

# ORDER IN THE COURT: COMMONSENSE SOLUTIONS TO IMPROVE EFFICIENCY AND FAIRNESS IN THE IMMIGRATION COURT

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October 2014

*[A]n immigrant's right to have her case heard should not be sacrificed because of the [immigration] J[udge]'s heavy caseload.*  
—Qi Cui v. Mukasey<sup>1</sup>

*I urge you always to bear in mind the significance of your cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve.*  
—Former U.S. Attorney General Alberto Gonzales<sup>2</sup>

## **I. EXECUTIVE SUMMARY**

The immigration court system is in crisis.<sup>3</sup> Immigration judges with insufficient resources are forced to cope with an enormous and increasing backlog. *Bona fide* asylum seekers and other noncitizens with viable claims wait years to have their cases heard, and then hearings often are rushed and flawed. With the recently launched “rocket dockets” expediting cases of Central American children,<sup>4</sup> many hearings will be delayed further and grow even more rushed and flawed. But unlike the humanitarian crisis driving these children to seek safety in the United States or the crisis of long overdue comprehensive immigration reform, the procedural crisis of the immigration courts can be readily addressed.

With basic procedural reforms, the Department of Justice’s (DOJ’s) Executive Office for Immigration Review (EOIR), which oversees the immigration courts, can increase the system’s efficiency and provide a higher quality of adjudication at little or no additional cost to taxpayers. These reforms would reduce unnecessary hearing continuances and help administrative court judges to make more deliberate and informed rulings, thereby avoiding costly federal appeals. These recommendations draw on exhaustive research of the immigration court and other court systems and on the experience of attorneys at Heartland Alliance’s National Immigrant Justice Center (NIJC), who practice extensively in the immigration courts. The findings complement those of other recent reports on immigration adjudications<sup>5</sup> by focusing on narrow improvements to the immigration court system that the DOJ and the Department of Homeland Security (DHS) can implement without substantial additional resources.<sup>6</sup>

### **A. Summary of Recommendations**

These recommendations cannot substitute for congressional action to reform the immigration system.<sup>7</sup> But even a more rational legislative framework for immigration matters would not fix the immigration court system without procedural reforms to advance fairness and efficiency.

These recommendations address all aspects of the immigration court system: DOJ’s oversight through EOIR, inter-agency coordination, the Board of Immigration Appeals (Board), and immigration court. Only by addressing all levels of the immigration court system, will the most fair and efficient adjudication process be available.

<b>Recommendation 1: Increase Efficiency of EOIR case management.</b>
1.A. Create an online case management system.
1.B. Require pretrial communication, negotiations, and information-sharing between opposing counsel.
1.C. Improve handling of preliminary matters.
1.D. Either grant EOIR control over work authorization matters, or eliminate EOIR’s responsibility for the work authorization clock.
1.E. Allow immigration judges to order transcripts prior to issuing written opinions, to facilitate more accurate and better-reasoned decision making.
1.F. Expand immigration judges’ authority to sanction DHS attorneys.
<b>Recommendation 2: Create alternative dispute resolution structure through inter-agency coordination.</b>
2.A. Authorize immigration judges, upon agreement of both parties, to terminate cases to permit applications for asylum to go forward with the Asylum Office.
2.B. Permit immigration judges to refer domestic violence matters to expert adjudicators at the U.S. Citizenship and Immigration Services’ (USCIS) Vermont Service Center.
2.C. Adjudicate adjustment of status applications with increased efficiency through better coordination with USCIS.
<b>Recommendation 3: Increase efficiency in the immigration court through access to counsel and legal information.</b>
3.A. Grant immigration judges authority to appoint counsel when it is required for the fairness of proceedings.
3.B. Allow attorneys to make limited appearances.
3.C. Institute a “help desk” pilot project for nondetained individuals.
3.D. Create a separate <i>pro se</i> docket at all immigration courts.
3.E. Facilitate legal information presentations for non-detained individuals.
<b>Recommendation 4: Reform the Board of Immigration Appeals.</b>
4.A. Create an online docketing and case management system.
4.B. Create a mediation center at the Board to promote settlement.
4.C. Authorize an appellate commissioner or chief clerk to adjudicate procedural motions.
4.D. Review all cases for potential appointment of counsel, likely through expansion of the BIA Pro Bono Project.
4.E. Facilitate greater public and <i>amicus</i> involvement in the Board’s decision making by publicizing oral arguments and cases considered for publication, publishing more decisions annually, and releasing all unpublished Board decisions to the public.
4.F. Eliminate single-member merits opinions and reform the Board’s organization to give Board members greater autonomy and ownership.
4.G. Streamline and reform bond appeals to minimize waste.

Implementing these recommendations would improve systemic fairness and justice, increase accuracy and efficiency of judicial decision making, restore confidence in the immigration courts, and allow more effective implementation of future immigration-focused legislative reforms.

## B. Methodology

These findings and recommendations draw on NIJC’s three decades of experience practicing in immigration courts, reviews of various studies of the immigration adjudication system,<sup>8</sup> and feedback from participants at a Federal Bar Association panel on immigration court reform.<sup>9</sup> The authors also interviewed other immigration experts, legal service providers, and *pro bono* attorneys.<sup>10</sup>

In addition to a focused study of the immigration court system, the authors conducted research on comparable legal aid and reform models in other civil judicial systems.<sup>11</sup> In particular, the authors explored reforms of the federal court system in recent decades as a model for immigration court reform.

### The Civil Justice Reform Act as a Model for Immigration Court Reform

Congress enacted the Civil Justice Reform Act of 1990 (CJRA)<sup>12</sup> “to implement procedural changes in order to minimize the excessive costs and delay associated with litigating civil cases in the Federal court system.”<sup>13</sup>

The CJRA uses six case management goals “to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques”:<sup>14</sup>

1. Differential management of cases “that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case”;
2. Early and ongoing judicial control of pretrial processes, including deadlines for motions (and a framework for deciding on motions) and “early, firm trial dates”
3. For complex cases, “careful and deliberate monitoring” through case-monitoring conferences, early identification of issues in dispute, and where appropriate, staged resolution or bifurcation of the issues
4. Cost-effective discovery through cooperation and voluntary exchanges of information
5. Good-faith efforts to resolve discovery disputes before filing motions; and
6. Diversion of cases, when appropriate, to alternative dispute resolution programs<sup>15</sup>

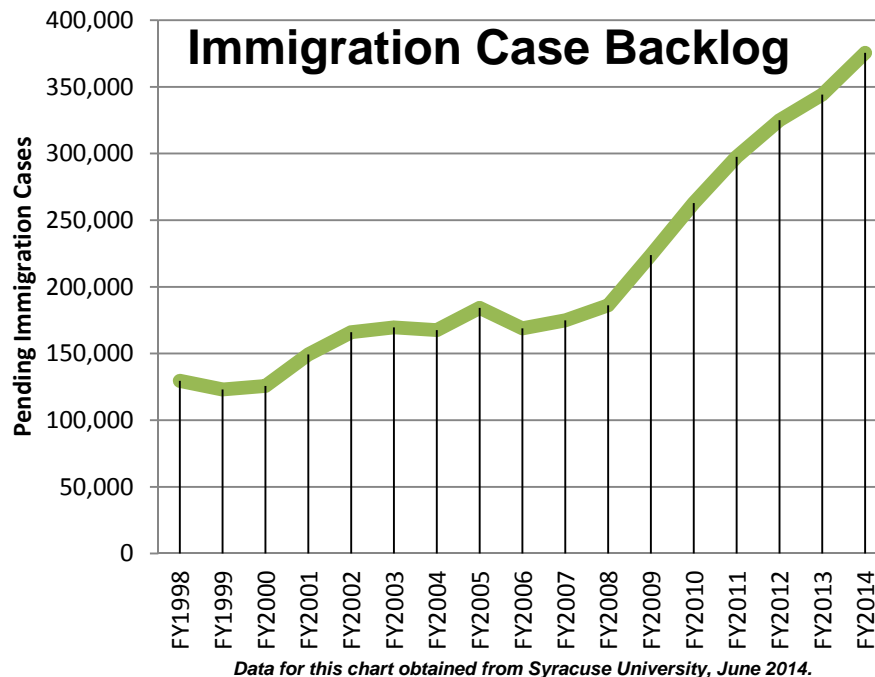
An evaluation of the CJRA pilot program found that early judicial case management reduced the time to disposition of cases, with no overall increase in costs.<sup>16</sup>

The CJRA provides useful guideposts for immigration court reform and informs our recommendations. Immigration courts suffer from the same “high costs, long delays and insufficient judicial resources” that Congress found problematic in the federal court system in 1990.<sup>17</sup> The immigration courts now, like the federal courts then, face the “increasing volume and complexity of civil ... cases [that] imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel.”<sup>18</sup>

## II. BACKGROUND: PROBLEMS IN THE CURRENT IMMIGRATION COURT SYSTEM

### A. Crisis-level Court Backlog

The backlog of cases before the immigration courts has grown continually over the past decade, especially since 2006.<sup>19</sup> As of October 2014, noncitizens in Chicago are scheduled for removal hearings in 2019.<sup>20</sup> At the end of FY 2010, EOIR’s backlog totaled about 300,000.<sup>21</sup> In just the last four years, the backlog grew a total of 42.9 percent, at an average of 9.3 percent per year. At last count, the backlog totaled 375,503 cases.<sup>22</sup> On average, noncitizens now wait more than 18 months for adjudication of their cases.<sup>23</sup>



Why is the backlog growing? Congress is spending more to apprehend noncitizens than to adjudicate their rights. It has failed to provide EOIR with adequate appropriations<sup>24</sup> while continually increasing funding for the enforcement arms of DHS, U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).<sup>25</sup> Clearly, “resources for the Immigration Courts have not kept pace with the meteoric rise in allocation” for immigration enforcement agencies.<sup>26</sup> The number of newly filed immigration cases has increased substantially, while the number of completed cases has continued to decline.<sup>27</sup>

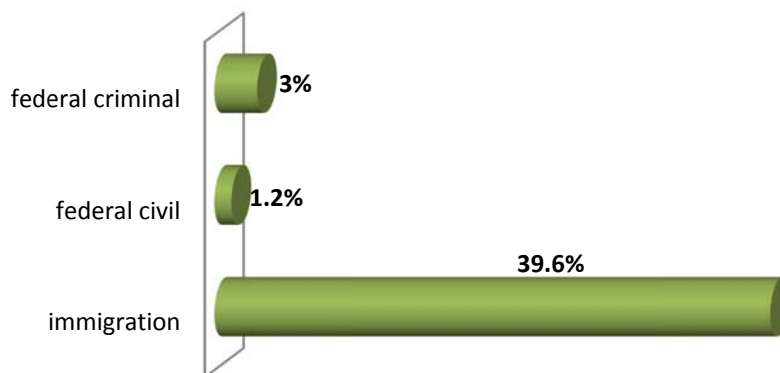
The Obama administration promised to address the backlog by authorizing trial attorneys to focus on “high priority” cases and exercise their discretion to close other less pressing cases.<sup>28</sup> So far, this has failed to reduce the caseload. Following the administration’s first announcement on the subject of prosecutorial discretion in June 2011, it released memoranda narrowing the types of cases that could be designated as low priority.<sup>29</sup> While

a substantial number of cases were designated for prosecutorial discretion,<sup>30</sup> these cases received only administrative closure,<sup>31</sup> only temporarily removing them from the court docket. Even a broader application of prosecutorial discretion without the additional reforms suggested here would be inadequate to reduce immigration court caseloads, due to the imbalance between the number of judges and the number of noncitizens placed in removal proceedings.<sup>32</sup>

A second factor contributing to the backlog is ICE's internal management of prosecutions. Generally, during the years-long intervals between the start and disposition of most court cases, ICE does not assign the cases to a particular ICE attorney, so no individual attorney manages the case from start to finish.<sup>33</sup> Therefore, no ICE attorney has the authority or incentive to conserve time and resources by narrowing issues or stipulating to matters early in the case. The cost of additional court hearings falls primarily on the immigration courts and noncitizens, not on ICE attorneys who are in court regardless.<sup>34</sup>

The legal framework guiding immigration proceedings fails to provide incentives for early case resolution. Immigration cases go to trial at a much higher rate than other cases.

