

Enhancing Quality and Timeliness in Immigration Removal Adjudication

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

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Enhancing Quality and Timeliness in Immigration Removal Adjudication

I. PREAMBLE

This draft report responds to a September 2010 Administrative Conference of the United States (ACUS) request for a study of immigration removal (formerly deportation) adjudication in the Executive Office for Immigration Review (EOIR). EOIR is a unit of the Department of Justice (DOJ) that contains the immigration courts and the Board of Immigration Appeals (BIA). This draft report concerns EOIR's removal adjudication of non-citizens charged by the Department of Homeland Security (DHS) with removability from the United States.

Based on proposals that we submitted, independently of one another, and follow-up discussion with Administrative Conference staff, we signed a joint research contract in March 2011 (modified slightly in August 2011). We agreed to formulate recommendations for the Conference's consideration about:

- the origin of removal cases in the DHS (without assessing DHS prosecution policies per se);
- legal representation for those in removal proceedings;
- immigration court case management and court management practices, including the courts' use of video hearings;
- BIA decision-making; and
- additional topics if possible.

We submitted recommendations to the ACUS Committee on Adjudication. We have inserted those recommendations, reformatted and sometimes paraphrased, at the outset of Section V's subsections (followed in each instance by "Analysis"). The Adjudication Committee revised some of those recommendations in preparing the recommendations for consideration by a June 14 and 15 ACUS plenary session. They are in a separate document available on the ACUS Website.¹

II. Framework for Analysis and Methods

A. Framework

Three broad approaches are available for a court system not fully meeting the three-pronged standard of just, speedy, and economical determination of matters submitted to it. Those approaches are to increase the system's resources; to reduce demand for the system's services; and to change how it does its work, which may include changes in judicial selection and court management, as well as structural reorganization. We operated on the assumption that Congress would be extremely unlikely for the foreseeable future to increase significantly (if at all) the resources for immigration removal adjudication agencies. Thus, this report reflects the principal

¹ Available at <http://www.acus.gov/research/the-conference-current-projects/immigration-adjudication/>

of “doing better with existing resources.” We also worked on the assumption that the current statutory and regulatory framework governing removal adjudication is unlikely to change. Our analysis and recommendations center on forum shifting and changes in some of the ways work is managed in the removal adjudication process, and in the way the courts manage themselves.

Furthermore, given Administrative Conference staff preferences, we have not examined DHS prosecution priorities or considered substantive changes in the nation’s immigration laws and policies. We have recommended some seemingly technical changes to statutes and the Code of Federal Regulations, but we have directed primary attention to practical changes that are within the authority of EOIR or individual immigration courts and judges to implement, in some cases with agreement of DHS. We have also identified some changes that are within DHS control. We have referenced, and sometimes endorsed, others’ proposals for statutory changes.

The EOIR (and thus the immigration court system) is part of the executive branch, not the federal judicial system authorized by Article III of the Constitution. Nevertheless, we have sometimes looked to the nation’s state and federal courts for comparative analysis and transferable methods, practices, and structures. The importance of the immigration courts’ mission and their size, geographic dispersion, and adversary procedures render them in some ways more similar to judicial branch courts than executive branch adjudication agencies.

B. Methods

1. Literature and other information sources

Popular, academic, and government publications about immigrant removal adjudication have informed our analyses, as has quantitative information about removal adjudication, namely EOIR’s Statistical Year Books; reports of the Transactional Records Access Clearinghouse; and data maintained by the Administrative Office of the U.S. Courts. In addition, EOIR’s Office of Planning, Analysis, and Technology (OPAT) graciously produced two series of particularized data runs—over twenty-three separate data sets—in response to our requests.

For most of the time this report was in production, the most recent EOIR data on removal adjudication—in its Statistical Year Book and in the separate data runs—were for fiscal year 2010 (October 2009-September 2010). On February 21, 2012, EOIR released its FY 2011 Statistical Year Book. Wherever possible, given the June 7 deadline for this final report and preparation for five Adjudication Committee meetings prior to that deadline, we have revised our report to use 2011 Year Book data, and we asked OPAT to update three of the data sets it provided earlier. Thus, this report contains an amalgam of data, mainly from 2011 and 2010.

2. Interviews

We began our research in late April, 2011, with the first of a series of meetings with EOIR Director Juan Osuna, complemented by interviews and discussions with other personnel at EOIR’s headquarter. Later we spoke with judges and support personnel in ten immigration courts around the country. The respective assistant chief immigration judge who supervised the particular court arranged the interviews and participated in them. In addition to these principal interviews, we also spoke informally with a few judges and others in EOIR.

Assistant Chief Immigration Judge Edward Kelly, an Adjudication Committee member, was our liaison with the EOIR and the Office of the Chief Immigration Judge (OCIJ) in particular,

including the assistant chief immigration judges with whom he cooperated in arranging our interviews with judges in the several courts we visited. He was uniformly helpful and cheerful in all aspects of our inquiry.

Early on, we also arranged to speak with officials in DHS agencies that initiate and prosecute removal cases in the immigration courts and the BIA, and with DOJ officials who argue cases in the courts of appeals. We also met with attorneys who represent respondents in removal proceedings, both individual attorneys and members of groups providing representation pro bono in various forms.

We spoke with officials of another high volume federal administrative adjudicative agency, the Board of Veterans' Appeals in the Department of Veterans Affairs and tried to meet with officials of the Social Security Administration's Office of Disability Adjudication and Review but were unable to do so because of scheduling conflicts. Procedures in both agencies are quite different from those in the immigration courts.

We promised those with whom we spoke that we would not quote them by name; we have indicated position or affiliation when necessary to establish context.

Our research for this report hinged on the cooperation of EOIR and DHS's immigration-related components, and, subject to certain institutional constraints and the press of time and other business, such cooperation was fully forthcoming.

Appendix 1 lists the agencies, offices, and immigration courts in which we conducted our interviews, the number of interviewees, and the dates of our meetings.

3. Survey

In January 2012, we distributed a twenty-nine item online survey to all immigration judges. OCIJ officials alerted the judges to the survey and permitted them to respond to it if they wished. EOIR officials insisted on vetting the questions in draft, which led to some questions' deletion. They also insisted that the survey be totally anonymous—precluding even data on the number of judges on the responders' courts or the length of their tenures as judges. As a result, we are somewhat limited in the analysis we can derive from the responses. We acknowledge that the survey responses in no way reflect any official position of the DOJ, EOIR, or any other agency or organization.

The response rate was robust—181 judges—sixty-eight percent (68%) of the 265 judges listed on the EOIR website as of early 2012. Not all of the judges who responded answered each of the twenty-nine questions. Judges added 754 written comments. We of course don't know how representative if at all they are of the views of judges who did not add comments.

We were unable to ask questions that would have provided a detailed picture of how representative those who completed the survey were of the entire population of judges. With a sixty-eight percent (68%) percent response rate, though, we can assume a fairly high degree of representativeness. Moreover, we were able to ask the judges to estimate whether their respondent populations were “mostly detained”, “more detained than non-detained,” “roughly half and half,” “more non-detained than detained,” and “mostly non-detained.” We collapsed the responses into three groups, “more detained” “half and half” and “more non-detained.” The responses closely track actual 2010 data that EOIR provided us; we grouped those data as “more

detained” (fifty-five percent (55%) and above) and “more non-detained” (forty-five percent (45%) and below).

	Survey estimate	EOIR data
More detained	25%	22%
Roughly half and half	6%	7%
More non-detained	68%	71%

EOIR and DHS officials declined out requests to survey immigration court administrators and ICE trial attorneys.

4. Consultation within the Administrative Conference and Related Groups

We consulted with ACUS staff and two related groups. One is the ACUS standing Committee on Adjudication, under whose jurisdiction we conducted the study. We are grateful to committee chairman Judge John Vittone and the committee members who met five times to consider our analyses and proposed recommendations. ACUS also assembled a sixteen-member Removal Adjudication Project Working Group of practitioners and scholars knowledgeable in administrative and other forms of adjudication. We are grateful to those members who provided comments. The members of both groups are in Appendix 2.

We submitted our first draft on December 19, revised it on January 12 for posting on the ACUS Website and met with the Adjudication Committee on January 25. ACUS scheduled four subsequent adjudication committee meetings in February through May to review portions of the draft, which we revised and updated during the process. The various iterations of the report are available on the ACUS Website.

5. Comments on Interim Draft Reports

We received comments on our January 12 draft and some subsequent revised sections, and in other contexts (Adjudication Committee meetings, for example) from various EOIR and DHS officials (none of which represented official agency views); from the National Association of Immigration Judges; from various groups and individuals involved in representing aliens in removal adjudication; and from several law professors. Written comments submitted to ACUS in response to its posting of revised report sections or meetings to review drafts are on the ACUS website. We have tried to convey the gist of all these comments and respond as appropriate.

C. Other General Comments on this Report

We note in various places that the time constraints of this project precluded analyses we would have preferred to pursue and that are probably worthy of additional ACUS examinations.

Some of our recommendations come close to stating the obvious. Some echo ideas that others have advanced; some echo current proposals on which EOIR, or others, are working. We include them in our report to give weight and visibility to them.

III. Immigration Removal Adjudication: Overview of Organization and Processes

This report is almost entirely about removal adjudication in the EOIR. Removal adjudication is initiated by agencies within the DHS, and is governed principally by the Immigration and Nationality Act of 1952, as amended (INA, codified in Title 8 of the U.S. Code), and provisions in Title 8 of the Code of Federal Regulations.

A. Department of Homeland Security

Three principal DHS agencies are involved in immigration removal adjudication.

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

Prior to DHS's 2003 creation, the government's deportation prosecution and adjudication functions were both housed in the DOJ, albeit in separate agencies—the Immigration and Naturalization Service (INS) for benefits and enforcement and EOIR for removal adjudication. When Congress created DHS, it abolished the INS and transferred its enforcement, benefits, and prosecution functions to DHS. It left EOIR within the DOJ.

B. The Executive Office for Immigration Review

The DOJ created EOIR through a 1983 reorganization. EOIR gained statutory recognition soon thereafter.²

EOIR contains the Office of the Chief Immigration Judge (OCIJ), of which the fifty-nine immigration courts are a part, and the BIA. It exercises authority delegated by the Attorney General within a framework of statutes and administrative regulations. In EOIR's words, it "primarily decides whether foreign-born individuals[] who are charged by the Department of Homeland Security . . . with violating immigration law[] should be ordered removed from the United States or should be granted relief or protection from removal and be permitted to remain in this country."³

The Attorney General appoints the EOIR Director. EOIR's Legal Orientation and Pro Bono Program (LOP) are housed within the Office of Legal Access; these programs recruit non-profit organizations to provide basic legal briefings to detained respondents and seek to attract pro

² "There is in the Department of Justice the Executive Office of Immigration Review, which shall be subject to the direction and regulation of the Attorney General under section 1103(g) of title 8." 6 U.S.C. § 521(a)(1) (2006).

³ Executive Office for Immigration Review, *EOIR at a Glance*, U.S. DEP'T JUST. (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

bono legal providers to represent them. The BIA administers EOIR's program to certify pro bono organizations and accredit non-lawyers to assist respondents in removal proceedings.

We did not study EOIR's Office of the Chief Administrative Hearing Officer (OCAHO), a small group of Administrative Procedure Act judges who hear cases (ninety-one cases in 2011, eighty-eight in 2010)⁴ involving employer verification of work authorization violations, immigration-related document fraud, and failure to comply with statutory international information dissemination requirements.

EOIR's appropriation for fiscal 2012 (as of June 2012) is slightly less than the full \$305,000,000 provided for the Justice Department's "Administrative Review and Appeals," budget subcategory, almost all of which funds EOIR (less than one percent funds the Office of the Pardon Attorney).⁵ EOIR does not report, at least publically, the dollar allocations to its several components. However, one of us, for a separate project,⁶ estimated the allocations for the 2010 "Administrative Review and Appeals" appropriation of \$300,685,000, based on DOJ-reported object class allocations and personnel figures provided by EOIR's Public Affairs Office. That estimate suggested that the immigration courts in 2010 received approximately forty percent (40%) of the appropriation, the BIA thirty-two percent (32%), EOIR's central offices twenty-six percent (26%), and OCAHO three percent (3%). (We provided this estimate to EOIR officials for any comments they wished to offer but received none.) By that same estimate, in 2010, EOIR had 1,561 full-time permanent positions, of which 500 were attorney positions. In late 2011 it had 1,533 full-time permanent positions, 1,296 of which were filled. Of the total number of positions, 508 were attorney positions, 464 of which were filled.⁷

1. Immigration Courts

The "EOIR Immigration Court Listing" on the EOIR Website⁸ current as of May, 2012, identifies sixty court locations, but EOIR officials explained that one location ("Chicago Detained") was on the list for technical reason and is not a court. The fifty-nine courts are located in twenty-seven states and two territories. The Website listed 264 immigration judges. The number of judges per court ranges from less than one (a judge splits time between two courts) to thirty-one. The median size is 4.9 judges, and the common or modal size is two judges (eighteen courts). Thirteen courts have three judges; and five have nine or more judges. Appendix 3 lists, among other things, the immigration courts and the number of judges in each court as reported on EOIR's website in May 2012. (In this report, unless otherwise indicated, "judge" means "immigration judge.")

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

⁴ OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FY 2011 STATISTICAL YEAR BOOK, Z1 (2011) available at www.justice.gov/eoir/statspub/fy10syb.pdf. [Hereinafter *Statistical Year Book, 2011*].

⁵ Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552.

⁶ See Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1862, n.71 (2010).

⁷ EOIR PERSONNEL STATISTICS, provided by EOIR (on file with authors).

⁸ Available at <http://www.justice.gov/eoir/sibpages/ICadr.htm> (viewed April 11, 2012).

And, as explained below, EOIR and DHS have a robust program to hold hearings using video conferencing technology, both from court to court, and court to other hearing locations. EOIR officials told us that in determining where to open up a hearing location by video, they consider available resources, the location's current and projected caseload, its proximity to existing courts whose judges may be able to cover the docket, technological issues, other court needs within the immigration court system, and appropriate coordination among DHS, EOIR, the private bar and, where applicable, any federal, state, county, or municipal authorities that may be involved. "If we are called upon to hold hearings," an official told us, "and if all these considerations are satisfactory and within [the EOIR] mission, standards, technological capacity, etc., [EOIR] may hold hearings there."

In addition to the immigration courts, the OCIJ (Office of Chief Immigration Judge) includes a deputy chief immigration judge, and, as per the Website page dated May 2012, thirteen assistant chief immigration judges (ACIJ), all appointed by the Attorney General.⁹ According to EOIR's most recent list of ACIJ assignments, eleven ACIJ supervise from four to seven immigration courts. One of the ACIJs who supervises four courts is also responsible for immigration judge "training" and "vulnerable population issues." Two other ACIJs have no court supervisory responsibilities. One is responsible for "conduct and professionalism" and "labor management issues" and one for "operations." Those two ACIJs and three others are based in EOIR's Falls Church, Virginia, headquarters, rather than in one of the courts they supervise; eight others sit in courts around the country. Within each court is a "liaison judge" to the ACIJ and "pro bono liaison" judge to oversee the court's pro bono efforts.¹⁰ In consultation with the judges in the respective courts, the ACIJ designates both the liaison judge and pro bono liaison judge. Service is sometimes on a rotational basis. Each court also has a court administrator, who is hired through standard civil service appointment procedures.

Immigration judges are not "administrative law judges" under the Administrative Procedure Act¹¹ (APA). They are career attorneys in the excepted service,¹² and as such are employed for indefinite terms and not subject to many of the personnel regulations that govern employees in the regular civil service. Congress defines an immigration judge as "an attorney whom the Attorney General appoints as an administrative judge" and says they are "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."¹³ The DOJ itself refers to them "as the Attorney General's delegates in the cases that come before them,"¹⁴ but adds that "[i]n deciding [those] cases . . . , and subject to applicable governing standards, [they] shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the" INA.¹⁵ The Chief Immigration Judge selects immigration judges through a competitive process in which the ACIJs participate.

⁹ For biographical information OCIJ officials, see Executive Office for Immigration Review, *Office of the Chief Immigration Judge*, U.S. DEP'T JUST. March 2012, <http://www.justice.gov/eoir/fs/ocijbio.htm>.

¹⁰ David Neal, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2008), available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf> [Hereinafter *OPPM: Facilitating Pro Bono Legal Services*].

¹¹ 5 U.S.C. § 701 *et seq.*

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

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

¹⁴ 8 C.F.R. § 1003.10(a) (2010).

¹⁵ 8 C.F.R. § 1003.10(b) (2010).

EOIR has a collective bargaining agreement with the National Association of Immigration Judges, which describes itself as “a professional association of immigration judges and also the certified representative and recognized collective bargaining unit that represents the immigration judges of the United States.”¹⁶ According to union leadership, a large majority of judges belong to the Association.

2. Board of Immigration Appeals

The BIA hears appeals mostly from the immigration courts as well as a smaller number of appeals from some DHS agencies. BIA decisions are binding unless modified or overruled by the Attorney General or a federal appellate court. The main work of the BIA is reviewing removal decisions.

The INA does not define the BIA. Instead, implementing regulations create the BIA and specify its size of fifteen members (including a chair), all appointed by the Attorney General.¹⁷ Regulations also authorize the EOIR Director to designate temporary BIA members from among immigration judges, retired BIA members, retired immigration judges, and certain other EOIR officials. As of May 2012, the BIA had a chairman, thirteen regular members and five temporary members.¹⁸

C. Removal Adjudication Processes

Although variations abound, immigration removal adjudication generally involves one or more of four steps:

- charging decisions and some dispositions within DHS;
- immigration court adjudications;
- administrative appeals of judges’ decisions to the BIA; and
- judicial appeals of BIA decisions to the federal court of appeals for the circuit in which the judge completed the immigration court proceeding.

U.S. district courts are not part of the removal adjudication process, unless the person is detained and making a habeas corpus challenge to the terms of detention. District courts are involved in litigation challenging agency procedures or providing APA review of denied visa petitions where the petition is not a part of a removal case.

Removal adjudication is part of the civil enforcement of federal immigration laws. We do not deal with federal criminal prosecution of immigration crimes such as smuggling or unlawful reentry. In fact, though, those prosecutions constitute a major element of all criminal filings in the U.S. district courts—27,292 filings in 2011, or thirty-five percent (35%) of all criminal filings. Filings alleging immigration crimes have increased sixty-three percent (63%) since

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

¹⁷ 8 C.F.R. § 1003.1(a)(1) (2010).

¹⁸ See *Board of Immigration Appeals, List of members and biographies*, U.S. DEP’T JUST. (May 2012) available at <http://www.justice.gov/eoir/fs/biabios.htm>.

2007,¹⁹ largely as a result of vigorous enforcement efforts along the southwest border. Immigration offenses in 2011 made up over half the criminal filings in each of the five border districts (Texas Southern and Western, New Mexico, Arizona, and California Southern) ranging from fifty-five percent (55%) in Arizona to seventy-one percent (71%) in New Mexico and Texas Southern.²⁰

1. Forms of Removal

Most estimates are that roughly 11,000,000 people in the United States are not citizens or in valid immigrant status.²¹ That number dwarfs the number of non-citizens whom DHS can realistically remove, given limits on resources such as field agents and detention space. As described later, periodic policy directives from DHS agencies (and before it INS) set prosecution priorities.

There are many reasons why an alien may be removable from the United States. Some entered the country illegally and are residing in the U.S. without authorization. Many entered lawfully but have remained beyond any authorized stay. Others have violated the terms of their nonimmigrant status or have committed an offense that renders them subject to removal, such as alien smuggling.²² Removal proceedings also include some who are seeking admission to the U.S. and who the government believes are statutorily inadmissible; they are removable because the statute bars their admission.²³ As discussed below, some people can be denied admission at the border under an expedited removal procedure that generally does not involve immigration court review.²⁴

In general, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE), apprehend (some) non-citizens whom they suspect are removable—CBP at or between ports of entry, ICE in the interior—including when state and local law enforcement agencies inform ICE that they have custody of non-citizens who may be removable. In some situations, officers may allow individuals to return voluntarily to their home countries.²⁵ Alternatively, officers may put individuals in immigration court removal proceedings, or in some situations, formally remove them without immigration court intervention.²⁶ In 2010, DHS made almost 517,000 apprehensions, ninety percent (90%) of them by CBP. In addition, CBP returned

¹⁹ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS JUDICIAL BUSINESS OF THE UNITED STATES COURTS at Tables D-2 (2011) *available at* <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>.

²⁰ *See id.* at Table D-3; *see also* Transactional Records Access Clearinghouse, *Illegal Reentry Becomes Top Criminal Charge*, SYRACUSE UNIV., (June 10, 2011), <http://trac.edu/immigration/reports/251/> (reporting that in the first six months of fiscal year 2011, the major immigration criminal offense, illegal reentry, was the “most commonly recorded lead charge brought by federal prosecutors”).

²¹ RUTH ELLEN WASEM, CONG. RESEARCH SERV. RL 33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986 (2011) *available at* <http://fpc.state.gov/documents/organization/174245.pdf>.

²² *See generally* INA § 237(a) (2010); 8 U.S.C. § 1227(a) (2006) for grounds of removal.

²³ *See generally* INA § 237(a)(1) 8 U.S.C. § 1227(a)(1) (2006) and the grounds of inadmissibility found in INA § 212; 8 U.S.C. § 1182 (2006).

²⁴ *See* INA § 235(b); 8 U.S.C. § 1225(b) (2006).

²⁵ The official regulations governing voluntary departure in lieu of being placed in removal proceedings are found at 8 C.F.R. § 240.25 (2010).

²⁶ *See discussion infra* at Section a, at 16.

approximately 476,000 aliens to their home country without a removal order (the great majority were from Mexico and Canada).²⁷

At various times, CBP has coordinated enforcement with the U.S. Attorney in a border state. Part of CBP's enforcement policy in southern Arizona, for example, is to use criminal enforcement for as many cases as the federal district court can accommodate and take the cases that could not be criminally prosecuted to the immigration court under a policy known as the Consequence Delivery System.²⁸ So, at least in one part of the United States, there seems to be a direct relationship between the immigration courts' daily workload and a district court's ability to enforce illegal entry crimes.

ICE effected 396,906 removals in FY2011,²⁹ up from 189,000 in 2001.³⁰ Congress has greatly expanded funding and resources for border enforcement. The Bush and Obama administrations have posted members of the National Guard along the southern border.³¹

a. Administrative Removal without Immigration Court Review

Congress has authorized DHS officers to issue removal orders in some cases without immigration court review or participation. The American Bar Association Commission on Immigration said these non-judicial removals implement Congress's intention to reduce immigration court workload through administrative removal of individuals whose lack of authorization to be in the country is "indisputable." That word comes from the legislative history of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act,³² but establishing "indisputability" in the removal context is hardly a simple task.

DHS officers may order the "expedited removal" of aliens whom they apprehend at ports of entry without valid documentation or who have committed fraud or misrepresentation, as well as those apprehended within 100 miles of the border who were not admitted or paroled and have not persuaded an immigration officer that they have been in the country for at least two weeks. As explained later, people in expedited removal proceedings have no recourse to the immigration

²⁷ U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2010* (2011), at 3,4 available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> [hereinafter *DHS Immigration Enforcement Actions, 2010*].

²⁸ See also *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border? Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. (2011) (statement of Michael J. Fisher, Chief, U.S. Border Patrol, U.S. Customs and Border Protection) and Aguilar's Aff. at 7 *United States v. Arizona*, No. 2:10-CV-951 (D. Ariz. July 6, 2010) (available at <http://www.justice.gov/opa/documents/declaration-of-david-aguilar.pdf>) (describing the federal government's activity in this region).

²⁹ *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Oct. 18, 2011), <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>.

³⁰ *DHS Immigration Enforcement Actions, 2010*, supra note 27, at 4.

³¹ See, e.g., National Guard Supports Border Security Efforts, CPB.GOV (Mar. 1, 2011), http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/03012011_7.xml.

³² AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-49 (2010) available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.auhcheckdam.pdf, citing ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2004) [Hereinafter *ABA Comm'n on Immigr. Rept., 2010*].

courts unless they claim U.S. citizenship, permanent resident status, or more commonly, state that they want to seek asylum or that they fear persecution or torture if returned to their home country. Thirty seven percent of the 189,000 removals in 2001 were expedited removals. By 2010, that percent was down slightly, to twenty-seven percent (27%) of 400,004 total removals.³³

DHS officers may also remove aliens who left the country under a removal order and then illegally reentered the United States. The prior order of removal is the basis for the subsequent removal, and there is no immigration court role in these INA § 241(a)(5) reinstatement-of-final-removal orders. One of the few exceptions to DHS's authority to reinstate a prior order of removal is if a non-citizen makes a claim of withholding of removal due to a fear of persecution or torture. Almost 131,000 of 2010 removals (about thirty-three percent (33%)) were by reinstatement of final removal orders.³⁴

Similarly, ICE may use a form of "hearingless" or administrative removal by serving notice of intent to remove a non-citizen who has been convicted of an "aggravated felony" as defined in the INA and implementing regulations and does not have lawful permanent resident status.³⁵ The INA has a long list of possible convictions and types of crimes that may constitute aggravated felonies. This is a very complex area of the law. A conviction for a misdemeanor, for example, can qualify as an aggravated felony in immigration matters. Non-citizens may also be subject to removal for criminal conduct that is not an aggravated felony.³⁶ Which crimes are included within the statutory definition is a frequent subject of immigration court litigation. The individual has a chance to rebut the allegations by written submission only and must do so within fourteen days or may waive rebuttal. There is no immigration court role in these § 238 removals. People subject to these removal orders can seek a limited petition for review in the courts of appeal.

In sum, DHS in 2010 effected over two thirds of removals without any adjudication within the immigration courts, as seen in this chart.

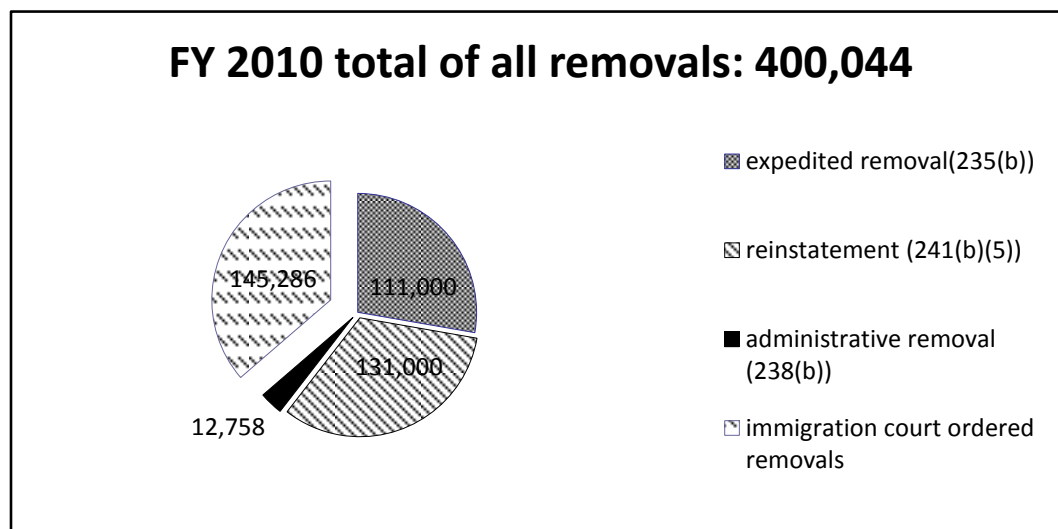
³³ *DHS Immigration Enforcement Actions, 2010*, *supra* note 27, at 4. ICE provided additional data on FY 2010 removals to the authors on June 5, 2012. Those data reflect slightly different definitions and fiscal year information. The table and text as provided by ICE are reproduced as Appendix 9.

³⁴ *DHS Immigration Enforcement Actions, 2010*, *supra* note 27, at 4.

³⁵ See INA § 101(a)(43) (2010); 8 U.S.C. § 1101(a)(43) (2006).

³⁶ See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 75-78 (2010) (describing INA § 238 removal procedures and the complexity of the aggravated felony definition); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in the Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (describing complex immigration issues and analysis interpreting the consequences of criminal convictions).

Chart 1: Forms of Removal, 2010*



* 2010 data. ICE provided updated § 238(b) administrative removals data to the authors on June 5, 2012. The earlier versions of this chart had used 2008 data.

b. Agency Filings in the Immigration Courts

Jurisdiction vests with the immigration court when a DHS officer files a charging document with the court, known as a “Notice to Appear” (NTA). Total NTAs rose from over 153,000 in 2004 to over 221,000 in 2009.³⁷ The latest available data indicate that in 2008, ICE issued about sixty-two percent (62%) of all NTAs, CBP issued about twenty percent (20%), and USCIS about eighteen percent (17%). CBP-issued NTAs dropped from about fifty-five percent (55%) in 2006, and ICE’s NTAs rose from about thirty percent (30%) that year.³⁸ When we asked for these data in our interviews, EOIR, DHS and DOJ personnel told us that the NTA-originating agency is not coded in statistical reports. Our interviewees’ estimates of the source of NTAs varied considerably—some put USCIS’s share at fifty percent (50%), for example, others put it at twenty percent (20%).

2. Immigration Courts

The immigration courts handle “matters.” Most matters are “proceedings” to determine the removability and eligibility for relief and/or protection from removal of someone about whom a DHS officer has filed an NTA. Auxiliary to proceedings are two other types of matters: bond redetermination hearings (for respondents in DHS detention); and motions (principally to reopen or reconsider closed cases). One respondent may account for several matters in the same or different fiscal years—for example, a request for bond redetermination and a proceeding to seek relief from removal.

Immigration court “receipts” (filings) and completions have both been going steadily up, as shown in Table A. Over the last five years proceedings received have risen twenty-one percent

³⁷ *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 1-13.

³⁸ *Id.*, at 1-12–1-15, based on data that DHS generated on request.

(21%) and all matters by twenty-eight percent (28%), due to a heavy increase in bond redeterminations. Proceedings received have increased four percent just over 2010.

Completed proceedings have increased more slowly over the most recent five years, by eleven percent (11%), and five percent (5%) over 2010.

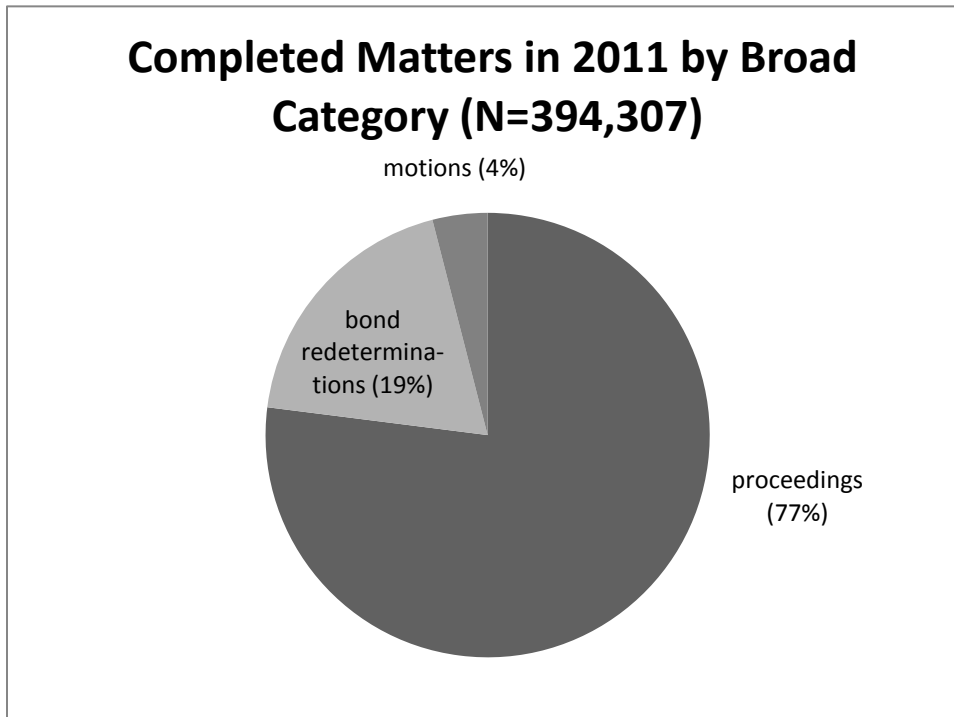
Table A—Immigration Court Receipts and Completions, 2007-2011

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

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

Chart 2 shows the breakdown for 2011 completions:

Chart 2: Matters by Broad Category, 2011



a. Proceedings

Proceedings are immigration court adjudications between DHS and an individual respondent. In proceedings, judges principally exercise the authority granted or delegated to them in § 240 of the INA, DOJ regulations, and decisions by the BIA and the U.S. courts of appeals.

Proceedings basically implicate two questions: is the respondent removable and, if so, is the respondent nevertheless eligible for one of the limited forms of statutory or regulatory relief or protection from removal, such as asylum? Immigration judges have no inherent or equitable authority to grant relief; they may only grant forms of relief created by Congress.

Proceedings begin and may end with an initial “master calendar” hearing. If a case does not conclude at the master calendar stage, it can extend to one or more “individual calendar” hearings to adjudicate the merits of the case. In some matters, the judge may schedule some form of pre-hearing or status conference (generally not referred to by those names).

[1] Master Calendar Hearing

Although removal adjudications are civil proceedings, the master calendar hearing is frequently analogized to a criminal arraignment. At a master calendar hearing, the respondent, or a group of respondents, appear(s) before a judge, who seeks to ascertain if the respondents understand the charges in the NTA and notifies them, among other things, of their right to be represented by counsel (or a non-lawyer accredited representative), albeit at no cost to the government. The judge also determines the need for translation services; directs the respondent or counsel to admit

or deny the charges; and explains types of relief to which the respondent may be eligible and asks whether the respondent will apply for relief.

[2] Individual Calendar Hearing

In most cases, at the master calendar hearing or at some later date, the judge schedules a hearing at which DHS and the respondent can present evidence about the merits of the case. At some stage in the process, the vast majority of respondents concede the allegations; however, some go on to seek relief.

[3] Pre-hearing, or Status, Conferences

Commonplace in state and federal civil litigation (involving other than relatively simple matters) are conferences in which the parties and the judge, or the parties on their own, confer (in person or through document exchanges) to narrow issues and otherwise prepare for the trial (or see if a trial can be avoided). Such events, although authorized by EOIR's governing regulations and policy, are not routine in immigration court, although it is difficult to determine their frequency and whether their occurrence varies among courts or judges because the OPAT data base does not have a specific entry for them, and thus most judges code them as master or individual calendar hearings.

b. Types of Dispositions of Proceedings

[1] Merits Decisions and Other Completions

In fiscal 2011 immigration judges completed 303,287 proceedings. They rendered merits decisions in 220,048 (seventy-three percent (73%)) of them. The other 83,239 were closed administratively or transferred to a different location or granted a change of venue. The seventy-three percent (73%) figure for merits decisions was down slightly from 2010, when seventy-seven percent (77%) of the completions were merit decisions.³⁹

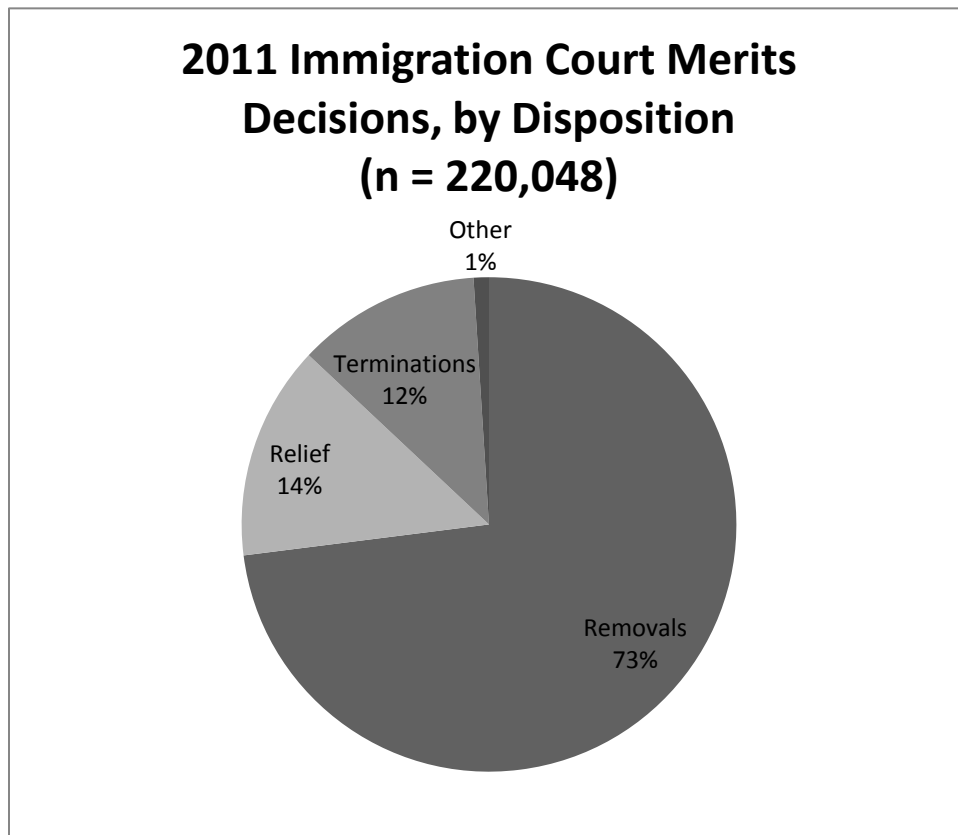
The 220,048 merits decisions comprised four types of dispositions:

- 161,354 (seventy-three percent (73%)) were orders of removal;
- 31,763 (fourteen percent (14%)) were grants of "relief," such as asylum;
- 25,562 (twelve percent (12%)) were "terminations," in which the judge decided that the government could not sustain the charges it filed, the respondent established eligibility for naturalization, or the government agreed to dismissal of the proceedings; and
- 1,369 (0.6 percent) of the decisions were categorized as "other."

