2017 (28,978), January 2018 (25,978), and trended upward again in February 2018 (26,666), and as noted in March 2018 (37,393).¹¹⁴ The March 2018 number should be monitored, but should otherwise be considered an anomaly related to that amnesty discussion.

¹⁰⁸ *Id.* at section 13.

¹⁰⁹ *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION, Dec. 15, 2017, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

¹¹⁰ *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

¹¹¹ See Dylan Scott and Tara Golshan, *The Senate's failed votes on DACA and immigration: what we know*, VOX, Feb. 18, 2018, available at: <https://www.vox.com/policy-and-politics/2018/2/12/17003552/senate-immigration-bill-floor-debate>.

¹¹² *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

¹¹³ *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION, Dec. 15, 2017, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

¹¹⁴ *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

And according to CBP, total apprehensions along the Southwest border declined by 25 percent between FY 2016 and FY 2017.¹¹⁵

These numbers directly affect the backlog in the immigration courts, because the fewer aliens apprehended along the border, the fewer new removal cases will be filed in the immigration courts. In addition, it can be assumed that some significant proportion of those aliens would have claimed “credible fear” had they entered illegally.

As I explained in an April 2017 backgrounder¹¹⁶ on “Fraud in the ‘Credible Fear’ Process”:

A credible fear request is a precondition to filing a defensive asylum application for an alien in expedited removal proceedings under section 235(b) of the [INA]. That section of the INA allows immigration officers — rather than judges — to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of the INA. DHS has expanded its use of expedited removal over the years.

The most common instance in which DHS uses expedited removal is when it apprehends (1) an alien seeking admission without a proper entry document at a port of entry; or (2) an alien who is attempting to enter or who has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an asylum officer for a “credible fear interview.” If the asylum officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an IJ, where the alien can file his or her application for asylum.

Under section 235(b)(1)(B)(v) of the INA, “the term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.”

Once a “credible fear” case is referred to the immigration court, at least four separate hearings are held: a master calendar hearing at which pleadings are taken and the alien requests an opportunity to apply for asylum, withholding of removal, and/or protection under Article III of the Convention Against Torture; a request for a bond; a hearing at which the asylum application¹¹⁷ is filed; and at least one hearing on the merits of that application. While the first and second (or second and third) hearings are often held on the same docket, each requires at least a setting of the matter and takes up time on a docket. Moreover, there may be additional

¹¹⁵ See *id.*

¹¹⁶ Andrew R. Arthur, *Fraud in the “Credible Fear” Process, Threats to the Integrity of the Asylum System*, CENTER FOR IMMIGRATION STUDIES, April 2017, available at: <https://cis.org/Report/Fraud-Credible-Fear-Process>.

¹¹⁷ I-589, *Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Mar. 23, 2017, available at: <https://www.uscis.gov/i-589>.

continuances, when for example an alien seeks counsel or is released (requiring the case to be reset to a non-detained docket), or when additional time is sought to complete the application or to obtain evidence or witnesses. The fewer the “credible fear” cases, the fewer the hearings, and the lower the backlog, or at least the lower the increase in the backlog.

More importantly for purposes of the backlog, however, is the fact that the number of UACs and family unit members had, until March 2018, decreased¹¹⁸ significantly since the election and the inauguration. The number of UACs apprehended at the Southwest border dropped 86 percent between November 2016 (7,346 aliens) and April 2017 (997 aliens), and the number of family unit members apprehended declined 92 percent during the same period, from 15,588 aliens in November 2016 to 1,118 aliens in April 2017.¹¹⁹ The number of UACs and family unit members has increased since then, to a high of 4,075 UACs and 8,120 family unit members in December 2017, but those numbers decreased again (to 3,148 and 5,484, respectively) by February 2018.¹²⁰ In March 2018, those numbers rose significantly (to 4,171 and 8,882, respectively)¹²¹, but again, I consider these to be anomalies related to the amnesty discussions ongoing in the Congress. I believe that the president’s response in sending additional resources to the border¹²² will cause these numbers to trend down in upcoming months.

Such decreases will, by themselves, significantly relieve additional pressure on the immigration courts’ dockets, as explained above. And, as noted, cases involving UACs and families are generally more complex (and time-consuming), so a decline in the number of those cases will provide even more relief to the IJs.

That said, however, the reassignment of IJs under section 5(c) of the order has (or is likely to have) caused delays in the short term in the courts from which they were reassigned.¹²³ In the long run, however, by deterring future illegal entries of aliens who will never appear on court dockets, the result of this change in policy should be a net decrease in the immigration courts’ backlog.

Change in Interior Enforcement Policy

¹¹⁸ *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION, Dec. 15, 2017, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

¹¹⁹ *Id.*

¹²⁰ *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, Apr. 4, 2018, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

¹²¹ *Id.*

¹²² Oren Dorell, *Trump’s Mexico border deployment: Mission needs will set Guard size, Pentagon says*, USA TODAY, Apr. 5, 2018, available at: <https://www.usatoday.com/story/news/world/2018/04/05/trumps-mexico-border-deployment-mission-needs-set-guard-size-pentagon-says/491732002/>.

¹²³ See Jonathan Blitzer, “[What Will Trump Do with Half a Million Backlogged Immigration Cases?](#)”, *New Yorker*, June 20, 2017 (“Since March, New York City, for example, has had at least eight of its twenty-nine immigration judges reassigned, at least temporarily, to Texas and Louisiana, WNYC has reported. But in relocating them the federal government is exacerbating the city’s own significant backlog: roughly eighty thousand pending cases and an average delay of six hundred and twenty-five days per case.”), available at: <https://www.newyorker.com/news/news-desk/what-will-trump-do-with-half-a-million-backlogged-immigration-cases>.

A change in message and policy as it relates to interior enforcement he will likely have a positive effect on the backlog as well.