## Minimum Percentage of Cases that Go to Trial



*Numbers from Executive Office for Immigration Review, 2014 . For more information, see footnote 36.*

While government statistics do not permit precise knowledge of how many cases go to trial in the immigration courts, it appears that between 39.6 and 63.5 percent of immigration cases go to trial.<sup>35</sup> This is substantially more than the 1.2 percent of federal civil cases and three percent of federal criminal cases which go to trial in the federal system.<sup>36</sup>

The substantive law does not encourage settlement. For example, the Immigration and Nationality Act (INA) provides no discernible plea bargain-like benefits<sup>37</sup> for noncitizens (even those ineligible for any other form of relief) to agree to depart the country without exercising their right to challenge removal. Under current law, voluntary departure is

often a worse choice than going to trial, even for respondents with little chance of winning relief.<sup>38</sup>

Although the legal framework of immigration law is beyond the ability of the courts to control, EOIR has authority to establish procedures that encourage attorneys to settle or stipulate to a particular case disposition, which would significantly expedite case resolution. Almost no such pretrial procedures exist.<sup>39</sup> Those pretrial procedures that do exist on paper are commonly disregarded or required only of counsel *for* the noncitizen, not counsel for ICE.<sup>40</sup>

The result of this backlog: a significant number of immigration cases that could be resolved prior to a trial are not.<sup>41</sup> Some of these trials may be abbreviated processes, where relief or termination is not contested. But, lacking any pre-trial mechanism for resolution, the parties and the court generally must retain a trial date and prepare as if a full trial will proceed.

## B. Unrealistic Dockets for Immigration Judges

A comparison with other administrative law judges illustrates the strain under which immigration judges work:

Court	Avg. case receipts per year per judge	Avg. dispositive hearings per year	Avg. backlog per year per judge
<i>Immigration</i>	1,094 <sup>42</sup>	1,023 <sup>43</sup>	1,413 <sup>44</sup>
<i>Veterans</i>	775 <sup>45</sup>	692 <sup>46</sup>	718 <sup>47</sup>
<i>Social Security</i>	653 <sup>48</sup>	631 <sup>49</sup>	628 <sup>50</sup>

Immigration judges must decide more cases than other judges with significantly fewer resources. Unlike federal district courts, where each federal judge has an average of three law clerks, immigration courts provide only one law clerk, divided between four immigration judges, to support an average of 4,852 cases.<sup>51</sup> In some courts, the ratio of clerks to judges is even lower.<sup>52</sup>

Compounding the backlog is the complexity of many cases. Courts have described the labyrinthine immigration law — where cases frequently turn on uncodified rules and arcane procedures — as “second only to the Internal Revenue Code in complexity.”<sup>53</sup> Even where the law is clear, immigration cases can be factually complex, perhaps turning on witness credibility — a determination made more difficult by language and cultural barriers — difficulties in corroborating witness accounts, and a trial system that enables “trial by ambush.”<sup>54</sup> Yet immigration judges must decide all these cases, no matter their complexity, with the same absence of resources.<sup>55</sup>

The result is that cases in which relief ultimately is granted take an average of 866 days, well over two years, to move through the courts.<sup>56</sup> The unrelenting pace of the court calendar, coupled with the potentially life-and-death result that a deportation sentence imposes, contributes to stress and burnout on the bench.<sup>57</sup>

### **C. Unfair Burdens on Noncitizens**

For individuals in ICE custody, court delays can mean prolonged detention in remote facilities, with limited access to counsel or to medical treatment, while their cases are adjudicated.<sup>58</sup> In detention, vulnerable noncitizens, including asylum seekers and victims of crime, are re-traumatized. Many are held in solitary confinement “for their own protection,” sometimes for more than six months at a time.<sup>59</sup>

For both detained and non-detained noncitizens, court delays cause personal and family stress due to long periods of separation and financial insecurity. Many noncitizens are not allowed to work while their cases are pending.<sup>60</sup> They risk losing their housing and face great difficulty providing for their families.<sup>61</sup> Some *bona fide* asylum seekers and others eligible for relief abandon their cases, and return to countries where they face persecution.<sup>62</sup>

Court delays also affect noncitizens’ ability to secure representation. Many *pro bono* attorneys are reluctant to accept a case when there is a good chance that a client’s hearing will be years away.<sup>63</sup> Frequent postponements with little notice increase costs by requiring attorneys to prepare for the same hearing several times, often paying for experts and interpreters each time. It is difficult for attorneys to gauge if they have the resources to handle a case given the uncertainties of immigration court timelines.

### **D. Short-Cut Reforms Create Bigger Problems**

In the absence of effective reforms, policy makers may be tempted to look for shortcuts to ease backlogs, but shortcuts will not resolve the problems. For example, in the 2000s, a short-term fix for backlogs at the Board resulted in a logistical nightmare.<sup>64</sup> The “fix” implemented by DOJ was not to increase agency resources or to create incentives that would reduce filings, but to “streamline” adjudication by expanding the use of summary procedures, especially single-Board-member “Affirmances Without Opinion” (AWOs).<sup>65</sup> Board members could spend only an average of 10 minutes per case.<sup>66</sup> The likelihood of a noncitizen winning her appeal to the Board plummeted.<sup>67</sup> These summary orders created a massive increase in appeals to the federal courts, which reversed Board decisions in unprecedented numbers.<sup>68</sup> The Board eventually receded from the frequent use of AWOs, apparently in response to federal court criticism.<sup>69</sup> Because it costs the government at least eight times more to litigate a case through a federal court of appeals than to handle a case that terminates at the Board,<sup>70</sup> it is quite probable that the “streamlining” reforms actually cost the government (and taxpayers) money even as they reduced access to justice.



### III. RECOMMENDATIONS

These recommendations would increase efficiency and fairness while respecting individual rights and maintaining the integrity of the judicial process.

#### **Recommendation 1: Increase efficiency of EOIR case management.**

The procedural improvements in this section would most directly affect represented cases. However, more efficient immigration court procedures would reduce the costs associated with representing noncitizens and thus would increase availability of legal counsel for all noncitizens in removal proceedings.<sup>71</sup>

##### **1.A. Create an online case management system.**

One way to improve the efficiency of immigration courts' docket management is to implement an electronic case management and filing system for pleadings, orders, and other court documentation. Congress mandates that federal courts maintain information electronically and provide automated case information to the public, which is accomplished through a system called Public Access to Court Electronic Records (PACER).<sup>72</sup> Many states and counties also use electronic case management.<sup>73</sup> These systems reduce the need for handling large physical case files, reduce storage costs, and ensure all parties receive documents and notices of scheduling changes. Further, the system tracks the progress of a case, allowing parties to know case status at any time.<sup>74</sup> EOIR has requested funding to create an electronic case management system, but its reality is far from certain.<sup>75</sup>

##### **1.B. Require pretrial communication, negotiations, and information-sharing between opposing counsel.**

As noted above, immigration cases go to trial at a remarkably high rate compared with other justice systems.<sup>76</sup> Most U.S. judicial systems have procedures to encourage pretrial settlement of cases or to narrow the factual and legal issues presented at trial.<sup>77</sup> Only 1.6 percent of civil cases reached trial in 2013 in the federal district court system;<sup>78</sup> most civil cases are resolved even before the pretrial stage.<sup>79</sup> Effective case resolution procedures reduce burdens on the court system and help "secure a just, speedy, and inexpensive determination of the issues."<sup>80</sup> The current immigration court system lacks an ethos and infrastructure to promote case resolution.

EOIR could reduce the number or scope of trials if it required ICE and respondents' attorneys to communicate with each other and the court prior to merits hearings, to reach stipulations and to narrow and focus the proceedings. Much of the success of pretrial resolution rests on communication between opposing counsel.<sup>81</sup> Many courts require good-faith efforts to resolve disputes before requesting judicial involvement.<sup>82</sup> In the civil context, guided by the CJRA, courts generally impose disclosure requirements.<sup>83</sup> The Federal Rules of Civil Procedure mandate initial disclosures of certain items by both parties prior to any request,<sup>84</sup> and require the parties to confer "as soon as practicable."<sup>85</sup>

Local and state court rules provide for opposing counsel to meet prior to trial to stipulate to issues of law and fact, narrow issues to those actually in controversy,<sup>86</sup> and comply in good faith with rules designed to focus the trial.<sup>87</sup>

Similar rules do not apply to immigration courts. Pretrial resolution of cases or narrowing of issues is rare, even when it is in both parties' interests. For example, ICE trial attorneys rarely provide written responses to respondents' relief applications.<sup>88</sup> Even where immigration judges set filing deadlines, ICE attorneys may file documents and arguments late, or not at all.<sup>89</sup> As a result, ICE attorneys rarely stipulate any legal or factual issues prior to the trial.<sup>90</sup> Both respondents and immigration judges are left in the dark as to what issues the government plans to concede or challenge.

Trials are rarely avoided or narrowed by stipulation, and the immigration judge must assume until the trial day that the case will go to trial on all possible issues, requiring her to budget sufficient time to complete the trial. Under the CJRA and the Federal Rules of Civil Procedure, this does not occur in federal civil matters.<sup>91</sup>

The following steps could help make pretrial case resolution a practical reality.

**First, ICE should assign a specific attorney or a small team to handle each case from start to finish.** ICE does not generally assign a given case to any attorney or attorney team.<sup>92</sup> Without a designated attorney, negotiations are difficult or impossible, incentives for government counsel to focus on cases months or years before trial are reduced, and stipulations to particular issues are discouraged. A system which seeks to narrow issues and settle cases would require pretrial discussions among attorneys with authority to make stipulations and admissions, such as under the Federal Rules.<sup>93</sup> ICE should give responsibility over each case to a specific attorney or small group of attorneys, and should notify the immigration judge and opposing counsel of the identity of its counsel. ICE attorneys should file appearances in immigration court, just as government attorneys file appearances in federal district court.

**Second, EOIR should require opposing counsel to “meet and confer” prior to trial.** This practice provides three benefits: (a) the parties could stipulate to issues of fact and law in cases where the stipulation is reasonably possible; (b) the parties could discuss impending pretrial motions, resulting in some motions being unopposed and other motions being avoided entirely; and (c) it would help clarify the issues for trial, increasing the chance that those arguments could be addressed as scheduled, without the need for continuances in response to unexpected arguments.<sup>94</sup>

**Third, EOIR should urge ICE attorneys to flag matters likely to be contested and issues not in dispute, and both parties should be required to address these issues well before hearings, in documents filed with the court.** Federal district courts commonly require joint pretrial statements,<sup>95</sup> and the federal rule sets forth a pretrial practice to facilitate handling of the case.<sup>96</sup> Immigration courts could adopt prescribed pretrial templates for the most common forms of relief, in order to narrow and clarify the questions at issue in cases.<sup>97</sup> To obtain full cooperation of the parties, the court system

should establish clear and mandatory consequences for either party's failure to file pretrial statements in a timely manner. The Immigration Court Practice Manual (ICPM)<sup>98</sup> should be clarified to state that untimely filing of required pretrial statements will forfeit arguments not raised prior to the hearings (subject to the normal rules by which forfeiture can be forgiven, and the possibility of a motion to reopen). If ICE forfeits arguments against relief eligibility, immigration judges should be authorized to grant relief without a hearing, just as default judgments may be entered in other judicial systems.