³⁹ *Statistical Year Book, 2011*, *supra* note 4, at D 1-2.

Chart 3 shows the breakdown graphically:

Chart 3: 2011 Immigration Completions by Disposition



As Table B and Chart 4 below show, there has been a decrease in merits decisions over the past five years (from slightly over 223,000 in 2007 to slightly over 220,000 in 2011), and a corresponding decline in removal orders (from about 170,000 to about 161,000). Orders granting relief rose from over 30,000 to almost 32,000 and terminations increased from about 21,000 to well over 25,500.⁴⁰

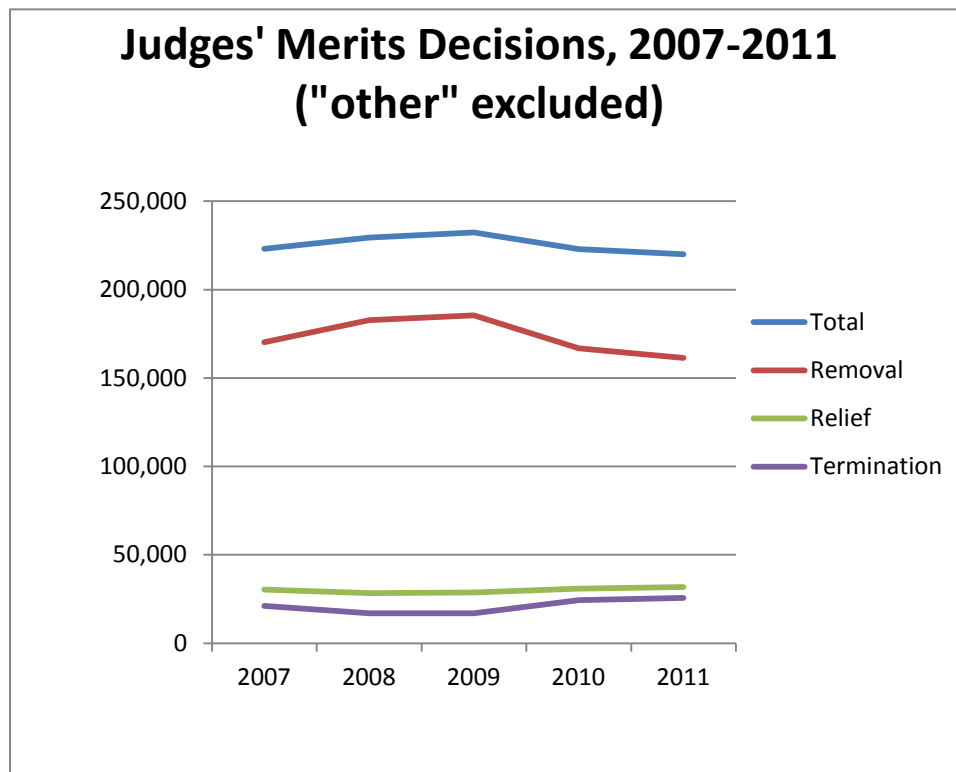
Table B: Immigration Judge Merit Decisions 2007-2011 (Number and percent)*

	2007	2008	2009	2010	2011
Total	223,085	229,463	232,385	222,909	220,048
Removal	170,291 76%	182,727 80%	185,421 80%	166,860 75%	161,354 73%
Relief	30,263 14%	28,386 12%	28,676 12%	30,947 14%	31,763 14%
Termination	21,146 10%	17,033 7%	17,038 7%	24,369 11%	25,562 12%

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

⁴⁰ *Id.*

Chart 4: Merits Decisions 2007-2011



[2] Special Categories of Removal

[a] In absentia dispositions

Some of the final decisions rendered by judges involve respondents who fail to appear at a hearing. In that situation, if the judge is satisfied that the respondent or counsel received notice of the hearing and the government establishes by clear, unequivocal, and convincing evidence that the respondent is removable, the judge must order the respondent removed in absentia. In absentia removal orders constituted twenty-one percent (21%) of judges' decision in 2011 for respondents whom DHS detained at no time during the proceedings (down from thirty-one percent in 2007) and twenty-six percent, for aliens who had been released from detention (down from twenty-nine percent (29%) in 2006). (Obviously, respondents in detention rarely fail to appear.)⁴¹ We do not know the reason for the decline in the total number of in absentia orders; many factors may have contributed. In 2006, Congress amended the INA to include a ten-year limitation on eligibility for discretionary relief if a person fails to appear.⁴²

⁴¹ *Id.* at H2-3.

⁴² See INA § 240(B)(7), 8 U.S.C. § 1229a(B)(7).

[b] Stipulated removal orders

Judges also issue a form of removal called a “stipulated removal order.”⁴³ These orders are not scheduled as either master calendar or individual hearings. In fiscal year 2010, judges signed 27,943 stipulated removal orders.⁴⁴ In these removals, the DHS counsels the respondent about his or her ability to waive the removal hearing and the consequences of agreeing to the issuance of an immediate removal order. Some judges waive the respondent’s appearance and sign the removal order after they have reviewed the evidence of service and a signed waiver of hearing from the respondent. Other judges interview the respondent to determine if the waiver of the hearing was “knowing and voluntary.”

Critics of stipulated removal are concerned that unrepresented respondents may not understand the rights they are waiving and may agree to stipulated removal solely to avoid lengthy DHS detention.⁴⁵ Others believe this procedure helps the respondent complete the removal process quickly, most often where the respondent is ineligible for any relief from removal, and is more efficient than requiring mass removal hearings where the judge may spend several hours to confirm each respondent’s desire to accept an order of removal and depart. Not all immigration courts have seen requests from DHS for stipulated removals orders. At least one court only saw them used when the stipulation was part of a plea bargain in a criminal proceeding and criminal defense counsel represented the respondents. Appendix 4 shows the aggregate decline in the number of such orders issued by immigration courts in 2009, 2010, and 2011.

[c] Voluntary departure

Judges may permit some respondents to depart the United States voluntarily rather than subject to a removal order. EOIR categorizes a grant of “voluntary departure” as a form of removal rather than a form of relief. While a person who receives voluntary departure cannot remain indefinitely (the order can only grant a period of up to 120 days), the long-term consequences of departing under this order as opposed to a removal order can be quite dramatic and much to the respondent’s benefit. Not every respondent is eligible for voluntary departure and the ultimate decision to grant the privilege is within the judge’s discretion. Of the 161,354 immigration court removal orders in 2011, 30,385 (nineteen percent (19%)) were voluntary departures.⁴⁶ DHS officials can also grant voluntary departure to individuals who are apprehended in the field, including those whom officers do not place in removal proceedings.⁴⁷

⁴³ See Brian M. O’Leary, Chief Judge, *Operating Procedures and Policy Memorandum 10-01: Procedures for Handling Requests for a Stipulated Removal Order*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2010) available at <http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf> [Hereinafter *OPPM: Stipulated Removals*].

⁴⁴ OFFICE OF PLANNING, ANALYSIS AND TECHNOLOGY DATA, provided by OPAT (on file with author) [Hereinafter *OPAT DATA*].

⁴⁵ SEE JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, *DEPORTATION WITHOUT DUE PROCESS* (2011) available at <https://nilc.org/document.html?id=6>.

⁴⁶ *Statistical Year Book, 2011*, *supra* note 4, at Q1.

⁴⁷ These voluntary departures are not included in the immigration court statistics. See INA § 240B(d); 8 U.S.C. § 1229(c) (2006) for voluntary departure post 1996. See 5 STEPHEN YALE-LOEHR & STANLEY MAILMAN, *IMMIGRATION LAW AND PROCEDURE* § 64.5 (Matthew Bender ed.).

c. Additional Aspects of Immigration Court Matters

[1] Detained Cases

DHS officers who place people in removal proceedings may, and in some cases must, detain them for all or part of the time until the case is resolved. DHS holds people in some DHS-managed facilities, some Federal Bureau of Prisons-managed facilities, some that private contracting corporations run, and in many spaces rented from state and local jails.⁴⁸ Some immigration court proceedings are held within or adjacent to detention centers. Statutory and DHS detention policies have been a source of controversy. The ABA Commission on Immigration criticized the rapid growth in the number of detainees, especially in facilities that DHS may not be able to supervise adequately; what the Commission regarded as overly broad mandatory detention pursuant either to the INA or DHS policies; and practical restrictions on access to family and lawyers imposed on those by detention in remote facilities.⁴⁹ Although we visited a few immigration court detention sites, and met with advocates and leaders of non-profit organizations that regularly represent detained individuals, we did not have time or resources to thoroughly examine the impact detention conditions have on immigration court proceedings. During our study, DHS also issued new detention guidelines.⁵⁰

Of the over 303,000 completed proceedings in fiscal year 2011, forty-two percent (42%) involved respondents who were detained during the adjudication, but the percentages varied by court, as shown in Appendix 3 and in the abbreviated table below, showing the five courts with highest and lowest percentage of detained respondents in 2011.⁵¹

	Percent Detained
Fishkill	99%
Ulster	99%
Stewart SPC (Georgia)	94%
Tucson	92%
El Centro SPC (Calif.)	82%
New Orleans	4%
Philadelphia	3%
Memphis	1%
New York City	<1%
Charlotte	<1%

Even immigration courts not located within detention facilities may have a very high detained docket, for example the Tucson court.

⁴⁸ See generally Symposium, *U.S. Immigration Detention: Policy and Procedure From A Human Rights Perspective: Intercultural Human Rights Law Review Annual Symposium*, 5 INTERCULTURAL HUM. RTS. L. REV. 1 (2010) (collection of articles addressing detention in immigration proceedings).

⁴⁹ *ABA Comm'n on Immigr., Rept. 2010*, supra note 32, at 1-50 ff.

⁵⁰ See *ICE Performance-Based National Detention Standards* (2011) available at <http://www.ice.gov/news/library/factsheets/facilities-pbnds.htm>.

⁵¹ Computed from data at B6 and O3, *Statistical Year Book, 2011*, supra note 4.

Congress has mandated detention for aliens in expedited removal; the statute provides limited review of detention in this context. Congress has repeatedly expanded the category of non-citizens who must be detained during regular removal proceedings, primarily those with certain categories of convictions. DHS has set priorities for the detention of aliens not subject to mandatory detention, and those detained can seek immigration judge review of the custody decisions as well as bond set by DHS.⁵² On any one day in 2009, about 32,000 individuals were in detention;⁵³ the number of respondents in detention at some point in 2001 was about 209,000; it rose to over 378,000 in 2008;⁵⁴ and declined to about 363,000 in 2010.⁵⁵

ICE can and does transfer detainees from one site to another. According to one estimate, in the first six months of 2008, over half the detainees were transferred at least once, and almost a quarter were transferred multiple times. At least in 2008-09, ICE housed about seventy percent (70%) of detainees in state and local jails, particularly in the south and southwest, many of which were remote from population centers.⁵⁶ Frequent transfer of detainees, especially to remote detention centers, limits detainees' access to representation. DHS is in the process of consolidating its detention centers, and DHS officials told us that detainee transfers have decreased recently.

EOIR often cannot control the environment within the detention facilities and has little space within them to operate its courts. It appears that the rapid growth in detention has made it difficult for EOIR to meet the increased need for hearing locations that can function within the detained settings. EOIR has been flexible and at times operates in substandard conditions and even converted storerooms to create more courtrooms. The rapid growth has also meant corresponding expansion problems for the courts' administrative operations due to the demand for file space and support staff.

We did not explore in any depth the level of coordination between EOIR and DHS with respect to the planning and construction of detention facilities in which judges might conduct proceedings. It may be a matter worthy of further inquiry.

[2] Representation By statute, respondents may be represented by counsel or other representatives but only "at no expense to the government."⁵⁷ As discussed more fully below, slightly over half the respondents in proceedings completed in 2011 had counsel (up from slightly under half in previous years), but a much lower percentage of detained respondents were represented. In some courts, the rate of representation is less than ten percent.⁵⁸

⁵² *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 1-12-15.

⁵³ U.S. Immigration & Customs Enforcement, *Fact Sheet: 2009 Immigration Detention Reforms*, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (last visited Dec. 30, 2011).

⁵⁴ Donald Kerwin & Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Washington, D.C.: Migration Policy Institute 2009), 6, 7 available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

⁵⁵ *DHS Immigration Enforcement Actions, 2010, supra* note 27, at 4.

⁵⁶ *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 1-57 (citing, in part, Translational Records Clearinghouse (TRAC) and ICE data).

⁵⁷ INA § 292 (2010); 8 U.S.C. § 1362 (2006).

⁵⁸ See Appendix 3 provided data on rates of representation by court location.

[3] *Hearings by video technology*

Some hearings, particularly for detained respondents, use video technology: at least one participant is not co-located with the others. Roughly one in eight of the hearings held in proceedings that were completed in 2010 were held by video (105,901 of 852,230). In 2010, video technology was also used in roughly one in three bond redetermination hearings (22,933 of 78,187).⁵⁹

3. Board of Immigration Appeals

Both the government and the respondent may seek review of immigration judges' decisions before the BIA. In 2011, the BIA received 27,237 appeals from immigration judge decisions. Of those, 15,565 were "case appeals;" the rest were appeals from other types of decisions, including 7,501 appeals from BIA decisions on motions to reopen BIA decisions or reconsider immigration judge decisions;⁶⁰ the 27,237 appeals involved 17,090 respondents.⁶¹ EOIR reports that ten percent or less of judges' decisions result in appeals to the BIA.⁶² However, the rate of appeal is higher in those cases where relief is sought. In 2010, in cases where any relief was sought (71,924 proceedings), the percentage rate of appeals was 15.3%. (The BIA has held that a respondent may not appeal from an in absentia order although in some cases the individual may seek a motion to reopen.)

We asked for data about who filed the appeals and learned that in fiscal year 2010, of the 15,556 appeals from immigration judge decisions, respondents filed 14,023 and DHS filed 1,312. In a small number, both parties appealed. Of the 14,023 appeals filed by the respondents in 2010, ninety-nine were appeals from in absentia orders and 2,924 appealed without any relief in the case being sought (the respondent was likely challenging the grounds of removal).

In 2011, in addition to the appeals from immigration judge decisions, the BIA received 8,725 appeals from decisions of DHS agencies.⁶³ These appeals mainly involve challenges to USCIS denials of family-based immigrant visa petitions.

The Board hears the great majority of appeals exclusively on written submissions. It held no more than three oral arguments per year since 2006.⁶⁴ This has long been the BIA's practice.⁶⁵

To help the BIA adjudicate its cases, approximately 125 staff attorneys review files, draft opinions for BIA member review, and sometimes sit as temporary BIA members. The vast majority of the BIA decisions are "single member decisions;" only one BIA member signs them. Some federal judges and other commentators criticize this practice and urge panel decisions.⁶⁶

⁵⁹ *OPAT DATA*, *supra* note 44.

⁶⁰ *Statistical Year Book, 2011*, *supra* note 4, at T2.

⁶¹ *Id.* at X1.

⁶² *Id.* at X.

⁶³ *Id.* at T2.

⁶⁴ *OPAT DATA*, *supra* note 44.

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

⁶⁶ See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 431 (2007) (evaluating the move from three-member to single-member decisions). See also Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829 (discussing history of BIA regulations creating forms of streamlining and the reactions of federal judges in subsequent appeals to the BIA structure).

Others say that many of the appeals are easily disposed of and that, as a quality control measure, what one EOIR official described as “the senior legal staff” review random samples of three categories of BIA final decisions before they are mailed out to the parties.⁶⁷ The three categories are: single board member decisions from the screening panel; three-Board Member decisions from any panel; and single Board Member decisions from any panel. In 2010, attorney managers reviewed twenty-three percent (23%) of the BIA decisions.⁶⁸ Rates of representation before the BIA are much higher than in the immigration courts—in 2011, eighty percent (80%) of respondents appealing immigration judge decisions.⁶⁹ In detained cases (in 2010), fifty-one percent (51%) of the respondent-appellants are represented. Eighty-seven percent of the non-detained respondents have counsel. In appeals from DHS denials of family based visa petitions, thirty-one percent (31%) of the respondents were represented in 2010.⁷⁰

4. U.S. Courts of Appeal

Respondents, but not the government, may seek review of a BIA decision in the court of appeals in the circuit in which the immigration court concluded the proceeding. The DOJ Office of Immigration Litigation (OIL) represents the government before the court of appeals. A sharp increase in appeals from BIA decisions began in 2002 and peaked in 2006. They are now about sixty percent (60%) of what they were in 2006 but almost four times the 2011 number. The volatility in appeals has been especially pronounced in the courts of appeals for the Second and Ninth Circuits.

IV. Framework and Focus of Analysis

Immigration removal adjudication agencies and processes have been the objects of reporting and analysis, most of it critical and of decidedly uneven quality, in the popular press,⁷¹ from organizations of various types,⁷² scholars,⁷³ advocates,⁷⁴ U.S. courts of appeals judges,⁷⁵

⁶⁷ Interview, staff of the Board of Immigration Appeals (May 2011); E-mail from ACIJ Edward Kelly (Dec. 2011) (on file with authors) (reconfirming information from interview with BIA staff).

⁶⁸ *Id.*

⁶⁹ *Statistical Year Book, 2011, supra* note 4, at V-1.

⁷⁰ *OPAT DATA, supra* note 44.

⁷¹ *E.g.*, Jacqueline Stevens, *Lawless Courts, Immigration Judges Who Flagrantly Disregard the Law are Sheltered by a Secretive System*, THE NATION, Nov. 8, 2010, at 17; Julia Preston, *Immigration Judges Found Under Strain*, N.Y. TIMES, July 11, 2009, at A11.

⁷² *E.g.*, *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at parts 2, 3, 5, 6; Transactional Records Access Clearinghouse, *Comprehensive, independent and nonpartisan information about U.S. federal immigration enforcement*, SYRACUSE UNIV., www.trac.syr.edu/immigration (last visited Dec. 30, 2011); Donald M. Kerwin, Doris Meissner, & Margie McHugh, *Executive Action on Immigration; Six Ways to Make the System Work Better*, (Washington, D.C.: Migration Policy Institute 2011) available at <http://www.migrationpolicy.org/pubs/administrativefixes.pdf>; APPLESEED, ASSEMBLY LINE JUSTICE—BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS (2009) available at www.appleseednetwork.org/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf; MARK H. METCALF, *BUILT TO FAIL, DECEPTION AND DISORDER IN AMERICA’S IMMIGRATION COURTS*, (Center for Immigration Studies 2011), available at www.cis.org/articles/2011/built-to-fail-full.pdf.

⁷³ *See* Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635 (2010); Wheeler, *supra* note 6; JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ, PHILIP SCHRAG & EDWARD KENNEDY, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2009) (including the lead authors’ 2007 article of the same title and additional comments by others); Lenni B. Benson, *You Can’t Get There from Here:*

immigration judges,⁷⁶ BIA members,⁷⁷ the DOJ,⁷⁸ and the Government Accountability Office.⁷⁹ (The footnotes cite only a small sample of the literature.)

Critics have:

- called for more EOIR resources to hire more judges and support staff and thus ease the backlog of matters;
- criticized judge hiring standards and procedures, and recommended enhanced orientation, continuing education, and performance monitoring (reflecting in part press and court of appeals accounts of judges' intemperate behavior and decisional disparities within and between immigration courts); and
- called for moving immigration adjudication agencies from the DOJ into one of several alternative arrangements within the executive branch, arguing that, even though DHS, not DOJ, prosecutes removal cases, law enforcement management of the immigration courts threatens independent judicial decision-making.

Diagnoses underlying the many prescriptions offered over the last few years have been based largely on impressions from direct observation and comments reported by secondary observers. There has been some quantitative research, such as several analyses of decisional disparities in asylum cases.⁸⁰

Managing Judicial Review of Immigration Cases, 2007 U. CHI. LEGAL F. 405; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006-2007); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

⁷⁴ E.g., Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623 (2009) (describing the reports of the Katzmann Study Group to promote adequate representation for those in removal proceedings in the New York City area).

⁷⁵ E.g., *Immigration Litigation Reduction Hearing Before the Subcomm. On the Judiciary*, 109th Cong., at 5, 9, 182, (2006) (statement of Chief Judge John Walker (2d Cir) and Judges Carlos Bea (CA-9) and letter of Sidney Thomas (CA-9)). See, e.g. Lynne Marek, *Posner Blasts Immigration Courts As 'Inadequate' And Ill-Trained*, NAT'L L. J., April 22, 2008; J. Roemer, *Ninth Circuit Judge Criticizes Rulings On Asylum Cases* J. DAILY J. (CA) Feb. 15, 2008. See also news account Pamela MacLean, *Immigration Judges Still Under Fire*, NAT'L L. J., Jan. 30, 2006.

⁷⁶ Slavin & Marks, *supra* note 16; Brennan, *supra* note 74; Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008); Stuart Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks & Denise Slavin, *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22 (2008).

⁷⁷ Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923 (2006).

⁷⁸ E.g., *Measures to Improve the Immigration Courts and Board of Immigration Appeals*, THE ATT'Y GEN. (2006) available at <http://www.justice.gov/ag/readingroom/ag-080906.pdf> and follow up reports *infra* at text accompany note 81 and note 82.

⁷⁹ Executive Office of Immigration Review, *U.S. GAO—Executive Office For Immigration Review: Caseload Performance Reporting Needs Improvement*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 12, 2006), available at <http://www.gao.gov/products/GAO-06-771>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-935, U.S. ASYLUM SYSTEM, AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN (2008) available at <http://www.gao.gov/new.items/d08935.pdf>.

⁸⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES (2008) available at <http://www.gao.gov/new.items/d08940.pdf>, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-935, *supra* note 79; RAMJI-NOGALES ET AL, *supra* note 73; Transactional Records Access Clearinghouse, *TRAC Immigration Report*:

The DOJ responded to some of this criticism in 2006 when Attorney General Alberto Gonzales ordered a “comprehensive review” of the immigration courts and the BIA. Based on that review, he directed implementation of twenty-two measures, most of which involved the immigration courts and the single largest number of which, nine, involved selection training, supervision, and performance evaluation of judges and BIA members.⁸¹ In June 2009, EOIR announced that it had substantially completed implementation of the twenty-two measures⁸² and claimed completion of other measures in subsequent press releases.⁸³ We discuss these measures below, although we have not built our analyses around them.

A. The Basic Problem

A constant in the recent literature about immigration removal adjudication is the gap between resources—in particular the number of judges—and the workload facing the courts and to a lesser degree, the BIA. The ABA Immigration Commission put it succinctly: “[n]umerous stakeholders and commentators have recognized what IJs also know: the EOIR is underfunded and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.”⁸⁴ EOIR and DOJ have sought vigorously and with some success to receive additional appropriations with which to hire more judge “teams” (a judge, law clerk, and support staff), but we strongly doubt that substantial additional resources are in the cards.

1. Workload

In 2011, the immigration courts received 430,574 total “matters,” up by nine percent from 2010. They completed 394,307 matters, up by eleven percent (11%) from 2010. Per judge, they completed 1,494 matters on average, up from up from 1,338 matters on average in 2010. The “per judge” figure is a rough one, calculated principally for comparative purposes, because we used the 264 judges on board in May 2012 as the base number.⁸⁵

a. Completed Matters

Completed matters in 2011 included:

- 75,258 bond redetermination matters (roughly 283 on average for each of the 264 judges reported in office in 2012);

Asylum Disparities Persist, Regardless of Court Location and Nationality, SYRACUSE Univ., (Sept. 24, 2007), <http://trac.syr.edu/immigration/reports/183/>.

⁸¹ Executive Office of Immigration Review, *Caseload Performance Reporting Needs Improvement*, *supra* note 79.

⁸² Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR's Improvement Measures—Update*, U.S. DEP'T JUST., (2009), available at <http://www.justice.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf>.

⁸³ *E.g.*, Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *The Executive Office for Immigration Review Announces New Process for Filing Immigration Judge Complaints*, U.S. DEP'T JUST., (2010), available at <http://www.justice.gov/eoir/press/2010/IJConductProfComplaints05192010.pdf>, Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR Completes Digital Audio Recording Implementation*, U.S. DEP'T JUST., (Sept. 2, 2010), <http://www.justice.gov/eoir/press/2010/EOIRCompletesDAR09022010.htm>.

⁸⁴ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 32, at 2-16.

⁸⁵ *Id.* at B-4.

- 15,762 motions to reopen or reconsider (roughly sixty per judge, on average); and
- 303,287 completed proceedings (roughly 1,149 per judge, on average).⁸⁶

b. Hearings

For 2010's 287,207 completed proceedings, judges held 852,230 hearings⁸⁷ (not all of them in 2010), roughly 3,626 hearings per judge, on average. This figure is imprecise for several reasons. For one thing, we used 235 judges as the denominator, based on a September 2010 EOIR report that "more than 235" judges were then in office.⁸⁸ For another, OPAT counts a master calendar hearing for multiple respondents as multiple master calendar hearings.⁸⁹ (We did not ask OPAT to generate data on hearings conducted for the proceedings completed in fiscal 2011.)

Of 2010's 287,207 completed proceedings:

- slightly less than half—139,065—had master calendar hearings but no individual calendar proceedings; 127,715 of those had more than one master calendar hearing. At some point, though, the respondent either conceded removability or failed to appear for subsequently scheduled hearings.
- slightly more than half of the 287,207 completed proceedings—146,142—had at least one individual calendar hearing, and 56,519 of the completed proceedings had more than one individual calendar hearing.⁹⁰

There is no separate code in the OPAT data system for pre-hearing or similar conferences.⁹¹ Judges and court administrators typically code such conferences as master calendar or individual calendar hearings. Thus the figures above don't represent completely accurate counts of actual master and individual calendar hearings.

c. Variations in Per Judge Workloads

The number and mix of matters varies greatly from court to court. Because EOIR has no system of "weighting cases" according to the average time different case types require of judges, it is difficult to compare the actual workload of judges in different courts around the country. Nevertheless, in 2011, in nine courts (using the 2012 judge counts), the per judge completion figure for all matters was 750 or less. For ten courts, it was over 3,200. Table C displays courts with the lowest and highest matters per judge; Appendix 3 presents the figures for all courts. These per judge figures are approximations. For one thing, judges sometimes serve temporarily in other courts, either in person or by video.

⁸⁶ *Statistical Year Book, 2011*, *supra* note 4.

⁸⁷ *OPAT DATA*, *supra* note 44.

⁸⁸ Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *EOIR Swears in Omaha Immigration Judge*, U.S. DEP'T JUST., (Dec. 5, 2008), <http://www.justice.gov/eoir/press/08/DCInvest1IJ120508.htm>; *EOIR at a Glance*, *supra* note 3.

⁸⁹ *Id.*

⁹⁰ *OPAT DATA*, *supra* note 44.

⁹¹ *Id.*

Table C: Matters Per Court and Per Judge

	Judges (April 2012)	Comp. Proc.	Comp. Proc./ Judge	Bonds	Motions	All Matters	Per Judge
SAN DIEGO	6	3,021	503	132	239	3,392	565
FISHKILL	0.5	287	574	0	17	304	608
HONOLULU	2	967	483	269	47	1,283	642
SAN FRANCISCO	18	9,172	509	1,833	583	11,588	644
PORTLAND	2	1,226	613	43	80	1,349	675
GUAYNABO	2	1,133	566	119	128	1,380	690
NEW YORK CITY	29	18,382	633	0	1,919	20,301	700
PHILADELPHIA	4	2,617	654	0	244	2,861	715
MIAMI	15	10,030	668	2	1,212	11,244	750
LANCASTER	3	5,854	1,951	3,736	38	9,628	3,209
HARLINGEN	4	9,797	2,449	2,625	525	12,947	3,237
LOS FRESNOS	2	3,653	1,826	3,035	52	6,740	3,370
EL PASO	2	6,408	3,204	820	164	7,392	3,696
YORK	2	5,389	2,694	2,515	66	7,970	3,985
STEWART	3	11,342	3,780	1,716	26	13,064	4,355
HOUSTON SPC	3	11,067	3,689	3,299	43	14,409	4,803
TACOMA	2	6,277	3,138	3,672	57	10,006	5,003
PEARSALL	2	6,612	3,306	3,451	21	10,064	5,032
OAKDALE	3	12,359	4,119	5,595	54	18,008	6,003
TOTAL (all 59 courts)	264	303,287	1,149	75,258	15,762	394,307	1,494

d. Contesting Removability and Seeking Relief

The general view among immigration judges is that almost all respondents concede removability but seek to remain in the country by applying for some form of relief from removal, for example, by making a claim for asylum, adjustment of status, or cancellation of removal. In fact, though, the 2011 EOIR Statistical Year Book reports that only twenty-four percent (24%) of all proceedings involved applications for relief, down by one percent from 2010 and five percent from 2003.⁹² Appendix 3 shows the percentage of completed 2011 proceedings for each court that involved an application for relief, and Table D shows the courts with highest and lowest percentage of proceedings with applications for relief.

At first glance, that nationally only twenty-four percent (24%) of cases involved applications for relief might indicate that immigration courts have little to do, but in addition to the cases with applications for relief are cases with applications resulting in voluntary departure (seven and a half percent) or in terminations of proceedings (six percent). These cases, especially terminations, can involve significant judicial work. Adding these types of determinations to the cases where relief is sought means that in approximately thirty-eight percent (38%) of the docket involved some of the most complex and from the perspective of the respondent some of the most important adjudications. There is, moreover, considerable variation in individual courts' case mix, including the proportion of cases involving requests for relief. As Table D shows, for the

⁹² *Statistical Year Book, 2010, supra* note 4, at N1.

most part, courts with few applications for relief are those with large detained populations and large proceedings-per-judge ratios.

Table D: Comparison of Detained Courts

	Judges	Comp. Proc's.	Per Judge	% proc's. w/ app. for relief
STEWART	3	11,342	3,780	2%
OAKDALE	3	12,359	4,119	3%
TUCSON	2	3,688	1,844.	3%
HOUSTON SPC	3	11,067	3,689	6%
IMPERIAL	1	943	943	8%
PEARSALL	2	6,612	3,306	8%
FLORENCE	3	5,619	1,873	8%
EL PASO SPC	3	4,082	1,360	8%
SEATTLE	3	3,080	1,026	45%
BALTIMORE	5	4,732	946	45%
HONOLULU	2	967	483	46%
ORLANDO	6	4,562	760	47%
GUAYNABO	2	1,133	566	51%
NEW YORK CITY	29	18,382	633	66%
TOTAL (all 59 courts)	264	303,287	1,494.	24%

e. Comparisons to Other High-Volume Administrative Courts

Comparisons of the immigration court per-judge 2011 completion rate (on average, 1,494 matters) to those in other high volume adjudication agencies are stark—an average of 544 dispositive hearings per year in 2007 for Social Security Administration ALJs,⁹³ and 819 decisions per year in 2010 on average for Veterans Law Judges.⁹⁴ The comparison with federal district courts is even starker, even granting that cases in federal district court deal with a much wider range of issues. In 2011, each federal district judge terminated an average 566 cases but very few of those terminations involved trials or other evidentiary hearings. They held, on average, nineteen proceedings at which evidence was taken.⁹⁵ What that points to is a different situs for the work of an immigration judge (principally in the courtroom) and the federal district judge (principally in chambers).

2. Consequences

The increase in per judge workload to date has had two main consequences: growing backlogs and overworked judges and staff.

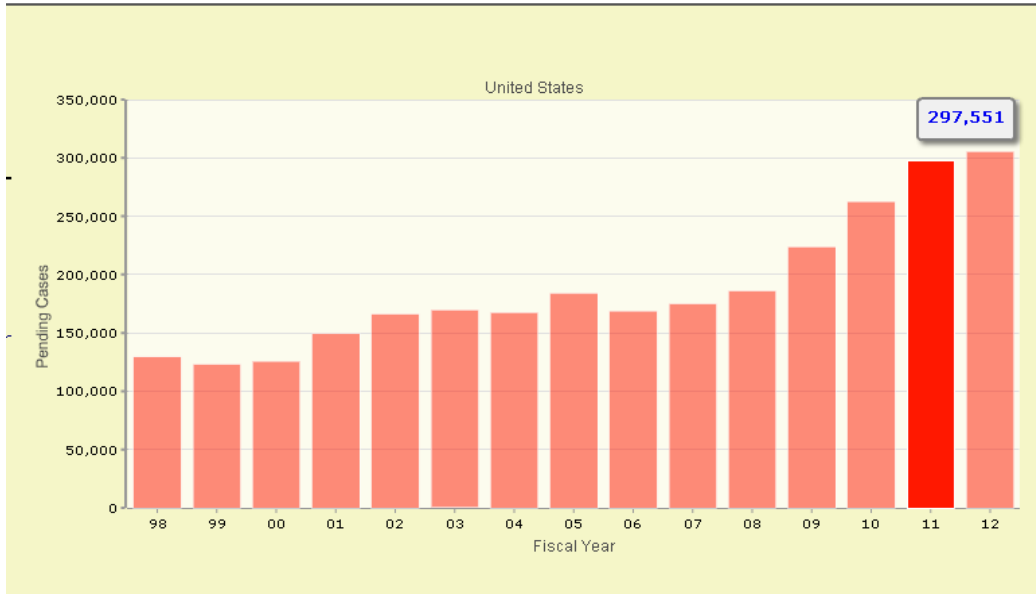
The Transactional Records Clearinghouse (TRAC) at Syracuse University has been tracking pending cases in the immigration courts for over ten years. EOIR began reporting pending cases a few years ago (at pages Y 1 and 2 of the Year Book), and the EOIR and TRAC figures seem

⁹³ *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 2-37.

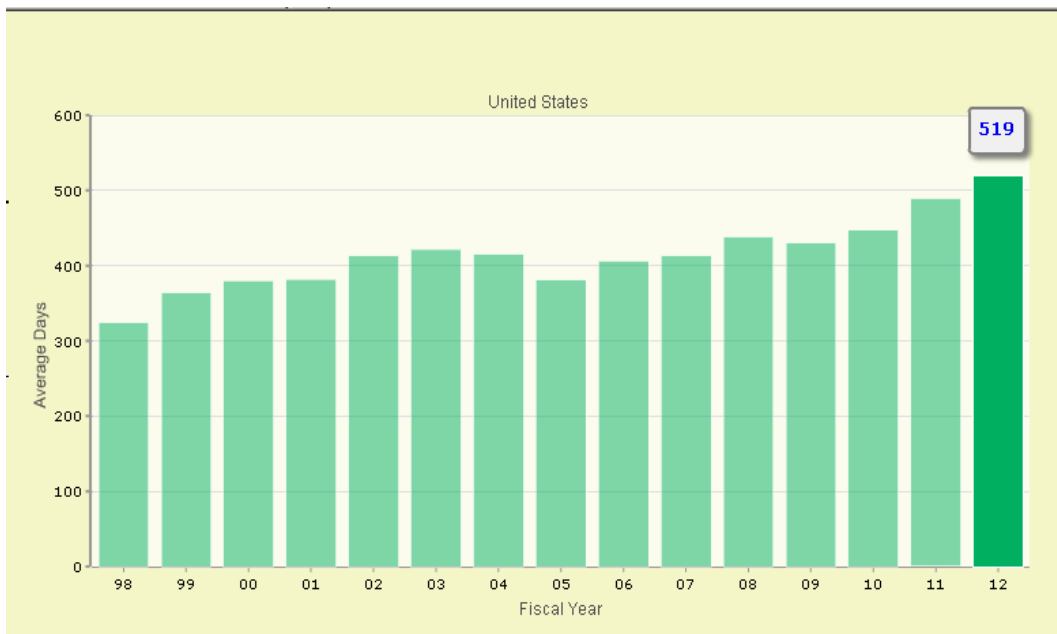
⁹⁴ Briefing material from BVA officials (August 9, 2011) at 16 (on file with authors).

⁹⁵ Calculated from data in *Judicial Business of the U.S. Courts 2011, supra* note 1, at Tables C and D (terminations per judge) and *Federal Court Management Statistics, 2011, All District Courts, available at* <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/DistrictFCMSProfilesSeptember2011.pdf&page=1>.

compatible. The latest data, report by TRAC through the end of March 2012, show 305,556 pending cases, and the figure below, taken from the TRAC Website, show the growth in pending cases since 1998, and that the 305,556 figure for the end of March 2012 is up from 297,551 for the 2011 fiscal year.⁹⁶



Average days from filing to completion have also been growing, as shown by this TRAC graphic, again current as of the end of March 2012. Average days of cases pending then were 519, up from 489 in fiscal year 2011.