On the same day the president issued the Executive Order above, January 25, 2017, he issued Executive Order 13,768, “Enhancing Public Safety in the Interior of the United States.”¹²⁴ Section 2 of that order, captioned “Policy,” makes clear that the policy of the executive branch is to:

- (a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;*
- (b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;*
- (c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;*
- (d) Ensure that aliens ordered removed from the United States are promptly removed; and*
- (e) Support victims, and the families of victims, of crimes committed by removable aliens.*¹²⁵

That policy was echoed in statements made by Acting ICE Director Thomas Homan before Congress the.¹²⁶ In his June 13, 2017 written testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, Homan stated:

*To ensure the national security and public safety of the United States, and the faithful execution of the immigration laws, our officers may take enforcement action against any removable alien encountered in the course of their duties who is present in the U.S. in violation of immigration law.*¹²⁷

¹²⁴ “Executive Order 13,768, Enhancing Public Safety in the Interior of the United States,” the White House, dated January 25, 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

¹²⁵ *Id.*

¹²⁶ See Paul Bedard, “ICE chief rips critics of deportations, entering illegally ‘is a crime’”, *Washington Examiner*, dated June 13, 2017, available at: <https://www.washingtonexaminer.com/ice-chief-rips-critics-of-deportations-entering-illegally-is-a-crime/article/2625799>.

¹²⁷ Thomas Homan, “Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request”, testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, 115th Congress, 2017, available at: <https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland>.

Press reports state that in his oral testimony, Homan similarly told the Subcommittee: “If you’re in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried”¹²⁸

Homan contrasted ICE’s current efforts in enforcing the immigration laws with those of the prior administration:

*Under prior enforcement priorities, approximately 345,000, or 65 percent, of the fugitive alien population were not subject to arrest or removal. President Trump’s EOs have changed that. As a result, ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers issued are up 75 percent. Thus far in this fiscal year, through May 15, 2017, ERO has removed 144,353 aliens from the United States and repatriated them to 176 countries around the world; these are aliens who posed a danger to our national security, public safety, or the integrity of the immigration system. Of those removed, 54 percent (78,301) had criminal convictions. ERO has also issued 78,176 detainers and 63,691 charging documents; maintained an average daily population of 39,610 in detention; and monitored an average of 70,044 participants daily under the Intensive Supervision Appearance Program (ISAP) III contract or Alternatives to Detention (ATD) program.*¹²⁹

In the short run, the additional number of aliens arrested and detained will likely increase the dockets of the immigration courts. Again, however, by making it clear that all aliens who are removable are subject to arrest and removal, Director Homan’s statements (and ICE’s actions) should deter individuals from seeking to enter illegally, which will reduce the burdens on the immigration courts’ dockets in the long run.

Increased detention will also make it less likely that aliens with non-meritorious cases will remain in the court system. Logic and experience indicate that aliens enter the United States illegally to remain at large in the United States; assume for purposes of argument that they enter to work to provide for themselves and their families. The longer that the alien is able to remain at large and work, therefore, the better. If the alien is detained and cannot work, however, there is no longer an incentive to remain; instead, accepting an order of removal or a grant of the privilege of voluntary departure is therefore more advantageous to the alien than continued detention.

Limiting Dockets by Encouraging Self-Deportation

¹²⁸ Stephen Dinan, “No apologies: ICE chief says illegal immigrants should live in fear of deportation”, *Washington Times*, June 13, 2017, available at: <https://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/>.

¹²⁹ Thomas Homan, “Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request”, testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, 115th Congress, 2017, available at: <https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland>.

These policies and their implementation will also encourage aliens to leave the United States without ever coming to the attention of ICE. It is axiomatic that no one wants to be detained, and most aliens at large in the United States do not want to go through the process of deportation, either. As immigration enforcement becomes more of a certainty, therefore, aliens will be more likely to leave on their own. This is the “self-deportation” concept that Mitt Romney was excoriated for promoting in the 2012 election¹³⁰, but that has actually been demonstrated in at least one discrete context: aliens facing registration under post-9/11 policies, especially NSEERS.

NSEERS¹³¹, or the “National Security Entry-Exit System,” was a tool used by the former INS as part of its role in the War on Terror following the attacks of September 11, 2001. It was announced by then-Attorney General John Ashcroft in November 2002, and consisted of “registration through various ports-of-entry and registration through the Special Registration program.”¹³² As the Migration Policy Institute (MPI) noted in April 2003:

Port-of-entry registration began as a pilot program in September 2002 and has been implemented at all ports of entry (e.g., border crossings, sea ports, and airports) since October 2002. Port-of-entry registration applies to all foreign visitors entering the U.S. since October 2002 who are identified as presenting an elevated national security concern or who are from Iran, Iraq, Libya, Sudan and Syria. The criteria for identifying these individuals is based on intelligence information provided to immigration officers at ports of entry or to visa-issuing officials abroad. Upon entry to the U.S., foreign visitors are fingerprinted, photographed, and asked detailed background information. Some 49,712 foreign visitors had registered through port-of-entry registration as of March 25, 2003. In addition to the initial registration, foreign visitors must also appear at a U.S. immigration office if they plan on staying in the country for more than 30 days, and all are required to complete a departure check only at a designated departure port (of which there are approximately 100 nationwide) on the same day that they intend to leave the country.

* * * *

The Special Registration program, which was announced in November 2002 and officially launched in December 2002, requires all male foreign visitors, already in the U.S., aged 16 and older from specified countries to register at designated immigration offices within a given time period. This program, unlike the port-of-entry program that requires registration based on an elevated national security concern, depends on nationality-based criteria. To date, nationals from 25

¹³⁰ See Lucy Madison, “Romney on immigration: I’m for ‘self-deportation’”, *CBS News*, January 24, 2012, available at: <https://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation/>.

¹³¹ See Kris W. Kobach, “State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists”, Center for Immigration Studies, June 2004, available at: <https://cis.org/State-and-Local-Authority-Enforce-Immigration-Law>.

¹³² See Maia Jachimowicz and Ramah McKay, “‘Special Registration’ Program”, Migration Policy Institute, April 1, 2003, available at: <https://www.migrationpolicy.org/article/special-registration-program/>.