**Finally, DHS should provide respondents' Alien Files (A-files)<sup>99</sup> upon the filing of written requests by respondents or their counsel.** Respondents and their counsel should not be forced to file Freedom of Information Act requests to obtain copies of their immigration files. This step would implement nationally a Ninth Circuit Court of Appeals decision holding that DHS must provide individuals with A-files upon request to align with the Fifth Amendment's due process guarantee of a "full and fair hearing in a deportation proceeding."<sup>100</sup> Requiring DHS to provide access to A-files would allow attorneys faster access to pre-charging documents,<sup>101</sup> conviction documents, and documents relating to potential citizenship or relief eligibility. This practice would eliminate the need for court continuances while respondents await information critical to their cases.<sup>102</sup> This would also align removal proceedings with the CJRA and the Federal Rules, which require voluntary exchanges of information and voluntary disclosures.<sup>103</sup> Increasing the availability of information earlier would encourage parties to resolve issues more quickly and facilitate earlier identification of any issues.

### **1.C. Improve handling of preliminary matters.**

The current system encourages a proliferation of preliminary hearings, known as "master calendar" hearings, but without the likelihood of resolution.<sup>104</sup> A recent Inspector General report highlighted the large number of repeated continuances in removal proceedings; among the most frequent reasons for continuances is to file relief applications.<sup>105</sup> This inefficiency slows down the system, making it unable to respond to motions and other preliminary matters. The following procedural improvements to pretrial processing could eliminate many unnecessary hearings and substantially expedite immigration cases.

**First, EOIR should incentivize represented noncitizens to respond in writing to charges of removability and to submit applications for relief before hearing dates.** Although the ICPM allows written pleadings in lieu of oral pleadings,<sup>106</sup> there is little incentive in terms of cost- or time-savings to do so. Filing written pleadings does not avoid the scheduled preliminary hearing or waive the requirement that the noncitizen appear at that hearing.<sup>107</sup> Indeed, if the noncitizen fails to appear at a hearing where her presence has not been waived, she would ordinarily be ordered removed *in absentia*.<sup>108</sup> In practice, written pleadings are seldom filed; a respondent concedes or admits to certain allegations in master calendar hearings which require substantial court time.<sup>109</sup>

The same problems plague the filing of applications for relief. Backlogged courts are too busy to react when noncitizens file applications for relief before their master calendar hearings, so the unnecessary hearing remains scheduled. As with written pleadings, the

noncitizen lacks incentive to make an extra, early trip to the court to file the application, because filing early does not alter her case.

A known, predictable system allowing noncitizens to avoid unnecessary hearings would encourage noncitizens to file pleadings outside of court, resulting in substantial efficiency gains. Accordingly, the ICPM should be amended to provide that when represented immigrants file written statements conceding removability as stated in the Notice to Appear (NTA), courts should vacate automatically the master calendar hearing dates and excuse the respondents' presence. Also, upon the filing of a relief application, courts should automatically vacate any master calendar hearings scheduled merely to permit filing of relief applications, waive respondents' presence, and authorize the court clerk to enter orders scheduling matters for trials and setting appropriate dates for the filing of supporting documentation.<sup>110</sup>

**Second, the immigration courts should again follow the CJRA and allow judges to set “an early, firm trial date” for most cases.** For complex cases, immigration judges should engage in ongoing judicial monitoring, including periodic case management conferences to ensure prompt forward progression.<sup>111</sup> Earlier judicial involvement in the case, as envisioned in the CJRA, could provide additional predictability to a case, but only if immigration judges were actually able to provide a “firm” trial date. Currently, immigration courts frequently reschedule matters due to agency priorities which shortsightedly call for one type of case to be prioritized over another; most recently, in the context of families seeking asylum.<sup>112</sup> This prevents judges from providing the kind of predictability which is afforded in other judicial systems. Early judicial monitoring should therefore be a mid-term goal for the system, to be implemented in the courts once the court system is stable enough to avoid reactively jumping from crisis to crisis.

**Third, EOIR should create a motions docket to ensure quick and predictable adjudication of pretrial motions and scheduling of merits hearings.** The ICPM creates a presumption against an oral hearing on a motion, giving full discretion to the immigration judge to determine if an oral hearing is required.<sup>113</sup> This approach presents several problems. For example, immigration judges do not always address motions in a timely manner; if a respondent files a Motion to Reschedule two months before a merits hearing, delay in addressing the motion can be wasteful and unfair.<sup>114</sup>

To give immigration judges an opportunity to address procedural and preliminary motions, EOIR should adopt the practice of many federal and state courts that have a motions docket on one or multiple mornings per week.<sup>115</sup> These separate hearings reserve docket space to hear the substance of cases, and allow procedural motions and issues to be addressed separately.

Efficient procedures, such as those employed by some federal courts, would allow a motions docket to function without affirmative action by the court.<sup>116</sup> A party could schedule a motion hearing during pre-set motions times with a particular judge, pursuant to rules which would leave enough time between the filing of the motion and the hearing to allow the opposing party to respond and to ensure the availability of files.<sup>117</sup> If an

immigration judge were able to rule on a motion prior to the hearing, the hearing could be canceled. For a more complicated case, the scheduling of the motion before the judge would permit the judge to discuss the matter with counsel. This model would serve for a variety of issues; for instance, EOIR could place government motions to preterm relief applications on the motions docket, together with motions filed by noncitizens.<sup>118</sup>

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Taken together, these changes would establish the kind of ongoing judicial control over the pretrial process which, in the federal court system, facilitates the prompt and fair resolution of complex civil cases.<sup>119</sup>

**1.D. Either grant EOIR control over work authorization matters, or eliminate EOIR’s responsibility for the work authorization clock.**

Congress generally requires EOIR to adjudicate asylum cases within 180 days; EOIR tracks asylum cases to monitor compliance.<sup>120</sup> A separate statute limits the ability of asylum seekers to obtain work authorization before the application has been pending at least 150 days.<sup>121</sup> The latter rule binds USCIS, not EOIR, because USCIS has authority over work authorization.<sup>122</sup> Immigration judges have no authority to grant work authorization or to control the work authorization status of noncitizens.

EOIR spends many hours attempting to administer an “asylum clock” that USCIS uses to decide whether to grant work authorization.<sup>123</sup> EOIR calculates that 20 percent of the immigration court’s administrative time is used to manage the asylum clock and to respond to asylum clock queries.<sup>124</sup> The requirement for EOIR to promptly adjudicate asylum cases greatly differs from the rules that govern work authorization for asylum seekers.<sup>125</sup> If EOIR could extricate the immigration court from its role in administering the asylum clock, it would eliminate one of the greatest distractions for the court’s administrative personnel.<sup>126</sup>

There might be sound policy reasons for allowing immigration judges to decide work authorization matters for those noncitizens with pending cases. The ability to decide to grant or deny work authorization might give immigration judges another tool to discourage dilatory tactics and to ameliorate humanitarian problems. But there is little logic to forcing the immigration courts to waste time calculating a work authorization “clock” that relates to matters under another agency’s control.

**1.E. Allow immigration judges to order transcripts prior to issuing written opinions, to facilitate more accurate and better-reasoned decision making.**

Immigration judges often issue quick oral decisions while the case facts are fresh in their minds. But in some cases – often the most complex cases – immigration judges issue written decisions. Currently, a transcript is produced only after an immigration judge

issues a written decision and the case is appealed to the Board. Federal courts of appeals have reversed immigration court rulings on numerous occasions where immigration judges misremembered aspects of testimony or misstated factual nuances.<sup>127</sup> The availability of transcripts would facilitate the involvement of law clerks (who rarely attend hearings) in the production of decisions. To the extent that a given case would be appealed to the Board, no extra cost would result from the earlier production of a transcript, and in some cases, a transcript might even avoid appeals, saving taxpayer dollars. Most importantly, transcript availability could help immigration judges to produce stronger written decisions, granting relief or protection where appropriate.

### **1.F. Expand immigration judges' authority to sanction DHS attorneys.**

For immigration judges to control proceedings, DHS attorneys need to know that they are subject to orders of the immigration courts. While the statute grants authority to impose civil penalties for contempt, EOIR has never promulgated regulations implementing that authority.<sup>128</sup> It must do so without delay.

Moreover, DHS regulations allow immigration judges to sanction “practitioners” appearing before them, but exclude DHS counsel from that definition.<sup>129</sup> The Board even struck down an immigration judge’s requirement that the government file a brief in support of its legal arguments before the hearing.<sup>130</sup> Expecting immigration judges to control their dockets while exempting one of the parties from any effective control by those judges is impractical and unfair.

An example of this problem: One regulation requires immigration judges to wait for DHS notification that background checks have been completed before relief from removal can be adjudicated.<sup>131</sup> DHS counsel can, for any reason or no reason, fail to conduct records checks, thus preventing the immigration court from issuing a decision in a case.<sup>132</sup> Some courts grant “conditional” relief in this circumstance. Others have recommended the adoption of a separate, dedicated docket for cases delayed by lack of background checks.<sup>133</sup> The better solution is to give immigration judges power over both parties practicing before them, so that they can control their own courtrooms.

Regulations should be promulgated to include DHS counsel in the definition of “practitioner” and to authorize immigration judges to exercise contempt authority over all attorneys in their courtroom.

### **Recommendation 2: Create alternative dispute resolution structures through interagency coordination.**

Part of the problem with the immigration court system is that immigration matters go to trial at a very high rate.<sup>134</sup> Alternate dispute mechanisms could help to channel cases away from the immigration courts, reducing the crushing caseload.

In federal district courts, a host of mechanisms work to encourage settlement.<sup>135</sup> Many matters are handled initially by magistrate judges. The Federal Magistrate Act of 1979 empowered magistrate judges — with the parties’ consent — to handle all pre-trial and trial matters and issue judgments in civil cases.<sup>136</sup> Studies have concluded that the use of magistrate judges increased access to the federal judiciary for litigants and helped federal judges manage their caseloads,<sup>137</sup> particularly after Congress allowed judges to remind the parties of the availability of magistrate judges.<sup>138</sup> The use of magistrate judges and/or “special masters”<sup>139</sup> likely played an important role in preventing an increase in *pro se* filings from producing a backlog crisis in federal courts.<sup>140</sup>

Coordination among DHS agencies could provide many of the benefits of the magistrate system, at relatively little cost. Such a system would help avoid many thousands of trials, benefitting both those individuals whose cases are resolved outside of litigation and those whose cases proceed to trial more quickly in the immigration court system. Moreover, better adjudication of cases would result in better outcomes: approvals for deserving cases and denials for other cases.

The use of alternate resolution mechanisms depends on both the existence of fair and adequate mechanisms and the perception that they are fair and adequate. The quality of USCIS adjudications is not within the control of EOIR; but for applications, or in districts, where high-quality USCIS adjudication is available, it is wasteful not to make use of that option.

**2.A. Authorize immigration judges, upon agreement of both parties, to terminate cases to permit applications for asylum to go forward with the Asylum Office.**

Asylum cases are a good target for interagency coordination. The USCIS Asylum Office (AO) has historically been expeditious in its adjudications,<sup>141</sup> and already handles defensive asylum cases for unaccompanied immigrant children under the Trafficking Victims Protection Reauthorization Act.<sup>142</sup> Because asylum is the most commonly sought form of relief,<sup>143</sup> procedures that would systematically encourage immigration judges to transfer some cases to the AO would reduce backlogs significantly. For example, in March 2014, the last month for which statistics are publically available, the AO approved 53 percent of the asylum cases that it adjudicated.<sup>144</sup> If a subset of asylum cases were reviewed by the AO, and a similar percentage of cases were resolved at the AO without the involvement of the immigration courts, the court’s caseload would decrease substantially.