⁹⁶ Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Courts*, SYRACUSE UNIV., (2012), available at http://trac.syr.edu/phptools/immigration/court_backlog/.

In short, the slight increases in the number of immigration judges have not been sufficient to reverse the trend of growing backlogs and increased time to disposition.

The mismatch of workload to judges means that judges must often defer some cases they are scheduled to hear. Our survey asked the judges to identify in their own words—as to cases scheduled for master calendar and individual calendar hearing sessions—“the four most common reasons that all cases are not addressed.” The most frequently entered reason for both was some variation of “more cases scheduled for the session than the judge was able to complete.” As to master calendar sessions, thirty-three percent (33%) of the judges responding gave some variation of that reason, and forty-six percent (46%) of those responding gave such a reason for not being able to complete all individual calendar hearings scheduled.

The other consequence of the growing imbalance between workload and workforce is the time pressure on judges to move cases, a pressure that crowds out other activities that are part of being a judge—from issuing reasoned opinions in contested cases that explain the judge’s decision to the parties and appellate bodies on the one hand, to continuing education (formal and otherwise) on the other. An oft-cited 2008 survey of immigration judges, based on standard cross-vocational measures, found higher levels of stress and burnout than in almost any other profession surveyed.⁹⁷ As of mid-2009, according to TRAC, judges on average had seventy minutes to deal with each matter received, down from 102 minutes in 1999.⁹⁸ Our interviews with judges enforced this perception of time pressure, in particular many judges’ insistence that they had no time to conduct status or issue-narrowing conferences prior to individual merits hearings.⁹⁹

3. Prospects for the Future

EOIR may be looking, not at additional appropriations, but rather at flat line or reduced funding, which would widen even more the gap between workload and workforce. Like most federal agencies, it could face reductions due to the across-the-board spending cuts resulting from the failure of the so-called “super committee” to produce a deficit reduction plan.

Absent unexpected caseload reductions, any funding cuts will mean even wider gaps between EOIR’s workload and its workforce. EOIR’s director told the Senate Judiciary Committee in May 2011 that he anticipates the loss of about ten judges per year due to “normal attrition.”¹⁰⁰ When we began our study, in April 2011, the EOIR website showed 270 immigration judges; as updated in May 2012, it showed 264. (A decline in the number of judges is not unheard of: the number dropped from 218 in 2003 to 205 in 2007.)¹⁰¹ Furthermore, although judges are the principal resource for processing the immigration courts caseload, they need the assistance of legal and administrative staff. In 2009, the immigration courts employed

⁹⁷ Lustig et al., *supra* note 76.

⁹⁸ Transactional Records Access Clearinghouse, *Maximum Average Minutes Available per Matter Received*, SYRACUSE UNIV., (June 2009), <http://trac.syr.edu/immigration/reports/208/include/minutes.html>.

⁹⁹ See discussion, *infra* at V.c.1.b.[2] text accompanying note 189.

¹⁰⁰ *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review), at 3, available at <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf>.

¹⁰¹ Transactional Records Access Clearinghouse, *Number of Immigration Judges, 1998-2008*, SYRACUSE UNIV., (July 2, 2008) <http://trac.syr.edu/immigration/reports/189/include/payroll.html>.

sixty-two law clerks, or one for every three and seven-tenths judges.¹⁰² As of May 2011, that number had increased to eighty-six,¹⁰³ lowering the ratio to three and one-tenth.

Spending cuts that would preclude additional EOIR resources could also preclude more DHS apprehensions. Regardless, the growth in DHS's controversial "Secure Communities" program may produce more NTAs. Under "Secure Communities," ICE—using information that local law enforcement agencies provide the FBI about individuals booked into local jails—begins removal actions against those whom ICE finds are here illegally or are removable based on criminal convictions. ICE says it has expanded Secure Communities from fourteen jurisdictions in 2008 to more than 1,300 in 2011, and plans to expand to all law enforcement jurisdictions by 2013.¹⁰⁴

EOIR officials told us they feared that expanded use of the program could "eat up the [detention] system" by injecting into it increasing numbers of people with low-level criminal convictions or traffic offenses. That in turn could add to the immigration courts' caseload as individuals seek adjudications to contest removability or to seek one of the limited forms of relief only available once a person is in removal proceedings, such as cancellation of removal¹⁰⁵ or withholding of removal. There is no mechanism to affirmatively file for these kinds of relief. Thus some people are better off in removal proceedings. Oddly, for some people the only path to lawful permanent resident status is to seek relief in removal proceedings as opposed to affirmatively filing for status with USCIS.

EOIR and DHS personnel provided different views of the extent to which Secure Communities has generated additional respondents. If Secure Communities generates more cases, it will most likely increase the immigration court workload, or at least change the mix of cases before the judges. It is also unclear how Secure Communities enforcement will be affected by the apparent heightened commitment within the executive branch to exercise its discretion to pursue removal of aliens who are the strongest candidates for removal (discussed below).

B. Principal Policy Emphasis

The pervading theme in our report is enhancing the immigration courts' ability to dispose of their caseloads fairly and as quickly and as economically as possible. (Economic operation in this context refers to costs to the government and costs to the parties.) This broad goal implicates almost all the specific areas of comment and criticism directed in recent years at immigration removal adjudication and the agencies that conduct it, as well as some aspects of the removal adjudication process that have received little attention.

As we see it, the need to do more work without commensurate or even any increase in resources points to four principal policies that EOIR must emphasize:

- strengthening its longstanding request that DHS filter more carefully the NTAs that it files;
- experimenting with efforts to reduce the need for immigration judge hearing time by use of a range of case management methods, including but not limited to some that are

¹⁰² *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 2-17.

¹⁰³ *Id.* at 3-4.

¹⁰⁴ *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/# (last visited Dec. 31, 2011).

¹⁰⁵ *See* INA §§ 240A(a) and 240A(b) (2010); 8 U.S.C. §§ 1229b(A)(a), 1229b(b) (2006).

already authorized by rule, endorsed by the OCIJ Practice Manual,¹⁰⁶ and, in some cases, have been effective in other high-volume courts;

- shifting some matters to more appropriate forums outside EOIR where they can be resolved as or more effectively than in the immigration courts and the BIA, and thus freeing time to devote to matters that remain; and
- expanding its efforts to enhance the availability of quality representation, and of legal advice and information, to respondents as a means of easing the burden on the system caused by non-citizens' trying to negotiate on their own a complex adjudication process that few of them understand.

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

V. PROPOSALS FOR CHANGE AND UNDERLYING ANALYSES

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

A. *Resource Enhancement*

EOIR should continue to seek appropriations beyond current services levels but plan for changes that will not require new resources.

Analysis

EOIR is underfunded. The imbalance between demand and resources is reflected in the judges' survey responses, reported earlier, on why not all cases scheduled for master and individual calendar sessions can be heard as scheduled. We also asked the judges to "[c]onsider the concept of a model immigration court" and to rank four of twelve listed items that they believed "would most contribute to creating and sustaining such a court," and, separately, to identify, from among ten listed factors, the four that they believed "would most improve your court." Of the 181 judges who responded to the survey, the same number, 158, answered both questions, and resources were at the top of both lists. For the model court, sixty-three percent (63%) selected "adequate time for the judge to review the file" and sixty-one percent (61%) selected "a sufficient number of law clerks." For the "improve your court" question, seventy-two percent (72%) selected "additional law clerks" and sixty-one percent (61%) selected the mirror image of "more judges," i.e., "fewer cases." (The other responses selected by substantial numbers on both questions involved more counsel for respondents and better prepared counsel on both sides.) Appendix 5 presents the complete responses to both questions.

Most reports about immigration adjudication recommend outright increase in resources—especially more judges—as well as changes that hinge on additional resources. Budget realities in 2012 and beyond make additional EOIR resources highly unlikely and justify skepticism about proposed changes that, without more resources, would require EOIR to tolerate longer

¹⁰⁶ The OFFICE OF THE CHIEF IMMIGRATION JUDGE, PRACTICE MANUAL (2008), *available at* www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressedPDF.pdf (finalized in 2008 by a team of immigration judges with input from DHS and the private bar) [Hereinafter OCIJ PRACTICE MANUAL].

times to disposition. In 2010, the ABA Immigration Commission called, for example,¹⁰⁷ for more judges; for “[r]equir[ing judges to issue] more written, reasoned decisions” which would require “additional resources” including not only more judges, but other changes, such as increasing judges’ administrative time, additional training (requiring “sufficient funding”) and related support. It also called for full installation of digital recording of proceedings and reduction of video hearings (with corresponding increases in travel costs); and “greater use of pre-hearing conferences.”¹⁰⁸ If implemented without additional judges or reduced caseloads most of these changes would probably lengthen completion times. More continuing education might make the existing corps of judges so much more efficient as to shorten case completion times, but that’s speculative at best. We discuss later the potential value of more pre-hearing conferences.

Congress should support the mission that it has assigned EOIR by providing larger appropriations, but our focus is on recommendations to use resources more effectively. Here we offer suggestions about temporary resource allocation and better estimating resource needs. (We note but do not comment on a recent National Research Council report on immigration enforcement that recommended significant changes in DHS and DOJ budgeting approaches, including a suggestion that the two agencies work more closely to develop budget models to assess the agencies’ needs more accurately. The report praised the agencies for their flexibility and ability to “make due” with resource allocations but warned that failing to coordinate the agency budgets and priorities may make achieving enforcement goals more difficult.¹⁰⁹)

1. Temporary Immigration Court Personnel

EOIR, as it prepares regulations authorizing temporary immigration judges, should, consider whether short-term temporary judges can bring the skill set required of an immigration judge. In any event, it should include transparent selection procedures and rigorous procedures for monitoring temporary judge performance. We think it should consider the National Association of Immigration Judges’ proposal for recalling senior judges for temporary assignment.

And, in light of our survey findings, EOIR should consider, in addition to or in lieu of temporary judges, selecting available employees (from the same or a broader pool from which it would recruit temporary judges) as temporary immigration court law clerks.

Analysis

a. Judges

Regulations allow for the appointment of temporary BIA members from within EOIR and DOJ.¹¹⁰ OCIJ officials told us that EOIR is working on a parallel regulation to allow the appointment of temporary immigration judges but would provide no further information (other than they would be drawn from mid-career GS-15 employees) because the regulations are in development. Recent controversies over the since-corrected politicized hiring of immigration

¹⁰⁷ *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-2, 2-3, 3-2 (summarizing the recommendations).

¹⁰⁸ *Id.* at 2-38–2-42.

¹⁰⁹ See BUDGETING FOR IMMIGRATION ENFORCEMENT, A PATH TO PERFORMANCE (NATIONAL ACADEMIES PRESS 2011) available at http://www.nap.edu/openbook.php?record_id=13271&page=5

¹¹⁰ 8 C.F.R. § 1003(a)(4), The EOIR website describes the authority and its use at http://www.justice.gov/eoir/fs/biabios.htm#Temporary_Board_Memberst

judges make it essential that EOIR's processes for hiring the temporary judges and monitoring their work be transparent; we assume they will be.

Some commentators on our earlier drafts doubted that temporary judges—if drawn from the same DOJ and EOIR employee pools as the temporary BIA members—would have the knowledge of immigration law and procedures (including circuit variations) that permanent judges are presumed to have. Perhaps more important, said the commentators, they would be unlikely to have skills of judicial deportment, docket management, and courtroom control that OCIJ seeks to develop in permanent judges through initial and continuing education and that judges acquire through experience. We cannot say more because EOIR did not provide us with the draft regulations.

NAIJ has proposed using retired immigration judges as senior judges, citing recent statutory authority for agencies to hire retired federal employees on a part-time basis, during which time they would receive both their annuity and a salary.¹¹¹ We do not know what that would cost.

b. Law clerks

EOIR might consider temporary immigration court law clerks, in lieu of or in addition to temporary judges. We presume that DOJ and EOIR personnel who could be spared for temporary judicial service—or even a wider pool that includes employees at lower GS levels—could also be spared to serve as temporary law clerks and might be better suited for those positions than for trial judge positions. Law clerks emerged as a pressing need in two questions in our survey. As we reported above, sixty-one percent (61%) of the judges selected a “sufficient number of law clerks” as an item that would “most contribute to creating a ‘model immigration court,’” almost the same as the sixty-three percent (63%) who selected “adequate time for judge to review the file.” As to items that “would most improve your court,” seventy-two percent (72%) selected “additional law clerks,” ten percent more than the sixty-one percent (61%) who selected “fewer cases.”

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

2. Refined Data on Immigration Court Caseloads

a. Case Weighting

EOIR should explore case weighting systems in use in other high volume court systems to determine their utility in assessing the relative need for additional immigration judges and more accurate monitoring and reporting of immigration court workload, and consider a pilot project to test one or more methods.

Analysis

In any judicial system, different types of cases require different amounts of judicial time. An immigration judge responding to our survey claimed that “[o]ne mental disability case on a 20-

¹¹¹ *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of National Association of Immigration Judges), available at <http://dl.dropbox.com/u/27924754/NAIJ%20Written%20Statement%20for%20Senate%20Judiciary%20Cmte%205-18-11%20FINAL.pdf> (citing the National Defense Authorization Act (“Act”) for FY 2010, Public Law 111-84).

case detained docket is equivalent to 30/40 cases.” Looked at from a different angle, of the judges responding to our survey query as to the number of merits hearings they conduct in a typical week, thirty-nine percent (39%) selected “6 to 10” while twenty-nine percent (29%) selected “11 to 15.” We don’t know whether, on average, those who conduct six to ten hearings a week were less efficient than those who conduct eleven to fifteen, or had more demanding caseloads.

To assist in analyzing and justifying the need for additional judgeships and support staff and for allocating or reassigning those resources, courts have developed methods for determining relative “weights” for different case types—measures of the work required to dispose of different types of cases that are more accurate than raw filing data. A case type with a relative weight of 2.00 for example, typically requires twice as much time as a case type with a relative weight of 1.00. At least since the mid-1990s, the National Center for State Courts has provided guidance on weighting caseloads.¹¹² The federal judiciary has assigned weights to district court cases since 1946 and publishes each court’s annual weighted filings.¹¹³ For some specifics: the case weighting system used by the federal courts assigns weights to sixty-one different case types—a weight of 12.89 to “Death Penalty Habeas Corpus” cases, for example, 1.12 to “Drug Offense—Manufacture” cases and 0.57 to “Alien Smuggling” cases.¹¹⁴ Not all cases of a certain type present the same time demands. To use the examples above, not every actual “Drug Offense—Manufacture” case will require twice as much time as every actual “Alien Smuggling” case. However, in the aggregate, the patterns that emerge from large numbers of cases of each type present an accurate relative indicator of the time required to dispose of those cases.

The cases filed with a court or courts, when weighted, can be aggregated for comparative purposes. In the year ending June 2011, nationally, raw filings per federal district judge nationally were 549 but weighted filings were only 490. In some courts, however, the balance was strikingly different. In the Eastern District of Texas, raw filings were 451 (thirty-fourth in the nation) but weighted filings were 683 (third in the nation).¹¹⁵ See Appendix 5

Case weights serve two primary purposes. First, they provide a more accurate, and thus more credible, description of the number of judges needed to handle a caseload. An EOIR appropriations request for X additional judges to deal with Y anticipated raw filings tells Congress less than a requested based on weighted filings. A raw-filings-based request provokes the implicit question “How much additional work will the anticipated caseload require? Will it demand enough additional work to justify additional judges?” Or consider the fact we reported earlier: despite the conventional wisdom that almost all respondents seek some form relief from

¹¹² See, e.g., Brian J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts, 1997: A National Perspective from the Court Statistics Project Judicial Workload Assessment*, NAT’L CENTER FOR STATE COURTS (1998) available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=24> and Victor E. Flango & Brian J. Ostrom, *Assessing the Need for Judges and Court Support Staff*, NAT’L CENTER FOR STATE COURTS (1996) available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=407>.

¹¹³ Administrative Office of the U.S. Courts, *2010 Federal Court Management Statistics* (2010) at vii-viii and *passim*.

¹¹⁴ See Figure 4: Final Case-Weight Values Presented to the Subcommittee for Approval, in PATRICIA LOMBARD & CAROL KRAFKA, 2003-2004 DISTRICT COURT CASE—WEIGHING STUDY, REP. TO THE SUBCOMM. ON JUDICIAL STATISTICS OF THE COMM. ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE U.S. (2005) at 60-62, available at [www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/\\$file/CaseWts0.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf)

¹¹⁵ *Supra* note 19, at 83, 167.

removal, in fact only twenty-four percent (24%) of 2011's completed proceedings involved an application for relief. The first conclusion from that fact might be that immigration courts see a lot of proceedings, but most of them are relatively simple. A weighted caseload index would allow a more precise analysis.

One response to our earlier draft was that EOIR's need for more judges is apparent without weighted caseload measures. That is true but weighted caseloads serve a purpose in addition to documenting the need for additional judges, namely facilitating more sophisticated management analysis. Later in our report, we note that the two largest courts in the system—New York City and Los Angeles—account for a disproportionate number of the adjournments (continuances) granted in all courts for all fiscal 2010 completed proceedings. Those two courts, however, ranked relatively low, nationally, in proceedings per judge. These facts might indicate poor case management but might also or instead reflect the comparative difficulty or complexity of the proceedings themselves. Those courts include a disproportionately large number of more difficult cases—proportionately more cases seeking relief, for example, which may require more adjournments—but accurate weighted caseload figures would allow more sophisticated analysis.

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

Policy-makers in assessing resource needs consider research-derived weights but do not apply them blindly to current caseload data. Rather they consider views of judges and administrators in individual courts who may claim that the weights derived nationally may need adjustment due to local idiosyncrasies. They assess the likelihood that current allocations of case type will change in the foreseeable future. And, of course, they balance the resource needs indicated by the case weights with the realities of what requests funding authorities will find reasonable (even if they cannot grant them).

Immigration court case weights have received little attention in the popular and academic literature. The ABA Immigration Commission made a passing reference to one weighting approach,¹¹⁶ and the NAIJ, in 2011 Senate Judiciary Committee testimony,¹¹⁷ advocated EOIR's adopting the case-weighting method that the federal courts used in 2003-04 (a method using both events analysis and Delphi-like techniques).¹¹⁸

¹¹⁶ See also *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 308.

¹¹⁷ *Supra* note 111.

¹¹⁸ See *Lombard and Krafska, supra note* (describing various approaches to case weighting); *Federal Judgeships: General Accuracy of District and Appellate Judgeship Case-Related Workload Measures Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2008)* (statement of William O. Jenkins, Director of Homeland Security and Justice) available at www.gao.gov/assets/130/120386.pdf (critiquing the Lombard & Krafska Study); Chad C. Schmucker, *How We Determine the Number of Judges We Need*, MICH. B. J., July 2011, at 18, available at <http://www.michbar.org/journal/pdf/pdf4article1877.pdf>; Letter from William A. VanNortwick, Chair, Supreme Court of Florida Committee on District Court of Appeals Performance & Accountability, to Peggy A. Quince, Chief Justice, Supreme Court of Florida (October 13, 2009) available at

OCIJ officials told us informally they thought the weighted caseload concept may merit further exploration, especially if it appears likely that it could result in cost savings and efficiencies, but that EOIR did not have funds at present to undertake the effort.

b. Documenting NTA Origination

DHS should revise the NTA form to allow the completing officer to indicate clearly and easily the officer's agency affiliation, being as specific as possible about the entity preparing the NTA. Likewise we think EOIR should expand its data collection field, using the NTA agency identification, to maintain aggregate data on which DHS agencies file NTAs.

Analysis

There is no single repository of readily available information on the proportion of NTAs filed by each DHS agency and no data that track the NTAs prepared by state and local governments pursuant to INA § 287(g) joint enforcement agreements. In May 2009, the ABA Commission sought information from DHS on its NTAs and in November, 2009, received six years of data organized according to which DHS component issued the NTA.¹¹⁹

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

The NTA includes the name and title of the DHS officer who filed it, but that information will not necessarily tell a court administrative staff which agency filed the NTA. To implement this suggestion, DHS may have to amend the NTA form, preferably with fields to allow the completing officer to check the relevant agency identifiers. EOIR would have to expand its data collection to capture the information. EOIR officials told us they are amenable to including this new field once their electronic docketing system is operational.

B. Direct Some EOIR Work to Other Agencies

We propose directing some categories of disputes now adjudicated by the immigration courts or the BIA to other decision-makers with the opportunity in some cases for further EOIR review. We also propose shifting certain case-processing related tasks currently that judges and staff currently perform to other agencies. The purpose of these recommendations is to direct the tasks

www.flcourts.org/gen_public/pubs/bin/2009ReviewOfRelativeCaseWeights.pdf. See also *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 32, at 308.

¹¹⁹ See *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 32, at 1-10-25.

in question to DHS forums that can perform them as well or better than the EOIR agencies and in turn to enable those agencies to attend more quickly to DHS prosecutions.

1. DHS Review of NTAs

We endorse the ABA Immigration Commission recommendation that DHS pilot test in offices with sufficient resources a requirement for lawyer approval for the issuance of any NTA. The best practice would be ICE-attorney NTA review and approval rather than by attorneys in other DHS components because ICE is the agency that must commit the resources to prosecute and execute removal orders.

Analysis

DHS is able, given its resources, to issue NTAs for only a small fraction of the roughly 11 million individuals who are in the country unlawfully. Thus, ICE, like its predecessor agencies, has issued advisories to field personnel setting out prosecutorial priorities to guide ICE officers and attorneys.¹²⁰

A June 2011 memorandum from ICE director John Morton identified ICE's enforcement priorities as promoting national security, border security, public safety, and the integrity of the immigration system. It provided a non-exclusive list of nineteen (mainly humanitarian) factors to consider.¹²¹ The memo said that a legitimate exercise of prosecutorial discretion also includes deciding whether to issue, file, serve, or cancel an NTA. Also, USCIS recently initiated a significant number of removal proceedings and in November, issued a memorandum that appears to direct USCIS officers to seek supervisory review before placing persons in removal and parallels some of the prosecutorial priorities in recent ICE memoranda.¹²²

In August, the administration created an interagency task force to identify those awaiting removal proceedings who are most appropriate for the exercise of prosecutorial discretion.¹²³ It issued further instructions and initiated case-by-case reviews of pending cases in November¹²⁴

¹²⁰ See John Morton, Director, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. DEP'T HOMELAND SECURITY, (June 17, 2011) available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> and earlier documents cited therein. See also, CIS Policy Memorandum on when to issue a Notice to Appear, *infra* note 122.

¹²¹ *Id.*

¹²² See U.S. CITIZENSHIP & IMMIGRATION SERVICES, U.S. DEP'T HOMELAND SECURITY, PM-602-0050, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (2011) available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20\(Appeared%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Appeared%20as%20final%2011-7-11).pdf).

¹²³ See Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE (Aug. 18, 2011, 2:00PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>; Letter from Janet Napolitano, Secretary of Homeland Security, to Harry Reid, Senator Majority Leader (Aug. 18, 2011) available at http://democrats.senate.gov/uploads/2011/08/11_8949_Reid_Dream_Act_response_08.18.11.pdf.

¹²⁴ See Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1; Peter Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, *Case-by-Case Review of Incoming and Certain Pending Cases*, U.S. DEP'T HOMELAND SECURITY, (Nov. 17, 2011) available at <http://www.immigrationpolicy.org/sites/default/files/docs/DHS%20PD%20Case%20Review%20Memo%20111711.pdf>.

and March, 2012. As of June, 2012, public reporting indicated that less than 21,000 pending cases were closed pursuant to these reviews.¹²⁵ EOIR has suspended or will suspend immigration court dockets in nine cities while DHS officials review case files to determine whether to defer prosecution of some detained respondents.¹²⁶

We endorse the ABA Immigration Commission recommendation¹²⁷ for two reasons. First, such a process could identify legally insufficient NTAs and either correct or reject them. Some judges commented in interviews on what they perceive as the failure of ICE attorneys to evaluate and reject NTAs for legal insufficiency. We could not include a question about the extent of legally insufficient NTAs in our survey, but the matter appeared rarely in open-ended survey comments and the judges we interviewed who said they were frustrated by legally insufficient NTAs, acknowledged nevertheless that they confront them rarely. DHS officials told us informally that implementing this proposal would require what they called substantial resources; that DHS policies, to use the officials' word, "ensure" the efficient use of agency resources; and that if legally insufficient NTAs still get filed, ICE attorneys can amend them or seek their dismissal in the removal proceeding itself.

We endorse the ABA recommendation, however, because, whether frequent or not, where possible it is best to keep the insufficient NTAs from getting into court in the first place.

We also support the ABA recommendation because it will help ensure that, before an NTA is lodged with the court, one of the prosecuting attorneys has evaluated the case and made a determination that the case fits current agency priorities. Some judges in our interviews expressed frustration about NTAs that seem inconsistent with those priorities, but we were unable to include in our survey a question to determine judges' perceptions of changes, if any, in DHS implementation of its recent policy guidance.

Another benefit of the ABA proposal is that the reviewing ICE attorney, at least ideally, would also try to complete background checks to identify criminal convictions that might need to be raised in the case during this pre-filing stage. ICE counsel often does not review a file until after the case has commenced in the court system. In our interviews ICE officials said several times that NTA review before the commencement of the case could be of great benefit to the system's operations, a comment echoed by Justice Department Office of Immigration Litigation lawyers, who represent the government at the final stage of the process, federal court review of removal orders.

ICE officials told us that ICE trial attorneys have the authority to reject insufficient NTAs and ICE encourages them to do so; that ICE attorneys continue to review cases before EOIR pursuant to agency guidance; that attorneys do review NTAs in certain circumstances; and that ICE

¹²⁵ *DHS expanding deportation case reviews to four more cities, will temporarily suspend court docket* (Associated Press), Washington Post, Mar. 29, 2012, available at http://www.washingtonpost.com/politics/dhs-expanding-deportation-case-reviews-to-4-more-cities-will-temporarily-suspend-court-docket/2012/03/29/gIQA5YjS_story.html. But cf. Julia Preston, *Deportations Go On Despite U.S. Review of Backlog*, The New York Times (June 7, 2012) at A13 available at <http://www.nytimes.com/2012/06/07/us/politics/deportations-continue-despite-us-review-of-backlog.html?smid=pl-share>.

¹²⁶ *EOIR Statement Regarding Second Stage of Case-by-Case Review Pursuant to DHS's Prosecutorial Discretion Initiative* (April 3, 2012), available at <http://www.justice.gov/eoir/press/2012/EOIRProsecutorialDiscretion04032012.htm>.

¹²⁷ *ABA Comm'n on Immigr. Rept.*, 2010, *supra* note 32, at 1-61.

attorneys have the opportunity to amend or seek dismissal of in the removal proceedings. Both judges and DHS officials suggested in interviews several reasons for ICE attorneys' possible reluctance to reject questionable NTAs: a willingness to "let the court sort it out;" a preference not to antagonize employees of sister agencies; the lack of time and resources to consult with agents located elsewhere; and a reluctance to terminate any effort underway to remove a non-citizen because of the possibility, however slight, that the person might later commit a brutal crime that the press and others would attribute to ICE's failure to remove the individual.

2. Preliminary Administrative Adjudication of Asylum Applications

People seek asylum by several means: they can request it when they are subject to expedited removal, and they can apply for it outside the expedited removal context. We endorse recommendations by the ABA Commission on Immigration and others for greater participation by the USCIS Refugee, Asylum, and International Operations Directorate (Asylum Office) in adjudicating asylum applications,¹²⁸ and suggest additional changes.

Proposals in this and the following subsection are of a piece with "alternative dispute resolution" (more recently "appropriate dispute resolution") efforts in other courts. ADR proponents seek to identify alternative, appropriate forums for some judicial work, not simply to relieve courts of workload but also to channel work to forums best equipped to perform it.

a. Expedited Removal

USCIS should seek to amend 8 C.F.R. § 235.6 and related regulatory provisions to authorize the asylum officer to approve qualified asylum applications in the expedited removal context. If necessary, USCIS should allocate additional resources to complete the asylum adjudication in this context as there are significant cost savings for other components of DHS and for EOIR.

Furthermore, USCIS should seek to amend regulations to clarify that an individual who meets the credible fear standard could be allowed to complete a non-adversarial asylum application with the asylum officer. Further, once that officer is satisfied that the individual has a well-founded fear of persecution or fear of torture, the officer should have the authority to grant parole into the U.S. and recommend that DHS allow the individual to be released from detention on parole pending completion of the asylum process, including required security and identity checks. (Existing procedures would remain in place for those cases where the asylum officer does not find the applicant met the "credible fear" standard.)¹²⁹

Finally, USCIS should clarify that in two cases the officer may prepare the NTA and refer the case to the immigration court as is done now: (a) where the non-citizen meets the credible fear standard but the officer believes that the case cannot be adequately resolved based on the initial interview and the asylum application prepared in conjunction with that interview and (b) where the officer believes there are statutory bars to full asylum eligibility. The fact that some cases could not be adequately resolved at this stage should not preclude the possibility of granting asylum as soon and as efficiently as possible in other cases.

¹²⁸ *Id.* at 1-61-64.

¹²⁹ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NO.11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE CREDIBLE FEAR OF PERSECUTION OR TORTURE (2009) available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

Analysis

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

Congress created the expedited removal system to allow the government to remove, immediately and without court involvement, people apprehended at the border who lack documents or used fraud to seek entry.¹³⁰ If a DHS officer determines that a non-citizen is subject to expedited removal and the individual expresses a fear of return, the officer will delay removal until an asylum officer can conduct a “credible fear” interview. DHS usually must detain the person until an asylum officer determines whether the person has a “credible fear of persecution or torture if returned to the home country. (A “credible fear” determination involves a less demanding standard than an asylum determination, which requires a “well-founded fear” of persecution on account of one of five protected grounds: political opinion, religion, nationality, race or membership in a particular social group.) An asylum officer who concludes that the individual has met the credible fear standard prepares an NTA, thus starting removal proceedings so that a judge can decide the asylum claim. If the asylum officer does not find a credible fear, the person could be subject to expedited removed unless he or she initiates review by an immigration judge. If the judge rejects the asylum claim in these expedited cases, there is no appeal to the BIA.

The ABA Immigration Commission in 2010 and the U.S. Commission on International Religious Freedom in 2005 recommended expanding the asylum officer’s authority from only determining credible fear to include also the authority to grant asylum. Those whose asylum claims were not granted could still seek immigration court consideration of the claim. DHS in 2008 recommended against implementation of the International Religious Freedom Commission recommendation.¹³¹ Pointing to the “accelerated timeframe and nature of the credible fear process,” DHS said that having asylum officers conduct a credible fear review and the more demanding review of an asylum claim could deprive applicants of the time and resources to develop a well-documented asylum claim or obtain legal counsel to assist them. DHS also said it would need additional asylum officers to conduct the asylum adjudication and that the applicants would need additional time to meet identity and security check requirements, thus lengthening the time in detention. DHS also expressed a concern that the asylum interview might have to be conducted using video technology and asylum officers were not confident that the in-depth interview could be conducted using only video.¹³²

Despite these objections, the ABA Commission said “if the goal is to streamline the adjudication of asylum claims in the immigration system *as a whole*, then the proposal deserves serious consideration.”¹³³ We agree, but we do not favor automatically diverting every case that passes the “credible fear” standard to the Asylum Office for full adjudication. According to the ABA

¹³⁰ As previously discussed there are other situations. *Supra* at III.C. 1. Forms of Removal.

¹³¹ Letter from Stewart Baker, Assistant Secretary for Policy, DHS, to Felice Gaer, Chair, U.S. Commission on International Religious Freedom (Nov. 28, 2008) (on file with author); *USCIRF Disappointed that DHS Action on Expedited Removal Process Falls Short*, U.S. COMM’N ON INT’L FREEDOM, (Jan. 9, 2009), http://www.uscirf.gov/index.php?option=com_content&task=view&id=2340&Itemid=126 (Gaer’s response to letter from Baker).

¹³² *Id.*

¹³³ *Id.*

Commission, the change proposed regarding expedited removal asylum claims would require regulatory but not statutory change.¹³⁴

Several reasons undergird our proposal.

First, asylum officers are qualified to make assessments about asylum claims. They do it already in the case of non-citizens who are not in removal proceedings and who apply for asylum directly—referred to earlier as “affirmative” applications.

Second, the adjudication by the Asylum Office reduces immigration court and DHS prosecutorial workload. According to data reported by the ABA Commission, from 2000 to 2004, asylum officers made positive credible fear determinations in 5,000 cases, and immigration courts granted relief (mainly asylum but also withholding or deferral of removal) in twenty-eight percent (28%) of them. If asylum officers had had authority to grant asylum where the applicant met the statutory standard of well-founded fear, and if they had granted asylum at rates similar to those of the immigration courts, the courts would have seen about 1,400 fewer receipts and DHS 1,400 fewer cases to litigate.

Third, this additional authority provides an expedited process for at least some subset of those individual who arrive at the border sufficiently prepared to establish eligibility for asylum; aiding this vulnerable population is humane and appropriate. Authorizing the Asylum Office to grant asylum may avoid delays in asylum grants caused by immigration court backlogs. By statute, if an asylum seeker does not file an application within one year of entry, the application can be time barred. A 2010 HRF study¹³⁵ and a separate study by several scholars¹³⁶ said that immigration courts rejected a growing number of applications due to the time bars. The scholars report that in 2010, 53,400 people (in expedited removal and otherwise) were subject to the time bars and that if the adjudication could have been heard first before the asylum office, more than 15,000 applicants and their derivative family members could have completed their cases within the deadline and without need for immigration court review. We also heard some anecdotal reports that in Texas and several other courts, individuals who are subject to expedited removal seek protection at the border, are paroled (released from detention) into the U.S. and pass a credible fear interview yet missed the one year filing deadline because the busy immigration courts could not hear their cases within the time deadline. These *pro se* applicants did not know they needed to press the court for an earlier hearing date due to the court’s rule requiring both a hearing to allow the in-person filing of an application for asylum. This procedure is also one we recommend changing to allow more flexibility.

We acknowledge some potential implementation problems but believe they are resolvable. For one thing, Human Rights First (HRF), a national non-profit organization that is very experienced in assisting asylum applicants, did not oppose this proposal in commenting on our draft report but noted that the credible fear interviews are often conducted under very challenging circumstances. They pointed to “communication significantly impeded by high levels of

¹³⁴ *ABA Comm’n on Immigr. Rept., 2010, supra* note 32; INA § 235(b)(1)(A)(ii)(2010); regulations implementing the review are found at 8 C.F.R. § 1235.6 (2009).

¹³⁵ See *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, HUMAN RIGHTS FIRST, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

¹³⁶ Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, & James P. Dombach, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WILLIAM AND MARY L. REV. 651 (2010), available at <http://wmlawreview.org/files/Schrag.pdf>.

background noise in the detention centers . . . , poor sound quality on the telephones made available to the Asylum Office to call contract interpreters, and, in many cases, poor quality interpretation.” Because some applicants would need more time to prepare and develop their application for protection, once an individual has met the credible fear standard, HRF said the application process should move to the usual “affirmative” asylum interview process. That should be possible if DHS releases individuals from detention once the Asylum Officer determines the individual has met the credible fear standard.

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

Finally, DHS commentators informally questioned whether this procedure would duplicate resources and decrease efficiency. In cases where DHS determined that detention was warranted, the recommendation might expand the length of detention. They also noted that it is not clear what would happen if the parole applicant does not appear at the Asylum Office or fails to complete the asylum application. Under the expedited removal statutes and regulations the individual is usually detained but if she is granted parole and fails to successfully complete the asylum process, DHS could revoke the parole and resume the expedited removal process. The burden would fall to the applicant to seek review of a denied asylum application before the immigration court – as now, where the court may, upon the individual’s request, review an Asylum Office finding that the person lacks credible fear. This happens in a very small number of cases. It is possible this review would increase under the new procedure but that would be similar to the right to de novo review of the asylum adjudication before the immigration court if the Office does not grant an affirmative asylum application. These commentators are correct that using this procedure in all cases would create an additional layer of adjudication to the asylum applicant at the border (once before the asylum office and review before the IJ) but these cases would still be barred from further BIA review by statute. And, as noted, we propose granting the Asylum Office the discretion to consider the asylum claim in these expedited removal cases, not mandating they do it every time they establish the less rigorous standard of credible fear. Discretion is appropriate in the expedited removal context because Congress designed a streamlined procedure for expedited removal in INA § 235; 8 U.S.C. § 1225.

b. Affirmative and Defensive Asylum Applications

EOIR should amend its regulations to provide, where the respondent seeks asylum or withholding of removal as a defense to removal, that the judge should administratively close the case to allow the respondent to file an application for asylum and/or withholding of removal in the Asylum Office. If the Asylum Office does not grant the application for asylum or withholding, or if the respondent does not comply with Asylum Office procedures, the Asylum

Office would refer the case to ICE counsel to prepare a motion to re-calendar the case. Further, EOIR should amend current procedures whereby judges “adjourn” asylum cases involving unaccompanied juveniles while the case is adjudicated within the Asylum Office and instead have the judge administratively close the case. If the Asylum Office cannot grant the asylum or other relief to the juvenile, the Asylum Office can refer the case to ICE counsel to initiate a motion to re-calendar the removal proceeding before the judge.