*countries have been identified to report to designated U.S. immigration offices to register. Except for North Korea, nearly all of the countries designated in Special Registration are predominantly Arab and Muslim. As of March 25, 2003, some 60,822 foreign visitors had registered through Special Registration.*¹³³

Of the 82,000 aliens who had signed up for “Special Registration,” 13,000 were found to be removable as of June 2003, and were placed into deportation proceedings.¹³⁴ As the *New York Times* reported at the time:

*For decades, illegal immigrants have often flourished because officials lacked the staff, resources and political will to deport them. But since the attacks on the World Trade Center and the Pentagon, the government has been detaining and deporting illegal immigrants from countries considered breeding grounds for terrorists.*¹³⁵

As an apparent consequence, those affected left rather than be deported. For example, according to the Pakistani embassy at that time, as a result of this program and other enforcement in the wake of those attacks, 15,000 Pakistanis in the United States illegally were “believed to have left for Canada, Europe, and Pakistan.”¹³⁶

The lesson is that if the immigration laws are enforced, and if aliens believe that there is a possibility that they could face removal, they will act in a rational manner and leave without ever having to face that process. Although it is impossible to quantify the effect of those departures on the immigration court system, that effect would be real, and would spare the immigration courts the resources that they would have expended on removal proceedings for those aliens.

Rescission of DAPA

Similarly, the rescission of the Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) by the Secretary of Homeland Security on June 15, 2017¹³⁷, ends a policy that needlessly extended removal proceedings, burdening the immigration courts. As USCIS has explained DAPA:

¹³³ *Id.* If

¹³⁴ Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, NEW YORK TIMES, June 7, 2003, available at: <https://www.nytimes.com/2003/06/07/us/thousands-of-arabs-and-muslims-could-be-deported-officials-say.html>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (‘DAPA’)*, U.S. DEPARTMENT OF HOMELAND SECURITY, Jun. 15, 2017, available at: <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

On November 20, 2014, [then-President Obama] announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include: . . . Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new [DAPA] program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.¹³⁸

MPI estimated that as many as 3.7 million aliens could have been covered by DAPA.¹³⁹ Many aliens who were in removal proceedings at the time that DAPA was announced sought, and were granted, continuances to assess their eligibility and apply for that benefit, even though federal District Court Judge Andrew Hanen blocked that program from going into effect in February 2015.¹⁴⁰ The ending of the program should clear the way for the completion of those cases.

Attorney General Decision on Certification Limiting Continuances

Significantly for purposes of the backlog, the Attorney General has already taken steps to address the issue of continuances in removal proceedings. As I explained above, there is currently little downside for an IJ who grants a continuance, but the judge may face problems if he or she denies one.

First, EOIR, on July 31, 2017, issued an operating policies and procedures memorandum (OPPM) to curb the number of continuances that IJs issue. That OPPM, 17-01¹⁴¹, captioned “Continuances,” states:

This [OPPM] ... is intended to provide guidance to assist [IJ]s with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an [IJ], and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in

¹³⁸ *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, dated April 15, 2015, available at: <https://www.uscis.gov/archive/2014-executive-actions-immigration>.

¹³⁹ MPI: *As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, MIGRATION POLICY INSTITUTE, November 19, 2014, available at: <https://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

¹⁴⁰ *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *affirmed* 809 F.3d 134 (5th Cir. 2015), available at: <https://www.documentcloud.org/documents/1668197-hanen-opinion.html>.

¹⁴¹ *Operating Policies and Procedures Memorandum 17-01: Continuances*, EXEC. OFFICE FOR IMMIGRATION REVIEW, Jul. 31, 2017, available at: <https://www.justice.gov/eoir/file/oppm17-01/download>.

order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.

This OPPM expands on an earlier one, OPPM 13-01¹⁴², which delineated in more general terms the factors that IJs should follow in granting continuances.

Importantly, the latest OPPM states:

*Overall, while administrative efficiency cannot be the only factor considered by an [IJ] with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an [IJ] must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, [IJs] should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.*¹⁴³

Noting the “strong incentive by respondents in immigration proceedings to abuse continuances,” the OPPM directs IJs to “be equally vigilant in rooting out continuance requests that serve only as dilatory tactics.”¹⁴⁴ The OPPM provides guidance to IJs to follow in considering requests for continuances for aliens to obtain counsel, for attorney preparation, and for continuances of merits hearings.¹⁴⁵ It also addresses the “rare” requests for continuances by the government.¹⁴⁶

In addition, the Attorney General has begun to use his “certification” or “referral” authority to address continuances in immigration proceedings. Notably, the Attorney General:

*[H]as authority to conduct de novo review of BIA decisions. . . . “The BIA is entirely a creation of the Attorney General,” and exercises only such authority as is delegated to it by the Attorney General. See 8 C.F.R. § 1003.1(d)(1) (2005). The Attorney General has retained full decision-making authority under the immigration statutes, including “full authority to receive additional evidence and to make de novo factual determinations.”*¹⁴⁷

¹⁴² *Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure*, EXEC. OFFICE FOR IMMIGRATION REVIEW, Mar. 7, 2013, available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf>.

¹⁴³ *Operating Policies and Procedures Memorandum 17-01: Continuances*, EXEC. OFFICE FOR IMMIGRATION REVIEW, July 31, 2017, available at: <https://www.justice.gov/eoir/file/oppm17-01/download>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Matter of A-H-*, 23 I&N Dec. 774, 779 n. 4 (A.G. 2005), review granted in part on other grounds sub nom. *Haddam v. Holder*, 547 Fed. Appx. 306 (4th Cir. 2013), available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3515.pdf>.

In *Matter of L-A-B-R-*, the Attorney General asserted this authority, inviting the parties in that proceeding, and interested amici, to file briefs addressing the following question:

*An [IJ] is authorized to "grant a motion for continuance for good cause shown." . . . In these cases, [IJs] granted continuances to provide time for respondents to seek adjudications of collateral matters from other authorities. Under what circumstances does "good cause" exist for an [IJ] to grant a continuance for a collateral matter to be adjudicated?*¹⁴⁸

(Internal citations omitted).

It is not entirely clear from the Attorney General's order what "collateral matters" are at issue in that case. The principle of granting continuances pending the adjudication of visa applications that are not before the court is well established in the current immigration law, however, and is likely at issue in that matter.

The Attorney General's final decision in that case should set limits on the ability of IJs to grant continuances, by specifying the parameters of their regulatory authority to do so "for good cause shown."¹⁴⁹ I believe that most IJs would prefer such guidance to a system in which they have scant ability to control their dockets without running the risk of a reviewing court finding that they have denied "due process" by denying continuances to aliens who have already been granted numerous continuances.