This approach might provide corollary benefits. First, in the asylum context, courts have suggested that adjudicative improvements would result if adjudicators with in-depth and detailed knowledge about specific countries’ local conditions could handle asylum cases specific to their expertise.<sup>145</sup> If all or nearly all asylum applications were heard within the same non-adversarial adjudicative system, the system could track cases on the basis of region or type, and better acquire evidence to corroborate or disprove particular claims. It might also help to reduce the disparities in asylum grant levels among immigration courts

and judges by providing more standardized opinions regarding the plausibility of particular claims.<sup>146</sup>

Second, a reduction in the asylum caseload might help reduce judicial burnout.<sup>147</sup> Asylum cases often involve details of persecution or torture and are emotionally challenging.<sup>148</sup> Immigration judges are not experts in particular country conditions or the psychological effects of violence and torture, yet they must assess the veracity of individual's claims, and often make life or death decisions on the basis of scant and generalized evidence. The gravity and stress of these decisions exacerbate the burnout problem.

Third, the diversion of asylum cases would reduce harm to meritorious asylum seekers by shortening adjudication times. Asylum seekers face unique struggles throughout the prolonged adjudication of their cases. More prompt adjudication would aid legitimate asylum seekers by reducing family separation and the accompanying food, shelter, and employment insecurity, and by facilitating representation by *pro bono* attorneys.<sup>149</sup>

Under the current regulatory scheme,<sup>150</sup> immigration judges have exclusive jurisdiction to consider the asylum applications of people in removal proceedings. Notwithstanding this regulation, the AO could adjudicate these asylum claims in removal proceedings if ICE agreed to termination of removal proceedings without prejudice, as it does in other contexts.<sup>151</sup> If, after termination, USCIS found individuals eligible for asylum, the cases would not come back before the immigration courts; USCIS could grant asylum as in any other case not in removal proceedings.<sup>152</sup> Where USCIS does not grant asylum, the cases would return to the immigration court docket.

## **2.B. Permit immigration judges to refer domestic violence matters to expert adjudicators at the USCIS Vermont Service Center.**

Similar benefits could be achieved regarding cancellation of removal based on the Violence Against Women Act (VAWA), a form of relief for individuals who have suffered domestic violence by their spouses.<sup>153</sup> Resolving some of these complicated and emotional cases through use of expert adjudicators would reduce pressure on immigration judges' dockets and protect victims. USCIS's Vermont Service Center has sole jurisdiction within USCIS over VAWA self-petitions.<sup>154</sup> It has a dedicated "VAWA unit" that adjudicates domestic violence cases, with staff trained to handle issues relevant to those cases, including in the effect and evidentiary burdens experienced by victims.<sup>155</sup>

Referring cases to the VAWA unit, with the agreement of the parties, would allow more accurate decisions, particularly regarding if an applicant for VAWA cancellation of removal has been "battered or subjected to extreme cruelty."<sup>156</sup> Involving the VAWA unit could help avoid re-traumatizing victims or putting them "on trial" in the adversarial setting of immigration proceedings.

A system of referring VAWA cancellation of removal cases to the VAWA unit for a recommendation would not require regulatory change, and might operate similarly to the



current system of referring asylum cases to the State Department for opinions about particular asylum claims.<sup>157</sup>

### **2.C. Adjudicate adjustment of status applications with increased efficiency through better coordination with USCIS.**

DHS has taken sensible steps to encourage the termination of removal proceedings to allow adjudication of adjustment of status applications by USCIS.<sup>158</sup> However, applicants frequently fail to use this process due to inefficiencies in the handling of such cases. USCIS is mandated to support itself through application fees.<sup>159</sup> If a noncitizen has paid EOIR the application fees, which total more than \$1,000, USCIS is spending money to adjudicate an application while EOIR obtains the fees, resulting in some USCIS offices requesting fee repayment.<sup>160</sup> Transfer back to USCIS comes with other risks, such as the possibility that the file will be lost.<sup>161</sup> It is to the system's benefit that USCIS resolve these cases. However, the difficulties of moving cases from EOIR to USCIS has convinced many applicants that their cases are better remaining with EOIR despite the lengthy waiting periods for case adjudication. EOIR should work with USCIS to ensure adequate transfer policies and protocols. Adjudication of these cases by USCIS would free immigration courts to give more expeditious consideration to the other cases pending before them.

### **Recommendation 3: Increase efficiency in the immigration court through access to counsel and legal information.**

Access to counsel benefits noncitizens in removal proceedings, facilitating the fair and prompt adjudication of cases. EOIR must improve access to justice for noncitizens by expanding self-help services and supporting policies that facilitate legal representation to indigent and detained noncitizens.

### **3.A. Grant immigration judges authority to appoint counsel when it is required for the fairness of the proceeding.**

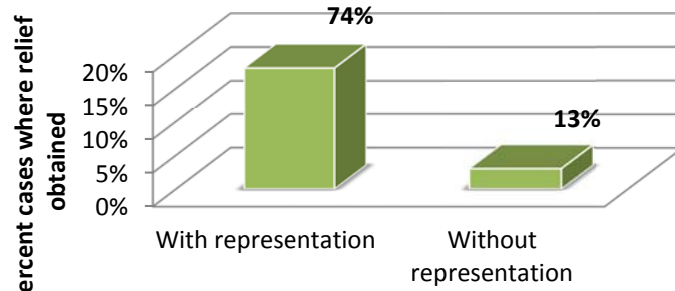
Unlike the criminal justice system, where individuals have the right to court-appointed counsel if they cannot afford to hire attorneys, individuals in immigration proceedings have no right to appointed counsel.<sup>162</sup> Thus, most noncitizens before the immigration court, especially those in detention, are unrepresented. In 2013, approximately half of noncitizens in removal proceedings — and more than 75 percent of detained noncitizens — appeared before the immigration court *pro se*.<sup>163</sup>

Changing the rules to permit appointment of counsel remains the best and most logical means of addressing this issue.<sup>164</sup>

A study of the New York Immigration Court found a large disparity between the success rates of represented and unrepresented individuals.<sup>165</sup> Represented, non-detained noncitizens succeeded in obtaining some kind of relief in 74 percent of cases while unrepresented, non-detained noncitizens succeeded in only 13 percent of cases.<sup>166</sup> Only

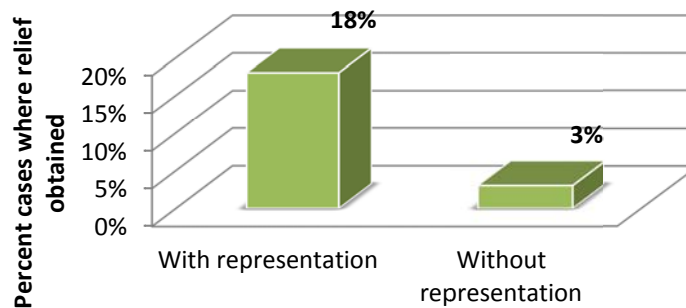
three percent of unrepresented, detained clients were successful in their petitions, compared with 18 percent with representation.<sup>167</sup>

### Effect of counsel on case success for non-detained noncitizens, 2005-2012



Numbers for this chart obtained from Katzmann Study Group, 2011.

### Effect of counsel on case success for detained noncitizens, 2005-2012



Numbers for this chart obtained from Katzmann Study Group, 2011.

Providing noncitizens with attorneys to help navigate immigration law would increase the efficiency of the system as a whole.<sup>168</sup> Appointed counsel is particularly necessary for vulnerable populations such as minors<sup>169</sup> or the mentally ill,<sup>170</sup> or in cases posing particularly complex legal or factual challenges.<sup>171</sup>

Representation of low-income clients falls primarily to small immigration law practices, overwhelmed *pro bono* attorneys, and nonprofit organizations. Legal representation initiatives<sup>172</sup> provide limited resources in some immigration detention facilities, including one-on-one consultations and screenings,<sup>173</sup> “Know Your Rights” (KYR) presentations,<sup>174</sup> and limited appearances for bond hearings.<sup>175</sup> These programs must be expanded to meet the overwhelming need for legal representation and information for noncitizens.

Judge Noel Brennan of the New York Immigration Court wrote that for immigration judges, “the unmet legal needs of the immigrant poor are perpetually apparent.”<sup>176</sup>

Immigration judges “must take extra care and spend additional time explaining this information” to make sure that respondents understand the consequences of the proceedings as well as their rights and responsibilities.<sup>177</sup> For individuals who proceed *pro se*, this explanatory process slows down court proceedings. Moreover, immigration judges often grant continuances to allow noncitizens to find *pro bono* attorneys, which causes more delays.

Increasing the percentage of noncitizens with counsel is the best way to increase efficiency in the immigration court. Authorizing judges to appoint counsel in appropriate cases is the simplest way of accomplishing this goal. Other, lesser steps, outlined below, can also help.

### **3.B. Allow attorneys to make limited appearances.**

Other civil judicial systems have considered allowing limited attorney appearances, or “controlled unbundling” of legal services, to alleviate low representation rates. Scholars have proposed that allowing attorneys — with client consent — to manage certain aspects of cases (such as drafting pleadings and negotiating) but not others (such as appearing in court for some matters) to make representation more affordable.<sup>178</sup>

Immigration courts generally do not allow limited attorney appearances. The ICPM mandates that once an attorney has made an appearance in a case, she is obligated to represent her client until termination of proceedings unless an immigration judge grants leave to withdraw or “specifically allows a limited appearance.”<sup>179</sup> This policy is problematic for *pro bono* attorneys, nonprofit organizations, and law school clinics attempting to manage their time and financial resources. Allowing attorneys more leeway in entering limited appearances for purposes of master calendar, bond, and motion hearings would avoid unnecessary continuances and would expand the pool of advocates by allowing law clinics to assume more cases.<sup>180</sup>

Allowing limited appearances would be particularly helpful in detention cases, where bond hearings are noncitizens’ first interaction with the system. Attorneys could assist with pre-hearing preparation of bond requests, helping noncitizens present their cases more effectively and avoid high bonds that would prolong their detention.<sup>181</sup> When noncitizens are released, they are better able to obtain representation. EOIR has recently proposed positive regulatory changes which would allow limited representation in the bond context.<sup>182</sup> However, the rationale for the rule change would cover more than the bond context. EOIR should change the ICPM to allow advocates, particularly *pro bono* counsel, to enter limited appearances in other contexts as well.<sup>183</sup> Also, EOIR should amend the appearance form (the EOIR-28), to allow counsel to enter limited appearances.

### **3.C. Institute a “help desk” pilot project for nondetained individuals.**

Where counsel cannot be appointed or obtained, immigration courts would benefit from various low-cost tools to help *pro se* litigants navigate the legal process. Other courts

provide guides and handbooks to *pro se* litigants explaining the court process or giving them a step-by-step guide to making a complaint and writing a brief.<sup>184</sup> But noncitizens in removal proceedings present unique challenges: they often have low or no English proficiency, and varying levels of literacy and education. Self-help services for *pro se* immigrant clients must account for these factors. It would be unwise to expect too much from printed materials alone.

Help desks<sup>185</sup> or staffed self-service centers<sup>186</sup> at or near court buildings would be more effective because they could offer limited individualized attention. To the extent that these programs would function, it is because the attorneys at the help desks understand the matters and are able to advise noncitizens of their rights and obligations. If the attorneys at the help desks were authorized to become involved to a limited extent in court proceedings, that would increase court efficiencies at minimal added cost.

EOIR should facilitate access to immigration courts for nonprofit organizations willing to set up “help desks.” Conversations between help-desk attorneys and *pro se* litigants could occur before, during, or after master calendar hearings. An institutionalized help desk would permit unrepresented individuals some access to legal advice and information. It could connect noncitizens with volunteer attorneys and supervised clinic students who could make limited appearances for master calendar hearings.

### **3.D. Create a separate *pro se* docket at all immigration courts.**

A separate *pro se* docket would help facilitate both limited appearances and help desks. Currently, *pro se* cases share a docket with represented cases, though in practice many courts choose to hear represented cases before unrepresented cases. Designating specific days and times for unrepresented master calendar hearings would allow legal services organizations or law school clinics to organize help desks or limited appearance programs.