Finally, to help implement these changes, USCIS should evaluate whether a fee is appropriate for the *defensive* filing of an asylum application, with the possibility of fee waivers and in consideration of fees required for other forms of relief sought as a defense to removal. If USCIS does not believe a fee is appropriate, the agency should seek appropriations to expand its resources to allow it to accomplish this critical adjudication.

Analysis

Affirmative applications for asylum are those that non-citizens who are not in removal proceedings file with the Asylum Office. If the Asylum Office cannot grant asylum and the person cannot document valid immigration status, the Asylum Office refers the matter to the immigration courts by filing an NTA. In contrast, a person who is already in removal proceedings may initiate a claim for asylum with the court (a defensive application). In these cases, there is no referral to the Asylum Office unless the asylum-seeker is an unaccompanied minor.¹³⁷ The ABA Commission recommended that Congress authorize judges to divert defensive applications to the Asylum Office for adjudication. If the Asylum Office did not grant asylum, it would refer the case back to the immigration court to consider the claim.

We agree. (It is possible that a statutory amendment is unnecessary for this change. The immigration court adjourns cases to allow other USCIS components to adjudicate visa petitions, and it may be that a similar procedure could be adopted here without any statutory change.)

Immigration court and DHS prosecution workload reductions. How much of an adjudication and prosecution workload reduction might this change accomplish? Total asylum cases received in the immigration courts declined from over 58,000 in 2007 to 41,000 in 2011.¹³⁸ Table E shows the smaller number of immigration court asylum cases disposed on the merits over the last five years. Overall, both affirmative and defensive completions have declined. Grants have hovered in the fifty-one to sixty-five percent (51%-65%) range for affirmative applications and in the thirty-four to thirty-nine percent (34-39%) range for defensive applications.

¹³⁷ See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. N.110-457 (2008).

¹³⁸ *Statistical Year Book, 2010*, *supra* note 4, at 11.

Table E: Immigration Court Asylum Cases Decided On the Merits¹³⁹

FY	<u>Asylum Applications Completions on the Merits</u>						
	<u>All</u>	<u>Affirmative</u>			<u>Defensive</u>		
		Total	Denial	Grants	Total	Denials	Grants
07	27,727	16,380	7,953	8,427 51%	11,347	6,921	4,426 39%
08	24,043	14,407	7,051	7,356 51%	9,636	6,116	3,520 37%
09	21,626	13,202	5,940	7,262 55%	8,424	5,394	3,030 36%
10	19,413	11,596	4,508	7,088 61%	7,817	5,046	2,771 35%
11	22,075	12,333	4,155	8,178 66%	9,742	6,416	3,326 34%

The ABA Commission reported that in 2008, seventy-seven percent (77%) of defensive asylum applications in the immigration courts were initiated after the NTA's filing (i.e., did not come after an expedited removal/credible fear review). Had the proposal been in effect in 2011, and assuming for the sake of analysis that seventy-seven percent (77%) of 2011's defensive claims were generated due to the initiation of removal proceedings, the judges would have referred to the Asylum Office about 7,500 claims (seventy-seven percent (77%) of 9,742). If the Asylum Office grant rate was the same as the judges' (thirty-five percent (35%)), about 2,625 cases referred to the Asylum Office would not have been prosecuted by ICE attorneys and adjudicated by immigration judges. The Congressional Research Service reported similar data on asylum and withholding of removal applications.¹⁴⁰

Overall, as Table E (above) shows, the total number of immigration court asylum grants where cases are filed defensively are not large. But defensive asylum cases are concentrated in a relatively few courts. In 2011, the eight courts shown below accounted for sixty-two percent (62%) of asylum completions.¹⁴¹

	Total Completions	Asylum Completions (number and percent of total)
NEW YORK CITY	18,382	9,127 (50%)
LOS ANGELES	21,190	6,728 (32%)
SAN FRANCISCO	9,172	2,449 (27%)
MIAMI	10,030	1,802 (18%)
ARLINGTON	7,719	1,451 (19%)
ORLANDO	4,562	1,379 (30%)
BOSTON	6,366	1,155 (18%)
BALTIMORE	4,732	1,098 (23%)
TOTAL(all courts)	303,287	40,524 (13%)

¹³⁹ *Id.* at K.

¹⁴⁰ See RUTH ELLEN WASEM, CONG. RESEARCH SERV. R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY (2011), available at <http://www.fas.org/sgp/crs/homesecc/R41753.pdf>.

¹⁴¹ *Id.* at I3, B4. *Statistical Year Book, 2011*, *supra* note 4, at I2, B3.

We asked in our survey about the judges' agreement with this statement: "Judges should have the authority to allow the asylum office to adjudicate all defensive asylum claims, reserving for unsuccessful applicants the right to seek the judge's de novo consideration of the application." Of the 157 judges who responded, ninety-three (fifty-nine percent (59%)) agreed (thirty-eight percent (38%) strongly); eighteen percent (18%) chose the "neutral" option and twenty-two percent (22%) disagreed. We do not know how much of the agreement was motivated much by a desire to reduce workload; a few commented along the lines of "[t]his could alleviate the court of some of its burden due to an ever-increasing case load," but that was not a pervasive theme in the comments. Agreement with the statement was strongest (seventy-three percent (73%)) among judges who said they average one to five merits hearings per week; of those who said they averaged sixteen or more such hearings a week, fifty-three percent (53%) agreed with the asylum statement, but that difference may reflect the fact that courts with lower per judge caseloads see more asylum cases. Cross tabulations with other responses similarly did not suggest that judges who are most concerned about too many cases were more inclined than others to favor shifting the defensive asylum claims initially to the Asylum Office.

The ABA Commission points out a possible auxiliary benefit of having asylum officers first consider defensive claims, related to the fact that a significant portion of asylum claims never reach a merits determination, but rather are withdrawn or abandoned (in absentia), or the respondent may receive another form of relief or a change of venue. In 2011, as noted, there were 41,000 asylum receipts, but as seen in Table E immigration courts completed only 22,075 claims on the merits, a significant difference even recognizing that receipts in one year are not all disposed of in the same year. The ABA Commission points out that the percentage of affirmative asylum applicants who withdraw or abandon the asylum claim is greater than the comparable figure for defensive claims; it reasons that involvement of the asylum officer may explain some of the difference and if so, involving them in defensive claims might increase withdrawals and abandonments.

The high rate of abandoned asylum claims may be because increasingly people file claims for asylum affirmatively knowing they are likely to be referred to the immigration court because the Asylum Office cannot grant the case. Once within the immigration court the individual abandons the asylum application and seeks relief known as cancellation of removal – a special limited form of relief for people who have lived at least ten years within the U.S., have good moral character, and whose removal would result in exceptional and extremely unusual hardship to a U.S. Citizen or LPR spouse, parent, or child.¹⁴² There is no affirmative process of seeking cancellation benefits without being in removal proceedings but there appears to be some interest in authorizing USCIS to do so. We did not explore this idea or the related question of whether implementation would require statutory change. (The current benefit within the courts is capped at 4,000 grants per year.)

Other benefits. The benefit to the defensive asylum seeker might include an initial assessment in a less formal setting by an asylum officer trained to conduct interviews involving sensitive issues, and access to a resource center for researching country conditions not usually available to busy immigration judges. HRF noted that non-adversarial interviews are the model used to evaluate asylum claims in most of the countries of the world.

¹⁴² See INA § 240A(b); 8 U.S.C. § 1229b(b).

USCIS officials told us that, although the Asylum Office workload had been falling in recent years, it has ticked up recently and even if the increase is temporary, the Asylum Office would need additional resources were it to assume the initial responsibility for adjudicating defensive asylum claims. (The office was able to handle juvenile cases without additional hiring, but the numbers were relatively small: 778 in 2010 and 577 in 2011, and the Office returned a third of the 2010 cases and over half of the 2011 cases because it did not have jurisdiction over the asylum claim).¹⁴³ Although the Asylum Office is fee-supported, the fees come, not from asylum applicants, but from surcharges imposed on other benefit applicants, creating an unpredictable source of financing. (In 2006, the USCIS rejected a USCIS Ombudsman recommendation that the agency begin to charge a fee with asylum applications.)¹⁴⁴ USCIS officials also questioned whether the reduction in immigration court asylum cases would be sufficient to justify the administrative and possible legislative changes it might require.

Administrative closure. We propose administrative closure for all cases referred to the Asylum Office. In our interviews and in comments on survey responses, judges noted that they refer juveniles' defensive asylum claims and that under current procedure the matter is "adjourned" or continued rather than administratively closed; the cases may appear for years on their dockets. Further, these judges were not confident that the Asylum Office notified the court when an asylum application was approved. The judges and several court administrators thought a better procedure would be for the cases to be administratively closed. Administrative closure would also allow the court administrators to relocate files and give a more accurate picture of the long range docket of the court. Furthermore, requiring children and/or their guardians to return to the immigration court to check on the status of an adjudication before the Asylum Office is burdensome and a drain on the resources of the court as well as the many pro bono and non-profit organizations that represent these children. There seems little reason to maintain that inefficiency or to exacerbate it if all defensive claims are referred to the Asylum Office

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

¹⁴³ See email from Ted Kim *infra* note 147.

¹⁴⁴ See Emilio T. Go, Director, U.S. Citizenship & Immigration Services, *Response to Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status*, U.S. DEP'T HOMELAND SECURITY (June 20, 2006), available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_24_Asymylum_Status_USCIS_Response-06-20-06.pdf.

c. Asylum Office Adjudication of Eligibility for the Closely Related Claims of Withholding of Removal or Eligibility for Withholding Due to the Convention Against Torture (CAT)

To facilitate Asylum Office adjudication of certain closely related claims, DHS should seek to amend 8 C.F.R. § 208.16 to authorize the Asylum Office to adjudicate eligibility for withholding of and restriction on removal. The revised regulation should provide that, if the Asylum Office grants withholding or restriction, there would be no automatic referral to the immigration court. Implementation of this recommendation would contravene DHS's current reading of its organic statute as restricting withholding decisions to the Attorney General and the immigration courts.¹⁴⁵

Alternatively, it should amend the regulations to authorize the Asylum Office to grant "supervisory release," identity documents and work authorization to individuals who meet the legal standards for withholding or restriction on removal and develop a procedure—in cases where withholding or supervisory release are offered—by which the Asylum Office would issue a Notice of Decision explaining the impediments to asylum and informing the applicant of his or her right to seek de novo review of the asylum eligibility before the immigration court. This Notice must explain the significant benefit differences between asylum and withholding protections.

Finally, DHS should develop a procedure to allow applicant to seek immigration court review; upon receipt of the request, the Asylum Office would initiate a referral to the immigration court.

Analysis

When individuals affirmatively file for asylum, asylum officers interview them about whether they meet the statutory criteria of a well-founded fear of persecution on account of membership in a protected group. Some are statutorily ineligible for asylum but qualify for a more limited type of protection known as withholding of removal.¹⁴⁶ There are basically two ways to qualify for withholding of removal. One is to establish that if returned to the country of origin the individual will more likely than not be subjected to persecution and harm. The second is to establish eligibility for protection under the U.N. Convention Against Torture by establishing a likelihood of torture if returned. This second form of withholding is also called "restriction on removal." Withholding prohibits the government from removing the individual to a specific country. People who are granted withholding may not sponsor relatives or travel internationally, but are eligible for work authorization.

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

Specifically, we propose that the Asylum Office make the necessary factual and legal findings to determine eligibility for withholding or restriction on removal at this stage. It is difficult to know

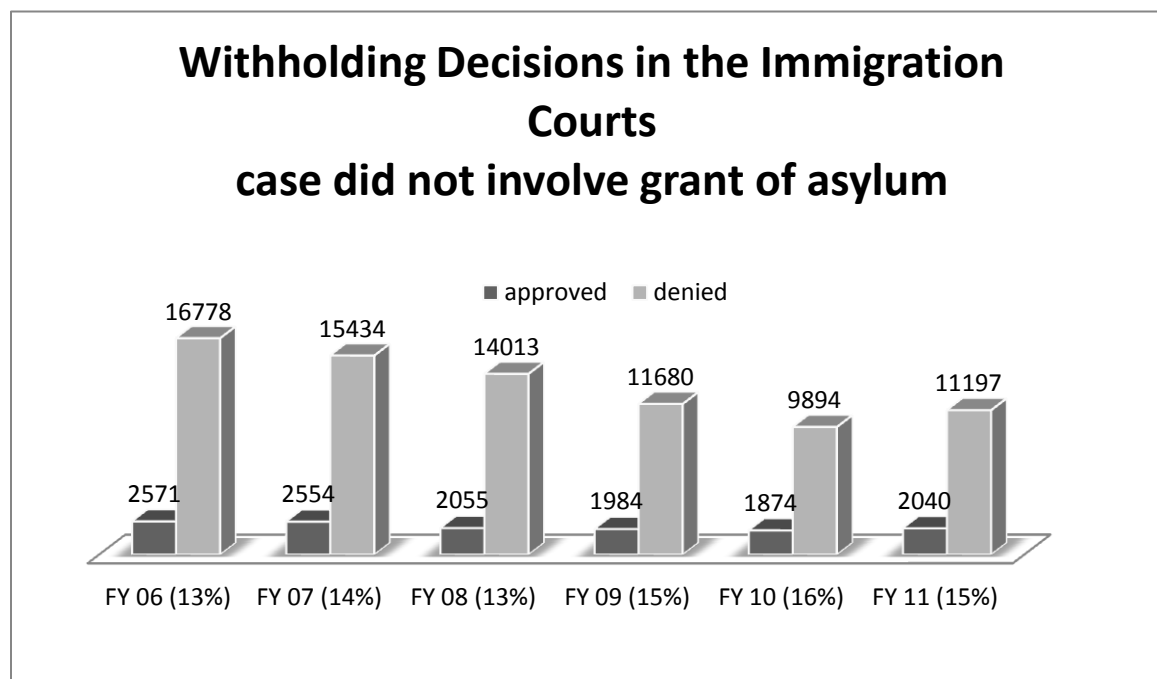
¹⁴⁵ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 and *supra* note 154 (describing and explaining the delegations of authority to the various components of DHS in the Homeland Security Act).

¹⁴⁶ INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2006).

how this change might reduce the number of cases referred to the immigration court. Even if granted withholding, applicants might be motivated to seek de novo review of eligibility for asylum. Several commentators said the opposite impact would occur, that individuals granted withholding protection would never pursue the more expansive relief of asylum because they would not fully understand the limited protection offered in withholding and the inability of the individual to secure permanent resident status or to sponsor immediate family for reunification – rights that do exist if the individual is granted asylum.

We make this recommendation to create a unified adjudication of eligibility for asylum and the related humanitarian protections. It may reduce the number of cases in the courts because in 2010, the courts approved withholding in 1,874 (sixteen percent (16%)) of the cases where asylum was not granted (or may not have been sought). An important distinction between asylum and withholding is that asylum relief includes a path to permanent residence and derivative benefits for immediate family.¹⁴⁷ An individual granted withholding of removal cannot travel internationally because a person who departs voluntarily has no right to return to the U.S. (withholding alone confers no formal status to the individual.)

Chart 5: Withholding Decisions in the Immigration Courts



Source: Year Book 2010 K-4, Year Book 2011 K-4. The Year Book explains that these cases do not include cases where asylum was also granted.

Currently, the Asylum Office is not authorized to grant withholding of removal or grant restriction on removal under CAT. This was not always the case. The authority of the Asylum

¹⁴⁷ E-mail from Ted Kim, Deputy Chief, Refugee, Asylum, & Int'l Operations Directorate, U.S. CIS, to author (Jan 2, 2012) (on file with authors) (suggesting that most people would be incentivized to seek immigration judge review of a denied asylum application, even if granted withholding, thus negating the potential for increased efficiency in the immigration court).

Office to adjudicate withholding in most cases was eliminated in 1995.¹⁴⁸ Congress has delegated the authority to formally withhold removal to the Attorney General and therefore the immigration courts. However, it might be possible for this authority to be delegated by regulation to the Asylum Office. Alternatively, DHS currently has the authority to place individuals under supervised release and to grant work authorization and identity documents. Regulations could make clear that this form of supervised release would have the same protections as a grant of withholding of removal and that no individual would be subject to removal under this procedure without an opportunity for a hearing before the immigration court.

Several commentators pointed out that a grant of withholding is made after the judge has found that the individual is removable. The BIA explains the significance in *Matter of I-S- & C-S-*: “Although entering an order of removal prior to granting withholding may appear to be a technicality, it is not an insignificant one. It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld. Indeed, the statute providing for withholding of removal is entitled ‘Detention and Removal of Aliens *Ordered Removed*.’ Section 241 of the Act. . . . clearly suggests that a removal order must precede any grant of withholding of removal.”¹⁴⁹ A grant of withholding of removal relates only to a specific country (i.e., withholding of removal to Nigeria). DHS is not precluded from removing an alien granted withholding of removal to a third country.

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

Under current procedure, if the asylum officer finds the individual is subject to one of the bars to asylum eligibility,¹⁵⁰ e.g., applied later than one year without a qualifying justifying exception¹⁵¹ or has a conviction for a particularly serious crime, or one of the other statutory bars, the asylum officer tells the applicant that the USCIS cannot grant the relief sought and files an NTA. This is not called a denial of asylum but a “referral” to the immigration court.

If the Asylum Office could grant withholding of removal or the equivalent protection of supervisory release and work authorization, some people would not seek further review of their pretermitted claim for asylum in the immigration courts. In our interviews some judges also thought the Asylum Office should have this authority because the inquiry about eligibility for withholding protections is very similar to the inquiry of eligibility for asylum and the asylum officer is capable of adjudicating the legal qualifications. Some of the people we interviewed argued that the asylum applicant should continue to have the right to litigate his or her claim for asylum in the immigration courts. The Asylum Office interview is non-adversarial and the

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

¹⁴⁹ 24 I&N Dec. 432, 433 (BIA 2008) (emphasis added).

¹⁵⁰ INA § 208(b)(2) (2010); 8 U.S.C. § 1158(b)(2) (2006).

¹⁵¹ See INA § 208(a)(2) (2010); 8 U.S.C. § 1158(a)(2) (2006).

applicant is frequently unrepresented or the role of the representative is less robust in the adjudication process. The opportunity to present the claim *de novo* in the immigration court is seen as a serious protection of the individual's rights.

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

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

3. Keeping DHS Appeals to the BIA within DHS

DHS should seek statutory and regulatory change that would direct to the USCIS's Administrative Appeals Office (AAO) appeals of denied I-130 petitions and all appeals from CBP airline fines and penalties to AAO. Alternatively, CBP could eliminate any form of administrative appeal and have airlines and other carriers seek review in federal courts.

Further, the AAO, to ensure quality and timely adjudication of family-based petitions should create a special unit for their adjudication, formally segregating the unit from its other visa petition adjudications; issue precedent decisions more often and increase their visibility; and publicize clear processing time frames so that potential appellants can anticipate the time that the appeal will be in adjudication.

Analysis

In addition to appeals from immigration courts, the BIA reviews three types of appeals from DHS agency decisions: waivers of inadmissibility for non-immigrants under certain provisions of the INA; fines and penalties that CBP imposes on air carriers, principally for allowing aliens without proper documentation onto flights to the U.S.; and, most significantly, appeals from USCIS denials of family-based visa petitions (I-130 forms). Table F shows all BIA receipts for 2007 through 2011 and then those from immigration court decisions and those from DHS decisions. In 2011, for example, the BIA received 35,962 appeals. Of those, seventy-six percent (76%) challenged immigration judge decisions, twenty-four percent (24%) challenged DHS visa petition decisions, and less than one percent (1%) each challenged other DHS decisions. Visa

petition appeals as a percentage of all BIA receipts varied from in the eight to twelve percent (8%-12%) range from 2007 to 2009, but reached twenty-four percent (24%) in 2010.

Table F: BIA Appeals from Immigration Courts and DHS¹⁵²

	2007	2008	2009	2010	2011
TOTAL APPEALS	36,633	33,513	32,952	35,833	35,962
Appeals from IJ decisions	32,324 88%	30,492 91%	28,638 87%	27,277 76%	27,237 76%
Appeals from DHS Decisions					
Visa Petitions Decisions	3,980 11%	2,851 8%	3,986 12%	8,606 24%	8,705 24%
212 Waiver Decisions	139 <1%	117 <1%	27 <1%	21 <1%	19 <1%
Airline Fines and Penalties*	190 <1%	53 <1%	301 <1%	1 <1%	1 <1%

*Airline fine and penalty appeals have never been a large component of DHS workload, and they have declined since complex litigation on the matter ended in 2009.¹⁵³

Although the BIA has developed expertise in these DHS appeals, there is no particular reason why it, rather than a DHS administrative adjudication body, should continue to hear the appeals. A change in procedure would probably require an amendment to the provision of DHS's organic statute that directs the principal legal adviser to the USCIS director to, among other things, "represent[USCIS] in visa petition proceedings before the Executive Office for Immigration Review."¹⁵⁴

The actual workload savings (as opposed to caseload savings) from moving these cases out of the BIA would not be great, at least by one measure of case difficulty, namely, whether the appeal gets a single member or panel decision. The BIA disposes of most of its cases by single-member decisions, but the percentage of immigration court appeals so disposed is lower than the percentage of DHS appeals so disposed, as seen in Table G.¹⁵⁵ From 2006 to 2010, immigration court appeals produced from eighty-seven percent (87%) to Ninety-two percent (92%) single member decisions, but ninety-nine percent (99%) or more DHS appeals got single member decisions.

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

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

¹⁵² Adapted from Table 16, *Statistical Year Book, 2011*, *supra* note 4, at T2.

¹⁵³ *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009).

¹⁵⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 § 451(d)(2)(B); 8 C.F.R. § 1003.1(b)(5) (2010) (setting out the BIA's appellate jurisdiction and gives the BIA jurisdiction over these petitions).

¹⁵⁵ Table 17, *Statistical Year Book, 2011*, *supra* note 4, at T2; *OPAT DATA*, *supra* note 44.

USCIS's Administrative Appeals Office (AAO) hears other appeals from USCIS adjudication officer decisions and is the logical place to hear I-130 appeals. Both BIA and AAO officials to whom we spoke endorse the concept.

Some who commented on a previous draft of this report were skeptical of the proposal, for several reasons. First, because the AAO is a fee-supported rather than appropriations-supported operation, the cost to citizens and non-citizens for filing visa petition appeals for family members would rise from the current \$110¹⁵⁶ to file with the BIA to about \$630, according to estimates provided by AAO personnel. This is the fee currently charged for other forms of AAO appeals. While a significant increase, the EOIR fee is probably artificially low—it has not changed in many years and the agency is funded by appropriations. The AAO is a fee based agency and will need to cover the expense of the adjudication.

Second, the AAO has been the subject of some criticism for its lack of transparency in the adjudication of appeals, and several organizations representing the private bar and individual attorneys expressed concern about the quality of the AAO procedures, referencing AAO website posts of processing times for various types of appeals of the denials of visa petitions. Some waiting times exceed two years.¹⁵⁷ There is no direct link from the AAO webpage to its published decisions. Instead selected cases are posted on the USUSCIS electronic library webpage and organized by subject matter.¹⁵⁸ In October, 2010, USCIS issued a press release heralding the issuance of two AAO precedent decisions—the first in over twelve years.¹⁵⁹ Several DHS officials reminded us that the AAO does have a process for identifying and vetting precedent decisions, as outlined in a document on the AAO website.¹⁶⁰

We grant these considerations but note that the new AAO leadership has expressed an awareness of the problems and a determination to refine the office's adjudication functions.

We received no comments from CBP officials, but one person voiced a concern that CBP might eliminate an appellate procedure for the transportation fines, which could increase overall litigation costs for the public and the government.

¹⁵⁶ OCIJ PRACTICE MANUAL, *supra* note 106, at 118.

¹⁵⁷ Processing times are listed by visa petition category. *See AAO Processing Times*, USCIS (Apr. 10, 2012) available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8ff31eeaf28e6210VgnVCM100000082ca60aRCRD&vgnnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD>.

¹⁵⁸ *See Administrative Decisions*, USCIS (2012), available at

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

¹⁵⁹ *See USCIS Issues Two Precedent Appeals Decisions*, USCIS (Apr. 10, 2010), available at

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

¹⁶⁰ *See ADMINISTRATIVE APPEALS OFFICE: PRECEDENT DECISIONS*, DHS, available at

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

4. Relieving Judges and Immigration Court Staff of Certain Case-Processing Related Tasks

a. Electronic Filing and Docket System

To reduce EOIR's administrative burdens and possible perceptions of lack of neutrality, EOIR should explore interim steps to provide limited electronic access to court dockets to registered private attorneys, accredited representatives, and ICE trial attorneys.

Analysis

Several court administrators whom we interviewed generate paper dockets for the ICE trial attorneys, and the practice is evidently widespread. While generating these materials may not seem particularly burdensome, it takes away time from other court administration operations and may be interfering with the court's administrative goals. Moreover, providing this information to the ICE trial attorneys, whether by hard copy or electronically provides greater access for the government counsel than for respondents and thus impairs the appearance of neutrality and independence. (In some courts, the administrators have developed an electronic "workaround" where the court can build a bridge between the EOIR database and the ICE trial attorney case management system. The electronic access is limited and does not provide access to the full EOIR case management system, but does allow the ICE Attorney to see all cases docketed and some case status information.) The lack of electronic access creates another problem in situations where the NTA filings have to be faxed to the court administrator for docketing removal hearings later that day at an "off site" location.

The electronic docket and filing system that EOIR is developing will reduce these burdens on the court administrative staff. Ability to access the full docket electronically will also help attorneys who have multiple hearings on the same date, perhaps before different judges and may allow greater efficiency and coordination of appearances in courts with a large number of judges. The new system, though, will not be in place for several years.

One court administrator reported that the agency might soon be able to allow private attorneys to register with the court system and have access to the public docket electronically. Another administrator surmised that the system might take ten more years before it could be fully integrated.

Several DHS officials, commenting on one of our earlier drafts, said that providing greater public access to the dockets might raise privacy concerns, a legitimate point *if* members of the public were to gain access to all information within the docket. Our proposal, though, concerns electronic production of the same types of information now posted publically on the immigration courts' bulletin boards on the day of the hearing. Many court systems also deal with privacy concerns through their electronic registration systems.

b. Eliminating EOIR's Role in Asylum Work Authorization Clock

EOIR should stop using adjournment codes to track the delays in asylum adjudication and inform DHS that it will no longer code adjournments or record the reasons for adjournment in the recording of proceeding for the purpose of tracking the number of days an asylum application is pending.

Correspondingly, DHS should revise its regulations and procedures to allow asylum and withholding applicants to apply for work authorization once at least 150 days have passed since the filing of an asylum application. The regulations should provide an additional thirty days for DHS to consider the application for work authorization. ICE counsel who believe that the applicant unreasonably delayed the filing of the application would make a formal written motion to the immigration judge and serve it on the respondent or respondent's counsel articulating the factual and legal basis for the ICE objection to the work authorization issuance. Respondent would have fifteen days to respond to the motion. The judge could then grant or deny the motion.

Analysis

In 1995, Congress overhauled the asylum application process, putting into place a number of constraints and incentives to try to deter weak or frivolous asylum applications. In particular, the changes decoupled the grant of work authorization with the filing of an application for asylum or similar protective relief and required DHS to withhold work authorization for asylum applicants until the government has had at least 150 days to adjudicate the asylum application. If a case is approved prior to that time, DHS grants work authorization. If DHS cannot approve an application for asylum or the application is presented for the first time as a defense to removal, the work authorization "clock" continues to run while the court adjudicates the asylum case. (The regulations authorize DHS to grant work authorization to individuals who seek cancellation of removal and to those who have a final order of removal but are under an order of supervision.¹⁶¹ Asylum is the only category with an employment authorization "waiting period." The regulations require a wait of 150 days to apply for work authorization and an additional thirty days for government objection.)¹⁶²

The current regulations, however, stop the clock that counts days toward work authorization eligibility where judges attribute the adjudication delay to the respondent. While the grant of work authorization is solely within DHS's authority, since the inception of these rules, the EOIR has used its record of proceedings to keep track of the reasons for adjournments and, as clarified recently,¹⁶³ the judge makes a specific finding about whether the respondent is responsible for the delay in adjudication, such as rejecting an available earlier date for a hearing or failing to produce required biometric data. This is a controversial area. A lawsuit was recently filed against DHS and EOIR for their role in managing the asylum work authorization clock.¹⁶⁴

In our interviews, court administrators consistently reported that staff (often senior staff) devotes at least twenty percent of their time to investigating queries about the "asylum clock." Respondents or their attorneys contact court personnel, who direct them to file a written request for information about the adjournment code used to continue the hearing. In some situations, the respondent or counsel objected that the judge did not intend the work authorization clock to stop and ask for an investigation of the code lodged in the record, which requires the court administrator to listen to the recording of the hearing and determine if the entered coding is

¹⁶¹ See 8 C.F.R. § 1274a.12(c)(10) (2010).

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

¹⁶³ See Brian O'Leary, Chief Judge, *Operating Policies and Procedures Memorandum 11-02: The Asylum Clock*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf>.

¹⁶⁴ A.B.T. et al. v. U.S. Citizenship and Immigration Services, No. 11-02108 (D. Wash. filed Dec. 15, 2011).

consistent with the judge's findings. Even after this investigation, some objections continue, requiring a reference to the respective ACIJ.

The work authorization clock is important in deterring frivolous asylum claims, but the lengthy delays in many of the immigration courts have extended the adjudication process far beyond 180 days. In short, diligent asylum applicants can face long delays to obtain work authorization eligibility simply because the court cannot docket another proceeding in the interim. Further, total applications for asylum have fallen, as noted above and largely stayed well below the high rates in the mid and late 1980s.

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

C. Process Modification

Another way to enable immigration courts and the BIA to function more effectively is to modify how they do their work.

1. Immigration Adjudication Case Management

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

- the extent, type, and quality of legal representation and advice that respondents receive;
- immigration court case management procedures, including the use of status, conferences and of video technology; and
- the management structure and administration of the immigration courts.

We have given limited attention to some aspects of process-modification because the asserted problem is unlikely to be resolved (e.g., due to lack of resources), or has been largely resolved (e.g., improved judge recruitment), or because the attention that others have given the topic and the limited time and resources available to us counseled against our extensive involvement. We believe that have not excluded totally any important topic.

a. Representation

Respondents in removal proceedings may be represented by lawyers who are admitted to a state bar. They can also be represented by non-lawyer "accredited representatives" whom EOIR has

certified as competent to provide such representation. The INA specifies that any such representation—by lawyers or non-lawyers—be “at no expense to the government.”¹⁶⁵

We offer our suggestions for enhancing the availability of representation, or at least of legal advice, to unrepresented respondents within this framework, not on the assumption that government-funded counsel is in the offing. (We recognize the possibility that in some situations, due process would require the appointment of government-funded counsel. The American Immigration Council’s Legal Action Center pointed out that while “a right to counsel ‘at no expense to the Government’ — . . . does not provide the *right* to paid counsel—it does not preclude the government from providing paid counsel when it chooses to do so or when otherwise required.” We agree but assume that at least for time being, additional appropriations, including those that might provide lawyers, are highly unlikely.)

There are two basic reasons to expand the availability of non-government funded representation and legal advice. One is basic fairness to the respondent. The other is the likelihood of cost-savings and efficiencies. Our survey asked judges about their agreement with this statement: “When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly.” Of the 166 judges who responded, ninety-two percent (92%) agreed (sixty-nine percent (69%) “strongly”); five percent (5%) selected “neutral.” Responding to our survey questions about factors contributing to a “model court,” fifty-six percent (56%) selected “high percentage of respondents represented by quality lawyers.” As to factors that would “most improve your court,” fifty percent (50%) selected “more quality counsel for respondents.”

Overall, slightly over two percent (2%) of judges responding to the “competent lawyer” statement disagreed with it, although almost seven percent (7%) of the judges with predominantly detained dockets disagreed. A few judges complained in our interviews or in their survey responses that lawyers often slow down the process to get their clients more time in country or encourage evasive answers by respondents.

Table H shows that the percentage of represented respondents in completed immigration court proceedings has been generally in the forty-fifty percent (40-50%) range for the most recent five years, and in the seventy-eighty percent (70-80%) range for completed BIA appeals from immigration judge decisions.¹⁶⁶ (Fifty-one percent (51%) of detained respondents in BIA appeals from immigration judge decisions had representation.)¹⁶⁷

Table H: Percentage of Represented Respondents in Completed Proceedings

	Immigration courts	BIA appeals from IJ decisions
FY07	48%	75%
FY08	45%	78%
FY09	45%	78%
FY10	49%	79%
FY11	51%	80%

¹⁶⁵ INA § 240A(b)(4)(A) (2010); 8 U.S.C. § 1229b(b)(4)(A) (2006); *see also* § 292; 8 U.S.C. § 1362 (2006). “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” *Id.*

¹⁶⁶ *Statistical Year Book, 2011*, *supra* note 4, at G, V.

¹⁶⁷ *OPAT DATA*, *supra* note 44.

EOIR officials told us that a proceeding is coded as “represented” if the respondent is represented at the time the case is completed. Thus, the representation figures probably overstate the actual level of representation because respondents in some proceedings coded as “represented” were not represented for the entire proceeding.

As seen in Table I below, the percentage of immigration court completions in which respondents had representation ranges considerably. Nationally, fifty-one percent (51%) of all completions had represented respondents and twenty-two percent (22%) of completions with detained respondents were represented.

Table I: 2011—Percent Represented in all Completions and in Completions in Detained Cases

	<u>All completions</u>	<u>Completions in detained cases</u>	
	Percent represented	Percent of all completions	Percent represented
TUCSON	7%	92.3%	1%
STEWART	11%	94.3%	7%
ULSTER	21%	98.7%	20%
OAKDALE	26%	78.7%	13%
FISHKILL	27%	99.3%	27%
EL PASO	30%	69.4%	15%
YORK	33%	79.6%	23%
ELOY	33%	65.3%	15%
TACOMA	34%	64.3%	12%
HOUSTON SPC	34%	80.3%	19%
NEW ORLEANS	68%	3.9%	69%
HOUSTON	69%	6.6%	63%
VARICK	69%	56.1%	50%
MIAMI	69%	5.7%	12%
BOSTON	70%	31.7%	49%
HONOLULU	70%	30.6%	33%
SAN DIEGO	72%	32.1%	54%
SEATTLE	73%	4.1%	38%
PHILADELPHIA	78%	2.6%	71%
NEW YORK CITY	88%	0.8%	78%
TOTAL (all 59 courts)	51%	42.4%	22%

In the ten courts in the table with heavily detained dockets, representation rates are well below the national level of fifty-one percent (51%). In those courts with smaller proportions of detained respondents—all but one of the second ten courts, completions with represented respondents were well above the national level. (The rate at the Varick court in New York no doubt represents the vigorous pro bono efforts in that city.) Appendix 3, from which this table is drawn, lists all the immigration courts and the percentage of 2011 completions coded as “represented.”

Having a lawyer does not ensure “adequate representation.” Studies have documented levels of inadequate representation. In 2010-2011, according to research by the Vera Institute of Justice undertaken for and with the Katzmann Study Group (described later in this section), New York immigration judges said respondents received “inadequate” legal assistance in thirty-three percent (33%) of the cases in their courtrooms and “grossly inadequate” assistance in fourteen percent (14%) of them. Generally, the judges said pro bono attorneys and those from nonprofit organizations and law school clinics performed better than private lawyers.¹⁶⁸

1] Costs to the government and current efforts to compensate for lack of representation EOIR should continue to make the case to Congress, regardless of the likelihood of statutory change, that funding representation for those, especially those in detention, who are unable to pay the cost of hiring individual counsel will work efficiencies and cost savings.

Analysis

We articulate the types of savings below and discuss some of the published data.¹⁶⁹ The lack of competent counsel means:

- some respondents’ remaining in tax-supported detention based on unrealistic hopes they will receive relief, hopes a competent and responsible attorney would explain are groundless. (We know of no published data documenting the number of detainees who, by some objective measure, have no realistic hope for relief. Pro bono counsel repeatedly told us that such detainees are a drain on detention resources, but they may have only limited access to the population and thus limited ability to evaluate the matter. ICE officials, in informal comments, disputed the statement that respondents remain in detention based on unrealistic hopes for relief; the officials said that ICE attorneys will notify a judge when a detained alien is not eligible for relief and the judge will issue a removal order.)
- lengthened removal proceedings, and thus increased detention costs in some cases, because of continuances that judges grant to allow respondents to seek representation. Almost fourteen percent (14%) of continuances granted in 2010 were to allow the respondent to try to find representation according to judges’ assigned adjournment codes;¹⁷⁰
- judges’ needing additional time to honor their obligation to inform the respondent, affirmatively, of opportunities for relief and taking court time to build a record of adequate notice and advisals. Several DHS officials who commented informally on an earlier draft said we provided “no empirical data to support this conclusion.” They were, however, commenting on an earlier draft, prepared before we had our survey results, including the

¹⁶⁸ See Kirk Semple, *In a Study, Lawyers Present a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES, Dec. 19, 2011, at A24; New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, (2011) available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf and in Steering Committee of the New York Immigrant Representation Study Project, *Accessing Justice*, 33 CARD. L. REV. 357, 364, 388-94 (2011).