Other Certification Decisions

The Attorney General has also used his certification authority to begin the process of addressing other issues that have slowed the completion of immigration cases.

For example, in *Matter of Castro-Tum*, the Attorney General has requested briefing on whether IJs and the BIA have the authority to administratively close cases; if not whether they should be granted such authority; and if they do, whether the Attorney General should withdraw that authority.¹⁵⁰ He also asked for briefing on the question:

Are there any circumstances where a docket management device other than administrative closure—including a continuance for good cause shown . . . , dismissal without prejudice . . . , or termination without prejudice . . . —would be inadequate to promote . . . that objective [of "expeditious, fair, and proper resolution of matters coming before [IJs]"]? Should there be different legal consequences, such as eligibility to apply for a provisional waiver of certain grounds of inadmissibility under the immigration laws or for benefits under

¹⁴⁸ *Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1045661/download>.

¹⁴⁹ 8 C.F.R. § 1003.29 (2017), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-33983.html>.

¹⁵⁰ *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1022366/download>.

*federal or state programs, where a case has been administratively closed rather than continued?*¹⁵¹

(Internal citations omitted). Establishing bright-line rules for the administrative closure if removal proceedings will provide IJs with greater ability to use that authority, or alternative authorities, to maintain their dockets.

In *Matter of E-F-H-L-*, the Attorney General used his authority to vacate an earlier BIA decision of the same name, in which the BIA had held that “that a respondent applying for asylum and withholding of removal was ordinarily entitled to a full evidentiary hearing.”¹⁵² This decision will enable IJs to more quickly issue decisions in non-meritorious asylum cases.

Finally, in *Matter of A-B-*, the Attorney General requested briefing on the question:

*Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable “particular social group” for purposes of an application for asylum or withholding of removal.*¹⁵³

As I explained in a March 12, 2018 post¹⁵⁴ analyzing this case:

By way of background, section 208(b)(1) of the Immigration and Nationality Act (INA) gives the attorney general the authority to grant asylum to any alien who has applied for that protection “if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)” of the INA.

Section 101(a)(42)(A) of the INA, in turn, defines the term “refugee” as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 208(b)(1)(B)(i) of the INA, as amended by section 101(a)(3) of the REAL ID Act of 2005, sets forth the burden of proof for asylum applicants:

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must

¹⁵¹ *Id.* (internal citations omitted).

¹⁵² *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1040936/download>.

¹⁵³ *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018), available at: <https://www.justice.gov/eoir/page/file/1041481/download>

¹⁵⁴ Andrew Arthur, *Attorney General to Review Asylum Standards*, CENTER FOR IMMIGRATION STUDIES, Mar. 12, 2018, available at: <https://cis.org/Arthur/Attorney-General-Review-Asylum-Standards>.

establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

The Conference Report for the REAL ID Act reflects the fact that this amendment was necessary to correct anomalies and clarify standards in the application of the asylum provisions. It states, in pertinent part:

Burden of Proof and Central Reason: Paragraph 101(a)(3) codifies case law standards for granting asylum, both to resolve conflicts between fora and to codify precedential rules.

First, that paragraph would create a new clause 208(b)(1)(B)(i) in the INA. This clause codifies existing regulations and case law standards stating that the burden of proof is on the asylum applicant to establish eligibility as a refugee. This clause also will clarify the standard that an asylum applicant must meet to establish the motivation for persecution claimed.

...

As the Supreme Court has held: "since the statute makes motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial."

...

In explaining the Supreme Court's decision, the Ninth Circuit stated: "[I]n those cases in which a persecuted activity could stem from many causes, some protected by the statute and others unprotected, the victim must tie the persecution to a protected cause. To do this, the victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in undertaking the persecution." The BIA has explained the alien's burden as follows: an asylum applicant "bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on account of" one of the five protected factors.

The main issue in assessing motivation in an asylum context occurs in so-called "mixed motive" cases, where there is more than one possible motive for harm, one protected, others not. In requiring an asylum applicant to establish that at least one central reason for persecution was or will be one of the five factors for asylum relief, this subsection calls for an evaluation of whether the protected characteristic is central to the persecutor's motivation to act.

Finally, with respect to so-called "mixed-motive" claims, under this amendment, asylum may be granted where there is more than one motive for mistreatment, as long as at least one central reason for the mistreatment

is on account of race, religion, nationality, membership in a particular social group, or political opinion.

The relationship between the harm suffered or feared and the reasons for that harm in an asylum claim is referred to as the "nexus". As the Congressional Research Service (CRS) explained in its September 2014 report, "Asylum and Gang Violence: Legal Overview":

The refugee definition's proviso that the persecution be "on account of" a protected ground has been construed to require that there be a "nexus" between the harm that the alien has incurred or fears and the alien's race, religion, nationality, political opinion, or membership in a particular social group. To establish the requisite nexus, the alien must provide some evidence (direct or circumstantial) that the persecutor is motivated to persecute the victim because the victim possesses — or is believed to possess — the protected characteristic. The alien need not prove the actual, exact reason for the persecution.

Many asylum claims in recent years from Central America have related to the violence, and in particular gang violence, in those countries, magnified by the number of [UACs] if who have entered the United States in recent years, as CRS suggested.

In the report referenced above, CRS found:

When considered by the BIA or appellate courts in light of how the INA's definition of refugee is construed, claims to asylum based on gang-related violence frequently (although not inevitably) fail. In some cases, this is because the harm experienced or feared by the alien is seen not as persecution, but as generalized lawlessness or criminal activity. In other cases, persecution has been found to be lacking because governmental ineffectiveness in controlling the gangs is distinguished from inability or unwillingness to control them. In yet other cases, any persecution that is found is seen as lacking the requisite connection to a protected ground, and instead arising from activities "typical" to gangs, such as extortion and recruitment of new members. The particular social group articulated by the alien (e.g., former gang members, recruits) may also be seen as lacking a "common, immutable characteristic," social visibility (now, social distinction), or particularity.

Four of the five factors for asylum relief are fairly straightforward: race, religion, nationality, and political opinion. The BIA and the courts, however, have struggled with the parameters of "membership in a particular social group". In *Matter of the M-E-V-G-*, for example, the BIA held: "The phrase 'membership in a particular social group,' which is not defined in the Act, the [United Nations Convention Relating to the Status of Refugees], or the [United Nations Protocol

Relating to the Status of Refugees], is ambiguous and difficult to define." In *Fatin v. INS*, then-Judge (now Justice) Alito, writing for the Court of Appeals for the Third Circuit, noted: "Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.'"