### **3.E. Facilitate legal information presentations for non-detained individuals.**

In many detention facilities, nonprofit organizations provide KYR or Legal Orientation Program (LOP) presentations (EOIR pays for the latter). Detained noncitizens who have participated in LOP presentations move through the immigration court system 13 days faster than those who do not, demonstrating that access to legal information improves speedy resolution of court cases.<sup>187</sup> Yet no KYR or LOP program exists for non-detained individuals. Creating KYR or LOP projects for these individuals would help unrepresented noncitizens identify possible relief options. Traditionally, KYRs and LOPs provide an opportunity to speak one-on-one with attorneys or advocates. To be effective, any non-detained program would need to be combined with similar consultations, perhaps in tandem with the help-desk model.

## **Recommendation 4: Reform the Board of Immigration Appeals.**

The Board of Immigration Appeals is addressed separately here, because it has systems, rules, and personnel different from the immigration court system.<sup>188</sup> The Board, which handles more than 35,000 cases per year,<sup>189</sup> has been repeatedly subject to strong admonitions by the federal courts of appeals for its handling of various matters.<sup>190</sup> The Board could handle its docket more fairly and more efficiently by adopting the following recommendations.

### **4.A. Create an online docketing and case management system.**

The creation of an effective docketing and case management system is as important for the Board as it is for the immigration courts. The Board has persistent problems with receipt of filings. For instance, some filings have not reached the Board on time due to inclement weather or carrier error.<sup>191</sup> In other cases, the Board has decided matters without indicating any awareness of pending motions, resulting in remand from appellate bodies.<sup>192</sup> Litigation and other administrative costs increase when briefs and appeals fail to reach the Board on time, or are mishandled by the agency. More importantly, these misfires deprive some noncitizens of their right to be heard on appeal.

The Board's difficulties do not only include incoming communications directed to the Board. The Board has also experienced some difficulties in communicating its decisions outwards, to both attorneys and *pro se* individuals.<sup>193</sup> Indeed, the Board now has a recognized process for dealing with cases where it fails to properly notify parties of its decisions, whereby the Board "reissues" its earlier decision.<sup>194</sup>

An electronic docket would facilitate filings with the Board and eliminate the source of many technical defaults. It also would better ensure actual receipt of Board decisions, facilitate the filing of appeals from those decisions, and reduce or eliminate the Board's mishandling of filings by the parties.

An electronic docket also would facilitate the production of searchable administrative records in cases ultimately appealed to federal courts. Electronically issued decisions would be easier to disseminate and search than paper decisions, allowing increased public access to unpublished decisions. This is true even as to asylum cases and other cases involving confidentiality concerns,<sup>195</sup> because it would facilitate redaction of names and identifying characteristics. Greater public access to unpublished decisions would help hold the Board accountable to deliver consistent rulings on cases presenting similar legal or factual issues.<sup>196</sup>

### **4.B. Create a mediation center at the Board to promote settlement.**

Like the immigration courts, the Board has a substantial backlog of cases and struggles to adequately adjudicate its tens of thousands of cases annually.<sup>197</sup> Creating a mediation or settlement office at the Board would help avoid full appeal adjudication. The Federal Rules of Appellate Procedure authorize settlement conferences<sup>198</sup> and it seems that some

type of settlement or mediator mechanism is standard practice in most federal appellate bodies.<sup>199</sup> A significant number of Board appeals may be amenable to more efficient handling acceptable to both parties; a mediator program could encourage those approaches. Three examples:

- Mediation would facilitate resolution of cases where DHS considers exercising prosecutorial discretion. Because the Board does not have prosecutorial discretion,<sup>200</sup> but must decide appeals promptly,<sup>201</sup> it wastes resources adjudicating appeals even in cases where DHS will decide to grant prosecutorial discretion. As the Second Circuit noted, “it is wasteful to commit judicial resources to immigration cases” when the government is not inclined to effectuate removal.<sup>202</sup>
- Some individuals who have entered the U.S. through “parole” are eligible to seek adjustment of status with USCIS, but not with the immigration court.<sup>203</sup> The Board can close the case administratively pending USCIS adjudication, with or without government agreement,<sup>204</sup> but this requires judicial resources, including weighing factors for and against closure.<sup>205</sup> Mediation could facilitate agreement between the parties, ensuring that judicial resources are used only when needed.
- Noncitizens may be denied asylum or other forms of relief based on the broad “terrorism-related inadmissibility grounds” (TRIG).<sup>206</sup> Congress permits exemptions to the TRIG bars, but gives DHS authority over those exemption decisions, resulting in a division of authority between DHS and the Board.<sup>207</sup> The Board adjudicates appeals in those cases, potentially triggering federal court appeals, without waiting for DHS decisions, in part because no mechanism exists for handling those split-authority situations.<sup>208</sup> Wasting adjudicative time on appeals by individuals for whom USCIS would grant discretionary relief is just as wasteful as using resources on individuals who will be granted prosecutorial discretion. Again, mediation would facilitate a more efficient approach.

Many mediation programs suggest criteria for inclusion or exclusion from the program. For instance, the Ninth Circuit website suggests a number of immigration matters appropriate for mediation.<sup>209</sup> Mediation programs may be employed at the behest of the court, or on request from counsel.<sup>210</sup> Some circuits state that cases are “randomly selected” for mediation.<sup>211</sup>

Mediation should be allowed when requested by the parties or upon suggestion of Board members or staff attorneys. The Board also should establish criteria for inclusion in mediation, and should apply those criteria by requiring litigants to complete a mediation form.<sup>212</sup>

Agreed dispositions benefit the parties and the system. The Sixth Circuit’s Office of the Mediators states that out of 1,000 cases selected for mediation, 40 percent settled.<sup>213</sup> If mediation worked at even half that rate at the Board, it would eliminate the need to adjudicate thousands of appeals, leaving more judicial energy for other matters, to decide cases faster and better. To the extent that federal appeals would be avoided, it would also save time both for federal judges who adjudicate those appeals and for the U.S.

government attorneys who litigate such cases.<sup>214</sup> In addition to reducing litigation costs, agreed resolution at the Board level likely would avoid some degree of humanitarian hardships for noncitizens and their families.

#### **4.C. Authorize an appellate commissioner or chief clerk to adjudicate procedural motions.**

The Board could process various procedural motions more quickly if it delegated some authority to staff, following the model of many federal courts of appeals.

For example, the Board has a fairly inflexible policy of granting briefing extensions only once, for 21 days.<sup>215</sup> Likewise, the Board will not normally entertain a motion to hold a matter in abeyance.<sup>216</sup> Yet there are cases in which additional extensions or abeyance would be appropriate. One common circumstance is a noncitizen with a pending family visa petition whose adjudication at USCIS would facilitate the court's consideration by supporting either removal or remand.<sup>217</sup> A matter may be awaiting decision by the court of appeals or the Supreme Court. In such cases, it makes little sense to speed the case toward adjudication, or to require expenditure of time by the parties; but the Board's rules make it inevitable.

In federal courts, local rules frequently specify when a matter must be brought to the attention of a judge or of a three judge panel, which allows the courts to act efficiently in employing judicial resources.<sup>218</sup> While it is unclear why no such mechanism exists at the Board, a subordinate judicial officer such as an appellate commissioner could handle such requests expeditiously and efficiently.

A subordinate judicial officer also might be able to handle matters such as background checks more efficiently. By regulation, relief applications may not be approved until background checks have been updated.<sup>219</sup> While the Board's regulations allow it to hold cases pending completion of background checks,<sup>220</sup> the Board instead remands these matters to the immigration court.<sup>221</sup> This is inefficient; because the Board lacks an appropriate procedural means of acting, it unnecessarily remands cases back to the overloaded immigration courts for conclusion of background checks. A subordinate judicial officer could resolve background check issues by confirming with the parties (generally DHS) whether background checks remain "current"; and if not, by ordering DHS to conduct new background checks and provide status reports until checks are concluded.<sup>222</sup> Delegating many of these non-dispositive procedures and motions to staff or clerks could facilitate the handling of the other appeals pending before the Board.

#### **4.D. Review all cases for potential appointment of counsel, likely through expansion of the BIA Pro Bono Project.**

NIJC has long advocated for the appointment of counsel in immigration cases.<sup>223</sup> In lieu of appointed counsel, the Board, working collaboratively with a collection of non-governmental organizations, currently has a BIA Pro Bono Project, which provides legal counsel to some individuals appearing *pro se*.<sup>224</sup> Under the project, EOIR identifies cases

based on criteria selected by the partnering volunteer groups; non-governmental organizations then review the cases, determine which cases are the best candidates for *pro bono* representation, and facilitate *pro bono* involvement.<sup>225</sup>

While successful, the project is limited in scope. Because the number of volunteers to review cases for the project is limited, only a subset of the cases which fit the criteria for inclusion in the program can be reviewed every week.<sup>226</sup> The project has reviewed over 7,200 cases,<sup>227</sup> and has arranged representation for a large percentage of those individuals.<sup>228</sup> Yet, the program has reviewed only 6.25 percent of *pro se* individuals.<sup>229</sup>

There must be many meritorious cases which come to the Board without having been reviewed by the BIA Pro Bono Project. Board members or staff attorneys must encounter cases frequently which would benefit from a full adversarial briefing. Courts of appeals have mechanisms for dealing with this scenario; for instance, a court may order the briefing stricken, and order recruitment of counsel.<sup>230</sup> The Board does not now consider appointing counsel.<sup>231</sup> The Board should develop appointed or “recruited” counsel mechanisms.

Such an approach does not suggest partiality toward unrepresented respondents, but rather concern that the case be adjudicated fairly and accurately. It is likely that any case identified by the Board itself would be readily placed with counsel through the BIA Pro Bono Project. If not, the Board could consider alternative placement mechanisms, or invitations to file *amicus* briefs.<sup>232</sup>

**4.E. Facilitate greater public and *amicus* involvement in the Board’s decision making by publicizing oral arguments and cases considered for publication, publishing more decisions annually, and releasing all unpublished Board decisions to the public.**

The Board works in obscurity. It handles appeals in a manner which seems intentionally calculated to avoid public attention and to frustrate public oversight. This is problematic on a number of levels.

The federal courts are traditionally open to the public.<sup>233</sup> They conduct arguments in public sessions, and make their decisions, published and unpublished, accessible to the public. This facilitates public oversight,<sup>234</sup> as well as the involvement of *amicus curiae*. The Supreme Court goes further, publicizing the decision to grant *certiorari*, which has the effect of alerting potential *amici* to issues the Court likely will decide.<sup>235</sup> Likewise, most federal administrative agencies act through public rulemaking, and even publicize in advance the subject of likely future rulemaking.<sup>236</sup> This also permits the public and interested stakeholders to submit arguments to attempt to influence agency decisions.

By contrast, the Board maintains no public docket. Nothing on its website, or in any other publication, indicates any case or issue which is under consideration for potential publication of a precedential decision.<sup>237</sup> Even oral argument at the Board is not



announced publicly.<sup>238</sup> The EOIR Facebook site mentions court closings and published decisions, but not oral argument.<sup>239</sup> From 2008 to 2013, the Board appears to have scheduled oral argument in only seven cases.<sup>240</sup> During that five-year period, the Board issued 192 precedential decisions, binding on the Board and DHS, while deciding more than 192,000 cases.<sup>241</sup> In other words, oral argument occurred in 3.6 percent of the published decisions and in less than .0037 percent of total decisions.

During this same five-year period, *amici curiae* appeared in only 11 of the Board's published decisions (less than six percent).<sup>242</sup> Three of those cases involved the overruling of earlier Board decisions which were decided without *amicus* involvement,<sup>243</sup> perhaps suggesting the value to the Board of the additional information, argumentation, and perspectives which are obtained from *amicus* briefing. The recent level of *amicus* involvement is actually substantially higher than the norm. From 2002 to 2006 (during which period 88 precedential decisions were issued), *amici curiae* were involved in only three published decisions (3.4 percent of the total).<sup>244</sup> Indeed, during that period, the Board issued as many published decisions in cases involving *pro se* noncitizens as in cases involving *amici curiae*.<sup>245</sup> Notably, in none of the published cases with *pro se* respondents – all involving minors – did the Board solicit *amicus* briefing or appoint counsel.