¹⁶⁹ In a recently published law review article Professor Linda Kelly articulates similar savings if counsel were provided to children in removal proceedings. Her article cites several of the Vera studies we mention above. See, e.g., Linda H. Kelly, *The right To be Hear: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. (2011) at n. 150.

¹⁷⁰ See Table M, *infra*. at 85.

judges' overwhelming agreement with our survey statement—"When the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly";

- poor administrative records that do not preserve important issues for further agency or judicial review;
- the inability of ICE trial attorneys, when the respondent is not represented, to handle higher volumes of cases or focus on the complex or difficult cases; and
- the lack of judicial education that the adversary process can provide.

The INA is a complex statute, about which the courts of appeals are often in conflict. Judicial education programs are essential components of any well-administered court system, but the adversary system itself can be a valuable form of judicial education. Two competent, opposing lawyers arguing a point provides a judge assurance that she has the best information she's likely to have.

[a] "Know-Your-Rights" presentations

EOIR should continue to give high priority for any available funds for the Legal Orientation Program. While recognizing DHS requirements for KYR providers, and acknowledging that the presentations are inadequate substitutes for representation by competent counsel, EOIR should continue to promote providers' access to detainees and to help ensure that presentations are made sufficiently in advance of the initial master calendar hearings to ensure adequate time of the detainees to consider and evaluate the presentation information.

EOIR should consider giving LOP providers electronic access to the court dockets in the same manner as is provided to DHS counsel and negotiate with the detention officers to provide lists of new detainees, their country of origin and language requirements at the earliest possible stage to both the court and the LOP providers.

Analysis

Non-profit organizations visit detention centers to provide "Know-Your-Rights" (KYR) presentations and sometimes screen cases for later referral for full representation. Many of these presentations fall within EOIR's Legal Orientation Program (LOP), which Attorney General Holder has described as a "critical tool for saving precious taxpayer dollars."¹⁷¹ EOIR administers some programs through contracts with the Vera Institute of Justice, which in turn arranges for presentations by local groups. The House and Senate Appropriations Committees, in commenting on their recommendations for 2012 DOJ funding, singled out the LOP as especially valuable and urged EOIR to direct whatever funds it could toward it.¹⁷² We endorse that recommendation.

DHS officials reminded us that DHS detention standards set forth requirements for such presentations; they told us that detention standards now in development would regulate how to

¹⁷¹ Attorney General Eric Holder Addresses the Pro Bono Institute, U.S. DEP'T JUSTICE, (Mar. 19, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

¹⁷² See H.R. REP. NO. 112-169 (2011) available at www.gpo.gov/fdsys/pkg/CRPT-112hrpt169/pdf/CRPT-112hrpt169.pdf; S. REP. NO. 112-78 (2011) available at www.gpo.gov/fdsys/pkg/CRPT-112srpt78/pdf/CRPT-112srpt78.pdf.

schedule presentations so that they could, at least in some circumstances, be conducted more often.

Value of Know-Your-Rights Programs. The Vera Institute evaluated the LOP in 2008 and found that participants moved through the courts faster, received fewer in absentia orders, and helped prepare respondents to proceed *pro se*. Detention facilities managers said they observe fewer behavioral problems by participants, and judges said participants were better able to articulate relief to which they might be entitled and to understand the proceedings.¹⁷³

Our survey asked judges about their agreement with this statement: “‘Know-your-rights’ presentations conducted under the aegis of EOIR’s Legal Orientation Program contribute to fair and effective proceedings.” Of the 134 judges who responded to this item, ninety (sixty-seven percent (67 %)) agreed, with twenty-five percent (25%) agreeing “strongly.” A comparatively large number of judges (twenty-eight percent (28%)) took the “neutral” option, probably because they were not familiar with the programs. Not all judges who agreed that KYR presentations contribute to fair proceedings are from courts with such programs. One judge who said there were no presentations in or near his court said, “[t]hey occur in the location where I am occasionally detailed and they are INCREDIBLY helpful.” Another who checked “Agree strongly” commented “I know nothing about this program but it sounds like a great idea.” Several others commented similarly.

Timing of the presentations. Timing can be problematic. Several LOP providers told us that when the presentation is made the same day as an initial master calendar hearing, a significant number of detainees request continuances to assess the information the presentation provided about their potential eligibility for relief from removal.

Our survey asked how often the presentations occur. Of the judges who said their courts or nearby detention centers had programs, over half (sixty percent (60%)) said they didn’t know their frequency. Of the thirty-six judges who provided an answer, the most common response was “several times a week” (forty-two percent (42%)) followed by “once a week” (twenty-two percent (22%)). Almost none selected “once a day.” It is difficult to read much into these small numbers.

A separate survey question asked whether the presentations occur “frequently enough to benefit most respondents.” Seventy-four judges responded and about half (forty-nine percent (49 %)) agreed that they did, with thirty-two percent (32%) taking the “neutral” option. We found a high association between those saying the programs made a contribution to fair and effective proceedings and those who said they occurred frequently enough to benefit the respondents. This result is not surprising, and even at that is based on low numbers.

LOP provider access to electronic dockets. An EOIR long-term goal is to allow all registered representatives to access the courts’ dockets electronically. LOP providers suggested, pending implementation of that goal, that it would enhance the presentations if registered providers had electronic access the court dockets (in the same manner as is provided to DHS counsel) to help them prepare for the presentations, potentially recruiting additional assistance or notifying needed translators. DHS officials, though, told us that such access may implicate privacy

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

considerations, but the providers we spoke with were not suggesting that they have electronic access to anything more than information to which they would later have paper access.

[b] “Accredited representatives”

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

Analysis

EOIR allows “accredited representatives” to appear in court to represent non-citizens. Accredited representatives are non-attorney employees of nonprofit organizations that apply to EOIR for accreditation based on their experience and training. We did not have time to assess the extent or value of these services or whether their expansion can realistically enhance the availability of representation. We did hear concerns that EOIR’s list of pro bono providers often continued to list non-profit organizations even though the particular “accredited representative” had left the organization.

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

[c] Advertising deficient providers

EOIR should conduct further evaluation of the procedures for adjudicating claims of ineffective assistance of counsel.

Analysis

EOIR recognizes the need to increase immigrants’ awareness of unscrupulous lawyers and others who offer representation. In 2011, courts and EOIR posted consumer warnings. These efforts are important, but there may be a need for more qualitative assessments of the accredited representatives and a more in depth monitoring of the pro bono and low cost providers list available at each immigration court. EOIR officials have told us informally that, based on their assessment of the list of free legal service providers on the EOIR website, they are drafting regulations they believe will improve its accuracy and utility.

The American Immigration Council’s Legal Action Center suggested we evaluate the availability of substantive and procedural remedies for victims of unscrupulous practitioners, citing Attorney General Holder’s decision¹⁷⁴ directing EOIR to initiate rulemaking to evaluate the current framework for adjudicating claims of ineffective assistance of counsel and determining possible modifications that could be proposed for public consideration.¹⁷⁵

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

¹⁷⁵ More information is available at the American Immigration Council, Legal Action Center letter on ineffective assistance of counsel. See <http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf>.

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

EOIR should develop—in consultation with groups that are encouraging pro bono representation and seeking to improve the quality of representation in general—a national pro bono training curriculum, tailored to detained and non-detained settings and offer a systematic cycle of training in partnership with CLE and non-profit providers. The successful mock hearings and training materials developed in one location should be shared with the other courts and where possible, trainings should be recorded and those video or audio recordings made widely available to the public. With appropriate disclaimers and updates, these trainings may help to increase representation, pro bono participation, and even raise the sophistication of the respondents and their families about what to expect of their representatives.

Analysis

Pro bono representation provided by such organizations such as Catholic Charities, the American Immigration Lawyers Association, and Human Rights First is a growing part of the representation picture. Some other examples (which we present for illustration albeit at the risk of slighting others' contributions):

- The ABA has projects in several cities. The Immigration Justice Project in San Diego, for example, tries to ensure that every person appearing in the court has access to pro bono counsel and hosts trainings for pro bono counsel.
- Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit has organized a multi-pronged effort to encourage the private bar, law schools, and pro bono organizations to provide increased (and better) representation to those in removal proceedings in the New York City area.¹⁷⁶
- More than 17 New York City immigration judges have volunteered to work on pro bono initiatives. In 2011 and 2012, with CLE partners in the bar associations and private firms, they planned a series of CLE programs that included mock trials held at the court involving ICE trial attorneys, the private bar, and the judges.¹⁷⁷ The sessions have been fully subscribed and the court is looking to expand. Working with the State Bar Association, the New York court is helping to raise awareness of the need for pro bono or low cost immigration representation outside of New York City. The NY State Bar held a summit on these issues at its January 2012 annual “presidential summit.” A New York State Bar Committee on Immigration goal is to increase representation for detained individuals throughout New York and developing KYR presentations.

¹⁷⁶ See, e.g., Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES, May 4, 2011, at A24; 78 FORDHAM L. REV. 2 (Nov. 2009) (describing of the groups' activities and articles addressing the needs of the unrepresented).

¹⁷⁷ See, e.g., Editorial, *Deportation without Representation*, N.Y. TIMES, Dec. 24, 2011, at SR14 (urging greater pro bono and training to improve inadequate representation) and responses by Eleanor Acer (describing how Human Rights First has tried to expand pro bono representation in New York) and Michael Rooney (describing pro bono work with the Heartland Alliance National Immigrant Justice Center and discussing the difficulty of providing representation in detention centers) N.Y. TIMES, Dec. 27, 2011, at A18. See also Lori Adams and Alida Y. Lasker, *Symposium: Innovative Approaches to Immigrant Representation: Exploring New Partnerships: The Asylum Representation Project and the Leon Levy Fellowship at Human Rights First: An innovative Partnership to Increase Pro Bono Representation for Indigent Asylum-Seekers*, 33 CARDOZO L. REV. 417 (Dec. 2011).

- The Phoenix immigration court has a Memorandum of Understanding with the Phoenix College of Law, where a part-time clinical instructor supervises students who attend weekly master calendar sessions. The judges call cases with represented respondents first, allowing the students and supervisor to consult with unrepresented individual about eligibility for relief. The Arizona courts want to have similar programs in Tucson and arrange for law students to appear in one of the detention centers to help with bond applications. Bar organizations in other cities staff similar screenings and opportunities to consult with the pro bono counsel. These groups uniformly report an inability to represent all who desire pro bono representation, especially for those in detention.¹⁷⁸

The courts we visited that were not located within a detention facility all had pro bono rooms for private consultations outside of the main public lobby. We did not see reading materials or videos providing any information, other than the list of pro bono providers.

CLE programs. Continuing legal education programs can enhance the work of pro bono lawyers, as well as paid counsel. Our survey asked judges about their participation in CLE programs as panel members, moderators, presenters, or other capacities. Of the 154 judges responding, fifty-one (thirty-three percent (33%)) said they participated in such programs at least once a year; fifty-eight (thirty-eight percent (37%)) said they never or almost never did and forty-five (twenty-nine percent (29%)) said they did so less than once a year. Participation rates did not vary greatly according to whether the judges' caseloads were mainly detained or not.

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

Regardless of their participation level, a substantial majority of 147 judges agreed that "CLE programs improve attorney performance" (eighty-four percent (84%), with forty-one percent (41%) agreeing strongly). Only six percent (6%) disagreed. The percent agreeing was highest among those who said they participated at least once a year (ninety-two percent (92%)) but was seventy-five percent (75%) even among those who said they never or almost never participated. Seven of those who checked "Agree" qualified their response with comments along the lines of "Depends on the topic and the presenter. The attorneys who could benefit the most from CLE are those that are least likely to attend."

¹⁷⁸ Margaret Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997). See also NAT'L IMMIGRATION JUST. CNTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 4-5 (2010), available at www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf. and LEGAL ACTION CENTER AND PENN STATE LAW CENTER FOR IMMIGRANTS RIGHTS, BEHIND CLOSED DOORS: AN OVERVIEW OF DHS' RESTRICTIONS ON ACCESS TO COUNSEL (2012) (documenting many obstacles to representation particularly in immigration related detention) available at http://law.psu.edu/file/Immigrants/LAC_Right_to_Counsel.pdf.

[2] Technology to Enhance Consultation and Representation

[a] Audio or video links for consultation

DHS, to improve the availability of legal consultation for detained respondents and help reduce continuances granted to allow attorney preparation, should provide video technology in all detention facilities allowing private consultation and preparation visits between detainees and counsel; it should continue to use its leverage to try to require such access in all leased or privately controlled detention facilities. In those facilities where video technology is not available, it should designate duty officers whom attorneys and accredited representatives can contact to schedule collect calls from the detainee.

Analysis

As explained more fully below, video conferencing equipment is available in all but one very small immigration court, and in many detention facilities. In general, both EOIR and DHS officials seemed receptive to the idea of making those links available to pro bono legal service providers and law school clinics and perhaps others who would be willing to answer questions from detained respondents

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

Providing even this simple technology in some detention centers, however, faces considerable hurdles. For one thing, some state and local jails in which DHS rents space may refuse to permit such links in their facilities. A 2010 National Immigrant Justice Center study reported that 78 percent of the over 25,000 detainees it surveyed were in facilities that prohibited attorneys from scheduling private calls with their clients.¹⁷⁹ Yet, some state and local jails are introducing video technology to allow family members to visit with incarcerated relatives. In New York, the State Bar is exploring whether immigration counsel could use the video conferencing equipment in a secure, confidential manner, to allow attorney consultation and preparation.

[b] Using video technology to enhance advisory presentations

Further, DHS and/or EOIR, to improve the availability of legal reference materials for detained respondents, should provide video versions of the “Know-Your-Rights” presentations in every detention facilities available to be played in the dorms throughout the day and on demand in the law libraries; both should assist in the transcription of the text of the recently released ABA Immigration Commission video into additional languages or provide audio translations in the major languages of the detained populations.

Finally, we think EOIR should encourage judges to permit pro bono attorneys to use the court’s video facilities to transmit KYR presentations into detention centers.

¹⁷⁹ NAT’L IMMIGRATION JUST. CNTR., *supra* note 155.

Analysis

Know-Your-Rights presentations sponsored under the aegis of EOIR's LOP cannot reach all respondents who might benefit from them, when they might benefit from them. Many of the detention centers are in locations that are not easily accessible by attorneys or non-profit representatives. Moreover, detainees may miss a presentation because they are moved from a facility before they can attend the relevant program or meet with any potential representative. Language accessibility can also be a problem. Many presentations are only in English or Spanish, yet the detained population may have dozens of other languages.

Video technology can broaden access to legal orientation information, and ICE detention standards "encourage [] qualified individuals and organizations to submit electronically formatted presentations (i.e., videotape, DVD, etc.) on legal rights," the content of which ICE must approve. They also direct facilities to "provide regularly scheduled and announced opportunities for detainees in the general population to view or listen to the electronic presentation(s)."¹⁸⁰ Some of this information is available through prerecorded video with foreign language captioning. The technology to facilitate this is widely used on such websites as You Tube. To the degree the detained population has access to these recordings, subsequent in-person visits or telephone consultation by non-profit organizations could spend more time on case-by-case assessment and counseling.

In April 2012, the ABA Commission on Immigration released a new know-your-rights video (in English, Spanish, and French), which is described and available for viewing on the Commission's website.¹⁸¹ According to DHS officials at the release event, DHS is making a concerted effort to have it available in all detention centers. Personnel at the Vera Institute told us LOP presentations are available as audio recordings on CD or MP3 for LOP participants in Arabic, Mandarin, Vietnamese, and French. They reported that, as part of a recent pilot effort, Vera is putting a small amount of LOP funds towards phone-based interpreter services, to help LOP providers work with non-English and non-Spanish speakers. In many of the detention facilities, televisions and DVD players are available in the dormitories, recreational rooms, and law libraries. Access to the law library may be too limited for short-term detainees and to the degree facilities limit visit to the libraries, these KYR videos should also be available in other areas of detained facilities.

Although the ICE standards speak in terms of prerecorded electronic presentations, it appears that some groups make KYR presentations by video. One judge, in supplementary comments on our survey, said that his court "is proactive with AILA and other groups in promoting these KYR presentations. The use of the Court's facilities (when available) and VTC system has greatly increased the number of detained aliens offered the KYR presentations and has made it much easier for the pro bono attorneys to volunteer to make these KYRs."

Several non-profit commentators, while agreeing that video technology could help expand KYR and even limited representation in detention facilities, urged caution in relying solely on such technology, arguing "that in-person presentations and meetings are preferable to video, and that

¹⁸⁰ Standard 37, "Legal Rights Group Presentations," section M ("Electronic Presentations") *available at* <http://www.ice.gov/detention-standards/2008/>

¹⁸¹ *New ABA Video Helps Immigrant Detainees Understand Their Rights*, ABA NOW (Apr. 19, 2012), *available at* <http://www.abanow.org/2012/04/new-aba-video-helps-immigrant-detainees-understand-their-rights/>.

video should only be used if necessary.” A few commentators argued that KYR presentations through VTC are inappropriate for vulnerable populations such as juveniles or people with mental illness, victims of trafficking and some categories of asylum seekers because attorneys cannot build sufficient rapport and trust with the clients and more importantly, might miss evidence due to poor communication or lack of a physical meeting where scars and other evidence of violence might be readily apparent to the attorney.

[3] “Limited Appearances” by Counsel

EOIR should encourage use of limited appearance in appropriate circumstances by modifying underlying regulations as necessary and consider issuing an OPPM or other guidance to explain to judges circumstances in which judges may wish to permit limited appearances and necessary warnings and conditions they should establish. Finally, it should amend the Practice Manual to reflect this modified policy.

Analysis

In a “limited appearance,” an attorney might, for example, provide representation at the master calendar hearing but not at a merits hearing held in a distant detention facility where video conferencing technology (VCT) facilities are unavailable. The OCIJ’s Practice Manual disfavors limited appearances. It tells attorneys that, once they appear in court to represent a respondent, they are obligated to continue representation unless the respondent terminates the representation or the judge grants a motion to withdraw or substitute counsel, or the judge “specifically allows a limited appearance.”¹⁸² Limited appearances are obviously subject to abuse; an attorney might collect a fee for a master calendar appearance but leave the respondent in the lurch to navigate the rest of process alone.

Despite these downsides, we suggest that EOIR encourage a more flexible approach to limited appearances. Pro bono counsel and some judges to whom we spoke said that limited appearances within the representation-deprived removal adjudication system may be better than no representation, if the respondent understands the limits it entails. EOIR officials told us informally that the expanded use of limited appearances was worth further consideration but that changes to the advice to parties in the practice manual would require changes to the underlying regulations as well, citing BIA precedent. As explained in the footnote, however, we believe the precedent cited stands for a different proposition than that limited appearances are disallowed.¹⁸³

[4] Pro Se Law Clerks

EOIR should consider a limited multi-year pilot program in a large immigration court or a detention center with a large immigration docket to assess whether a pro se law clerk office

¹⁸² OCIJ PRACTICE MANUAL, *supra* note 106, at Ch. 2, § 2.3(d).

¹⁸³ Citing *Matter of Velazquez*, 19 I&N Dec. 377 (BIA 1986) (“there is no ‘limited’ appearance of counsel in immigration proceedings”, as quoted in Immigration Judges Benchbook and *Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997) However, this case arose in the context where an individual tried to disclaim the admissions and statements of his prior counsel because the individual thought first attorney would only be making a motion to change venue and a request for bond. The statement “there are no limited appearances” means that respondents may be bound by the actions of any counsel who appear in their case. We are discussing allowing limited in scope representation so that attorneys will be encouraged to take on representation in situations where they may not be willing to commit to representing an individual for the full scope of the removal hearing. Understood in this context, no regulation change may be required.

could provide benefits that outweigh its costs, such as saving court time in explaining procedures and filing requirements and reduced need for continuances because a greater number of applications were complete upon submission.

Analysis

Some state and federal courts employ attorneys in the clerk's or court administrator's office to assist both pro se litigants and the judges who deal with them. We provided our interviewees a job description for such a position posted by a federal district court:¹⁸⁴

- screen complaints, petitions, and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints, that have been filed by pro se litigants to determine their legal merit, the issues involved, and the basis for relief;
- screen other pro se litigation such as social security and equal opportunity complaints;
- track the progress of and works with the judges to manage all pro se cases; advising the judges on the relative status and priority needs of assigned cases;
- draft orders, reports and recommendations for the disposition of pro se cases;
- maintain contact with pro se litigants who visit and appear in court; responding orally and in writing to questions relating to legal procedure and other processes posed by pro se litigants;
- answer correspondence and telephone inquiries from pro se litigants;
- prepare and update pro se litigant forms and instructional packets designed to assist unrepresented parties in drafting complaints and avoiding time-consuming procedural errors so cases can be processed efficiently.

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

b. Case Management Procedures

[1] Advice and Assistance Regarding Case Management Practices

EOIR should develop, perhaps through the LOP in cooperation with a non-profit legal services providing, a pro se version of the OCIJ Practice Manual that explains terms and concepts that lay persons, especially from other countries, are unlikely to understand. EOIR should share best practices developed by individual courts or judges by collecting and disseminating supplement instructions that individual judges have developed to aid the parties in preparing submissions to the court. If EOIR could develop video kiosks in the waiting rooms or similar spaces within the courts, the long term benefits might help respondents access the court website, find instructional materials and perhaps reduce delays in proceedings because respondents would be more prepared.

¹⁸⁴ *Law Clerk Job Descriptions*, NATIONAL CENTER FOR STATE COURTS (May 26, 2010) (providing the job description, as prepared the U.S. District Court, District of Utah), available at [http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks\(16\).htm](http://www.ncsconline.org/d_kis/jobdeda/jobs_lawclerks(16).htm).

Analysis

In 2008, the Chief Immigration Judge released the “Immigration Court Practice Manual”¹⁸⁵ as a response to one of the Attorney General’s 2006 directives for court improvement. The chief judge said the manual responded to the “public’s desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their ‘best practices’ nationwide.” He described it as “a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice” in the courts and that are “binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case.”¹⁸⁶ The Manual cites some CFR provisions that authorize steps that the Manual either authorizes or encourages.

Our interviews provided conflicting evidence of the Manual’s use. Some judges praised it for establishing a common procedural baseline, and most said they use it, at least as a general guide. ICE officials were mixed in their evaluation; some criticized judges for demanding compliance when such compliance was inappropriate, or for using it insufficiently. Likewise, private lawyers and advocates for pro se respondents charged that some courts insist on “mechanical application” of the Manual’s rules, citing court administrative staff’s refusal to accept materials due to technical errors such as failing to sequentially number the pages in an application. We note these concerns but have been unable to establish how widespread or meritorious they are.

Even judges who praise the Manual acknowledged that it is difficult for some unrepresented respondents to use, even if they can read English, because its prose is directed principally at attorneys. EOIR officials told us informally that they thought seeking a way to develop a pro se version of the manual was worth further consideration.

Some judges told us that they prepare supplemental instructions to assist parties, especially those proceeding pro se, in preparing documents in a manner consistent with the court’s or judge’s expectations. We suggest that OCIJ consider creating a central repository of such instructions that judges can consult and consider adapting and adopting to their needs.

We realize that developing kiosks is unlikely given the resource requirements but offer it as a suggestion. Several commentators noted the value of kiosks located in the court waiting area where respondents can log onto the court’s website to seek instructional material. We agree they have been valuable in other courts and believe they could be for EOIR. However, we realize the resource implications mean that EOIR will not be able to develop them in the near term.

[2] *Pre-hearing, or Status, Conferences or Exchanges*

EOIR should revise its coding scheme to allow judges or court administrators to identify “pre-hearing conferences” or “status conferences.”

Further, EOIR should test the utility of status conferences by assembling a working group or some other forum to probe more deeply about judges’ perceptions of the costs and benefits of such conferences and when and how they are or are not useful. Depending on the results of that inquiry, it might consider a pilot project in one or more courts to test the effectiveness of mandatory pre-hearing conferences in specified categories of cases and to evaluate situations in

¹⁸⁵ OCIJ PRACTICE MANUAL, *supra* note 106.

¹⁸⁶ *Id.* at 1.

which the judge should order the trial attorney to produce essential records from the A File. EOIR should also evaluate the use of EOIR Form-55 and/or create a new form and recommended procedure for stipulations by the represented parties. Finally, it should create a separate code for “status” or “prehearing” conferences, so that judges needn’t code them, misleadingly, as master or individual hearings.

Analysis

In most criminal and civil court systems, procedural rules and court practice encourage the parties to narrow issues and dispose of some disputes through conference, stipulation, and negotiation. Rules and practice also recognize that not all cases need or can benefit from prehearing conferences. Pre-hearing or status conferences in immigration courts have not received a great deal of attention in the extensive commentary on the immigration courts. The ABA Commission on Immigration referenced them but only briefly in a recommendation for “greater use of prehearing conferences.”¹⁸⁷ A 2009 Appleseed report claimed (without citing any evidence) that “[m]andating pre-hearing conferences at the request of either party would shorten hearings and make them more efficient by increasing trial attorney’s preparedness and by narrowing the issues before hearings.”¹⁸⁸

[a] EOIR Goals and Policies

In 1986, the late William Robie, who became the first chief immigration judge upon EOIR’s 1983 creation, said that the

primary distinction that we have made in our system between how immigration judges operated when they were part of the [Immigration and Naturalization] Service and how they operate today is in philosophy. Not only have we emphasized the independence of the Judges from the Service, but we have pressed them to be the managers of their caseload. Traditionally, the attorneys have managed the caseload in immigration judge proceedings. Our feeling is very strong that if the judge does not manage the caseload it is not going to move the system. This philosophy has been shared by a number of judicial systems. Most of the progressive judicial systems in the country today have had to move to this philosophy, again, because of a growing caseload and an effort to reduce backlog and delays in getting individuals an opportunity to have a hearing.¹⁸⁹

One of the instruments to serve this goal were “pre-hearing conferences,” at the discretion of the judge, in order, in Robie’s words:

to narrow issues, to obtain stipulations, to exchange information voluntarily, and to otherwise simplify and organize the proceedings, particularly in cases which are complex or are likely to require a significant amount of time. We have found that this works considerably better. Again, nothing really new or innovative. We are merely taking some existing practices out of systems that work fairly well and trying to put them into place in this system.¹⁹⁰

¹⁸⁷ *ABA Comm’n on Immigr. Rept., 2011 supra* note 32, at 2-41.

¹⁸⁸ APPLESEED, ASSEMBLY LINE JUSTICE, *supra* note 72, at 18. See also *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (written statement on Behalf of Appleseed, Texas Appleseed and Chicago Appleseed) available at <http://appleseednetwork.org/LinkClick.aspx?fileticket=K2R6rcJciJI%3d&tabid=596>.

¹⁸⁹ William Robie, *The Purpose and Effect of Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMM. L.J. 269, 272-73 (1986).

¹⁹⁰ *Id.* at 279.

That goal has persisted. The Practice Manual tells the parties that “[p] re-hearing conferences are held between the parties and the Immigration Judge to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceeding.” The Manual “strongly encourage[s]” the parties “to confer prior to a hearing in order to narrow issues for litigation.”¹⁹¹ The Manual also encourages parties to file pre-hearing statements “even if not ordered to do so by the Immigration Judge.”¹⁹²

A March 2008 OCIJ Operating Policy and Procedures Memorandum (“Guidelines for Facilitating Pro Bono Legal Services”) told judges that “pre-hearing statements can be especially valuable in pro bono cases, where the representative’s time and resources might be limited.”¹⁹³ Similar incentives would seem to operate for retained counsel. OCIJ’s five-day September 2011 “advanced training” for forty-five new immigration judges included an hour on “Rulings on Motions: Issues, Tips & Techniques” (taught by an immigration judge) and two hours on “Docket Management: Reports and Techniques to Improve Efficiency,” taught by a chief clerk and deputy chief.¹⁹⁴

[b] Judges’ Practices

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

1. Instructing the parties to confer

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

	Percent and number	
Right before I commence the merits hearing, I give the parties ten to fifteen minutes to discuss the case and narrow the issues.	45%	69
I tell the parties—at some point prior to the merits hearing that will resolve the disputed factual or legal issues—that I want them to confer to try to narrow issues in dispute	43%	66
I never or almost never tell the parties that I expect them to confer.	16%	24
I require the attorneys, prior to the merits hearing, to stipulate on the record to at least some of the issues in the case.	14%	22
None of these statements reflect my typical practice.	26%	40

¹⁹¹ OCIJ PRACTICE MANUAL, *supra* note 106, at Ch. 4, §4.18.

¹⁹² *Id.* at Ch. 4, §4.19.

¹⁹³ *OPPM: Facilitating Pro Bono Legal Services*, *supra* note 10, at 4.

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

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

	Percent	Number
Agree strongly	22%	35
Agree	43%	68
Neutral	13%	21
Disagree	17%	27
Disagree strongly	6%	9

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

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

On a related topic, our interviews suggested an apparent paucity of informal document sharing between the government and the respondent. The government’s “A File” may contain documents relating to the respondent’s entry and status in the U.S. Typically, trial attorneys require respondents to file FOIA requests to obtain the non-classified or confidential documents within their official A File.¹⁹⁵ A few people told us that when asked, some trial attorneys will share portions of the A File with respondent’s counsel. Developing a practice that encourages earlier and easier access to the A File may facilitate issue narrowing, settlement discussions, and fewer delays for preparation. In some cases, the failure to produce records from the A File may frustrate the constitutional guarantee of a fundamentally fair removal hearing. (Recently, the Ninth Circuit Court of Appeals vacated a removal order where many of the documents sought by the respondent who claimed he had acquired citizenship through adoption and subsequent naturalization were present in the trial attorney A File throughout the removal proceeding.¹⁹⁶) The better practice would be for the proactive DHS disclosure of unrestricted documents as part of the adjudication process.

2. Status or prehearing conferences—extent of judicial involvement

What about direct judicial involvement in efforts to narrow issues—judge-attended status conferences with the parties?

The governing regulations make clear that “[p] re-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise simplify and

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

¹⁹⁶ See *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). The court noted that the INA states that the respondent “shall have access to his entry document” and other [non-confidential] records and documents related to his entry or presence in the United States.” *Id.* at 374 citing INA § 240(a)(c)(2)(B); 8 U.S.C. § 1229a(c)(2)(B)(2006). Further, the court found that to force the respondent to rely solely on FOIA requests “would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it.” *Id.* See also Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 431, 539-542 (2011) (discussing among other constitutional concerns the *Dent* opinion and the need to increase access to government records under the 5th Amendment).

organize the proceeding.”¹⁹⁷ Our survey provided helpful information on immigration judges’ use of such conferences, but in many ways, we have only scratched the surface of this topic.

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

	Percent	N
For the most part, I simply don’t have time to hold such conferences, even if they might be helpful.	42%	69
I try to hold a status conference in every case in which I think it would be effective.	38%	62
I don’t hold a formal status conference but have used a “call up” date procedure to check quickly that the case is progressing, e.g., filings have been made, biometrics are complete, etc.	25%	41
I hold status conferences by telephone (but on the record), waving the physical appearance of the parties and counsel.	12%	20
I tried to hold such conferences but the parties were uncooperative.	7%	12
I don’t believe I have the authority to order the parties to participate in such conferences.	3%	5

The norm in immigration court is to use hearing time to move cases forward but the norm is hardly universal. As the table above shows, over a third of the judges responding said they hold status conferences in at least some cases. To the degree any of the twenty judges who said they hold telephone conferences did not also check the “try to hold status conferences when they can be effective” option, it increases the number who told the survey they hold some kind of status conference, potentially to half the responding judges. Also, some of the judges who selected the “don’t have time” for such conferences told us in comments that they nevertheless *make* time for them. One such judge said “I hold such conferences at 8:15am, before my normal bench time starts, and usually I have 2 or 3 such hearings a week.” Finally, the “call up date” procedure can be considered a kind of status conference, particularly for cases that do not present complex legal or factual questions.

We heard in our interviews of different practices in different courts, reflecting different local cultures. We could not probe different cultures in our survey, due to the anonymity requirement. One of us visited the San Diego court, however, and learned that the court developed a standardized form (see Appendix 6, “Record of Master Calendar Pre-Trial Appearance and Order,” identified as “Form EOIR-55, May 2009) to help the judge elicit specific commitments from the attorneys about the next steps in the case and what, if any, factual and legal issues can be agreed upon and stipulated to at that point in the proceeding. The judge completes the form by hand and places it in the record of proceedings file and gives copies to the parties.

In other court systems, Form 55 might be called a scheduling order. The San Diego judges firmly believe the form works because the culture there is one in which attorneys know that they must

¹⁹⁷ 8 C.F.R. § 1003.21(a) (2011).

be prepared to stipulate and narrow issues at an early stage in the adjudication. The form is available in the Immigration Judge Benchbook,¹⁹⁸ but we encountered few judges outside of San Diego who knew about it.

In our interviews, judges told us that they had few tools to incentivize the attorneys to cooperate. It is hard to say how widespread this problem is. But only a handful of survey respondents (seven and two-tenths percent (7.2%)) checked the “I tried but the parties were uncooperative.” What might more status or prehearing conferences accomplish? We asked in our survey for judges to identify in their own words “what in your experience are the four most common reasons that all cases [scheduled for a merits hearing] are not addressed during a merits hearing.” With the help of two New York Law School students with familiarity with immigration adjudication, we sorted the 538 answers into twenty reasons and present them below, organized into broad categories. (Only five of the 161 judges who responded disputed the question’s premise—e.g., “[o]ur court doesn’t overbook individual hearings, and I am able to address all cases.”)

	Judges	Percent
INSUFFICIENT TIME		
Too many cases scheduled	74	45%
Too much testimony for time allotted	30	19%
ATTORNEYS NOT PREPARED		
Respondent attorney not prepared	32	20%
DHS attorney not prepared	17	11%
Attorney (unspecified) not prepared	52	32%
MATERIAL MISSING, UNAVAILABLE		
		81%
Biometrics missing	58	36%
Forms/documents missing	50	31%
DHS file missing	22	14%
UNFORESEEN OR COMPLEX ISSUES		
(viz., testimony)	37	23%
PARTICIPANTS MISSING		
Attorney absence	23	14%
Respondent absence	16	10%
Witness absence	12	7%
Unspecified absence	7	4%
OTHER		
Interpreter problems	22	14%
Pro se to seek attorney	16	10%
Pending DHS application	11	7%
Pending criminal matter	2	>1%

A prehearing or status conference could not avoid entirely any of these delay-causing factors but they could anticipate some of them. It is not for us to lecture to overworked judges, especially based on their responses to our survey. We only note that responses suggest that judges must

¹⁹⁸ See Tools for the IJ, Record of Master Calendar Form available at [www.justice.gov/eoir/vll/benchbook/tools/Record%20of%20Master%20Calendar%20Pre-Trial%20Appearance%20and%20Order%20\(Form%20EOIR-55\).pdf](http://www.justice.gov/eoir/vll/benchbook/tools/Record%20of%20Master%20Calendar%20Pre-Trial%20Appearance%20and%20Order%20(Form%20EOIR-55).pdf).

continue merits hearings for reasons that status conferences are designed to keep under control: testimony that turns out to be longer than expected, for example, or issues emerge that judges or the parties had not anticipated, or attorneys appeared at the merits hearing unprepared to participate. (We do not know how many of the judges who offered these reasons for delay try to control them with status conferences.)

Tracking Status Conferences

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

We asked the judges in our survey how they code status conferences and got these responses, we presume mainly from the judges who selected one or both of the "hold a conference when it can be effective" and "hold conferences by telephone". Forty-seven said they code status conferences as master calendars; forty-four said they code them as individual hearings. In addition, sixty-six judges (slightly more than the sixty-two who told us they hold conferences when they think they can be effective) selected the option "I would like there to be a code for status conferences in the docket and a set time for conferences on the weekly calendar." These responses suggest that judges who use status conferences believe they should be a recognized part of proceedings. Several judges who selected the "code status conferences" option commented "I really DO think the system should be revamped to make status conferences a useful tool, to encourage narrowing of issues and to develop a discovery system for removal cases." Another said, "[u]nfortunately, we do not have this concept recognized officially in immigration court. I believe it should be taught as part of effective docket management for every IJ."

[3] Amendments to the NTA and the Authority to Administratively Close a Case

EOIR should propose a change to 8 C.F.R. § 1003.30, which currently allows the government to amend the charges and allegations in the NTA at any time in the proceeding. The new rule would liberally allow amendment at the first master calendar but once the respondent formally admitted or responded to the charges and allegations, amendment would only be considered based on motion to the court and good cause shown for why the government could not have presented the charges or allegations earlier.