In the gang violence context, this is complicated by the fact that, generally, as the BIA recognized in *Matter of Sanchez and Escobar*, "the tragic and widespread savage violence [in a general population] as the result of civil strife and anarchy is not persecution," and that, as the BIA recognized in *Matter of T-M-B-*, victims of crime (in that case, extortion) not related to one of the five factors for asylum relief have not been subject to "persecution" for purposes of that relief.

The BIA summarized these issues as they relate to gang violence in *Matter of M-E-V-G-*:

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.

Notwithstanding this, certain courts have held that aliens have been able to establish eligibility for asylum based on gang violence. For example, in *Hernandez-Avalos v. Lynch*, the Court of Appeals for the Fourth Circuit found that a Salvadoran national who had received death threats from Mara 18 members unless she allowed her son to join the gang had established eligibility for asylum. It held: "Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son," concluding that those "threats were ... made 'on account of' her membership in her nuclear family," a particular social group.

By providing IJs and asylum officers with better guidance on these issues, the Attorney General will be able to limit the number of claims (and in particular "credible fear" claims) that are considered in the immigration courts, and enable IJs and asylum officers to decide those cases more quickly.

Department of Justice Litigation

Finally, DOJ must fight vigorously for decisions that provide uniformity of law and "bright-line" rules for IJs to apply in real-world cases. Most people I talk to about my work as an IJ are surprised when I tell them that I handled more than 10,000 cases in just over eight years on the

bench. Because of the volume of cases they handle, IJs must be able to decide cases quickly, or run the risk that their dockets will be uncontrollable; otherwise, justice suffers, and the job becomes overwhelming. Uniform, clear standards of law are essential to this task.

In *Hawaii v. Trump*¹⁵⁵, its recent decision on the Executive Order¹⁵⁶ suspending entry of nationals from six countries in Asia and Africa, the Court of Appeals for the Ninth Circuit stated that a nationwide injunction of portions of that order was necessary “because ‘immigration laws of the United States should be enforced vigorously and uniformly.’” This is ironic coming from a court that has set rules for IJs to apply that vary significantly from those in the other circuits. The Supreme Court’s docket, however, is finite, so cases must be won or lost in the circuit courts. It is DOJ’s job to do so.

Conclusions on Immigration Court Backlogs

The backlogs in immigration courts are too large, but they are, to some degree, explained by the poor policies set by the executive branch in the recent past. There is much that needs to be done to remedy the problem, but the administration has taken some crucial first steps. It must follow through on those steps and its promises on immigration enforcement to reduce those backlogs, and Congress must also do its part by providing the needed funding to staff the immigration courts fully.

Immigration Court Restructuring

In its June 2017 report¹⁵⁷, GAO noted:

Some immigration court experts and stakeholders have recommended restructuring EOIR’s administrative review and appeals functions within the immigration court system—immigration courts and BIA—and OCAHO, with the goal of seeking to improve the effectiveness and efficiency of the system or, among other things, to increase the perceived independence of the system and professionalism and credibility of the workforce. To enhance these areas, these experts and stakeholders, such as individuals affiliated with professional legal organizations and former EOIR [IJs], have proposed changing the immigration court system’s structure, location among the three branches of government, and aspects of its operations.

¹⁵⁵ *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), order vacated by *Hawaii v. Trump*, 874 F. 3d 1112 (9th Cir. 2017), available at: http://cdn.ca9.uscourts.gov/datastore/uploads/general/cases_of_interest/17-15589%20per%20curiam%20opinion.pdf.

¹⁵⁶ Executive Order 13,780, “Protecting The Nation From Foreign Terrorist Entry Into The United States”, THE WHITE HOUSE, March 6, 2017, available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

¹⁵⁷ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73, available at: <https://www.gao.gov/assets/690/685022.pdf>.

Some background is necessary in order to put the current EOIR structure into context. As the office's website¹⁵⁸ states:

[EOIR] was created on January 9, 1983, through an internal [DOJ] reorganization which combined the [BIA] with the [IJ] function previously performed by the former [INS] (now part of [DHS]). Besides establishing EOIR as a separate agency within DOJ, this reorganization made the Immigration Courts independent of INS, the agency charged with enforcement of Federal immigration laws. [OCAHO] was added in 1987.

EOIR's website¹⁵⁹ also provides a useful history of the evolution of responsibility for adjudication of immigration cases prior to that office's establishment:

1891 - The Immigration Act of 1891 was the first comprehensive law that placed immigration under federal control. It established:

An Office of Immigration within the Department of Treasury (Treasury), headed by a Superintendent of Immigration;

A process for inspection officers to examine and exclude individuals seeking to enter the United States;

Authority for the Office of Immigration to deport individuals who had violated law; and

An appeals process in which the Superintendent of Immigration decided case appeals and the Secretary of the Treasury could review those decisions.

1893 - The Immigration Act of 1893 created Boards of Special Inquiry, consisting of three immigration inspectors, to review and decide cases related to the "exclusion" of individuals seeking to enter the United States, and the "deportation" of individuals who had violated the law. Boards of Special Inquiry continued to evolve for nearly 60 years. The Boards of Special Inquiry system provided for multiple levels of administrative review, but eventually raised significant concerns about due process.

1903 - Immigration responsibilities moved from Treasury to the new Department of Commerce and Labor.

1913 - Immigration responsibilities moved to the Department of Labor (DOL), as Commerce and Labor split into two separate departments.

1917 - The Immigration Act of 1917 codified and expanded exclusion and deportation provisions.

¹⁵⁸ *About the Office*, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Dec. 14, 2017, available at: <https://www.justice.gov/eoir/about-office>.

¹⁵⁹ *Evolution of the U.S Immigration Court System: Pre-1983*, EXEC. OFFICE FOR IMMIGRATION REVIEW, updated Apr. 30, 2015, available at: <https://www.justice.gov/eoir/evolution-pre-1983>.