Granted, *amicus* briefs are only one way for the public to be involved in cases and are uncommon even at the courts of appeals. But without some effective means of allowing public input, it will not be secured. Thus, precedent-setting decisions of the Board will continue to be made behind closed doors by methods far removed from the public, semi-democratic nature of traditional notice and comment rulemaking or public agency hearings.<sup>246</sup>

There are much better options. The Board has a website and a Facebook page.<sup>247</sup> No regulatory changes are required for the Board to be more transparent. The Board does sometimes solicit *amicus* briefs, usually by reaching out to the American Immigration Lawyers Association and the Federation for American Immigration Reform.<sup>248</sup> It is appropriate for the Board to invite *amicus* briefs on occasion, but a more regular process is critical.

The simplest way to obtain public input would be for the Board to maintain and make public an oral argument docket, and to adopt a policy of publishing decisions only after oral argument.<sup>249</sup> If the Board maintained an argument docket on its website, that page could include the name of the attorneys of record, as well as the Questions Presented or Issues Presented, as described by the parties. This would allow interested parties to find out more about cases, and in appropriate cases, to seek leave to appear as *amicus curiae*.<sup>250</sup> Public involvement in the issues before the Board could increase the quality of decisions, reduce appeals to the federal courts (and the likelihood of remand), and foster confidence in the Board's decision-making.

#### **4.F. Eliminate single-member merits opinions and reform the Board's organization to give Board members greater autonomy and ownership.**

For several years, the Board decided a substantial percentage of its cases through unpublished single-member decisions that affirmed the decisions of immigration judges without opinion.<sup>251</sup> Facing strong criticism, the Board reduced the percentage of such summary dispositions, but single-member opinions remain the norm.<sup>252</sup> Three-member panels now decide only 11 percent of appeals; all other cases are decided by a single Board member.<sup>253</sup> It is unclear if the Board obtains substantial efficiency gains from such a system, but the costs are real. Board members do not repeatedly confront the legal issues percolating through the system in a context which facilitates discussion with other Board members. Perhaps this is related to the Board's rate of publication, which at 0.11 percent is well below that of any federal court of appeals.<sup>254</sup> Three-member opinions should be the norm in cases not directly controlled by precedent.<sup>255</sup>

In past years, when the Board received fewer appeals, the current structure might have sufficed. However, the Board's current caseload is massive; the number of Board decisions annually has been 64 percent of the total output of all of the courts of appeals taken together.<sup>256</sup> Moreover, this occurs in the context of a Board structure that lacks assigned clerks or "chambers" within the Board.

Taken together, the result of the Board's structure appears to be a staff-driven. Realistically, Board members cannot draft opinions in sufficient numbers to address the tens of thousands of incoming cases; Board members in effect "join" or "sign onto" opinions drafted by staff attorneys, without the opportunity to engage with cases or to exercise adequate control over resulting opinions. Of course, federal appellate judges face similar pressures, but federal courts responded by developing chambers where individual judges can exercise relatively complete control over decision output.

Without substantial internal structural changes, the quality of Board decision-making would improve only slightly by a return to three-member panels. Given funding realities, the Board should consider re-designating some staff attorneys by moving them into chambers as permanent clerks to Board members. This would allow Board members to focus on opinions drafted for publication; if fully implemented, it would restore a substantial measure of justice for all individuals coming before the Board.

#### **4.G. Streamline and reform bond appeals to avoid waste.**

While more process is required for merits appeals, a more streamlined process would be appropriate for matters requiring expeditious consideration. For instance, the Board receives more than 1,800 bond appeals annually.<sup>257</sup> Bond appeals are filed, by definition, in cases involving detained individuals.<sup>258</sup> Yet they are currently the subject of a cumbersome appeal process, described below, rather than receiving expedited consideration.

Bond proceedings in immigration court are generally not transcribed.<sup>259</sup> Rather, when a bond appeal is filed, the immigration judge produces a bond memorandum explaining her reasons for the bond decision, a process which generally takes one to two months.<sup>260</sup> A briefing schedule is then set by the Board, and after briefing is received, the appeal can be decided.<sup>261</sup>

Meanwhile, the immigration courts have a sensible policy of expediting consideration of detained cases, generally requiring completion within 120 days.<sup>262</sup> As a result, cases are frequently resolved on the merits before the Board decides any bond appeal. This can be because the individual has prevailed before the immigration judge, such as on a claim of citizenship.<sup>263</sup> Alternately, the detainee may have been ordered deported, which, once final, deprives the Board and the immigration judge of jurisdiction over bond matters.<sup>264</sup> Indeed, because bond appeals are handled no more expeditiously than other appeals, the Board sometimes resolves a case on the merits before it decides the bond matter.

For example, consider the unpublished case of Cesar Nivardo Ramos-Sanchez, where an immigration judge concluded that his shoplifting conviction did not render him removable and ordered termination of proceedings.<sup>265</sup> The government appealed.<sup>266</sup> Two months after the judge's termination order, still detained, Mr. Ramos-Sanchez sought a bond hearing and obtained a bond of \$15,000 from the judge.<sup>267</sup> The government appealed the bond order, too.<sup>268</sup> The immigration judge produced a bond memorandum; the parties filed briefs.<sup>269</sup> Before the Board adjudicated the bond appeal, the Board adjudicated the case on the merits, and upheld the immigration judge's finding that Mr. Ramos-Sanchez was not removable.<sup>270</sup> The work that went into the bond matter was wasted because the case was adjudicated so slowly. As a result, Mr. Ramos-Sanchez remained detained despite the immigration judge's finding that bond was appropriate.

The Board does not report data on how many bond appeals are adjudicated on the merits, but because so many bond appeals become moot, it is likely a small percentage of the 1,800 bond appeals filed annually. This number is particularly small when comparing bond appeals at the Board with the number of bond decisions made annually in the immigration courts, which ranges from 50,000 to 78,000.<sup>271</sup> In effect, the Board's slow adjudications in the bond context leaves immigration judges with little guidance or correction. Where DHS disagrees with the bond decision, it has a regulatory remedy which allows it to obtain a stay of release for a period of time.<sup>272</sup> Unfortunately, noncitizens aggrieved by continued detention have no similar remedy.

Relatively small changes could address these issues:

- First, a Board member could presumptively adjudicate bond appeals, except those cases being considered for publication.
- Second, instead of separately drafted memoranda, bond proceedings should be recorded, including a brief oral decision. While transcription of recorded hearings would trigger slight additional costs, those costs would be far less than the time costs of requiring overburdened immigration judges to draft multi-page

memoranda explaining their bond decisions, The transcription of bond decisions would be faster and more efficient than production of written bond memoranda.

- Third, the Board could apply dispute-resolution mechanisms to help narrow or resolve bond matters without remand. Mediation might narrow the relevant issues in bond cases by stipulating to a bond amount if the Board finds noncitizens not precluded by statute from release.<sup>273</sup> Or, an appellate commissioner might order parties to clarify factual issues to allow decisions without further remand and delay.

## **VI. CONCLUSION**

While comprehensive immigration reform would help the immigration court system function for a time, and additional EOIR funding might ameliorate some injustice, procedural reforms are necessary for the system to function well. With cost-effective procedural reforms, the government can improve the administration of justice and ensure due process to benefit immigrants, government attorneys, and the system itself.

### ***About the authors***

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## Endnotes

<sup>1</sup> 538 F.3d 1289, 1295 (9th Cir. 2008).

<sup>2</sup> ALBERTO GONZALES, ATTORNEY GENERAL, MEMORANDUM TO IMMIGRATION JUDGES (Jan. 9, 2006) available at <http://1.usa.gov/1n11dik>.

<sup>3</sup> See, e.g., AMERICAN BAR ASSOCIATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN ADJUDICATING REMOVAL CASES 1 (February 2010) [hereinafter ABA REPORT] available at <http://bit.ly/1ke1RPg>; see also NATIONAL IMMIGRANT JUSTICE CENTER, COURTS OF INJUSTICE: IMMIGRATION COURT SYSTEM NEEDS VITAL FIXES TO PROTECT HUMAN RIGHTS (2010) [hereinafter NIJC, COURTS OF INJUSTICE] available at <http://bit.ly/WFOOnA>.

<sup>4</sup> See, Jayashri Srikantiah and Lisa Weissman-Ward, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, THE STANFORD LAWYER (Aug. 15, 2014), available at <https://stanfordlawyer.law.stanford.edu/2014/08/the-immigration-rocket-docket-understanding-the-due-process-implications/>; Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases Are Accelerated*, N.Y. TIMES, Aug. 4, 2014, at A17.

<sup>5</sup> See, e.g., LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (June 7, 2012) [hereinafter ACUS REPORT] available at <http://1.usa.gov/1mS4kKx> (last accessed May 29, 2014).

<sup>6</sup> See ACUS REPORT, *supra* n. 5, at 29-30.

<sup>7</sup> See, e.g., National Immigrant Justice Center, Press Release, Comprehensive Immigration Reform Act of 2011 Offers Alternatives to Deportation-Only Immigration Initiatives (June 24, 2011) (commending Congressional efforts to pass comprehensive immigration reform) available at <http://bit.ly/1kYrMW1>.

<sup>8</sup> See, ABA REPORT, *supra* n. 3; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICAN’S IMMIGRATION COURTS (May 2009) [hereinafter APPLESEED REPORT] available at <http://bit.ly/WKARMI>; Fordham L. Rev., Vol. 78, No. 2 (November 2009); Betsy Cavendish, Steven Schulman, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE: TRANSFORMATIVE CHANGE FOR THE IMMIGRATION JUSTICE SYSTEM (2012) [hereinafter Reimagining the Immigration Court Assembly Line], available at <http://bit.ly/1mJz2Vb>; Peter L. Markowitz, *Barriers to Representation Detained Immigrants Facing Deportation: Varick Street Detention Facility - A Case Study*, 78 FORDHAM L. REV. 541 (2009); KATZMANN STUDY GROUP, THE NEW YORK IMMIGRANT REPRESENTATION STUDY PRELIMINARY FINDINGS (May 3, 2011) [hereinafter KATZMANN REPORT] available at <http://nyti.ms/1pfhFjs>; THE VERA INSTITUTE OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM LESSONS FROM THE LEGAL ORIENTATION PROGRAM (May 2008) [hereinafter VERA INSTITUTE REPORT] available at <http://bit.ly/1x7oLLg>.

<sup>9</sup> The panel took place in Chicago on September 8, 2011. The panelists were Chief Immigration Judge Brian M. O’Leary, Immigration Judge Dana Marks, and Melville Washburn, a partner with Sidley Austin, LLP, who has taken on numerous immigration cases on a *pro bono* basis over the last 20 years. NIJC Executive Director Mary Meg McCarthy moderated the panel.

<sup>10</sup> The authors interviewed Malcolm Rich, Executive Director, Chicago Appleseed Fund for Justice; Natalie Brouwer Potts, Clinic Assistant Professor of Law, IIT Chicago – Kent College of Law; Danielle Hirsch, Director of Advocacy, the Chicago Bar Foundation; Patricia Chiriboga-Roby, Acting Affiliate Director, World Relief Baltimore; Uzoamaka Nzelibe, Clinical Assistant Professor of Law, Northwestern University School of Law; Michael Edelberg, Clinic Coordinator, Chicago Volunteer Legal Services; Melville Washburn, Partner, Sidley Austin LLP, Chicago; Gregory McConnell, National *Pro bono* Counsel Coordinator, Winston & Strawn LLP; Judge Dana Marks, Immigration Judge, and President of the National

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Association of Immigration Judges; Antonio Hernandez, Coordinator, San Francisco Immigration Court Pro Bono Program, San Francisco Bar Association. The authors extend a warm thanks to interviewees for taking the time to share with us their knowledge and experience. The views and recommendations in this paper do not necessarily reflect the views of the individual interviewees.