As to administrative closure, EOIR should seek to clarify the proper use of administrative closure by amending the OCIJ Practice Manual to define specifically "Motions for Administrative Closure." Further, it should issue OPPMs or amending regulations to authorize the judge to initiate this motion *sua sponte*; indicate that a specific basis for administrative closure should be the failure of the parties to meet and confer as previously directed by the judge; and authorize government and private counsel under the procedural rules to object to the administrative closure orally or in writing. If the caseload of the court grows so large that the court cannot possibly address the backlog of cases, administrative closures of cases that ICE policy and directives would characterize as a low priority may be an appropriate mechanism to

manage the workload of the courts.¹⁹⁹ This guidance for judges should specifically reference when administrative closure is appropriate over the objection of the respondent.

Finally, EOIR should authorize a special docket for cases awaiting biometric results with a special coding for these cases to allow later measurement of the degree to which the security checks are solely responsible for the delays. When the check is complete, if the trial attorney found the results of the security check warranted a resumption of the hearing, the trial attorney would move to calendar a resumed individual hearing to address the biometric results. If no further hearing is necessary, the trial attorney could file a notice with the court and respondent stating that no new evidence was presented in the results of the security check and upon receipt of this notice, the judgment would convert to a final order.

Analysis

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

It is possible, as some DHS officials note, that a rule to limit amending the pleadings could have a *res judicata* or claim preclusion effect. If DHS failed to allege a charge or make a factual allegation necessary to the case in the initial pleadings, the government may have lost the opportunity to present that claim. The exact state of claim and issue preclusion in immigration proceedings is an unsettled area of law. Few federal cases have presented the issues.²⁰⁰ However, the policy behind the common law's creation of the *res judicata* doctrine motivates our proposal—attorneys know that if they fail to present any and all claims arising from the same transaction or related to the litigation—they may be barring future litigation of those claims. Courts balance the desire for full litigation against the competing interest in efficiency and certainty in litigation. Were this proposal adopted, and if, over time, patterns emerge where parties are litigating amendments of pleadings, it may help refine the practices and resources needed for the ICE trial attorneys to avoid the problem. The state of the current practice creates an unequal process in which judges have little or no control over the development of their cases.

¹⁹⁹ This closure of these cases might be seen as analogous to the procedures the BIA used to expedite adjudication of newer cases while working to reduce the backlog of old cases.

²⁰⁰ The scope of claim and issue preclusion in immigration proceedings is complex. The BIA has recognized preclusion effects within immigration matters. *See Matter of Fedorenko*, 19 I.& N. Dec. 57 (BIA 1984). The Ninth Circuit appears to recognize a form of claim preclusion where the government tried to recharge an individual based on a conviction that existed at the time of the first removal hearing. *See Bravo-Predroza v. Gonzalez*, 475 F.3d 1358 (9th Cir. 2007). However, the second and third circuits have questioned this position or distinguished the scope of the preclusive effect. *See, e.g., Channer v. DHS*, 527 F.3d 275, 280 n.4 (2d Cir. 2008) (acknowledging possibility of preclusion but limiting scope); *Duhaney v. AG of the United States*, 621 F.3d 340 (3d Cir. 2010) (rejecting the application of preclusion).

We asked judges we interviewed if they had the authority to close a case administratively when they thought the parties were not ready, or where essential related immigration adjudications are pending before another agency. Technically no statute or regulation addresses the authority of the judge to order administrative closure. The court can order termination of a removal proceeding where respondents establish they are citizens or the government is unable to establish the allegations in the NTA. There is also a regulatory provision authorizing termination where the respondent demonstrates prima facie eligibility for naturalization and proves that a naturalization application is pending before the USCIS.²⁰¹ Unlike termination, an administrative closure is not a final decision and does not prevent the government or the respondent from moving to re-calendar the proceedings. EOIR has instructed judges to use administrative closure systematically when there have been significant alterations in the substantive immigration law or after litigation settlements ordering these closures; e.g., new eligibility for adjustment of status.²⁰² Barring one of these situations, agency precedents appeared to require the consent of both parties—government and respondent—before a judge may administratively close a matter.²⁰³ In late January 2012, though, the BIA issued a new precedent decision that expressly disavowed this position and set forth a new general set of criteria guiding a judge’s evaluation of administrative closure. The BIA said in *Matter of Avetisyan* that the judge must:

weigh all relevant factors presented in the case, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.²⁰⁴

The Practice Manual references administrative closure; it also discusses how to prepare a Motion to Recalendar a case that has been administratively closed, but the Manual does not provide guidance for initiating or preparing a Motion for Administrative Closure.²⁰⁵ Several BIA and federal court cases explain that case completion goals alone are not a reason for a judge’s granting a motion for continuance, a motion closely related to administrative closure. Now that the BIA has adopted this tool in *Avetisyan*, EOIR should specify the procedures to prepare such a motion.

The EOIR guidance is important because the recent precedent decision in *Avetisyan* does not address some important concerns. For example we received informal comments by DHS officials that it was inappropriate for the court to use administrative closure to move “low priority” cases because the priorities are determined by ICE. Our recommendation reflects those comments. Further, some advocates’ commented that allowing administrative closure over the respondent’s

²⁰¹ 8 C.F.R. § 1239.2(f) (2010).

²⁰² *E.g.*, ABC Settlement administratively closing removal cases involving certain asylum applicants to allow them an opportunity to have the asylum application reconsidered; or administrative closure to allow the adjudication of a legalization application under INA §§ 245A, 210 (2010); 8 U.S.C. §§ 1255a, 1160 (2006).

²⁰³ *See In re Alba Luz Gutierrez-Lopez*, 21 I. & N. Dec. 479 (B.I.A. 1996) *reversed by Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012).

²⁰⁴ *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012)(Part B of the opinion). The BIA opinion states that administrative closure may also be an appropriate tool for appellate cases in some situations as well.

²⁰⁵ *See* OCIJ PRACTICE MANUAL, *supra* note 106, at 99.

objection might be inappropriate where the respondent is affirmatively seeking relief. We recommend that EOIR issue guidance for the judges on that point.

[4] *Vertical or Unit Prosecution Cooperation and Conditional Decisions on Relief*

We think government attorneys' efforts to focus responsibility for litigation through "vertical" or "unit prosecution" arrangements can promote efficient case processing. In any event, EOIR should consider providing judges clear guidance on what they may do to require that government counsel are fully prepared and are responsible for actions they must take prior to the next hearing. This guidance can include establishing that the judge may rely on a prosecution team member to follow up on such matters as forensic examinations, that they may hold all ICE trial attorneys on any particular case as responsible for the actions and omission of others on the same case, including accountability for commitments made in prior hearings (holding them to the same standard that courts hold private counsel in the same law firm on non-profit). EOIR should amend the Practice Manual to define trial attorney responsibilities. Finally, EOIR should clarify the judge's authority to make conditional decisions on applications for relief where trial attorneys did not secure completed agency action, and their authority to continue the case for some specific period (e.g., 60 days) that does not create undue hardship for respondents who have been granted relief while allowing DHS adequate time to complete biometric or security checks.

Analysis

The background for this proposal are the efforts, some since abandoned, of some ICE Chief Counsel to organize the ICE trial attorneys into teams assigned to cover the dockets of specific judges. We use the term vertical prosecution to describe this practice. A variation is "unit prosecution," in which trial attorneys function as a unit but are not assigned to a specific judge. In one vertical prosecution city, teams of six to seven trial attorneys were assigned to three judges. In another city, teams of two to four attorneys were assigned to two judges. Three attorneys from the Office of the Principal Legal Advisor (OPLA) and approximately twelve judges we interviewed who worked with these teams told us that the goal was to ensure that the same attorney or a prepared team member would follow a case from master calendar through completion. If the government attorney who appeared at the first master calendar would not be available at subsequent hearings, the team would take responsibility for knowing what, if any, actions DHS needed to pursue or would be conversant with legal position previously taken in the case.

Our interviews, comments on our survey, and comments on earlier reports yielded mixed views of the process. We were not able to include a question on vertical or unit prosecution arrangements in our survey, but two judges volunteered comments. A judge who disagreed with the survey proposition that the parties would narrow the issues at the master calendar if the judge directed them to do so, volunteered that "[s]ince DHS is not on a vertical system, no agreements are binding on the merits attorney." Another said "[m]ost often there is a different government attorney at the next hearing, and often a different respondent's attorney, and they will often not be aware of what was said at the last hearing."

In a few interviews, judges with experience in vertical prosecution expressed concern over a "strict" form used in large courts where DHS assigned only one or two trial attorneys to appear before the judge in all proceedings. They cited delays because frequently the court had to work

around the prosecutors' calendar restrictions and the difficulty of scheduling cases to ensure that the same trial attorney was assigned throughout the length of a case. One judge also expressed a concern that the judge appeared "inappropriately" familiar with the DHS trial attorneys because anyone visiting that court—or regularly appearing respondent counsel—would always see the same prosecutor appearing in that judge's court, giving the impression that respondent's counsel were "outsiders." These same judges had fewer concerns if the organization was structured as "unit" prosecution teams.

We spoke to six members of the private bar and non-profit organizations about these arrangements. Most said that the ICE trial attorneys should have specific prosecution assignments so that the private counsel could know which trial attorney to contact as soon as a case was assigned to a judge. Even more important, the private lawyers we interviewed generally wanted the ability to negotiate with the trial attorney to narrow issues, to discuss the order of witnesses, to prepare stipulations, or to have conversations about pending actions within the case. When the case file is not assigned to a specific attorney, these lawyers reported great difficulty in getting ICE trial attorneys to discuss cases with them outside of regular hearing time and even more difficulty in getting them to commit to stipulations. The judges also liked the idea that respondent's counsel would know they could communicate with any member of a unit and perhaps achieve stipulations or agreements outside of the court in advance of hearings.

Senior OPLA personnel told us that the office favors teams of trial attorneys in a form of modified vertical prosecution but that some immigration courts had resisted the full integration of vertical prosecution teams.

Another technique that might improve the preparation and behavior of attorneys who appear in court would be allowing the judge to prepare a provisional or conditional order pending the final results of security checks. Some judges believe they may not "conditionally" grant relief and continue a case awaiting the results of security checks. Similarly they believe they cannot deny a case while DHS conducts a required security check. 8 C.F.R. § 1003.47 makes clear that relief cannot be granted without the necessary security checks, but the regulation does not prohibit a "conditional grant." A conditional grant would allow the judge to prepare his or her decision soon after the testimony and review of the application for relief. If the judge is going to deny the relief, the security check is technically not essential to the judge issuing a decision on the application.

Some DHS officials said a special docket permitting judges to issue conditional grants was unnecessary and might delay adjudication. It is possible that a security check turns up information that requires further factual development in the case. EOIR could develop a procedure that protected the ability of the government to "reactivate" the case if material information came forward in a security check that was not previously known to the government but in general, a rule that allowed the judge to deal with the record before him or her and to decide the case when the testimony is current was a better practice for the vast majority of cases.

Perhaps this practice would also create greater incentives within DHS to conduct necessary security checks at an early stage of the proceeding so that the government would be less concerned about the possibility of detrimental information in the individual's past. Conditional grants might, in appropriate cases, enable people in detention to secure release and to reduce detention time. This change would go a long way to freeing judge's dockets from repeat hearings to update the status of necessary paperwork steps. The separate docket would allow the judge

and management to have a clearer view of the weight and complexity of cases yet to come before the court and would remove those matters where the judge has made the essential determinations.

[5] *Streamlining the Immigration Court Asylum Application Process*

EOIR can promote efficiency and reduce delay in asylum cases by eliminating the presumption that respondents in removal proceedings who wish to apply defensively for asylum must do so in person, in open court. EOIR should amend the Practice Manual to allow for a different procedure, or issue an OPPM that provides application procedures that do not require the judge's participation, that authorizes court personnel to schedule a telephonic status conference with the judge and ICE attorney where the respondent or representative says they do not understand the process, that permits court personnel, at the merits hearing, to renew the advisal concerning frivolous asylum applications and permit their withdrawal, and that makes clear that filing with court personnel qualifies as a filing triggering the 180 day work-authorization period.

Analysis

Under current procedures, when a respondent indicates an intention to seek asylum, the judge sets a deadline for the submission of the application and in most instances requires an in-person application and the court appearance of the respondent and any representative so that the court can confirm receipt of the application and the judge can deliver specific advisals. (Those advisals, however, are already part of the written asylum application warning of the consequences for filing fraudulent or frivolous asylum applications.) After this brief proceeding to accept the application and provide the advisals, the judge sets the date for the individual hearing on the application. In busy immigration courts, scheduling a hearing to receive the asylum application adds to the burden on all of the parties and can significantly delay the final adjudication because of the lack of hearing time. Moreover, a hearing date on the merits can be months or even a year from the date of the submission of the application. These delays frequently mean the application must be updated or supplemented before the individual hearing and that new biometric background checks may be needed.

Our proposal reflects the American Immigration Council's Legal Action Center concern that a change in the procedure would also require a corresponding change in the "work authorization clock". The Center was generally supportive of the proposal and agreed that the in-person filing requirement created delays.

EOIR officials expressed concerns, informally, about eliminating the in-person filings because an "out of court room" advisal would not be part of the record of proceedings. Further, they said, having court personnel provide the advisals could create both in staffing problems and threaten consistency. We believe those concerns can be allayed if the oral advisals and confirmation of the applicant's understanding took place during the merits hearing.

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

[6] *Evaluating the Use of Stipulated Orders of Removal*

EOIR should consider a pilot project to test, systematically, stipulated removals' utility as a mechanism to reduce detention time, allow judges to focus on contested cases, and assess the contexts, if any in which, the use of stipulated removals might diminish due process protections.

During the pilot, most appropriately conducted in a detention center, the judges would direct attorneys for respondents and ICE counsel to confer and discuss the entry of a stipulated order of removal in cases where the NTA alleges removal on serious criminal grounds (we suggest this subset because in most criminal cases the conviction bars eligibility for relief, thus making a subset that is compatible with DHS priorities and a group likely to have limited defenses).

EOIR would encourage judges to permit attorneys to make limited appearances to meet and advise detained respondents about the possibility of relief and the availability of a stipulated order of removal. In a randomly selected subset of cases, judges would hold an in person hearing and review of the advisals and assess the understanding of the respondent about the nature of the stipulated removal order and the voluntariness of the waivers.

In the pilot, "know-your-rights" presenters should have sufficient access to the respondents to allow them to make personal inquiries about their ability to contest removal or to establish prima facie eligibility for relief prior to the master calendar hearing. Respondents could be informed about the ability to request a stipulated order of removal after the presentation.

We further suggest that EOIR consider designing, in jurisdictions where DHS routinely seeks stipulated removal orders and asks for a waiver of the respondent's appearance, a random selection procedure that does not include the waiver and brings the and the respondent to the immigration court to ensure adequate warnings and the waivers were knowing and voluntary.

EOIR, if it undertakes such a project, should encourage one or more advocacy organizations to prepare a video presentation (with subtitles or dubbing in a number of languages) focusing specifically on removal proceedings, general eligibility for relief, and the possibility of requesting a stipulated order of removal should the respondent wish to waive the hearing and any application for relief including the privilege of voluntary departure.

Analysis

Proceedings in most civil and criminal courts are expedited by the parties' agreeing to stipulations that reduce the number of contested matters. In the immigration courts, the practice is rare, including stipulations by respondents who agree to be released from detention and removed from the country. We thus propose testing whether stipulated orders--with appropriate safeguards of the rights of the parties--could be an effective tool for both reducing hearing time and significantly reducing the length of detention for some respondents, while protecting their rights.

In INA § 240(d), Congress authorized the Attorney General to develop regulations about the issuance of stipulated removal orders. EOIR has implemented this authority through a regulation and an OPPM.²⁰⁶ Appendix 4 displays the percentage that stipulated removal orders comprised of all completed proceedings in the forty-two courts that were recorded as entering any such orders in 2009, 2010, and/or 2011. The percentages varied considerably, from less than one percent for some courts to about half of all completed proceedings for another court. Nationally,

²⁰⁶ 8 C.F.R. § 1003.25(b) (2010); *OPPM: Stipulated Removals*, *supra* note 43.

as a percent of completed proceedings, they have declined from fourteen percent (14%) in 2009 to seven percent (7%) in 2011.

The table below shows the courts where such orders constituted at least ten percent (10%) of completed proceedings in 2011, along with those courts' detained cases as a percent of completed proceedings. Although there are some clear exceptions, higher than average use of the orders is concentrated in courts with high proportions of detained respondents. The court with the highest proportion of completed proceedings with detained respondents had only the third highest proportion of stipulated removals. Cleveland and Los Fresnos both had fifty-four percent (54%) of completed proceedings with detained respondents. Cleveland had the highest proportion of stipulated removal completions and the Los Fresnos had the lowest of those courts included in the table.

Court	Comp'd Proc'gs, % SROs	Comp'd Proc'gs, % Detained
Cleveland	32%	54%
Salt Lake City	29%	71%
Steward Detention	23%	94%
Dallas	21%	61%
Bloomington	18%	53%
El Paso SPC	18%	77%
Las Vegas	18%	46%
Kansas City	17%	29%
Omaha	15%	41%
Los Fresnos	12%	54%
Chicago	12%	34%
TOTAL (all courts)	7%	42%

We suggest pilot testing controlled use of stipulated removal for courts with large caseloads of detainees with serious criminal convictions, because the criminal conviction is often also a bar to relief or limits defenses. Further, this is a subset of cases that DHS has identified as a priority. The American Immigration Council's Legal Action Center urged us to oppose stipulated removal orders' use in any *pro se* case. We agree that using stipulated removals is very problematic where the respondent has had no opportunity to consult counsel and are not recommending stipulated orders where the respondent is not counseled/and or represented by an attorney or accredited representative. DHS officials also told us that if an individual requests a stipulated order of removal, the ICE counsel obtain one if they can.

EOIR's implementing OPPM appears to focus on using the stipulated order *before* the first master calendar hearing is scheduled. However, nothing in the OPPM or regulation precludes using this method to complete the proceeding at a later point. As noted earlier, some critics are concerned about the way that stipulated orders may be obtained during apprehensions or in detention centers. Many doubt that the current system adequately protects due process rights. Where respondents are represented by counsel, judges may want to ask the attorneys to confer and consider whether a stipulated order of removal might be appropriate in a particular matter. In cases where the respondent is detained, if "know-your-rights" presentations could be combined with one-on-one consultations with the presenters—assuming the availability of adequate

language translation for both—there may be a number of pro se detained respondents who would wish to shorten their detention by asking for a stipulated order of removal.

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

[7] Greater Use of EOIR Continuance (Adjournment) Data for Case Management Analysis

EOIR should continue its evaluation of adjournment code data, as an aid to system-wide analysis of case management practices, reduce the number of codes available, and reevaluate its one-reason-only principle for the codes or devise codes that reflect all the reasons a judge might assign to an adjournment.

Analysis

As in all court systems, immigration judges continue proceedings to a future date to permit parties to prepare for the next event, obtain evidence, seek legal representation, identify experts, and many other reasons. There is debate over how freely judges should grant continuances (“adjournments” in immigration court parlance). Some judges are fairly liberal in granting continuances, preferring to err (if at all) on the side of permitting the parties to pursue the litigation as they think best. Other judges believe that a liberal continuance policy encourages lawyers to be dilatory, and, conversely, that lawyers will be prepared for the next hearing when they know judges are unlikely to grant continuances, thus shortening the time to disposition and reducing the costs to the parties and to the court system.

Adjournment Code Data. Judges assign one of over seventy adjournment and call-up codes to every adjournment they grant. We wanted to know what if anything the adjournment data might say about the behavior of respondents and their lawyers, of ICE attorneys, and the judges. (EOIR officials have told us informally that EOIR has underway an examination of the utility of all the data it collects, including the adjournment codes).

In response to our request, OPAT provided us data on adjournments in proceedings that were completed in 2005, 2008, and 2010. (Obviously, not all the adjournments occurred in those respective years, because a proceeding might take several years to reach completion.) OPAT and other EOIR personnel warned us to be cautious in analyzing these data because a judge might adjourn a hearing for several reasons but must assign only one code to it. (For example, a judge may grant an adjournment because both attorneys request time to prepare, but the judge must attribute the adjournment to one or the other.) ACIJs told us they do not use adjournment data in assessing the performance of the judges they supervise, because they can get information from their own observation and from the court administrators about problems.

In our analysis, we eliminated from the data set adjournments that were not related to the behavior of lawyers, ICE attorneys, and judges as well as “case completion” adjournments, which are assigned to the hearing at which the proceeding is completed.

Table J: Adjournment Factors Eliminated

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

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

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

Table K: Number of Adjournments per Completed Proceeding

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

We grouped the adjournments using the OPPM’s classification of adjournments as “alien-related,” “DHS-related” and “IJ-related.” In all three years, judges attributed about two-thirds of the adjournments to the alien and/or his or her attorney.

Table L: EOIR Assignment of Codes as Alien/DHS/Judge Related

	2005	2008	2010
Aliens	69%	70%	68%
DHS	7%	15%	19%
Judge	25%	15%	13%

Frequently used adjournment codes. We next rank ordered the 2010 adjournments, sometimes grouping closely-related adjournments together, by percentage of the subtotal, and then identified the percentages for the same items in 2005 and 2008. So, for example, adjournments coded as those granted to allow the respondent and/or the respondent’s lawyer or accredited representative to prepare for a next event, constituted twenty percent (20%) of the total subset of 2010 adjournments.

Table M: Major Reasons for Adjournments as Assigned by Judges

	Percent of all adjournments		
	2005	2008	2010
Alien attorney prep/other requests	26	21	20
Alien to seek rep	16	15	14
Alien application pending with DHS	4	9	10
Alien to provided updated forensic	1	9	9
DHS to provide updated forensics	1	6	9
Alien filing other application in immigration court	12	8	7
Adjournment to the merits hearing	12	8	6
Judge absence (sickness, other assignment, etc.)	4	4	5
DHS-detainee related adjournments	1	4	5
Adjourned because alien wanted a different date or forum	8	4	4
DHS preparation	3	3	3
Alien/attorney no show (illness, etc.)	2	2	2
Alien contesting charges citizenship	0	1	1
Alien family related adjournments	0	1	1
DHS file unavailable	1	1	1
Insufficient time to complete hearing	1	1	1
TOTAL	92%	97%	98%

2005--7.5% adjournments were attributed to "Case Conversion" (Code 98) which the OPPM does not define. In 2008 and 2010, code 98 was 2% and <1%

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

Geographic variation. We also wanted to learn how evenly the various types of adjournments are distributed across the courts. As a preliminary matter, we analyzed the proportion of the most frequent adjournments in 2010 (10,000 or more) attributable to the two largest courts, New York City and Los Angeles. Those courts accounted, together, for twelve percent (12%) of 2010's 287,207 completed proceedings, but, as seen below, they accounted for twenty-seven percent (27%) of the adjournments in those proceedings. That figure is due largely; it would seem, to the nature of their caseloads. They are comparatively low in terms of completed proceedings per judge (634 in New York, 684 in Los Angeles, compared to the national average of 1,148). But those two courts are high in the proportion of cases in which the respondent seeks relief from removal (sixty-six percent (66%) and forty-four percent (44%) respectively) and in which the respondent has a lawyer (eight-eight percent (88%) and sixty-eight percent (68%)). (These are

2011 data; see Appendix 3). (As we noted earlier, some kind of weighted caseload index would be helpful in assessing this particular point.)

Table N: Adjournments for New York City and Los Angeles

Adjournment for	NYC and LA
All	27%
DHS forensics 24	82%
Alien forensics 36	46%
I-130 pending 7C	29%
DHS prep	22%
Other alien, attorney request 12	20%
IJ absence 34, 35, 19	19%
Attorney preparation (2)	15%
Alien seeking attorney 1	13%
Adjourn to merits hrg 17	13%
Alien released from detention	<1%

Those two courts accounted for eighty-two percent (82%) of the continuances that judges ascribed to the need to permit the Trial Attorney to provide updated biometric data and almost half the continuances attributed to the need to permit the respondent to do so. If we remove those two courts' continuances ascribed to those two reasons, the proportion of such continuances nationally as shown in Table N would drop from nine percent to four percent, and from eight percent to three percent respectively.

As noted, we think EOIR should reduce the number of codes and allow judges to assign more than one reason to an adjournment and/or revise the codes to accommodate more than one reason for some common adjournments. Many of the over seventy codes were scarcely used; by our count, fifty-nine of the adjournment and call-up codes used less than one percent (1%) of the total assignments. (Codes 7D, E, F, G, for example accounted collectively for three-fourths of one percent (0.76%) of the codes entered.) The precision these codes provide may not be worth the proliferation in the code book. An overhaul might produce fewer codes but codes that more accurately reflect the multiple reasons for an adjournment.

[8] *Enhancing Immigration Judge Authority by Enhancing Attorney Accountability*

Some of the unnecessary delay in immigration removal adjudication is created by counsel, either as a tactic (e.g., to provide more time for the respondent to remain in the country), because of individual incompetence, or because of organizational inefficiencies (e.g., government attorneys not meeting deadlines because they did not receive files in time).

In this section we discuss expanding attorney discipline and increasing options available to judges to ensure attorney preparation and adequate performance. In other portions of the report we recommend giving judges the power to administratively close cases or to encourage the parties to enter into stipulations as a method of obtaining more control over the case docket. See Section V.C.1.B. [2] and [3].

[a] Incentivizing private, non-government, attorneys

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

EOIR should consider developing mandatory CLE materials that judges could order attorneys to complete (including passing a qualifying examination) based on a finding that an attorney's behavior is substandard due to lack of substantive or procedural knowledge. If EOIR's resources are insufficient to develop such materials, it should explore pro bono partnerships with reputable CLE providers or consider seeing regulatory authority to impose fines to subsidize the cost of developing such materials.

Analysis

Regulations allow EOIR to discipline private attorneys.²⁰⁷ The EOIR website lists disciplined attorneys and includes the related orders. In May 2012, 483 attorneys were on the list.²⁰⁸ While we did not review all of these orders, the vast majority appear to be the result of DHS or EOIR disciplinary counsel requests for reciprocal discipline based on the disciplinary actions of a federal court or state bar. While the EOIR has increased its attention to attorney discipline, some observers suggest spending more resources to investigate and prosecute attorneys who are repeatedly ill-prepared and harm the interests of their clients.

The most recent amendments to the disciplinary regulations state that a judge may not initiate discipline of an attorney but must instead submit a complaint to EOIR disciplinary counsel.²⁰⁹ This two-stage process seems appropriate for serious discipline such as suspension or expulsion from the immigration courts. In less serious cases, it may be preferable to allow judges to act directly, in a manner analogous to a federal judge's imposing sanctions such as written and oral reprimands under Federal Rule of Civil Procedure 11.

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

²⁰⁷ See 8 C.F.R. § 1003.101 (2011) et seq.

²⁰⁸ Executive Office for Immigration Review, Office of the Director & Office of Legislative & Public Affairs, *List of Currently Disciplined Practitioners*, U.S. DEP'T JUST., (May 11, 2012), <http://www.justice.gov/eoir/discipline.htm#top> (last visited May 24, 2012).

²⁰⁹ 8 C.F.R. § 1003.104 adopted in 73 Fed. Reg. 76914 (2008). See also, Peter L. Markovitz, *The Robert L. Levine Distinguished Lecture Overcoming Barriers to Immigrant Representation: Exploring Solutions: Report of Subcommittee 2: Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 73 FORDHAM L. REV. 541, 574-75 (2009) (calling for expanding the role of judge oversight).

	Percent	Number
Very sufficient	5%	7
Sufficient	35%	55
No opinion	12%	19
Insufficient	29%	45
Very insufficient	19%	29

Overall, forty percent (40%) of the judges said the process was sufficient, while forty-eight percent (48%) said it was not. Among the forty-two additional comments on this item, eight judges said EOIR disciplinary counsel lawyers, due perhaps to overwork, do not process judges' references promptly enough to make sanctions effective.

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

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

[b] ICE Trial Attorneys

We encourage EOIR to continue its efforts to implement the statutory grant of immigration judge contempt authority.

Analysis

EOIR has no disciplinary procedures for ICE trial attorneys' failure to meet deadlines or other problematic behavior. Some of these matters may be referred to ICE's Office of Professional Responsibility. The Practice Manual tells practitioners that they, as well as judges, may raise "[c]oncern or complaints about the conduct of DHS attorneys . . . in writing with the DHS Office of the Chief Counsel where the Immigration Court is located."²¹⁰ The American Immigration Lawyers Association website refers people with complaints about ICE counsel to the Office of Bar Counsel in Washington. We do not know if judges ever make such referrals.

The INA says that immigration judges "shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter."²¹¹ The twenty-two "Improvement Measures" that the Attorney General announced in 2006 included "Updated and Well-Supervised Sanction Authorities for Immigration Judges for Frivolous or False Submissions and

²¹⁰ OCIJ PRACTICE MANUAL, *supra* note 106, at 10.3(a), (c).

²¹¹ INA § 240(b)(1) (2010); 8 U.S.C. § 1229a(b)(1) (2006).

Egregious Misconduct” and “Updated Sanction Powers for the” BIA. The memorandum noted, however, that the statutory authorization to impose a civil monetary penalty “exists only for conduct ‘in contempt of an immigration judge’s proper exercise of authority’” and thus “its use will require substantial oversight.”²¹²

Our survey did not ask judges if they should have sanction authority for DHS attorneys but rather whether they agreed with the statement that “Judges should have authority to recommend investigation of DHS attorneys for possible sanction.” A substantial majority (eighty percent (80%)) agreed (thirty-five percent (35%) “strongly”). Twenty-seven judges offered additional comments, which ranged from “I’ve never had a problem with a DHS attorney that might require sanctions” to “Immigration Judges should be able to exercise contempt power applicable to both DHS attorneys and private bar attorneys as provided in section 240(b)(1) of the Act.”

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

c. Video Hearings

EOIR and DHS, in light of the judges’ negative evaluations of VTC—especially evaluations from judges who serve primarily detained dockets—must provide and maintain first rate VTC equipment.

To facilitate more effective representation, including self-representation in removal proceedings conducted with VTC, the Practice Manual (and other materials that EOIR prepares for attorneys and for pro se respondents) should provide more guidance about how to prepare for and conduct proceedings using VTC. EOIR should encourage judges to permit counsel and respondents to use the courts’ VTC technology to prepare for the hearing so that their first experience is not the high stakes hearing.

EOIR should consider more systematic assessments of VTC, beyond the informal monitoring that it conducts today, in order to provide more systematic information on how to make its use more effective and to ensure against undue prejudice. Periodic publication of the results of these assessments would promote transparency about a practice about which many advocates and judges have serious doubts.

Assessments might include consultation with the Asylum Office and review of their VTC best practices for possible adoption and integration into EOIR procedures; randomly selecting VTC hearings for observation by ACIJ’s and/or other highly trained personnel such as BIA staff attorneys or visits by senior members of the Asylum Office, to prepare formal evaluations of the VTC hearings, especially those involving claims for asylum or other humanitarian relief. Ideally these special observers would also review a random selection of in-person hearings to offer a comparative assessment. EOIR should also consider providing surveys or questionnaires to the parties and their witnesses to gather information about how the VTC may have impaired hearing

²¹² ATT’Y GEN MEMORANDUM, *supra* note 78.

during the proceeding and evaluating the data collected periodically to determine if corrections to procedures or technology are warranted.

This assessment should include a realistic accounting of the net monetary savings attributable to EOIR's use of VTC.

As to procedures, EOIR, as it works toward implementing electronic docketing and electric case files (which will permit ready access to documents in video proceedings), consider the interim use of document cameras in video proceedings to avoid the need to fax documents between locations. Parties in VTC hearings may request an in person hearing, and such requests appear to be on the rise, as discussed below. We suggest EOIR instruct judges to make this clear to respondents who request in-person hearings that the judge's granting the request may delay the hearing date substantially.

We also endorse two recommendations that the Adjudication Committee added during its review of our report, namely that EOIR (a) encourage judges, in writing and by best practices training, to be alert to the possible privacy implications of off-screen third parties who may be able to see or hear proceedings conducted by VTC, and take appropriate corrective action where procedural, statutory or regulatory rights may otherwise be compromised and (b) consider amending the Practice Manual's §4.9 ("Public Access") to remind respondents and their representatives that they may alert the judge if they believe unauthorized third parties are able to see or hear the proceedings. (This second provision is not restricted to VTC proceedings.)

Analysis

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

[1] Immigration court use of VTC

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

According to an EOIR "directory" of immigration court VTC equipment,²¹⁴ as of October 2011, fifty-eight of the fifty-nine immigration courts had at least one VTC unit (the exception was the very small Fishkill, NY court)—159 units in all. (The fifty-nine courts include the Falls Church "Headquarters Court," where four judges conduct only video hearings in cases that other courts sent to them for resolution.) Of the 159, 150 were for removal hearings; nine were in pro bono rooms or conference rooms or other office settings. The number of VTC units for hearings ranged from seven (Los Angeles) to one, in over ten courts. The average number of units per court was two and a half; the modal number was two. An additional nine units were in EOIR

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

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

hearing locations, such as the Huntsville, Texas, detention center. Almost all of the 168 units were owned by EOIR; DHS owned a handful. These 168 units, however, are in addition to VTC units in other DHS detention facilities as well as local, state, and federal jails and prisons where judges may hold hearings.

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

O: VTC Use in Hearings in Proceedings and Bond Redeterminations Completed in 2010

	Removal Proceedings	Bond Redeterminations	Both
All hearings	852,230	78,187	930,417
In person	737,385 (87%)	53,390 (68%)	790,775 (85%)
Video	105,901 (12%)	22,933 (29%)	128,834 (14%)
Telephone	8,944 (1%)	1,864 (2%)	10,808 (1%)

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

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

²¹⁵ Table based on *OPAT DATA*, *supra* note 44.

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

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

From 2005 to 2010, the total number of hearings increased by twenty-four percent (24%), but the number of adjournments to in-person hearings increased from 462 to 1,380 (198%). We don't know whether adjournments to in-person hearings in 2010 grew at a much greater rate than all hearings because of the increase in VTC hearings generally or judges' growing willingness to grant request for in-person hearings or some combination. Nor do we know whether the increase in 2010 is an aberration and/or whether the numbers reflect the inadequacies of the adjournment codes. Commentators on an earlier draft speculated that the increase in requests for in-person hearings could reflect the increase, however, slight in respondents with lawyers, who may be more aware than pro se respondents that they may request in-person hearings.

A judge's granting a request for an in-person hearing, especially for a detained respondent, may cause a delay in the hearing as ICE and EOIR seek a place and time to hold the hearing.

[2] Competing claims about VTC in Removal Proceedings

The "In-House Research Report" (for ACUS's 2011 project on VTC's use in high-volume administrative adjudication agencies²¹⁶) summarizes the results of ACUS staff interviews with, and other information provided by, EOIR officials.²¹⁷ Its summary of the arguments for and against current and expanded use of VTC tracks those that we heard in our interviews with judges, and with government and respondent counsel, and arguments found in the literature.²¹⁸ (The report used VTC in social security and veterans' benefits adjudication as case studies but not in removal adjudication, citing the complications involved and the lack of data within EOIR on VTC's use. Although the report said, in an apparent reference to our project, that ACUS "plans to study the use of video hearings by EOIR in-depth as part of its forthcoming Immigration Adjudication project,"²¹⁹ we did not have the time or resources to go deeply into the matter, certainly not to design and execute empirical research to answer the dispositive question, viz., whether VTC is associated with significant differences in outcomes of removal adjudication proceedings.)

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

²¹⁷ Materials cited in report but not published. On file with ACUS staff.

²¹⁸ See ACUS VIDEO HEARINGS REPORT, *supra* note 1; Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259 (2008) (both citing the literature). See also *ABA Comm'n on Immigr. Rept., 2010*, *supra* note 32, at 2-26-27.

²¹⁹ ACUS VIDEO HEARINGS REPORT, *supra* note 216, at 2 n.7.

EOIR officials look favorably on VTC, as summarized in the ACUS draft report:²²⁰

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

On the other hand, the four non-governmental entities that commented on the VTC portions of our earlier draft were unabashedly opposed to its use in any but the most limited circumstances, if at all. They said video hearings threaten respondents' due process rights to be heard, to consult meaningfully with counsel, to have proceedings adequately translated, and to fully see, and be seen by, the other participants. Human Rights First said it welcomed "short-term efforts" to improve VTC's use but objected to our description of VTC as "here to stay," and said the short term efforts should not "serve to institutionalize or normalize the use of VTC in the system." The American Immigration Council's Legal Action Center "reject[ed] the premise that the use of video hearings should continue pending the execution of empirical research to assess the impact of this practice on the outcome of removal proceedings." The American Bar Association said that it "opposes using ... VTC ... in immigration hearings, except in procedural matters in which the noncitizen has given consent." The Harvard Immigration and Refugee Clinical Program "recommend[ed] that [VTC] be eliminated in immigration court."

We understand the advocates' concerns, and our assessment of competing claims about VTC that follows, as well as our summary of the judges' survey responses, provide bases for the concerns. Nevertheless, it seems clear that VTC is in fact here to stay, due partly to Congressional insistence, and thus we cannot endorse the recommendations that it be abandoned, even as we agree that it needs systematic assessments.