1921 - The Immigration Act of 1921 introduced the National Origins Quota System, which limited the number of immigrants to the United States by assigning a quota to each nationality. The new quota system prompted a growing workload of increasingly complex case appeals. In response, the Secretary of Labor created a Board of Review to review case appeals and make recommendations to the Secretary of Labor.

1933 – [INS] was created within DOL to handle all immigration matters.

1940 - INS moved from DOL to [DOJ] and the Attorney General reconstituted the previous Board of Review as the newly-created [BIA]. While the previous Board of Review had authority to make recommendations regarding case appeals, the BIA had authority to decide case appeals. The BIA was and remains an independent adjudicatory body that is responsible solely to the Attorney General in reviewing and deciding immigration case appeals. . . .

1952 - Congress combined all previous immigration and naturalization law into one statute, the Immigration and Nationality Act (INA). The INA eliminated the Special Inquiry Boards and established special inquiry officers to review and decide deportation cases.

1973 - Special inquiry officers were authorized by regulation to use the title "immigration judge" and to wear judicial robes.

As you can see, as the nation's interest in immigration moved from revenue to labor to law enforcement and national security, the immigration adjudication function also moved from department to department.

In its report¹⁶⁰, GAO stated that the experts and stakeholders to whom it had spoken supported three main scenarios for restructuring the immigration court system, each of which would require a statutory fix:

- a court system independent (i.e., outside) of the executive branch to replace EOIR's immigration court system (immigration courts and the BIA), including both trial and appellate tribunals;
- a new, independent administrative agency within the executive branch to carry out EOIR's quasi-judicial functions with both trial-level IJs and an appellate level review board; or
- a hybrid approach, placing trial-level IJs in an independent administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.

¹⁶⁰ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 73-74, available at: <https://www.gao.gov/assets/690/685022.pdf>.

That report details the pros and cons of each of these proposals, as well as the costs of each, and compares each to various different current court structures.¹⁶¹

Among the positives it listed for restructuring the current immigration court system were: increasing the perceived independence of the court; greater judicial autonomy; improving the professionalism or credibility of the immigration court system's work force; and greater organizational capacity or accountability.¹⁶²

Among the negatives identified by GAO were the fact that: "a court system independent of the executive branch may not address the immigration courts' management challenges, such as the case backlog;" "requiring presidential nomination and senate confirmation of IJs under an independent court system could" complicate and delay the hiring of new judges "by making the appointment of additional judges more dependent on external parties;" the difficulty in establishing and administering a court system independent of the executive branch; difficulties for the court for procuring resources outside of DOJ; and (under a "hybrid system") disconnection of the trial level court from the appellate court, particularly if the trial level court remains within the executive branch, with the appellate court outside of the executive branch.

With respect to independence, GAO stated:

Six of the ten experts and stakeholders we contacted stated that establishing a court system independent (i.e., outside) of the executive branch could increase the perceived independence of the system. For example, one of the experts and stakeholders explained that the public's perception of the immigration court system's independence might improve with a restructuring that removes the quasi-judicial functions of the immigration courts and the BIA from DOJ because DOJ is also responsible for representing the government in appeals to the U.S. Circuit Courts of Appeals by individuals seeking review of final orders of removal. This same expert and stakeholder noted that removing the immigration court system from the executive branch may help to alleviate this perception that the immigration courts are not independent tribunals in which the respondents and DHS attorneys are equal parties before the court. Another one of the experts and stakeholders explained that under the existing immigration court system, respondents may perceive, due to the number of [IJs] who are former DHS attorneys and the co-location of some immigration courts with ICE's OPLA offices, that IJs and DHS attorneys are working together. Two of the ten experts and stakeholders we interviewed also proposed that an immigration court system independent of the executive branch would be less susceptible to political pressures within the executive branch. Experts and stakeholders cited similar independence-related reasons for supporting the administrative agency and hybrid scenarios.¹⁶³

¹⁶¹ *Id.* at 80-87.

¹⁶² *Id.* at 80-84.

¹⁶³ *Id.* at 81-82.

This raises many important points. DOJ representation of the government in immigration matters before the courts of appeal would appear to be a very soft variable, particularly given the fact that a different DOJ component (the Office of Immigration Litigation (OIL), within DOJ's Civil Division)¹⁶⁴ provides such representation. Further, the fact that EOIR and ICE are both within the executive branch would be a factor in any court restructuring that left a trial-level court within that branch.

The co-location of many immigration courts and ICE attorney's offices within close proximity to each other would likely continue, regardless of whatever restructuring plan were chosen, unless the government were willing to pay the costs of relocating each of those new courts. Similarly, the number of ICE attorneys who become judges in any immigration court would likely continue as well, given that immigration is a highly specialized area the law with which few general practitioners are familiar enough to assume the role of IJ.

The "political pressure" factor raises different issues. It is not clear if the "political pressure" in question relates to such pressure on the judges, or whether it refers to the Attorney General's aforementioned control over the courts, including his certification authority.

If it is the former, as a former IJ and under Attorneys General from both parties, I can dispositively state that I never perceived any political interference in my decisions. No one ever attempted to force me to issue any specific decision in any case; to the contrary, I was encouraged to apply the law evenly in all cases (a duty I took seriously). The Attorney General could take any decision that I made (assuming that it was affirmed by the BIA) on certification and reverse it, but short of that, my decisions were mine and mine alone.

If it is the latter, however, it is an issue that gets to the heart of any court restructuring that would take jurisdiction over the court away from the Attorney General. As preliminary matter, the INA expressly states that "determination and ruling by the Attorney General with respect to all questions of law" related to the INA "and all other laws relating to the immigration and naturalization of aliens . . . shall be controlling."¹⁶⁵

In *Arizona v. U.S.*¹⁶⁶, the Supreme Court held:

*Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. **Some discretionary decisions involve policy choices that bear on this Nation's international relations.** Returning an alien to his own country may be deemed inappropriate*

¹⁶⁴ Office of Immigration Litigation, U.S. DEPARTMENT OF JUSTICE, CIVIL DIV., updated Oct. 20, 2014, available at: <https://www.justice.gov/civil/office-immigration-litigation>.

¹⁶⁵ Section 103(a)(1) of the INA, available at: <https://www.law.cornell.edu/uscode/text/8/1103>

¹⁶⁶ *Arizona vs. U.S.*, 567 U.S. 387, 396-97 (2012), available at: <https://www.law.cornell.edu/supremecourt/text/11-182>.