<sup>11</sup> See, e.g. CHARLES P. KINDREGAN JR., AND PATRICIA A. KINDREGAN, *PRO SE* LITIGANTS: THE CHALLENGE OF THE FUTURE: PROBATE AND FAMILY COURT DEPARTMENT, *PRO SE* COMMITTEE REPORT (1995) available at <http://1.usa.gov/1z8yFfu>.

<sup>12</sup> 28 U.S.C. §§ 471-482 (2010).

<sup>13</sup> Hon. Jack Brooks, Extension of Remarks in the House of Representatives, Jan. 25, 1990, 101 Cong., 2d Sess.; Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J. L. AND PUB. POL'Y 1, 3 (1992) (“I believed that the legislative challenge presented by the problems of delay and excessive cost in civil litigation was clear: to formulate proposals that would effectively bridge the growing distance between the promise of Rule 1 – “the just, speedy, and inexpensive determination of every action” - and the reality of a system becoming increasingly inaccessible to the average citizen. The Civil Justice Reform Act of 1990 answers this challenge by establishing a national framework for transforming the ideal of Rule 1 into the daily practice of every federal court.”).

<sup>14</sup> Pub. L. 101–650, title I, § 102, 104 Stat. 5089 (Dec. 1, 1990).

<sup>15</sup> 28 U.S.C. § 473(a). For an evaluation of their implementation, see JAMES A. KAKALIK ET. AL., AN EVALUATION OF CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT xviii (1995) available at <http://bit.ly/1mJBw5T>; James A. Kakalik et. al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 BOSTON COLLEGE L. REV. 613 (1998).

<sup>16</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY ASSESSMENT OF PRINCIPLES, GUIDELINES & TECHNIQUES 30 (May 1997) (quoting RAND CORPORATION, JUST, SPEED, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CJRA 55 (1996)) available at <http://host4.uscourts.gov/library/cjra/cjrafin.pdf>.

<sup>17</sup> S. Rep. No. 101-416, 101 Cong., 2d Sess., at 1 (Aug. 3, 1990).

<sup>18</sup> 28 U.S.C. § 471(6).

<sup>19</sup> Transactional Records Access Clearinghouse (TRAC), Backlog of Pending Cases in Immigration Courts as of June 2014, SYRACUSE UNIV. (June 2014) [hereinafter TRAC, *Backlog 2014*] available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) (last visited July 13, 2014); see also TRAC, *Latest Immigration Findings: Immigration Court Backlog, Wait Times Keep Rising*, SYRACUSE UNIV. (September 2012) [hereinafter TRAC, *Immigration Court Backlog, Wait Time Keep Rising*] [http://trac.syr.edu/immigration/reports/latest\\_immcourt/#backlog](http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog) (visited October 29, 2012); see also TRAC, *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, Figure 1 (2011), <http://trac.syr.edu/immigration/reports/250/> (last visited Nov. 10, 2011).

<sup>20</sup> See Erin Toner, *Refugee Children Coming to Wisconsin Could Wait Years for a Court Date*, WUWM Milwaukee Public Radio (July 30, 2014), <http://wuwm.com/post/refugee-children-coming-wisconsin-could-wait-years-court-date>.

<sup>21</sup> White House Office of Budget Management, Proposed Budget Fiscal Year 2010, 707 (2011) [hereinafter OBM Budget Proposal] available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jus.pdf>.

<sup>22</sup> See, TRAC, *Backlog 2014*, *supra* n. 19.

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<sup>23</sup> See *id.*

<sup>24</sup> See Testimony of Dana Leigh Marks, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review, at 3 (May 18, 2011) (“Despite the complexity of the task for Immigration Judges, resources for the Immigration Courts have not kept pace with the meteoric rise in allocations for the Border Patrol and Immigration and Customs Enforcement (“ICE”) or the increased DOJ focus on enforcement of criminal laws relating to immigration violations.”).

<sup>25</sup> In FY 2010, Congress approved \$41 billion in discretionary budget to DHS; ICE received \$5, 846 billion, \$34 million above FY 2011. U.S. Senate Committee on Appropriations, Press Release, Summary: Fiscal Year 2012 Homeland Security Appropriations, September 6, 2011 1, 5. This is consistent with an overall increase in DHS funding since 2003. See CHAD C. HADDAL, HOMELAND SECURITY DEPARTMENT: FY2011 APPROPRIATIONS, Table 3. DHS Appropriations, FY2003-FY2010 5 (October 13, 2010) available at <http://www.hsdl.org/?view&did=14998>.

<sup>26</sup> Marks, *supra* n. 24.

<sup>27</sup> See Executive Office for Immigration Review, Office of Planning, Analysis, & Technology, FY 2013 STATISTICS YEARBOOK, A2 (April 2014), found at <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (last accessed May 15, 2014) [hereinafter FY 2013 Statistics Yearbook] (showing decline beginning in 2012); DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FISCAL YEAR 2011 STATISTICAL YEARBOOK at B2, Figure 1 (January 2011) available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (including earlier figures). The White House Office of Budget Management has reported higher figures for both immigration court receipts and completions in 2010. The White House FY 2012 Budget Proposal states that the Immigration Court received 481,802 new cases in 2010 while only completing 379, 016.

<sup>28</sup> See JOHN MORTON, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS, (June 17, 2011) available at <http://1.usa.gov/1nx2S3O>; JOHN MORTON, PROSECUTORIAL DISCRETION: CERTAIN VICTIMS, WITNESSES, AND PLAINTIFFS, (June 17, 2011) available at <http://1.usa.gov/1kYAIRY>.

<sup>29</sup> See JOHN MORTON, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (November 7, 2011) available at <http://1.usa.gov/1qCJmqk> (last accessed May 10, 2013).

<sup>30</sup> See TRAC, *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated*, available at <http://trac.syr.edu/immigration/reports/339/> (approximately 6% of all case closures are now for prosecutorial discretion).

<sup>31</sup> See, e.g., Morton testimony (video available at <http://1.usa.gov/1pfiSaA>); see also TRAC, *Pace of New Closures under ICE Prosecutorial Discretion Slackens in September* (September 2012) available at [http://trac.syr.edu/immigration/reports/latest\\_immcourt/#pd](http://trac.syr.edu/immigration/reports/latest_immcourt/#pd).

<sup>32</sup> ICE removals hit a record high of over 400,000 in FY 2012. ICE, *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources* (Dec. 21, 2012), available at <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm> (noting 409,849 removals) (last visited July 16, 2014). In FY 2013, ICE removed slightly less individuals. U.S. Immigration and Customs Enforcement, *ERO Annual Report: FY 2013 ICE Immigration Removals 1*, available at <http://1.usa.gov/IZea03> (368,644 removals) (last visited July 16, 2014).

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<sup>33</sup> See ABA REPORT, *supra* n. 3, at ES-21 (recommending that ICE attorneys be assigned to a case from beginning to end); Reimagining the Immigration Court Assembly Line, *supra* n. 8, at 44-45.

<sup>34</sup> Although this paper does not provide any recommendations specific to alleviating ICE trial attorney caseloads, implementation of many of the recommendations below might suggest changes in the structure of prosecutions.

<sup>35</sup> According to government statistics, 39.6 percent of noncitizens in removal proceedings filed an application for relief. FY 2013 Statistics Yearbook, *supra* n. 27, at II. A noncitizen who files an application for relief is generally heard at a merits hearing. See *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014).

Notably, this number does not include the relief of Voluntary Departure. FY 2013 Statistics Yearbook, *supra* n. 27, at II. Voluntary Departure may be sought as an alternative to another relief application, or alone; and can itself trigger a merits hearing. See 8 C.F.R. § 1240.26(b)(1)(i)(D) (2012); *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000); *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012). The precise number of trials triggered by Voluntary Departure requests is unknown, but in FY13, the number of cases involving Voluntary Departure requests was 10.6 percent of the total number of initial case dispositions. Cf. FY 2013 Statistics Yearbook, *supra* n. 27, at O1 with FY 2013 Statistics Yearbook, *supra* n. 27, at II.

Another 13.3 percent of immigration cases were terminated by the Immigration Judge, generally upon a finding that the government had not met its burden to prove removability. FY 2013 Statistics Yearbook, *supra* n. 27, at O2; see, e.g., *Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002) (termination for improper service); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (proceedings terminated where noncitizen not removable as aggravated felon). Again, in some of these cases, a relief application may have also been filed, and any overlap is not covered by publicly available EOIR data.

Therefore, the total percentage of immigration cases going to trial is between 39.6 percent (assuming total overlap, i.e., that in every case involving termination or voluntary departure, there was also a relief application) and 63.5 percent (assuming no overlap between termination, voluntary departure, and other relief).

<sup>36</sup> Approximately 1.2 percent of cases in the federal civil justice system go to trial. UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013 Table C-4 available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C04Mar13.pdf>. Approximately 2.6 percent of federal criminal cases go to trial. UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013 Table D-4 available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/D04Mar13.pdf>.

<sup>37</sup> In federal court, defendants who pleaded guilty received, on average, a prison term that was *three times shorter* than those found guilty at trial – an average of 56.2 months compared to 148.2 months. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 71, Figure 5.3 Average prison sentences imposed on defendants convicted at trial or by guilty plea (October 1, 2003 - September 30, 2004) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs0405.pdf>.

<sup>38</sup> This void reflects the unintended effects of statutory changes. Before Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, many individuals agreed to depart voluntarily rather than accept deportation, an agreement that enabled them to be able to return lawfully to the United States in the future. IIRIRA, however, prohibited the government from extending periods of voluntary departure, and simultaneously introduced bars to re-entry for individuals who had accrued periods of unlawful presence in the United States. See P.L. 104-208, Division C. Prior to 1996, an individual with a foreseeable ability to legalize in the future could obtain voluntary departure, which could be extended for months or years in the discretion of the government, assuming continued good behavior. Then, without a removal order, the individual would be able to travel abroad with a fair degree of confidence in her ability to return lawfully. By contrast, under the current system, an undocumented person married to a U.S. citizen has little incentive to “settle” her case by taking voluntary departure, because even if she loses, the result of deportation is effectively the same as if she took voluntary departure. Worse, the current bars to reentry make the possibility of return speculative, turning on her ability to obtain a separate,



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discretionary grant of a waiver. 8 U.S.C. 1182(a)(9)(B)(v). The result is to render voluntary departure less desirable than an attempt at other relief possibilities, even for an applicant likely to be denied that other form of relief.

<sup>39</sup> There are no provisions in the Immigration Court Practice Manual encouraging this type of behavior. *See generally* OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL (2006) [hereinafter ICPM] available at <http://1.usa.gov/1kFVJcJ>.

<sup>40</sup> *See, e.g., Matter of Rivens*, 25 I&N Dec. 623, 624 (BIA 2011) (finding no legal support for a judge's requirement that the government file a brief in support of its legal arguments).

<sup>41</sup> *See supra* n. 36.

<sup>42</sup> There are currently 248 Immigration Judges. *See* <http://www.justice.gov/eoir/sibpages/ICadr.htm>. According to the FY 2013 Statistics Yearbook, *supra* n. 27, at A7, figure 2, Immigration Courts received 271,279 matters in FY 2013. This number is actually reduced from 2011, when it stood at 1213 new receipts per Immigration Judge. *See* Juan Osuna, Statement Before the Committee on the Judiciary, Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System," 1 (May 18, 2011) [hereinafter Osuna Testimony] (testifying that the total number of cases received by the Immigration Court at the end of FY 2010 was 325,326 and the total number of judges is 268; resulting in about 1,213 cases per judge) available at <http://1.usa.gov/1nx4RoM>.