[a] Quality of transmissions, due process protections

Proponents claim that the integrity and quality of the visual images that VTC provides is more than adequate and does not require the compromises that might have been necessary in earlier versions of the technology. In 2004, EOIR asserted that "VC does not change the adjudication quality or decisional outcomes."²²¹ Subsequent EOIR press advisories have been less definitive; a 2009 release asserted "VTC technology allows court proceedings, as well as meetings and training, to be conducted efficiently and effectively, even though participants are not together at one site."²²²

As explained in more detail in the next section, only thirteen percent (13%) of judges responding to our survey agreed that VTC hearings, "all things considered, are basically no different than

²²⁰ *Id.* at 32.

²²¹ See Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Headquarters Immigration Court*, U.S. DEP'T JUST., (July 21, 2004) available at www.justice.gov/eoir/press/04/HQICFactSheet.pdf.

²²² Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: EOIR's Video Teleconferencing Initiative*, U.S. DEP'T JUST., (Mar. 13, 2009) available at www.justice.gov/eoir/press/VTCFactSheet031309.pdf.

‘in-person’ hearings” and slightly less than a third said the VTC equipment “allows me to hear and see clearly all participants in remote locations.” Nevertheless sixty-six percent (66%) said VTC was “effective for most master calendar hearings;” a smaller number, thirty-seven percent (37%), said it was effective for most merits hearings.

Critics say the quality of the VTC transmissions vary greatly, including as between EOIR equipment and that maintained by DHS in some detention facilities. They also say that no screen image can duplicate an in-person hearing, where the fact finder can observe “nonverbal cues and a sense of the applicant’s demeanor.”²²³ Critics argue that in cases where credibility assessments are key to an immigration judge’s ruling, especially in asylum and related cases, the video format may not provide adequate visuals of body language. (As we previously noted, the Asylum Office uses VTC to conduct some limited interviews but does not use it for full asylum interviews.²²⁴ USCIS officials told us that all VTC interviews that result in a negative finding—lack of credible fear—are subject to supervisory view.²²⁵)

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

Finally, critics, while acknowledging VTC’s growing use in administrative and civil adjudication in other court systems, note that it has been resisted in criminal proceedings, partly because of the confrontation clause. Removal proceedings, of course, are civil and thus the confrontation clause does not apply as it would in criminal proceedings. Still, many observers point to the functional similarities between removal adjudication and criminal procedures.²²⁷

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

[b] Effect on representation and translation

VTC can increase the availability of representation during hearings by enabling an attorney who is unable or unwilling to travel to the site of a hearing to participate in the hearing from a remote location. Furthermore, OCIJ has encouraged judges to allow attorneys appearing pro bono to use the VTC equipment to confer briefly with their clients in remote locations²²⁸ (a request that would seem equally justified for most paid counsel). We received a summary of an informal survey that the assistant chief immigration judges undertook to learn their respective courts’

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

²²⁴ Letter from Baker to Baer, *supra* note 131.

²²⁵ Email from Ted Kim, *supra* note 147.

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

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

²²⁸ OPPM: *Facilitating Pro Bono Legal Services*, *supra* note 10.

practices as to such requests.²²⁹ It indicates that judges usually grant such requests, if the time involved is brief, partly on the view that doing so may speed the hearing. When judges grant such request, they often clear the courtroom except for a security guard and translator.

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

Critics say VTC hearings present respondent's with two bad options. A lawyer with the judge during the hearing cannot confer freely with the respondent in a remote location. A lawyer who is with the respondent cannot, as the ABA Report put it, "establish credibility and connect emotionally with the judge."²³⁰ VTC arrangements may also impede communication with the ICE Trial Attorney by the judge and respondent's attorney Critics say translation may be hampered depending on the translator's location vis-à-vis the non-English speaking respondent.

[c] Effective case management

VTC hearings enhance case management by allowing judges to be available in numerous sites, when needed, within short time spans. On the other hand, there can be delays in delivery of documents that parties submit during the hearing. In an in-person hearing, documents can be exchanged hand-to-hand, but during a VTC hearing, they must be faxed to the judge or other participants (EOIR does not yet authorize email transmission of hearing-related documents).

We heard anecdotal evidence that some judges refuse to accept faxed materials for admission into the record even though the Practice Manual section on VTC hearings says that judges "often allow documents to be faxed between the parties and the" judge.²³¹ Parties either will have to have mailed all documents prior to the hearing or the judge will have to adjourn the proceedings to await receipt of the documents. One judge explained that he refused to accept faxed transmissions in VTC hearings in order to enforce the Manual's filing deadlines because allowing faxes would encourage late or last-minute filings.)

In response to our survey, as explained in more detail in the next section, twenty-seven percent (27%) of the judges agreed that the need to fax documents sometimes creates "non-trivial" problems in conducting the proceedings.

[d] Cost

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

EOIR officials provided ACUS researchers a one-page, undated document, evidently prepared by the EOIR Controller's office in order to identify savings resulting from the "AG Savings Initiative: Increase the use of video conferencing for the Department." The document states that \$2,374,451 in "Actual FY 2010 Annual Savings" were attributable to EOIR use of video

²²⁹ *QUERY RE: VTC and current practice: Summary of Comments Received*, (Exec. Off. for Immigr. Rev. informal manuscript (Oct. 2011) (provided by EOIR officials) (on file with authors).

²³⁰ *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at 2-27.

²³¹ OCIJ Practice Manual at Ch. 4.7 (d), *supra* note 106.

conferencing. “This is a savings offset, calculated by estimating the amount it would have cost in detail travel, had the Judges and Court Staff not been able to handle the hearings via videoconference.”²³² The document provides no further details.

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

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

Estimate of 2010 actual travel expenditures	\$2,044,500 (46%)
Travel savings in 2010 that EOIR attributes to VTC	+ \$2,374,451 (54%)
<u>Total funds needed for travel if no VTC</u>	<u>\$4,418,951</u>

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

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

Given the opposition to any VTC by sizable portions of advocates representing aliens, and tepid enthusiasm for it among judges, as explained in the next section, claims of cost savings attributable to VTC must be credible.

[3] *Survey responses*

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

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

²³³ See text at page 6, and *supra* note 7. (We provided this estimate to EOIR officials at the outset of the project and asked for comments or actual EOIR budget figures but received no response.)

Video teleconference hearings (VTC) are (select one):	<u>Percent and Number</u>
Effective for most master calendar hearings, but not for most merits hearings.	39 (33%)
Effective for most merits hearings but not for most master calendar hearings.	5 (4%)
Are usually effective for both.	39 (33%)
Are usually effective for neither	16 (14%)
None of these statements describes my view.	19 (16%)

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

Effective for most master calendar hearings: 66%

Effective for most merits hearings: 37%

The only control we have for assessing these responses is whether the judges identified their caseloads as primarily detained, primarily non-detained, or roughly evenly split. On that measure we saw little difference in the responses, except that nineteen percent (19%) of those with primarily detained dockets said VTC was “usually effective for neither” master nor merits hearings, while only eleven percent (11%) of judges with mostly non-detained dockets selected that option. These might reflect better VTC equipment used in hearings involving judges with mainly non-detained dockets, but the numbers are small and thus the percentages volatile.

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

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

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

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

	Percent and Number	
The equipment allows me to hear and see clearly all participants in remote locations.	32%	38
VTC hearings, all things considered, are basically no different than “in-person” hearings	13%	16
Equipment failures that require delay or adjustment occur often enough to be a non-trivial problem in conducting proceedings.	47%	56
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that the need to transmit documents by fax sometimes creates a non-trivial problem in conducting proceedings	27%	31
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that other aspects of VTC sometimes create a non-trivial problem in conducting proceedings.	21%	25
None of these statements describes my view.	25%	30

Of the 119 judges, almost half (forty seven percent (47%)) said that “equipment failures” occur often enough to be a non-trivial problem in conducting proceedings, and some of those judges likely selected at least one of the additional options, as to problems caused by document transmission or other things. If so, that would likely raise the (forty seven percent (47%)) percent figure to over half. (Note that 119 judges selected 166 options, in addition to the thirty who said that none of the statements reflected their views.)

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

(Factors paraphrased.)	Mostly detained		50-50	Mostly non det		Total
Equip. lets me see/hear clearly	11	29%	1	26	68%	38
VTC no different than “in person”	5	31%	0	11	69%	16
Equip. failures occur too often	23	41%	4	29	52%	56
VTC no different except for doc. transmission	12	40%	1	17	57%	30
VTC no different except other	7	29%	1	16	67%	24
None describes my views	7	23%	2	21	70%	30

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

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

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

But they were also more likely to say:

- equipment failures occurred often enough to be a non-trivial problem

- faxing documents sometimes caused non-trivial problems in conducting proceedings, and
- “other aspects of VTC” sometimes created problems.

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

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

- ten were essentially neutral (“effective for people who want a speedy hearing and to go home”);
- six were favorable (even though “observing the witness is not as good on VTC as it is live, I think the benefits of VTC far outweigh the negatives”); and
- twenty-two were critical (including from seven judges who selected the “none-of-these-statements-describes-my-views” option. Five of the twenty-two commented on the inability to assess demeanor.

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

[4] Effect on outcomes

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

EOIR officials told the ACUS staff, and more recently us, that they monitor the use of VC equipment, consider comments received from attorneys and others, and emphasize to judges the need to try to accommodate needs of participants in VTC proceedings. But they also acknowledged, quoting the ACUS report, that “the agency does not keep or analyze evaluative data regarding outcomes of video hearings versus in-person hearings.”²³⁴ EOIR officials said that, given the many variables at play in removal adjudication, a reliable evaluation might be impossible.

The best way to answer the question of effects, if any, on outcomes would be a classic control-group experiment that randomly assigned cases that are similar in all major characteristics either to VTC or in person hearings. The challenges of such an effort in the overworked immigration courts are obvious.

We are aware of only one effort to identify outcome differences attributable to VTC in immigration court proceedings, a 2008 article that mainly summarized popular, academic, and judicial commentary on the hard-to-discount differences in how fact-finders perceive individuals who are physically present in a courtroom versus those observed through the VTC medium.²³⁵

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

²³⁵ Walsh & Walsh, *supra* note 218.

The article also presented OPAT-provided data on the disposition of asylum claims in 2005 and 2006,²³⁶ as summarized in Table P below, to which we have added 2010 data that OPAT provided us. (We eliminated the small number of telephonic hearings; hearings involving withdrawn or abandoned claims, and larger numbers of hearings coded as “Other”, typically a case in which the judge did not decide on the asylum claim because the respondent, for example may have received another type of relief.)

For all three years, grants for all VTC asylum applicants were in the twenty-three percent (23%) to twenty-nine percent (29 %) range, while in-person grant rates rose from thirty-eight percent (38%) to fifty percent (50%).

Table P: Asylum Grants and Denials for Seekers in VTC and In-Person Hearings*

Disposition and forum	2005	2006	2010
VTC grant	109 (23%)	101 (24%)	216 (29%)
In-person grant	11,473 (38%)	13028 (45%)	8,338 (50%)

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

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

The authors also analyzed outcome differences for asylum seekers not represented by attorneys and observed only minor differences with the rates for all seekers. They furthermore reported that the results were statistically significant as to the general population and the unrepresented population.

The authors did not report, however, the effect of detained status on the relationships. Detained asylum claimants may be more likely to be ineligible for asylum for the same reasons they were detained, such as statutory bars due to criminal conduct, or were less likely to have approvable asylum claims. We asked OPAT for data on 2010 asylum grants by type of hearing (VTC or in person), representation status, and detained status. Table Q presents the results for those in detention, those who had been detained but were released when the case was completed, and those who were never detained.

²³⁶ *Id.* at 271-72.

²³⁷ *Id.* at 271.

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

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

Table P shows a fifty percent (50%) grant rate for all asylum seekers with in-person hearings. In Table Q, that grant rate for 2010 asylum seekers with in-person hearings drops to eleven percent (11%) for those in detention. In fact, detained asylum seekers in 2010 did better overall if they had a VTC hearing (twenty-four percent (24%)) than an in-person hearing (eleven percent (11%)). Detained seekers in VTC hearings who were represented got asylum forty-two percent (42%) of the time. (We have no explanation for this observation; one commentator suggested that asylum seekers in remote detention facilities may have an easier time securing supporting witness testimony if the witnesses can appear by video rather than having to travel to the remote location.)

For 2010 asylum seekers with VTC hearings, those who had been released from detention, and those who had never been detained fared better than detained respondents (thirty-nine percent (39%) and forty-two percent (42%) respectively), but, unlike detained respondents, fared worse than respondents in in-person hearings (thirty-nine percent (39%) to forty-six percent (46%) for released applicants and forty-two percent (42%) to fifty-seven percent (57%) for never detained applicants). The number of released and never-detained asylum seekers who had VTC hearings was quite low (in double or single digits, making the percentages volatile). The differences in success for represented and non-represented respondents are noticeable in all categories—for example, forty-two percent (42%) of detained respondents in VTC hearings got relief versus four percent (4%, N=9) for non-represented VTC detainees.

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

2. BIA Case Management Procedures

We provide here a relatively brief analysis of BIA procedures, as requested in our arrangements with ACUS. Later in this subsection, we make a single proposal about grounds for assigning appeals to three-member panels.

Appeals to the BIA in 2011 were 35,962, down slightly from 36,633 in 2001; appeals from immigration judge decisions only were down by a greater margin, from 30,772 in 2007 to 27,237 in 2011. Completions were also down slightly from 36,416 in 2007 to 36,284 in 2011, completions in immigration judge appeals were down from 30,772 to 28,984. There has also been a change in the mix of cases. In 2007, eighty-eight percent (88%) of the appeals filed came from the immigration courts, the rest from DHS offices (almost all appeals from denials of family visa petitions); in 2011, seventy-six percent (76%) came from immigration courts.²³⁸

The BIA has been extensively analyzed. Our interviews with BIA members and others suggest that earlier problems with BIA performance have abated to the point that our research time and resources would be better spent on other subjects. We did not evaluate and therefore take no position on aspects of BIA performance that continue to prompt criticism, such as whether the proportion of BIA completions by single member affirmances (over ninety percent (90%)) is too high. Before describing the regulation referenced above, we analyze the adequacy of BIA remands and the changing relationships between the BIA and U.S. Courts of Appeals caseloads.

a. Adequacy of BIA Remands

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

	%	N
Almost or almost always (roughly 90-100 % of the time)	74%	58
Usually (roughly 75 to 89%)	37%	55
Sometimes (roughly 50 to 74%)	14%	20
Not often (roughly 25 to 49%)	5%	8
Rarely or never (less than 25%)	5%	7

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

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

In 2002, Attorney General Ashcroft reduced the BIA from twenty-three members to eleven and revised the regulations governing the procedures and standards used on review.)²³⁹ Soon thereafter, petitions for review in the U.S. courts of appeals (“BIA Appeals”) shot upward, reaching a peak in mid-decade, especially in the courts of appeals for the Second and Ninth

²³⁸ *Statistical Year Book, 2011 supra* note 4, at T2.

²³⁹ See Press Release, *U.S. Dep’t of Just. Attorney General Issues Final Rule Reforming Board of Immigration Review Procedures* (Aug. 23, 2002) available at <http://www.justice.gov/eoir/press/02/BIARestruct.pdf> (describing changes in regulations). The regulations were published in 67 Fed. Reg. 54878 (Aug. 26, 2002).

circuits. BIA appeals as a percentage of all filings have receded but not to the levels seen before the Attorney General's changes.²⁴⁰

Table R: BIA Appeals as a Percent of All Appeals

(12 month period ending Dec. 30)

	2001	2006	2011
Total appeals filed	56,687	63,676	55,817
BIA appeals	1,642 (3 %)	10,750 (17%)	6,511 (12%)

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

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

Table S: Rate of Appeal from BIA Decisions

(12 month period ending Dec. 30)

	2001	2006	2011
BIA decisions	28,106	33,506	24,422
BIA appeals	1,640 (6%)	10,750 (32%)	6,511 (24%)

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

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

²⁴⁰ Drawn from data reported by the Statistics Division of the Administrative Office of the United States Courts (on file with authors). Some data are also reported in Administrative Office of the U.S. Courts, Judicial Business of the United States Courts, 2011.

Table T: Total Appeals, BIA Appeals, Rate of Appeal (CAs 2 & 9)

	(12 month period ending Dec. 30)			
	2001	2006	2008	2011
Total appeals filed CA-2	4,460	6,643	6,708	5,661
BIA appeals	166 (4%)	2,486 (37%)	2,606 (39%)	1,420 (25%)
Rate of appeal*	3%	43%	42%	31%
Total appeals filed CA-9	10,054	13,828	13,577	12,306
BIA appeals	913 (9%)	5,166 (37%)	4,625 (34%)	3,132(25%)
Rate of appeal*	10%	43%	43%	35%

*--Underlying figures not shown

Did respondents appeal a much greater percentage of the BIA decisions in 2011 than they did they in 2001 because 2011 BIA decisions were more vulnerable, or for some other reason? Did they appeal a lower percentage of decisions in 2011 than in 2006 because the decisions were less vulnerable or because the economic downturn put legal fees beyond reach of many respondents? To the degree that the level of appeals from its decisions is a measure of adequate BIA performance, the rather sharp decline in appeals and the less dramatic drop in the rate of appeals could suggest that serious performance difficulties have abated.²⁴¹ The rate of appeal, in short,, is affected by factors other than BIA performance, such as the state of the economy and costs of pursuing appeals; discipline of abusive attorneys who filed frivolous cases; developments in the doctrinal law that have refined issues frequently litigated in the court; and perhaps an increase in pre-appeal opportunities to remain in the U.S. ranging from granting of motions to reopen to the use of deferred departure.

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

EOIR should assign a priority to getting approval of 2008 draft regulations allowing creation of a three-member panel whenever the BIA member to which the appeal has been assigned believes the case merits such review. Such a change will restore greater flexibility in the use of three-member panels. We take no position on other proposals or concepts within the draft regulations.

Analysis

The variation in the rate of appeal does not appear to be associated with any change in the ratio of single member to panel decisions. See Table U below:²⁴²

²⁴¹ Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405 (2007) (suggesting an interplay of factors that motivate respondents to see judicial review of BIA decisions).

²⁴² Data from *Statistical Year Book*, 2011, *supra* note 4 and special O.P.A.T data run.

Table U: Completions of Appeals from IJ and DHS Decisions and Procedural Characteristics

	Completions	Single Member Affirmances	Oral Argument
2006	41,475	38,649 (93.2%)	3
2007	35,394	32,325 (91.3%)	2
2008	38,369	35,656 (92.9%)	0
2009	33,102	30,124 (91.0%)	1
2010	33,358	29,695 (89.0%)	3

The BIA in 2008 proposed amending its regulations governing when a single member could refer the case to a three-member panel. Existing regulations provide criteria that limit three-member panels to specific situations: (1) the need to settle inconsistencies among the rulings of different immigration judges, (2) the need to establish a precedent construing the meaning of laws, regulations, or procedures, (3) the need to review a decision by a judge or DHS that is not in conformity with the law, (4) the need to resolve a case or controversy of major national import, (5) the need to review a judge's clearly erroneous factual determination, or (6) the need to reverse a judge or DHS decision.²⁴³

EOIR proposed a regulation that would have allowed the creation of a three-member panel whenever the BIA member believed the case presented “[t]he need to resolve a complex, novel, or unusual issue of law or fact.” These regulations, though proposed in 2008, have not been finalized.²⁴⁴ EOIR officials told us that although the proposed regulation was not controversial when proposed, it was withdrawn along with all pending regulations when the presidential administrations changed in 2009. They added that the regulation is still actively under review but is not a priority. We believe it should be.

3. Court Performance and Immigration Court Management

A court system's performance can be affected by how it balances, structurally and operationally, judges' independence and accountability within an organizational framework that can lean toward centralized authority or to local autonomy.

We said at the outset of this report that although EOIR is part of the executive branch, we assessed immigrant removal adjudication with a comparative eye on the nations' state and federal judicial branches. Like those courts, and unlike all but a few of the executive agencies that conduct adjudication, immigration courts and the BIA use an adversary process to decide cases of major national importance, involving some individuals for whom the case approaches life or death importance. Unlike all but a few of the administrative adjudication agencies, the immigration courts constitute a large judicial system of over 260 judges dispersed across the country. EOIR's Office of Chief Immigration Judge (like the Chief Administrative Law Judge in the Social Security Administration) is analogous to other court system's centralized management as vested its supreme courts or chief justices or in a few cases a judicial council.

²⁴³ 8 C.F.R. § 1003.1(e)(6)(i)-(vi) (2010).

²⁴⁴ See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654 (proposed June 18, 2008).

1. *Immigration Judge Selection and Evaluation*

a. *Selection*

To promote transparency about hiring practices within EOIR, we think EOIR should publish annually, as do some courts, or post periodically, summary and comparative data on the gender and race/ethnicity composition of categories of EOIR personnel (e.g., judges, BIA members, staff by occupational category), as well as summary information on judges' prior employment, with due attention to any statutory restrictions to protect privacy.

If EOIR is disinclined to post such information, or forbidden to do so, we encourage other groups to do so, based on judges' names on the EOIR website and Internet-available biographical information.

Analysis

Immigration judge selection has been a staple of recent commentary since reports surfaced in 2007 of inappropriate partisan hiring of judges by DOJ political appointees, practices documented in a 2008 report by the DOJ Inspector General/Office of Professional Responsibility.²⁴⁵ There is little evidence that the officials who meddled in the hiring process knew or cared what the judges do; they only cared that party loyalists got the jobs.

The Attorney General instituted new hiring practices that re-vested authority in EOIR.²⁴⁶ OCIJ officials insist that the process is non-partisan and merit-based; we have no evidence that it is not. A 2010 press release asserted that the "requirements for becoming an immigration judge set high standards for the applicants and the screening process ensures that only the best candidates are selected." In addition to having at least seven years of "post-bar legal experience," the release said, applicants are evaluated on criteria of temperament; knowledge of immigration law and procedures; litigation experience, preferably in high volume litigation arenas; experience in conducting administrative hearings; and knowledge of judicial practices and procedures."²⁴⁷ ACIJs told us they participate in the hiring process and believe it is working well. Other EOIR press releases reporting on implementation of the twenty-two improvement measures describe orientation and continuing education for judges and staff, as well as performance evaluations (described later in this paper).²⁴⁸

We did not have the opportunity to assess the quality of newly hired judges, much less compare them systematically to judges who have been serving longer in the immigration courts. We certainly were in no position to operationalize and test EOIR's empirical assertion that the "screening process ensures that only the best candidates are selected."

Despite these changes, some have called for more precise standards and greater participation by interested stakeholder groups in the process in order to promote diversity and proper judicial

²⁴⁵ U.S. DEP'T OF JUST. OFFICE OF RESPONSIBILITY & OFFICE OF INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) available at <http://www.justice.gov/oig/special/s0807/final.pdf>.

²⁴⁶ *Id.* at 114-15.

²⁴⁷ Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Immigration Judge Hiring Initiative*, U.S. DEP'T JUST., (Mar. 2010) available at http://www.justice.gov/eoir/press/2010/EOIR_IJHiring_FactSheet.pdf.

²⁴⁸ *EOIR's Improvement Measures*, *supra* note 82.

temperament.²⁴⁹ The NAIJ, by contrast, has referred to “a cumbersome hiring and clearance process.”²⁵⁰ We have not had the time to weigh these objections or assess the likely feasibility of the proposals.

Likewise, we did not have time to assess any changes in recent years in the demographic makeup of the judicial corps or in the mix of pre-judicial vocations. As early as 1983,²⁵¹ the first Chief Immigration Judge worried that “[h]istorically, individuals selected to become immigration judges were individuals who had come through the” prosecutorial ranks of the since abolished Immigration and Naturalization Service. In 2010, the ABA Immigration Commission cited more recent complaints of homogeneity in backgrounds and charges that irascible judge behavior and disparities in the proportion of asylum grants may be an outcome of those hiring patterns.²⁵²

Some court systems publish annual reports of the demographic composition of their workforce, including judges (the selection of whom for the most part the courts do not control) and supporting staff. The Administrative Office of the U.S. Courts, for example, publishes “The Judiciary Fair Employment Practices Annual Report,”²⁵³ although it is not available on-line.

b. Performance Monitoring and Evaluation

The press has reported instances of abusive immigration judge behavior toward parties, a matter amplified by criticism in court of appeals opinions.²⁵⁴ We have no grounds to doubt the accuracy of specific reports but have no way of knowing how representative they are of overall immigration judge conduct (and, frankly, nor do circuit judges, who see records in only a small fraction of immigration court proceedings).

These reports and criticisms helped make conduct and professionalism a leading component of the Attorney General’s 2006 changes. Five dealt directly with monitoring and evaluating performance and dealing with complaints of misconduct.

[1] Individual Judge Performance Evaluation

EOIR should consider incorporating some elements of “Judicial Performance Evaluation” models used in some state judicial systems into its performance evaluation process, including use of a separate body to conduct reviews, agency-wide.

Analysis

The first of the Attorney General’s 2006 EOIR “Improvement Measures” was “Performance Evaluations for Immigration Judges and BIA Members.” This subject is a moving target within EOIR, and we were unable to give it the time and attention that we did to other topics.

According to EOIR officials, ACIJs conducted the first performance evaluations under the new system starting in July 2011. The DOJ/EOIR “Performance Appraisal Record” for “Adjudicative

²⁴⁹ *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-18–2-19, 2-29.

²⁵⁰ *Supra* note 111.

²⁵¹ *See, e.g.,* William Robie, *The Purpose and Effect of Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMM. L.J. 269, 271-72 (1986).

²⁵² *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-19.

²⁵³ *E.g.,* The [Federal] Judiciary Fair Employment Practices Annual Report, (2011, published by the Administrative Office of the U.S. Courts).

²⁵⁴ *See ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-19 (citing commonly referenced judicial opinions).

Employees”²⁵⁵ provides for a rating on three job elements—“Legal Ability,” “Professionalism,” and “Accountability for Organizational Results,” leading to an “Overall Rating” of “Satisfactory,” “Needs Improvement,” and “Unsatisfactory.” The ACIJ may provide written comments (and must in the case of an unsatisfactory rating). The form defines the evaluation standards for each job element and instructions for calculating the overall rating.

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

	Percent	Number
Very useful	13%	19
Useful	28%	41
No opinion	16%	24
No more than marginally useful	19%	29
Not at all useful	24%	36

Perhaps surprisingly, given the general unpopularity of performance reviews, judges were fairly evenly divided in their perception of the evaluations. Overall, forty percent (40%) selected one of the “useful” options, and forty-three percent (43%) selected one of the “not useful” options. Seventeen of the nineteen judges who offered additional comments were judges who checked one of the “not useful” options or “no opinion.” The bulk of the seventeen comments were that the review was uninformative. “I was simply told I was doing a satisfactory job.” There was little variation in these overall responses based on whether the judges had a primarily detained or non-detained docket. Other data, unavailable to us, might shed additional light on these responses—such as the length of the responders’ tenure as judges and, of course, the nature of the evaluations they received.

Some judges have objected to the use of quantitative measures in evaluating their performance. EOIR’s “Agreement” with the NAIJ notes EOIR’s determination that subpart 3.1 of the “Accountability for Organizational Results” job element (“Acts consistently with the goals and priorities established by the Chief Immigration Judge”) “does not encompass any specific numerical or time-based production standards, such as the OCII case completion goals” except for statutory or regulatory based deadlines.²⁵⁶

OCII has regularly promulgated case completion goals, most recently in July 2010, when it added such goals as completing 100 percent of credible fear review determinations within seven days.²⁵⁷ The goals respond to the 1993 Government Performance and Results Act, which seeks to “improve Federal program effectiveness and public accountability by promoting a new focus on results, service quality, and customer satisfaction.”²⁵⁸ The case completion goals are similar to the ABA’s “Standards of Timely Disposition” for state trial courts—for example, that “90 percent of all civil cases should be settled, tried, or otherwise concluded within 12 months of the

²⁵⁵ Provided by EOIR officials and on file with the authors.

²⁵⁶ Executive Office for Immigration Review Performance Plan, provided by EOIR (on file with the authors).

²⁵⁷ Memorandum from Brian O’Leary, Chief Judge, New Case Completion Goals FY2010, to all Immigration Judges (and others) (July 14, 2010) (on file with the authors).

²⁵⁸ Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) at § 2(b)(3).

date of case filing . . . ”²⁵⁹ Of course, the ABA standards are not mandatory unless a court adopts them. OCIJ regards the case completion goals as aspirational, but the president and vice-president of the NAIJ wrote recently that “judges perceive these goals to be mandatory and frequently in conflict with ideal conditions for adjudicating cases fairly and independently,” citing judges’ narrative responses to a survey on judicial stress.²⁶⁰

As far as we could tell from our interviews, ACIJs do not get centrally generated quantitative reports of judicial performance but rather in their supervision of the courts, rely on their own observation and those of the respective court administrators to alert them to judges who may be having problems in completing cases.

The use of quantitative measures as part of judicial performance evaluations is a generally accepted practice within state courts. The 2010 ABA Immigration Commission report recommended that EOIR use an evaluation method based on the “Judicial Performance Evaluation” models (JPE for short) developed by the ABA and the Institute for the Advancement of the American Legal System.²⁶¹ JPE denotes a process by which independent commissions, created typically by state law and consisting of judges, lawyers, and other stakeholders, evaluate judges periodically in such areas as legal knowledge, integrity and impartiality, communication and administrative skills, and judicial temperament, using surveys and interviews of court users, case management data, and reviews of the judge’s work product. JPE results have been put to various purposes: providing voters objective data on which to determine whether to retain judges in office; providing feedback to judges about their performance; and helping to shape judicial education programs.²⁶²

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

[2] Immigration Court Performance Monitoring

EOIR should monitor immigration court performance by continuing its assessment of the adaptability of performance measures used in other court systems, and publicizing the results of

²⁵⁹ AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS 86, at 2.52(a) (1992).

²⁶⁰ Slavin & Marks, *supra* note 16, at 1787 citing Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64-65 (2008).

²⁶¹ See *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-32 to 2-34.

²⁶² See Institute for the Advancement of the American Legal System, *Quality Judges Initiative*, U. DENV. <http://www.du.edu/legalinstitute/jpe.html> (last visited Jan. 6, 2012) (providing JPE resources) (disclosure: Wheeler serves on the Institute’s Board of Advisors); American Bar Association, Black Letter Guidelines for the Evaluation of Judicial Performance (2005), available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf; *ABA Comm’n on Immigr. Rept., 2010, supra* note 32, at 2-33.

its assessment. It should include rank-and-file immigration judges in the assessment, as well as stakeholder DHS agencies. We also think assessing the feasibility research on the links between immigration court performance and individual court culture may be a worthwhile endeavor for the Administrative Conference in conjunction with EOIR.

Analysis

Measuring an individual *judge's* performance evaluation is different from monitoring a *court's* performance. Probably the best example of court performance standards are the Trial Court Performance Standards developed by the National Center for State Courts as part of the national emphasis over the last two decades in measuring organizational performance—the same emphasis that produced the Government Performance and Results Act, to which the immigration court case completion goals are a response. The Trial Court Performance Standards have five elements: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.²⁶³

To help courts implement them, the National Center has developed a generic performance monitoring device—“CourTools”—which provides guidance to courts that want to measure their performance in ten specific areas, such as “access and fairness,” “trial date certainty,” and “court employee satisfaction.”²⁶⁴ EOIR officials told us there were aware of CourTools and were exploring its applicability to the immigration courts.

Some state court systems, such as Utah's, have modified CourTools' measurement devices and post the results of their application on their websites, with the aim (in Utah) of “help[ing] courts identify and monitor important performance measures and make improvements to better serve the needs of the public.”²⁶⁵ The Utah performance areas include quantitative measures of case disposition—clearance rate (see Appendix 7 for an excerpt) and age of active pending cases, for example—but other areas as well, such as access and fairness in the courts and court employee satisfaction. The performance rankings reflected in the federal courts Court Management Statistics are another example of publically available indices of court performance (see Appendix 6).

Although the measured unit in these schemes is the court, not individual judges, courts that are serious in performing consistently with the standards they have established, need ways to encourage individual judges to perform adequately. According to current research about successfully performing trial courts, successful court performance is not simply a matter of getting outlier judges to toe the mark but it also requires the creation of a culture within the court that are conducive to high performance. National Center for State Court researchers, adapting tools for examining corporate culture, identified several cultural types among state criminal courts and established links between different cultures and court performance.²⁶⁶

²⁶³ NCSC: *Research: Trial Court Performance Standards*, NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/d_research/TCPS/index.html (last visited Jan. 6, 2012).

²⁶⁴ *CourTools Performance Measurement Tools for Trial and Appellate Courts*, NATIONAL CENTER FOR STATE COURTS (2011) http://www.ncsconline.org/D_Research/CourTools/index.html. See also The Executive Office for Immigration Review, Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, of the H. Comm. on the Judiciary, 110th Cong. (2010) (statement of Russell R. Wheeler) (discussing the possible application of CourTools and other performance measures to immigration courts), available at <http://judiciary.house.gov/hearings/pdf/Wheeler100617.pdf>.

²⁶⁵ *Utah Courts Performance Measures*, UTAH STATE COURTS (Oct. 20, 2011) <http://www.utcourts.gov/courtools/>.

²⁶⁶ Ostrom et al., *supra* note 112.

Obviously, measuring the culture of individual immigration courts and assessing any links between different court cultures and court performance is a task well beyond this project. Indeed, the workload strains within immigration courts may make inapposite the type of organizational analysis that the National Center researchers were able to conduct in state criminal courts.

[3] Handling Complaints Against Immigration Judges

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

Analysis

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

At least since 2010 EOIR has had an “Immigration Judge Conduct and Professionalism” page on its website,²⁶⁷ which includes information about how to file complaints against judges, a description of the complaint procedure, and summary quarterly statistics on complaints filed and their disposition. In January, EOIR and the NAIJ agreed to an “Ethics and Professionalism Guide for Immigration Judges,” which is also posted on the conduct and professionalism page. As noted earlier, EOIR has assigned one of the ACIJs responsibility for “conduct and professionalism.”

According to information on the conduct and professionalism page, complaints may arise from filings by individuals or groups, or if the OCIJ initiates (“identifies,” in the argot of judicial discipline) a complaint *sua sponte* when it becomes aware of possible problematic conduct from any number of sources, including press accounts and judicial opinions. Responses to verified allegations that are not the responsibility of DOJ’s Offices of Professional Responsibility or Inspector General generally rest with the respective ACIJ with supervisory authority over the subject judge’s court, as well as the ACIJs for conduct and professionalism and for training and education. In fiscal 2011, EOIR received 159 complaints involving eighty-nine judges. It dismissed fifty-three complaints, imposed formal disciplinary action as to two complaints, and undertook informal non-disciplinary action as to seventy-three complaints. Sixteen were concluded when the subject judges resigned or retired and the rest of the complaints were carried over. The data for fiscal 2010 were very similar.

We did not have the time or resources to delve deeply into the complaint process’s design or implementation, especially given the web of executive branch rules and regulations within which the disciplinary process sits. The EOIR complaint processing system, although probably similar to those in most executive agencies, differs from those of almost all state court systems, which have established investigating bodies of judges, lawyers, and laypersons, which receive and research complaints and submit those they regard as meritorious to adjudicating bodies for

²⁶⁷ Executive Office for Immigration Review, *Immigration Judge Conduct and Professionalism*, U.S. DEP’T JUST., (Oct. 2011) <http://www.justice.gov/eoir/sibpages/IJConduct/IJConduct.htm>.

disposition or further appeal.²⁶⁸ (The federal judicial disciplinary process rests principally within the all-judge circuit judicial councils.)²⁶⁹

Both the state and federal judicial disciplinary processes make public, with some exceptions, the names of judges whom the adjudicating body publically reprimands. Such publication provides needed transparency to an often obscure process. The EOIR summary statistics do not identify judges who have been formally disciplined. EOIR officials explained that they are barred by statute and executive branch policies from doing so, although some officials volunteered that doing so might increase transparency. (EOIR's "Summary" of its complaint handling procedure notes that the OCIJ publishes the summary statistics referenced above "to increase the transparency of the process" "[c]onsistent with the Privacy Act.")

2. *Locus of Management Responsibility*

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

Analysis

a. The OCIJ Management Structure and Rationale

One aspect that distinguishes immigration courts from most state and federal judicial systems is the absence of almost any management authority vested in the judges of each court. An EOIR official told us informally that "OCIJ is one immigration court, in fifty-nine locations. The locations are not autonomous but are an arm of the agency, and that is as it should be." The idea of a "unified court"—one single system-wide court with branches—was first articulated in Progressive Era proposals that "the whole power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, department, or divisions."²⁷⁰ The idea never got implemented because individual courts demanded some flexibility to deal with local problems even within the context of centrally allocated funds and system-wide procedural and administrative regulations.