*even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. **The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.***

(Emphasis added).

The supremacy of the executive branch in issues of foreign policy is well-established. In *U.S. v. Curtiss-Wright Export Corp.*¹⁶⁷, the Supreme Court held:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’

Moving the adjudication of immigration cases out of the executive branch, therefore, would have serious constitutional implications. Nowhere is that more clear than from the Supreme Court’s decision in *INS v. Aguirre-Aguirre*¹⁶⁸, where the Court held:

[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials “exercise especially sensitive political functions that implicate questions of foreign relations.” . . . A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.

Not only can no stronger argument be made against moving the immigration courts out of DOJ, but frankly, such constitutional concerns should be dispositive of the issue.

With respect to “judicial economy,” GAO reported:

¹⁶⁷ *U.S. vs. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), available at: <https://supreme.justia.com/cases/federal/us/299/304/case.html>.

¹⁶⁸ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), available at: https://scholar.google.com/scholar_case?case=3793273925328568150&hl=en&as_sdt=6&as_vis=1&oi=scholar.

*Four of the ten experts and stakeholders we interviewed stated that a court system independent of the executive branch might give [IJs] and BIA members more judicial autonomy over their courtrooms and dockets. For example, one of the experts and stakeholders stated that [IJs] in an independent court system would be able to file complaints against private bar attorneys directly with the state bar authority instead of filing the complaint with DOJ first, as presently required for [IJ]s acting in their official capacity. EOIR officials explained that while [IJs] cannot directly file a complaint with the state bar authority, EOIR's Disciplinary Counsel, which is charged with investigating these complaints, can file a complaint with the state bar on behalf of the [IJ].*¹⁶⁹

It is unclear how much more autonomy I would have had over my courtroom and docket if I had been an IJ in an independent court than I did as an IJ within EOIR. I had full control over my courtroom, and of the parties who appeared in it. My bailiff (a York County Prison employee) was solely responsible to me when court was in session. I also had sufficient leeway to move cases around in order to accommodate my docket, consistent with due process.

As for filing bar complaints, this was a rarity for me. There was only ever one attorney whose conduct I ever deemed to have risen to the level of a bar complaint, and that matter was handled by Disciplinary Counsel in a satisfactory manner. Any judge should generally be able to control the conduct of the parties in his or her courtroom in almost any situation without recourse to such measures. An inability to do so, respectfully, reflects more on the judge than on EOIR.

As for “workforce professionalism or credibility,” GAO stated:

*Four of the ten experts and stakeholders we contacted stated reasons why a court system independent of the executive branch might also improve the professionalism or credibility of the immigration court system's workforce. For example, one of the experts and stakeholders explained that placing judges in an independent immigration court system could elevate their stature in the eyes of stakeholders, and by extension, enhance the perceived credibility of their decisions. Additionally, one of the experts and stakeholders explained that if the judge career path was improved under a restructuring such that [IJs] were able to advance to more prestigious judgeships, this could assist in attracting candidates to the immigration bench. Regarding the hybrid scenario, one of the experts and stakeholders noted that this proposal may attract a more diverse and balanced pool of candidates for [IJ] positions.*¹⁷⁰

Again, this is extremely soft variable, and one that would nowhere near justify the cost and difficulty of transitioning immigration courts out of EOIR. Respectfully, the “professionalism or

¹⁶⁹ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 82, available at: <https://www.gao.gov/assets/690/685022.pdf>.

¹⁷⁰ *Id.* at 82.

credibility of the immigration court system’s work force” is more a factor of that work force than a factor of where they are positioned within the United States government.

As for elevating the stature of IJs, I never viewed the job as being beneath me, and I do not believe that any attorney who ever appeared in my court thought any less of me as a judge than that attorney did of any other judge. The fact was, I was the decision-maker with whom those lawyers had to deal, and they acted accordingly.

Nor did I ever feel constrained in moving along in my career. I certainly could have applied for any other judgeship (state or federal) that had an opening for an attorney with my skills and experience. As practical matter, however, my skills and experience were better utilized on the immigration court than they would have been in some other tribunal.

Finally, I was never aware of any difficulty that EOIR had with attracting a diverse pool of qualified candidates to the bench. The fact is, the job comes with many benefits (a title, a relatively high rate of pay, a pension, access to the federal Thrift Savings Plan and health benefits, generous vacation benefits, federal holidays, and the stature and dignity of being a judge). Certainly, an IJ could advance to the position of Board Member at the BIA, or Assistant Chief Immigration Judge, and more than a few did. Many of my colleagues had, however, served for years as IJs, and intended to retire in that status.

Organizational capacity or accountability *is* an issue with which EOIR struggles. I believe, however, that this is largely due to the fact that many Attorneys General in various administrations had neglected the office for a significant period of time. It is apparent from Attorney General Sessions’ statements and actions that he intends to correct these issues, and he should be given the opportunity to do so. This is especially true given the expense and difficulty of transitioning the immigration courts to a different organization, or making them independent.

I concur with the “experts and stakeholders” whom GAO contacted and who asserted “that a court system independent of the executive branch may not address the immigration courts management challenges, such as the case backlog.”¹⁷¹ The fact is, regardless of where they are placed, immigration courts will have a large caseload, with which the courts will have to contend. Again, Attorney General Sessions has attempted, and is attempting, to obtain sufficient resources to enable the courts to handle that caseload.

Moreover, absent a change to section 292 of the INA¹⁷², aliens will either have to hire their own lawyers, obtain pro bono counsel, or represent themselves. This would be true regardless of where the court is located, and would be an issue with which the court would have to contend, regardless of whether it remains in EOIR or not.

¹⁷¹ *Id.* at 84.

¹⁷² Section 292 of the INA, available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9617.html>.

Perhaps the strongest non-constitutional reason for not moving the immigration courts out of EOIR (aside from the cost and difficulty of doing so) is the need for more judges. As GAO stated:

Two of the ten experts and stakeholders we interviewed noted that requiring the presidential nomination and senate confirmation of IJs under an independent court system could further complicate and delay the hiring of new judges by making the appointment of additional judges more dependent on external parties.¹⁷³

The biggest issue facing the immigration courts is resources, and in particular (but not solely, as noted above) IJs. Simply put, there are too few judges to handle the immigration court caseload at the present time. Any proposal to restructure the immigration courts that would slow down the hiring of IJs by making the hiring of those judges dependent on any external party would do a disservice to the alien respondents, the government, and justice itself. If Congress is interested in acting on the crippling backlogs facing the immigration courts, it would be best to direct its efforts toward providing those courts with more money and resources.