The OCIJ management model is eleven assistant chief immigration judges with supervisory responsibility over from four to seven immigration courts, as seen in Table V (which draws on May 2012 information posted on the EOIR website, and reflects a modest April or May 2012 reorganization of the ACIJ ranks that appeared unannounced on the EOIR Website). The duty station of four of these ACIJs is EOIR's Falls Church headquarters; they supervise courts located around the country (and the four-judge video court in the headquarters building and the nearby Arlington court). Eight of the ACIJs have duty stations in the metropolitan areas of courts they supervise, and they supervise other courts in other cities as well. Three of the Falls Church-based ACIJs supervise only courts in other cities (and one of those ACIJs has responsibilities for education and "vulnerable populations." Two other ACIJs, who had court supervisory authority before the reorganization, now have no specific-court responsibilities and are charged,

²⁶⁸ See BUREAU OF JUST. STATISTICS, U.S. DEP'T JUST., STATE COURT ORGANIZATION 56 (2004) available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>.

²⁶⁹ See 28 U.S.C. ch. 16 (2006).

²⁷⁰ *The State-Wide Judicature Act*, 1 J. Am. Judicature Soc'y, Dec. 1917 at 101.

respectively, with “labor management issues” and “conduct and professionalism,” and with “operations.”) Three new court-supervising ACIJs are in place.

The courts that have a resident ACIJ account for 124 judges, forty-seven percent (47%) of the 264 judges on board in May 2012. This is a slight increase from forty-five percent (45%) before the reorganization; 140 judges are in courts without a resident ACIJ.

Table V: Assistant Chief Immigration Judge Assignments²⁷¹

ACIJ and Duty Station	Cts at/near duty station (# of judges)	Other courts (# of judges)
Rico Bartolomei, San Diego	San Diego (6)	East Mesa, El Centro, Imperial (3)
John Davis, Denver	Denver (6)	Bloomington, Cleveland, Las Vegas, Kansas City (10)
Larry Dean, San Antonio	San Antonio (7)	El Paso, El Paso SPC, Harlingen, Pearsall, Port Isabel (13)
Thomas Fong, Los Angeles	Los Angeles (31)	Honolulu, Lancaster, Saipan, Salt Lake City (7)
Print Maggard, San Francisco	San Francisco (18)	Portland, Seattle, Tacoma (7)
Christopher Santoro, Falls Church	HQIC (4)	Arlington, Baltimore, Philadelphia, York (16)
Elisa Sukkar, Miami	Miami, Krone (20)	Atlanta, Stewart, Orlando, San Juan (16)
Robert Weisel, New York City	NYC, Varick (32)	Elizabeth, Newark, Fishkill, Ulster (9)
Jill Dufrene, Falls Church		Batavia, Boston, Buffalo, Chicago, Detroit, Hartford, Omaha (25)
Despali Nadkarni, Falls Church		Charlotte, Dallas, Houston, Houston SPC, Memphis, New Orleans, Oakdale (22)
Jack Weil, Falls Church, (Trg., Vulnerable Populations)		Eloy, Florence, Phoenix, Tucson (12)
	124 JUDGES	140 JUDGES

The in-court placement of most ACIJs responds in part to one of the measures the Attorney General ordered in 2006: that “the Acting Chief Immigration Judge . . . consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees, on a pilot basis” to evaluate whether the arrangement improved “managerial contact and oversight in those courts.”²⁷² EOIR asserted in June 2009 that the effort has been “well received by immigration judges, EOIR staff, the private bar, and the government bar.”²⁷³

²⁷¹ Drawn from Executive Office for Immigration Review, *EOIR IMMIGRATION COURT LISTING*, U.S. DEP’T JUST.(May 2012) available at <http://www.justice.gov/eoir/sibpages/ICadr.htm> and subsequent communications from the Office of the Chief Immigration Judge.

²⁷² ATT’Y GEN MEMORANDUM, *supra* note 78.

²⁷³ *EOIR’s Improvement Measures*, *supra* note 82.

We asked why EOIR has adopted the approach of vesting authority for administering the courts in a small number of ACIJs, rather than vesting that authority—subject to national administrative policies—in the judges of each court and creating the position of chief judge in each multi-judge court, with appropriate caseload reductions for those in large courts. The response, in a phrase we heard often, was that “hearing time is the court’s most precious commodity,” and the judges should have no responsibilities other than preparing for and conducting hearings.

An exchange we had with an EOIR official was illuminating. We asked, hypothetically, whether a court’s judges could, on their own, invite a local law professor to come to the court to make a presentation about an area of his or her immigration expertise—and to do so gratis—either in a class room setting or in an informal brown bag lunch. We learned that the judges could not issue such an invitation without the supervising ACIJ’s approval—whether the ACIJ served in the court in question or was based elsewhere. The ACIJ’s prior knowledge and approval was necessary because, as described to us, the ACIJ is responsible for the court’s administration, including how judges allocate their time.

Moreover, because the “training” involved in the professor’s visit might be useful to other courts, the ACIJ need to know about all such events. Furthermore, the ACIJ principally responsible for education and training would need to know, in advance, about the proposed unpaid presentation or brown bag lunch, inasmuch as that judge needs to know about any and all training or requests for training so as to be in a position to oversee and document it.

This approach—freeing line judges from any administrative decisions— might trace back to the first chief immigration judge, the late William Robie, cited earlier in our report concerning status conferences. As to court administration, according to a 1993 post-mortem tribute,²⁷⁴ Judge Robie:

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

We of course cannot say how Judge Robie would have regarded the current centralized approach to immigration court management and, more important, whether it is the best approach. Nor do we know the degree to which, if any, the current approach is a product of DOJ rules governing the behavior of department attorneys, and if so, whether any change in those rules to recognize the special role of the judges might be possible.

²⁷⁴ Jere Armstrong & Richard J. Bartolomei, *A Tribute to the Honorable William R. Robie*, 7 GEO. IMMIGR. L.J. 265, 268 (1993).

b. Judges' Views of their ACIJs

Our January 2012 survey posed several questions about the ACIJ arrangement (obviously, the one in place then, not the slightly reorganized arrangement described above). First, we asked about agreement with dual statements—"My ACIJ is aware of the conditions, needs, and problems in my court that need his/her attention," and "I am aware of my ACIJ's preferences and policies as to how I should perform my duties."

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

	ACIJ aware of court needs, etc.		IJ aware of ACIJ pref's	
	Number	Percent	Number	Percent
Strongly agree	55	36%	41	27%
Agree	65	42%	72	48%
Neutral	11	7%	26	17%
Disagree	11	7%	8	5%
Strongly disagree	11	7%	3	2%

Substantial majorities of judges believed their ACIJ's were aware of conditions, needs, and problems in their respective courts (seventy-eight percent (78%)) agreed or strongly agreed) and believed they knew what their respective ACIJ's expect of them (seventy-five percent (75%)) agreed or strongly agreed). Although we don't know in which specific courts the responding judges work, we observed almost no differences in the breakdowns based on whether the judges had predominantly detained or non-detained caseloads. We also know that forty-seven percent (47%) of the judges are in courts with a resident ACIJ, but the percentages of those agreeing as to both statements are over seventy-five percent (75%), suggesting that a fair proportion of judges without a resident ACIJ nevertheless believe they understand their ACIJ's preferences and their ACIJ understands the respective courts' needs.

The judges' responses to these questions appear are related in part to their perceptions of the utility of the recently completed performance evaluations. Almost all (ninety-five percent (95%)) of those judges who found the performance reviews useful agreed or strongly agreed that their ACIJ was aware of their courts' needs and conditions. Of those who didn't find the review useful, a majority still agreed that their ACIJ's were aware of their courts' conditions, but the figure was only sixty-five percent (65%). Likewise, ninety percent (90%) of the judges who said they were aware of their ACIJ's preferences found the reviews useful, but only sixty percent (60%) of those who disputed the reviews' utility said they knew what their ACIJ's expected of them.

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

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

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

Standards and evaluative tools developed for judicial branch courts²⁷⁵ embrace a less centralized approach than that used by OCIJ. The ABA's judicial administration standards, for example, while recognizing the need for overall centralized management of a judicial system, stress that each trial court should have its own administration "so that it can manage its business."²⁷⁶ The most thorough effort to link management approaches with trial court performance emphasizes the role of local chief judges in promoting cultures conducive to high performance, a phenomenon we discussed earlier. The principal research on trial court culture describes the chief judge's role as "fostering agreement among members and staff of the court in a collegial manner" and "encourage[ing] other judges and staff to embrace one set of cultural orientations in case management style and change management and another set in judge-staff relations and internal organization."²⁷⁷ An international consortium of several U.S. and foreign court administration and research organizations sums up the conventional wisdom: "To become an excellent court, proactive management and leadership are needed at all levels, not only at the top, and performance targets have to be determined and attained. Well informed decision-making [about achieving high performance] requires sound measurement of key performance areas and reliable data."²⁷⁸

As stated above, we were not able, within the confines of this project, to assess various cultures in different immigration courts. Nor were we able to inquire about the degree to which the observations above regarding the locus of management authority are applicable to the immigration courts, whether the ACIJs are performing the chief judge roles found effective in other courts and whether the immigration courts would function better if more management authority were vested in the courts themselves. (A few judges told us that their time on duty is so consumed by conducting hearings to leave little time for the kind of chief-judge-led collegial problem solving described above.) We point to our earlier suggestion of a possible ACUS-EOIR project on assessing immigration court cultures.

²⁷⁵ E.g., ABA Judicial Administration Division, *supra* note 259; Trial Court Performance Standards, *supra* note 264; Ostrom et al., *supra* note 112; INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE (2008) available at www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf.

²⁷⁶ ABA Judicial Administration Division, *supra* note 259, at 29.

²⁷⁷ Ostrom et al., *supra* note 112, at 127.

²⁷⁸ INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra* note 275, at 2, 4, 26.

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

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

The responses are summarized below; 152 judges responded.

	Percent	Number
Strongly agree	23%	35
Agree	20%	31
Neutral	22%	34
Disagree	22%	33
Strongly disagree	13%	19

Neither agreement nor disagreement received a majority of the responses. Those who agreed with the idea of individual court chief judges were forty-three percent (43%) of the 152 who responded to this question; those who disagreed were thirty-five percent (35%), almost a ten point difference. The second most frequent response of the five available was “neutral” (no opinion).

We compared responses to the local chief judge concept and judges’ perceptions of their ACIJs. Of those judges who agreed that their ACIJ was aware of their courts’ needs and conditions, thirty-nine percent (39%) agreed with the concept of local chief judges and an almost identical percentage (thirty-eight percent (38%)) disagreed. Likewise, of those who believed they knew their ACIJ’s preferences for their performance, 41 percent favored the concept of local chief judges and thirty-four percent (34%) disfavored that concept. (The numbers who disagreed that their ACIJs knew local conditions or that they knew their ACIJ’s preferences were too small to draw much of any conclusions.)

There was some association between judges’ preference for local chief judges and the judges’ view of the performance reviews’ utility. Of the judges who agreed with the concept of local chief judges, a small majority (fifty-two percent (52%)) said the reviews were not useful, and thirty percent (30%) said they were useful. Of the judges who disagreed with the concept of local chief judges, forty-three percent (43%) found the reviews useful and thirty percent (30%) did not.

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

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

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

It is perhaps striking how high a percentage of judges favored the local chief judge arrangement even though many of them, probably, have little idea how local chief judge systems work in federal and state courts. The survey instrument did not explain the concept.

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

4. Restructuring

A pervasive theme of critics of immigrant removal adjudication has been the independence of immigration judges. They, as noted earlier, are not Administrative Law Judges with the processes and protections provided by the APA, and are described both by statute and DOJ regulations as attorneys who perform tasks delegated by the attorney general, albeit with admonitions as well that they should exercise independent judgment within the structure of the delegation. Some immigration judges and commentators see an inherent conflict.

Those who charge that the judges lack, or appear to lack, independence have usually called for removing the immigration adjudication agencies from the DOJ into some sort of independent status within the executive branch of government—either as a standalone administrative agency or a so-called Article I court with presidentially appointed judges. The ABA Immigration Commission Report describes the alternative approaches.²⁷⁹ Commentators and judges have argued that, even though DHS, not DOJ, attorneys litigate cases in the courts and appeals in the BIA, it is inconsistent with independent judicial decision making to place judges under the administrative control of the nation's chief law enforcement officer.

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

There are several reasons why we devoted little attention to this matter. One is that it has been extensively studied by others, and in the limited time we had for our study, it seemed best to deal with other, less studied topics. Another is that, although there is an obvious potential for DOJ management's manipulation of immigration judge decision-making, through performance reviews, sanctions, threats of removal for office and similar steps, we have encountered little

²⁷⁹ *ABA Comm'n on Immigr. Rept., 2010, supra* note 32, at Part 6.

evidence of such manipulation. Third, although independent agency status would be a barrier against DOJ decisional manipulation, the prospects of creating a new agency are dim, even though EOIR is administratively sufficient within DOJ and might be relocated with little additional long-term cost. Moreover, an autonomous immigration adjudication agency risks poor sailing in the appropriations process compared to one served by the DOJ's advocacy, both with the Office of Management and Budget and Congressional appropriators. Aliens, especially aliens accused or convicted of crimes, who DHS says should not be in the country, are hardly an attractive constituency to appropriators.

Having said all that, we believe the case for independent immigration removal adjudication and appeals agency has considerable merit.

VI. Conclusion

We appreciate the cooperation of the many people who met with us and look forward to working with the Administrative Conference as it evaluates the recommendations before it.

Acknowledgements

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New York Law School research assistants: Eberle Schultz, JD Class of 2013, primary assistant, and Aisha Elston-Wesley, JD Class of 2013.

Brookings Institution interns: Markus Brazill, Eric Glickman, and Carolyn Harbus

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APPENDIX 1

INTERVIEWS

DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

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

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

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

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

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

Immigration Courts (by state),*Arizona* (Benson only)

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

California (Benson only)

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

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

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

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

Virginia Several hour interviews with a subset of Headquarters Court judges and observation of proceeding, October 24.

Civil Division, Office of Immigration Litigation, **David McConnell** (Director), April 28 (Washington, 2 hours).

DEPARTMENT OF HOMELAND SECURITY

Office of General Counsel, Group Interview April 28 **Seth Grossman** (Chief of Staff), **Nader Baroukh** (Associate General Counsel for Immigration), **Nicholas Perry** (Assistant General Counsel for Immigration Enforcement), **Adam V. Loiacono**, Attorney Adviser, Immigration (Washington, D.C., 2.5 hours (Grossman 30 minutes only)).

Immigration and Customs Enforcement

Office of the Principal Legal Adviser, **Peter S. Vincent** (Principal Legal Adviser) May 18 (Washington, 1.5 hours) (joined by **Gary Mead**, Executive Associate Director, Enforcement and Removal Operations, ICE).

Riah Ramlogan, (Deputy Principal Legal Adviser), April 28 (Washington, 1 hour), November 17 30 minutes; November 18 2 hours).

Geraldine Richardson, (Special Assistant to the Office of the Principle Legal Adviser) (Washington 2 hours) and email correspondence in November.

Detention Compliance Officers (**2 people names unclear**) July 13, Eloy Detention facility, 1 hour.

Ruben Mayes (Detention Officer) Florence Detention facility, July 12, 1 hour.

Customs and Border Protection

Office of General Counsel, **Jorge Luis Gonzalez**, (Attorney), May 18 (Washington, 1 hour)

Director of the Tucson Border Patrol Sector and Officer in charge of public relations (names to be confirmed) July 14, Tucson, Arizona (2 hours).

Julie A.G. Koller, Attorney (Enforcement) Office of Chief Counsel, via telephone, (Benson only) November 29, 2011 (1 hour).

Citizenship and Immigration Services

Office of General Counsel, **Dea Carpenter** (Deputy General Counsel), May 18 (Washington, 2 hours).

Administrative Appeals Office, **Perry Rhew** (Chief of the AAO) June 21 10 to 11:30 (by phone, 1.5 hours).

Asylum Division, Refugee, Asylum & Int'l. Operations, **Joseph E. Langlois** (Director), **Ted Kim** (Deputy Chief), August 9 (Washington, 1 hour 40 minutes) and subsequent email correspondence.

IMMIGRATION LAWYERS (non-government)

Interviews in Arizona, New York, and Washington, D.C. with 6 attorneys associated with the American Bar Association, American Immigration Council Legal Action Center, Catholic Charities, Katzmann Study Group on Immigration Representation, and members of the private bar, approximately 30 attorneys in all. (Interviewees made clear they were not speaking for organizations with which they might be affiliated.)

OTHER INTERVIEWS

We interviewed Donnie Hachey, Chief Counsel for Operations, and several other personnel of Board of Veterans' Appeals August 9 (Washington, DC, 1 ½ hours).

We interviewed **David Martin** (Univ. of Virginia, former General Counsel, DHS, by phone, May 10, 2 hours).

We spoke during the project with several judges on the U.S. Courts of Appeals.

APPENDIX 2**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES****COMMITTEE ON ADJUDICATION**

John Vittone	Committee Chair, Public Member
Fred W. Alvarez	Public Member
Judge Charles	Center Liaison Representative
Mariano-Florentino Cuéllar	Council Member
Ivan K. Fong	Government Member
Susan Tsui Grundmann	Government Member
Christopher Hughey	Government Member
Mary Lucille Jordan	Liaison Representative
Elaine Kaplan	Government Member
Edward Kelly	Liaison Representative
Richard J. Leighton	Senior Fellow
Robert Lesnick	Government Member
Nadine Mancini	Government Member
Malcolm S. Mason	Senior Fellow
Doris Meissner	Public Member
Bob Schiff	Government Member
Glenn E. Sklar	Government Member
Thomas W. Snook	Liaison Representative
Daniel Solomon	Liaison Representative
Alan Swendiman	Liaison Representative

IMMIGRATION PROJECT WORKING GROUP

Kevin Burke	Judge, Hennepin County District Court (Minnesota)
Dea Carpenter	Deputy General Counsel, USCIS
Bill Ong Hing,	Professor of Law and Asian American Studies, Univ. of Cal., Davis
Edward Kelly,	Assistant Chief Immigration Law Judge, EOIR
Mark Krikorian,	Executive Director, Center for Immigration Studies
Stephen Yale Loehr,	Adjunct Professor, Cornell University Law

Adam Loiacono,	Attorney Advisor, Office of General Counsel, DHS
David McConnell,	Director at Office of Immigration Litigation, US DOJ
David A. Martin,	Professor, UVA Law, former Deputy General Counsel, DHS
Doris Meissner,	Senior Fellow, Migration Policy Institute
Juan Osuna,	Director, EOIR
Riah Ramlogan,	Deputy Principal Legal Advisor, US ICE
Rebecca Sharpless,	Assist. Prof. Clinical Legal Ed., University of Miami Law School
Margaret Stock,	Adjunct Instructor, University of Alaska
Crystal Williams,	Executive Director, American Immigration Lawyers Association

APPENDIX 3

	<u>Completed Proceedings</u>						<u>Detained Proceedings</u>			<u>Other Matters</u>		<u>All Matters</u>	
	IJs	Total	Per judge	w/ app relief	w/ asy app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
ARLINGTON	5	7,719	1,543.8	29%	19%	60%	32.2%	12%	43%	1,105	541	9,365	1,873
ATLANTA	5	5,760	1,152.0	22%	11%	59%	30.8%	9%	31%	1,520	524	7,804	1,561
BALTIMORE	5	4,732	946.4	45%	23%	67%	19.1%	11%	22%	833	368	5,933	1,187
BATAVIA SPC	2	1,857	928.5	10%	5%	35%	64.6%	14%	23%	1,323	11	3,191	1,596
BLOOMINGTON	3	3,716	1,238.7	18%	9%	57%	53.2%	9%	41%	1,163	117	4,996	1,665
BOSTON	6	6,366	1,061.0	40%	18%	70%	31.7%	18%	49%	1,778	726	8,870	1,478
BUFFALO	1	2,380	2,380.0	13%	5%	68%	4.7%	15%	49%	107	145	2,632	2,632
CHARLOTTE	3	3,273	1,091.0	36%	17%	67%	0.7%	33%	75%	1,133	222	4,628	1,543
CHICAGO	9	11,468	1,274.2	16%	7%	42%	34.4%	6%	19%	2,233	496	14,197	1,577
CLEVELAND	3	4,733	1,577.7	19%	13%	45%	54.0%	7%	21%	1,073	204	6,010	2,003
DALLAS	5	8,462	1,692.4	12%	3%	37%	60.7%	6%	17%	748	343	9,553	1,911
DENVER	6	6,865	1,144.2	20%	6%	47%	40.1%	10%	19%	2,772	288	9,925	1,654
DETROIT	3	3,812	1,270.7	19%	7%	49%	49.7%	9%	21%	1,727	174	5,713	1,904
EAST MESA	2	1,198	599.0	18%	10%	39%	77.4%	19%	27%	636	12	1,846	923
EL CENTRO SPC		1,648		20%	10%	35%	81.6%	20%	24%	639	24	2,311	
EL PASO	2	6,408	3,204.0	11%	2%	30%	69.4%	7%	15%	820	164	7,392	3,696
EL PASO SPC	3	4,082	1,360.7	8%	2%	44%	76.3%	9%	33%	1,470	37	5,589	1,863
ELIZABETH	2	1,633	816.5	17%	10%	49%	50.6%	9%	15%	1,103	63	2,799	1,400
ELOY	4	8,050	2,012.5	11%	3%	33%	65.3%	14%	15%	3,892	38	11,980	2,995
FISHKILL	0.5	287	574.0	18%	1%	27%	99.3%	18%	27%	0	17	304	608
FLORENCE	3	5,619	1,873.0	8%	3%	35%	69.7%	11%	18%	2,515	40	8,174	2,725
GUAYNABO	2	1,133	566.5	51%	13%	68%	10.7%	9%	49%	119	128	1,380	690
HARLINGEN	4	9,797	2,449.3	12%	6%	59%	17.8%	15%	42%	2,625	525	12,947	3,237

	<u>Completed Proceedings</u>						<u>Detained Proceedings</u>			<u>Other Matters</u>		<u>All Matters</u>	
	IJs	Total	Per judge	w/ app relief	w/ asy app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
HARTFORD	2	1,592	796.0	38%	11%	67%	22.7%	13%	24%	1	127	1,720	860
HONOLULU	2	967	483.5	46%	26%	70%	30.6%	11%	33%	269	47	1,283	642
HOUSTON	5	4,135	827.0	36%	8%	69%	6.6%	12%	63%	0	364	4,499	900
HOUSTON SPC	3	11,067	3,689.0	6%	2%	34%	80.3%	7%	19%	3,299	43	14,409	4,803
IMPERIAL	1	943	943.0	8%	2%	36%	62.5%	1%	12%	5	14	962	962
KANSAS CITY	2	4,059	2,029.5	17%	7%	46%	29.1%	6%	40%	1,129	145	5,333	2,667
KROME	5	7,345	1,469.0	22%	8%	44%	74.1%	24%	32%	4,432	159	11,936	2,387
LANCASTER	3	5,854	1,951.3	10%	5%	36%	66.2%	13%	20%	3,736	38	9,628	3,209
LAS VEGAS	2	2,800	1,400.0	25%	12%	50%	46.1%	9%	20%	360	151	3,311	1,656
LOS ANGELES	31	21,190	683.5	44%	32%	68%	25.8%	18%	33%	3,061	2,180	26,431	853
LOS FRESNOS (Pr. Ia ¹)	2	3,653	1,826.5	22%	14%	50%	54.4%	25%	27%	3,035	52	6,740	3,370
MEMPHIS	2	2,907	1,453.5	26%	16%	60%	1.1%	3%	55%	36	169	3,112	1,556
MIAMI	15	10,030	668.7	38%	18%	69%	5.7%	11%	12%	2	1,212	11,244	750
NEW ORLEANS	1	893	893.0	31%	12%	68%	3.9%	6%	69%	0	63	966	966
NEW YORK CITY	29	18,382	633.9	66%	50%	88%	0.8%	15%	78%	0	1,919	20,301	700
NEWARK	6	5,557	926.2	31%	16%	62%	33.2%	19%	25%	1,643	760	7,960	1,327
OAKDALE	3	12,359	4,119.7	3%	1%	26%	78.7%	3%	13%	5,595	54	18,008	6,003
OMAHA	2	4,151	2,075.5	19%	14%	61%	41.1%	13%	31%	1,399	200	5,750	2,875
ORLANDO	6	4,562	760.3	47%	30%	66%	10.5%	14%	20%	277	452	5,291	882
PEARSALL	2	6,612	3,306.0	8%	3%	40%	64.8%	9%	18%	3,451	21	10,064	5,032
PHILADELPHIA	4	2,617	654.3	41%	23%	78%	2.6%	21%	71%	0	244	2,861	715
PHOENIX	3	3,340	1,113.3	28%	9%	54%	16.4%	5%	15%	0	207	3,547	1,182
PORTLAND	2	1,226	613.0	35%	20%	55%	10.8%	14%	26%	43	80	1,349	675
SAIPAN		136		16%	0%	33%	9.6%	15%	46%	10	14	160	
SALT LAKE CITY	2	2,568	1,284.0	14%	6%	34%	71.1%	5%	18%	237	47	2,852	1,426

	<u>Completed Proceedings</u>						<u>Detained Proceedings</u>			<u>Other Matters</u>		<u>All Matters</u>	
	IJs	Total	Per judge	w/ app relief	w/ asy app	rep'd	% of all	w/ app relief	rep'd	Bonds	Motions	Total	Per judge
SAN ANTONIO	7	8,529	1,218.4	10%	4%	49%	16.0%	10%	34%	639	579	9,747	1,392
SAN DIEGO	6	3,021	503.5	34%	15%	72%	32.1%	35%	54%	132	239	3,392	565
SAN FRANCISCO	18	9,172	509.6	42%	27%	65%	23.8%	20%	34%	1,833	583	11,588	644
SEATTLE	3	3,080	1,026.7	45%	29%	73%	4.1%	23%	38%	0	173	3,253	1,084
STEWART	3	11,342	3,780.7	2%	0%	11%	94.3%	1%	7%	1,716	26	13,064	4,355
TACOMA	2	6,277	3,138.5	12%	6%	34%	64.3%	15%	12%	3,672	57	10,006	5,003
TUCSON	2	3,688	1,844.0	3%	1%	7%	92.3%	0%	1%	0	19	3,707	1,854
ULSTER	0.5	527	1,054.0	17%	2%	21%	98.7%	17%	20%	0	13	540	1,080
VARICK	3	2,319	773.0	42%	11%	69%	56.1%	29%	50%	1,397	38	3,754	1,251
YORK	2	5,389	2,694.5	11%	5%	33%	79.6%	12%	23%	2,515	66	7,970	3,985
TOTAL	265	303,287	1,148.8	24%	13%	51%	42.4%	11%	22%	75,258	15,762	394,307	1,494

* Number of judges counted from listing on EOIR website, list dated April 2012. Total includes four judges in the headquarters video court.

Caseload numbers/percentages drawn from, or computed from data drawn from, EOIR Statistical Year Book, Fiscal Year 2011 and data provided by EOIR's Office of Planning, Analysis, and Technology (completions with representation and detained completions with applications for relief).

APPENDIX 4

STIPULATED REMOVAL ORDERS (SRO) AS % OF COMPLETED PROCEEDINGS—
FY 2009-2011

COURT	2009		2010		2011	
	SROs	% of all compl'ns	SROs	% of all compl'ns	SROs	% of all compl'ns
ARLINGTON	904	14%	582	8%	499	7%
ATLANTA	327	5%	373	6%	68	1%
BALTIMORE	1	0%	57	1%	146	3%
BATAVIA SPC	16	1%	58	3%	62	3%
BLOOMINGTON	1,127	24%	737	15%	684	18%
BOSTON	13	<1%	18	<1%		
CHARLOTTE,	268	9%	51	1%	3	<1%
CHICAGO	2,583	25%	2,199	21%	1,349	12%
CLEVELAND	3,005	40%	1,824	34%	1,506	32%
DALLAS	2,316	30%	2,743	31%	1,788	21%
DENVER	1,387	12%	878	8%	200	3%
DETROIT	694	12%	577	10%	232	6%
EL CENTRO SPC	16	1%	13	1%		
EL PASO SPC	1,153	19%	840	18%	295	18%
EL PASO	118	2%	479	6%	400	6%
ELIZABETH	692	30%	527	20%	123	8%
ELOY	5,092	39%	2,547	26%	3	<1%
HARLINGEN	2,381	18%	1,210	11%	213	2%
HARTFORD					4	<1%
HONOLULU	14	1%	11	1%	4	<1%
HOUSTON SPC	3	<1%	7	<1%	256	2%
IMPERIAL	36	3%	43	4%		
KANSAS CITY	1,126	32%	772	15%	683	17%
KROME	4,262	35%	2,185	18%	643	9%
LANCASTER	1,376	17%	844	11%	449	8%
LAS VEGAS,	239	6%	1,516	38%	494	18%
LOS ANGELES					28	<1%
LOS FRESNOS	256	8%	652	20%	432	12%
MIAMI, FLORIDA	2	<1%	1	<1%	6	<1%
NEWARK					1	<1%
NEW ORLEANS	1	<1%	114	11%	3	<1%
OMAHA,	121	2%	976	20%	640	15%
ORLANDO	51	1%	26	<1%	61	1%
PEARSALL					13	<1%
SALT LAKE CITY	1,724	52%	1,401	46%	735	29%
SAN ANTONIO	21	<1%	52	<1%	1	<1%

SAN DIEGO	1,161	24%	67	2%		
SAN FRANCISCO	759	8%	1,750	16%	157	2%
STEWART	518	7%	244	3%	2,630	23%
TACOMA	2,441	25%	1,186	13%	6	<1%
VARICK	1	<1%	12	1%	23	1%
YORK	328	4%	125	2%	6	<1%
TOTAL	36,533	14%	27,706	11%	14,846	7%

Based on data in EOIR Statistical Year Books for respective years and data provided by OPAT. Data are for 42 courts. Some courts reported no SROs for all three years or only for selected years.

For 2009, the range is <1% to 52% (Salt Lake City)

For 2010, the range is <1% to 46% (Salt Lake City)

For 2011, the range is <1% to 32% (Cleveland)

APPENDIX 5

RESPONSES TO “MODEL COURT” AND “IMPROVE YOUR COURT” SURVEY
QUESTIONS

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

Responding to survey: 181

Responding to this question: 158

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

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

Appendix 5 con’t. next page

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

Responding to survey: 181

Responding to this question: 158

RESPONSES TO “IMPROVE YOUR COURT” QUESTION

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

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

APPENDIX 6

This is a page from the 2010 Federal Court Management Statistics, available at
<http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Jun.pl>

U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

			12-MONTH PERIOD ENDING JUNE 30 [2011]								
TEXAS EASTERN			2011	2010	2009	2008	2007	2006	Numerical Standing		
OVERALL CASELOAD STATISTICS	Filings*		3,981	3,578	3,500	3,641	3,889	3,571	U.S.	Circuit	
	Terminations		3,480	3,298	3,535	3,671	3,536	3,560			
	Pending		4,070	3,553	3,280	3,321	3,391	3,043			
	% Change in Total Filings	Over Last Year			11.3					19	1
		Over Earlier Years				13.7	9.3	2.4	11.5	34	3
Number of Judgeships			8	8	8	8	8	8			
Vacant Judgeship Months**			12.0	5.9	.0	.0	.0	.0			
ACTIONS PER JUDGESHIP	FILINGS	Total	497	448	437	455	486	447	34	3	
		Civil	424	376	369	376	403	368	23	1	
		Criminal Felony	73	71	68	79	83	79	39	3	
		Supervised Release Hearings**	0	1	0	0	0	0	-	-	
	Pending Cases			509	444	410	415	424	380	20	3
	Weighted Filings**			896	613	568	650	662	528	3	1
	Terminations			435	412	442	459	442	445	48	6
	Trials Completed			17	21	23	23	17	21	65	8
MEDIAN TIMES (months)	From Filing to Disposition	Criminal Felony	11.4	9.7	9.9	9.4	8.8	9.2	73	8	
		Civil**	8.1	10.0	10.4	9.5	9.7	9.2	33	4	
	From Filing to Trial** (Civil Only)			23.2	22.5	26.6	17.8	18.0	15.0	33	6
OTHER	Civil Cases Over 3 Years Old**	Number	190	161	146	82	114	93			
		Percentage	5.6	5.4	5.3	3.0	4.0	3.8	49	5	
	Average Number of Felony Defendants Filed Per Case			1.9	2.1	1.9	2.0	1.7	1.6		

**12-MONTH PERIOD ENDING
JUNE 30 [2011]**

TEXAS EASTERN			2011	2010	2009	2008	2007	2006	Numerical Standing	
	Jurors	Avg. Present for Jury Selection	37.39	43.68	38.68	36.14	39.00	36.58		
		Percent Not Selected or Challenged	31.5	40.6	35.1	38.3	34.4	29.5		

APPENDIX 7

U.S. Department of Justice
Executive Office for Immigration Review

**Record of Master Calendar Pre-Trial
Appearance and Order**

Name: _____ Date: _____

File No.: _____ Best Language: _____

Presiding Judge: HON. _____

Government's Attorney: _____ Respondent's Attorney: _____

Factual Allegations No.: _____ **ADMITTED** _____ **DENIED**

Removability: **CONCEDED** **CONTESTED**

The respondent is not interested in INA § 240B(a) relief and will seek the following: _____

Country of choice for removal purposes: _____

The parties acknowledge receipt of a copy of this record and order and have no objections to the contents herein.

Government's Attorney *Respondent* *Respondent's Attorney*

ORDER

The Court directs _____ as the country designated for removal purposes.

All relief applications and documents in support thereof, including proof of fee payment and biometrics registration, must be filed no later than _____, or by such date as may be extended by the Immigration Judge. Failure to timely file the aforementioned documents will result in the conclusion that such applications are abandoned.

Any pretrial motions, legal briefs, and/or pre-hearing statements must be filed by: the Respondent, the Government, or Both Parties no later than _____, and the opposing party's statement must be filed by _____.

All filings and submissions must comply with this Order and with the Immigration Court Practice Manual. The Practice Manual is available at http://www.usdoj.gov/eoir/vll/OCIIPracManual/ocij_page1.htm.

Individual Calendar Trial Date: _____ at _____ a.m./p.m.

Master Calendar re-set Date: _____ at _____ a.m./p.m.

Further Orders, requirements, or issues of note: _____

_____.

So ordered _____
Immigration Judge

APPENDIX 8

The Utah state court performance measures page *available at* <http://www.utcourts.gov/courtools/> presents aggregate and in some cases comparative performance measures for the states courts. One of the nine performance measures is “Clearance Rate,” defined as “The number of court cases being completed or disposed of as a percentage of court cases being filed.” Below is a recreated excerpt from the clearance rates report for courts in two of the states eight districts, and the statewide figures.

	Criminal	Misd DUI	Misd	Other	State Felony	Domestic	General Civil	Probate	Prop Rights	Torts	Traffic/ Parking
District 1	95%	100%	105%	87%	110%	93%	105%	86%	96%	67%	105%
Brigham City	126%	---	---	100%	162%	103%	117%	130%	83%	88%	250%
Logan	91%	100%	110%	86%	100%	88%	100%	75%	104%	61%	105%
Randolph	70%	---	0%	76%	60%	33%	86%	0%	200%	0%	78%
District 2	94%	214%	106%	101%	91%	92%	102%	89%	85%	84%	96%
Bountiful	128%	233%	133%	123%	---	---	---	---	---	---	130%
Farmington	87% --	167%	81%	86%	96%	98%	88%	96%	86%	200%	
Layton	101%	0%	69%	105%	---	---	---	---	---	---	86%
Morgan	93%	---	---	63%	160%	39%	33%	13%	100%	---	100%
Ogden	89%	---	109%	89%	94%	91%	101%	93%	75%	80%	275%
Statewide	106%	122%	109%	112%	104%	93%	119%	91%	94%	102 %	109%

APPENDIX 9

Below are a table and explanatory text exactly as provided by ICE to the authors on June 5, 2012.

ERO LESA Statistical Tracking Unit

ACUS Study of Immigration Removals - FY11 and FY10 Removals

Case Category	FY2011 Removals	FY2010 Removals
[8F] Expedited Removal	55,464	34,998
[11] Administrative Deportation / Removal	11,721	12,758
[16] Reinstated Final Order	119,806	121,008
All Others	209,915	224,098
Total Removals	396,906	392,862

FY2011 and FY2010 data is historical and remains static.

Removals include Returns. Returns include Voluntary Returns, Voluntary Departures and Withdrawals under Docket Control.

Starting in FY2009, ICE began to "lock" removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE will include the removals and returns confirmed after October 5th into the next fiscal year. The number of removals in FY2009, excluding the "lag" from FY2008, was 387,790. The number of removals in FY2010, excluding the "lag" from FY2009, was 373,440. This number does not include 76,732 expedited removal cases which ICE closed on behalf of CBP in FY2010. Of those 76,732, 33,900 cases resulted from a joint CBP/ICE operation in Arizona. ICE spent \$1,155,260 on those 33,900 cases. The number of removals in FY2011, excluding the "lag" from FY2010, was 385,145.

FY Data Lag/Case Closure Lag is defined as the physical removal of an alien occurring in a given month; however, the case is not closed in EARM until a subsequent FY after the data is locked. Since the data from the previous FY is locked, the removal is recorded in the month the case was closed and reported in the next FY Removals. This will result in a higher number of recorded removals in an FY than actual departures.