Moreover, I again wholeheartedly concur with the “experts and stakeholders” who “expressed the concern that a restructured immigration court system, regardless of the scenario, would not be able to procure sufficient resources outside of DOJ.”¹⁷⁴ It would be an understatement to say that immigration is a contentious issue, and has been for the 25 years I have been involved in the field. It would be easy to foresee a scenario in which resources to an independent immigration court were constrained by a Congress that did not agree with its opinions.

I would note that there have also been discussions about relocating OCAHO within the immigration court. I believe that any such proposal would be in error. The provisions of the INA that are handled by OCAHO are significantly different from those that are handled by the immigration courts, as are the procedures governing OCAHO, as to create a significant learning curve for any IJ assigned a case that would currently go to OCAHO. Given the limited number of cases that are handled by OCAHO, it is unlikely that any IJ who was not already familiar with sections 274A, 274B, and 274C of the INA (and few are) would ever gain sufficient familiarity with those provisions to handle an employer sanctions, unfair immigration-related employment practices, or document fraud case efficiently or effectively, or at least as efficiently and effectively as OCAHO does.

One area, however, in which Congress should act is to create an Article III Court of Appeals for Immigration. Under current law, an alien who is seeking review of a decision of the BIA or

¹⁷³ *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, GOVERNMENT ACCOUNTABILITY OFFICE, June 2017, at 84, available at: <https://www.gao.gov/assets/690/685022.pdf>.

¹⁷⁴ *Id.* at 85.

Attorney General can file a petition for review “with the court of appeals for the judicial circuit in which the [IJ] completed the proceedings.”¹⁷⁵ .

Such a proposal, from then-Judiciary Committee Chairman Arlen Specter, was included in section 501 of S. 2454 in the 109th Congress.¹⁷⁶ With respect to that provision, CRS explained:

Section 501 of S. 2454 would consolidate appeals regarding removal of aliens in the U.S. Court of Appeals for the Federal Circuit. It would increase the authorized number of judges on the Federal Circuit from 12 to 15 and would authorize sums necessary to implement these changes and the increased case load of the Federal Circuit for fiscal years 2007 to 2011. . . .

This consolidation of appeals would remove pressure on the other federal appellate circuits from the dramatic increase in their caseload, largely resulting from immigration appeals; it would basically add the equivalent of another 3-judge panel to the Federal Circuit. This provision would also eliminate future inconsistency among appellate circuits in interpretations of immigration law, which in the past may have increased litigation as different circuits considered an issue for the first time and as the U.S. Supreme Court may have had to resolve circuit differences. Differences among circuits also may have necessitated congressional action to clarify or establish statutory standards in response to inconsistent appellate circuit interpretations.¹⁷⁷

Given the number of immigration cases that circuit courts handle each year, this proposal would have overwhelmed the Court of Appeals for the Federal Circuit, even if that court were assigned an additional three judges. The creation of a new circuit court, solely dedicated to immigration petitions for review, would provide the benefits suggested by CRS, and would expedite appeals because each of the judges on that court would be a subject-matter expert in immigration. Such a proposal would provide greater benefits to the interests of justice than the restructuring of the immigration courts.

Summary

The nation’s cadre of some 334 IJs are, by and large, dedicated, experienced, and knowledgeable professionals dedicated to ensuring that the immigration laws are fairly and uniformly administered in each of the 58 immigration courts. Carved into the rotunda of the Attorney General’s office at DOJ is a quote from then-Solicitor General Frederick Lehmann: “The United

¹⁷⁵ Section 242(b)(2) of the INA, available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html>.

¹⁷⁶ S. 2454, 109th Cong., § 501 (2006), available at: <https://www.congress.gov/bill/109th-congress/senate-bill/2454/text?q=%7B%22search%22%3A%5B%22S.+2454%22%5D%7D&r=49#toc-id734C06366FEF4789B17F9568312887B3>.

¹⁷⁷ Margaret Mikyung Lee, *Immigration Litigation Reform*, CONG. RESEARCH SERV., at CRS-4, May 8, 2006, available at: <http://trac.syr.edu/immigration/library/P582.pdf>.

States wins its case whenever justice is done one of its citizens in the courts.”¹⁷⁸ The same is also true of the aliens who appear in DOJ’s tribunals, and it is a fact that is known to, and taken to heart by, every IJ when he or she walks into court.

Unfortunately, for years, those IJs have been hobbled in performing their mission, largely as result of neglect of the agency in which they serve, EOIR, and of misguided immigration policies implemented in the past by the executive branch. Simply put, the immigration courts of the United States are failing at their primary mission of “adjudicat[ing] immigration cases by . . . expeditiously. . . interpreting and administering the Nation’s immigration laws,”¹⁷⁹ largely due to no fault of the IJs and staff who work in those courts.

The Attorney General is actively working to remedy this problem, by providing the needed resources to the immigration courts, and by implementing bright-line rules for the IJs to follow in adjudicating the cases they consider. He should be supported in those efforts by this Committee and by the Congress as a whole.

Restructuring the immigration courts and the BIA will almost certainly not address the core problems that are facing those courts. Moreover, not only would such restructuring be complicated and costly (and likely ultimately fruitless), but any proposal that would move either the immigration courts or the BIA out of the executive branch would implicate serious constitutional concerns.

I thank you again for your invitation to attend today’s hearing, and I look forward to your questions.

¹⁷⁸ Michael Gartner, *The President’s Man at the Supreme Court*, WASH. POST, (Oct. 25, 1987), available at: https://www.washingtonpost.com/archive/entertainment/books/1987/10/25/the-presidents-man-at-the-supreme-court/ed5f19e1-4f16-4222-8e87-b8569b9663fe/?utm_term=.8eb68b6861a8.

¹⁷⁹ *Executive Office for Immigration Review*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, undated, available at: <https://www.justice.gov/eoir>.