<sup>43</sup> This is calculated by dividing the total number of receipts for FY2013, 253,942 matters, by 248 Immigration Judges. *See* <http://www.justice.gov/eoir/sibpages/ICadr.htm> (listing 248 Immigration Judges); FY 2013 Statistics Yearbook, *supra* n. 27, at A8, figure 3; *cf.* ACUS REPORT, *supra* n. 5, at 31 (noting that in prior fiscal year, Immigration Judges completed an average of 1338 matters)1.

<sup>44</sup> *See* FY 2013 Statistics Yearbook *supra* n. 27, at W1 (reporting the total pending caseload of Immigration Courts at the end of FY 2013 as 350,330 cases, which if divided by the total number of judges 248 equals 1412.6 pending cases per judge).

<sup>45</sup> *See* Bd. of Veterans' Appeals, Fiscal Year 2012 Report of the Chairman, 4 (February 2013) available at [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2012AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf) (hereinafter BVA FY 2012 REPORT) (reporting that the Board received 49,611 new cases, the number was then divided by the 64 Veterans Law Judges on the Board).

<sup>46</sup> *See* BVA FY 2012 REPORT, *supra* n. 45, at 4 (reporting that the BVA made 44,300 decisions, noting that there were 64 judges). However, even fewer – an average of 193 per judge, per year – went to trial before Veterans Law Judges. *See id.* (12,334 actual hearings).

<sup>47</sup> *See* Bd. of Veterans' Appeals, *supra* n. 45, at 16. (reporting that there were 45,959 cases pending before the BVA at the end of FY 2010, the number was then divided by 64 VLJs).

<sup>48</sup> U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2013 2.79-2.80, tables 2.F8, 2.F9 (February 2014) (reporting 849,869 new receipts in FY 2012, which divided by 1301 ALJs, which then equals 653.2 new receipts per judge per year) available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2013/supplement13.pdf> (hereinafter 2013 SOCIAL SECURITY STATISTICAL SUPPLEMENT).

<sup>49</sup> *See* 2013 SOCIAL SECURITY STATISTICAL SUPPLEMENT at 2.80, table 2.F9 (820,484 hearings per year), *id.* at 2.79, table 2.F8 (1301 ALJs). This comes to 630.7 dispositive hearings per judge per year. *Cf.* ACUS REPORT, *supra* n. 5, at 27 (noting average of 544 dispositive hearings per judge per year in earlier fiscal year).

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<sup>50</sup> See [2013 SOCIAL SECURITY STATISTICAL SUPPLEMENT at 2.80, table 2.F9 \(816,575 pending cases at close of year\), id. at 2.79, table 2.F8 \(1301 ALJs\). This comes to 627.7 pending cases per judge per year.](#) Cf. ACUS REPORT, *supra* n. 5, at 27 (noting average of 575 pending cases per judge per year in earlier fiscal year).

<sup>51</sup> Testimony of Dana Leigh Marks, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review, at 2 (June 17, 2010) available at <http://1.usa.gov/1pZsPGD>.

<sup>52</sup> ABA REPORT, *supra* n. 3, at ES-28.

<sup>53</sup> *Castro-Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985)).

<sup>54</sup> Compare *United States v. Noe*, 821 F.2d 604, 609 (11th Cir. 1987) (noting that Federal Rules of Criminal Procedure “were designed to prevent” “trial by ambush”) with *Matter of Magana*, 17 I. & N. Dec. 111, 115 (BIA 1979) (federal rules of civil procedure not applicable in removal proceedings, and discovery is generally not permitted). In a sense, immigration law functions as civil and criminal law did in previous generations; “[i]n the days before the Federal Rules of Civil Procedure, trial by ambush and secrecy was considered normal in the courts of law. No discovery tools were available to ferret out information about an opponent’s claim or defense.” M. Pollack, *Discovery-Its Abuse and Correction*, 80 F.R.D. 219, 220 (1979).

<sup>55</sup> The ACUS Report notes that judges now average 72 minutes per case, down from 102 minutes in 1999. ACUS REPORT, *supra* n. 5, at 32.

<sup>56</sup> TRAC, *Immigration Court Processing Time by Outcome by Removals, Voluntary Departures, Terminations, Relief, Administrative Closures* (data through June 2014), available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome) (last accessed July 17, 2014).

<sup>57</sup> 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, 74 (2008-2009) (“The combination of hearing traumatic stories and not knowing which ones to believe is what is so mentally and emotionally exhausting. It is really hard work and we are not given enough recovery time within our busy schedules.”).

<sup>58</sup> See generally NATIONAL IMMIGRANT JUSTICE CENTER, ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT (September 2010) available at <http://bit.ly/UqGON1>.

<sup>59</sup> See, e.g., National Immigrant Justice Center, *Submission of Civil Rights Complaints Regarding Mistreatment and Abuse of Sexual Minorities in DHS Custody* 5 (April 13, 2011) available at <http://bit.ly/1nx5P4u>. ICE has recently taken some steps to address segregation. See ICE Directive 11065.1: Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013), available at <http://1.usa.gov/1sZ2DCa>.

<sup>60</sup> See, e.g., 8 C.F.R. § 208.7(a)(1).

<sup>61</sup> See John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 774 (2000).

<sup>62</sup> According to DHS statistics, 15 percent of individuals seeking asylum and 41 percent of individuals seeking withholding currently give up their quest due to delays in the credible fear and reasonable fear process. See Information Sharing on Foreign Nationals: Border Security (Redacted), Department of

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Homeland Security, Office of the Inspector General, OIG-12-39 February 2012 at 51; *see also*, letter from Ashley Huebner, on file with author.

<sup>63</sup> *See* Letter from Greg McConnell, on file with author.

<sup>64</sup> *See* Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1003 (2006).

<sup>65</sup> John R. B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005); John B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeal: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 19 (2006-07).

<sup>66</sup> *Kadia v. Gonzales*, 501 F.3d 817, 820 (7th Cir. 2007) (citing Lisa Getter & Jonathon Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003).

<sup>67</sup> *See* Palmer, *Nature and Causes*, *supra* n. 65, at 24. GOVERNMENT ACCOUNTABILITY OFFICE, U.S. ASYLUM SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 10 (Sept. 2008), available at <http://www.gao.gov/new.items/d08940.pdf> (“... BIA decisions favoring the alien were almost 50 percent lower (declining from 21 percent to 10 percent) in the 4 ½ years following the 2002 streamlining compared with the 4 ½ years preceding it”) (last visited November 23, 2011).

<sup>68</sup> *See A Decade of Change in the Federal Courts Caseload: Fiscal Years 1997-2006*, 39 THE THIRD BRANCH (Nov. 2007), available at <http://1.usa.gov/1oiqObG> (“Administrative agency appeals nearly tripled in the last decade, rising from 4,412 appeals in FY 1997 to 13,102 in FY 2006. Appeals of administrative decisions involving the Board of Immigration Appeals accounted for nearly all of this increase.”) (last visited November 23, 2011). *See also* EOIR Fact Sheet, *BIA Restructuring and Streamlining Procedure* (Mar. 9, 2006) available at <http://1.usa.gov/1pMGe67>. From September 2004 to September 2005, the Seventh Circuit reversed 40 percent of the BIA adjudications that came before it, while reversing only 18 percent of other civil cases before it in the same period. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

<sup>69</sup> *See* Osuna Testimony, *supra* n. 42, at 5 (testifying that AWOs made up 30 percent of BIA decisions in 2004 but with steady decrease were only two percent of BIA decisions in 2011).

<sup>70</sup> Office for Immigration Litigation, U.S. Department of Justice, *What Does it Cost to Regulate Immigration? Three Measurements to Calculate Costs*, IMMIGRATION LITIGATION BULLETIN, Vol. 15, No. 7, July 2011 at 6, available at <http://1.usa.gov/1nx6ra4> (last accessed Nov. 29, 2011) (finding a total cost of \$ 20,338 for cases litigated through the Court of Appeals, as opposed to \$2,480 for cases litigated only through the BIA).

<sup>71</sup> To the extent that immigrants of limited means cannot pay enough to support adequate handling of their cases, they are paying below the normal market rate for attorneys; when this happens, “[e]ven [noncitizens] who somehow ... manage to attract lawyers... get what they pay for: lawyers who are less than fully employed or who are less capable.” *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 742-43 (1987) (Blackmun, J., dissenting). As the time-cost of handling a case decreases, it follows that an increased number of noncitizens will be able to pay closer to market rate for counsel. Increased court efficiency would simultaneously reduce the number of noncitizens unable to pay for private counsel and increase the ability of nonprofit agencies to represent more noncitizens. It would also reduce the cost of any government-sponsored appointed counsel.

<sup>72</sup> 28 U.S.C. § 481; *see also*, <http://www.pacer.gov/psc/faq.html>.

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<sup>73</sup> See, e.g., State of Texas, <http://www.texas.gov/en/tx-efiling/Pages/benefits.aspx>; Travis County, Texas, [http://www.co.travis.tx.us/district\\_clerk/default.asp](http://www.co.travis.tx.us/district_clerk/default.asp); State of Connecticut, <http://www.jud.ct.gov/external/super/e-services/efile/start.htm>; State of Wisconsin: <https://logon.wicourts.gov/login/login.html?target=ccefiling>. Even counties began establishing e-filing systems since the 1990s. Jefferson County, Texas, has had an established e-filing system since 1995; two year later, Montgomery County, Texas, followed Jefferson's example. Due to their success, these pioneer models served as prototypes for the statewide e-filing system. See Peter Vogel and Mike Griffith, *Electronic Filing: The Texas Model*, available at <http://www.courts.state.tx.us/jcit/Efiling/pdf/TheTexasModel.pdf>.

<sup>74</sup> THE NATIONAL CENTER FOR STATE COURTS, STANDARDS FOR ELECTRONIC FILING PROCESSES (TECHNICAL AND BUSINESS APPROACH) 3 (February 26, 2003) available at <http://bit.ly/1qCKU3F>.

<sup>75</sup> In its five-year strategic plan, EOIR acknowledged that an e-filing system would help “adjudicate[e] cases in a timely and fair manner.” EXECUTIVE OFFICE OF IMMIGRATION REVIEW, STRATEGIC PLAN FISCAL YEARS 2008-2013, 12 (January 2008) available at <http://1.usa.gov/1ujuDIG>; Executive Office for Immigration Review, *FY 2010 Congressional Budget Submission: Administrative Review and Appeals*, at 1-2, 21-23 (Apr. 28, 2009), available at <http://1.usa.gov/1oiuxpG>. That request has received Congressional support, but appropriations have not yet been approved. See Department of Commerce and Justice, and Science, and Related Agencies Appropriations Bill, S. Rep. 111-034, 111<sup>th</sup> Con. Sess. 2d available at <http://1.usa.gov/1kYDPCE>.

<sup>76</sup> See *supra* at n.35-40 and accompanying text.

<sup>77</sup> See *supra* n. 36-38 and accompanying text

<sup>78</sup> UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013, Table C-4 Cases Terminated, by Nature of Suit and Action Taken available at <http://1.usa.gov/1qCKBWC>.

<sup>79</sup> *Id.* Of the 200,395 cases on which the court took some action, 172,338 were resolved at the “Before Pretrial” stage.

<sup>80</sup> Northern District of Illinois, Standing Order Establishing Pre-trial Procedures, available at <http://www.ilnd.uscourts.gov/home/LocalRules.aspx?rtab=localrule>.

<sup>81</sup> See 28 U.S.C. §§ 472(a)(4), (a)(5).

<sup>82</sup> DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 5, Federal Judicial Center (1995) (hereinafter CJRA Sourcebook); see also, e.g., Southern District of California, Local Rules and Procedures, Civil Rule 16.1(c) Early Neutral Evaluation (“ENE”) Conference.

<sup>83</sup> See generally 28 U.S.C. § 473(a)(4); CJRA Sourcebook at 105-130. Examples of local rules include Northern District of Illinois, Standing Order Establishing Pre-trial Procedures, 6(a) (Counsel for all parties are directed to meet in order to . . . (3) exchange copies of documents that will be offered in evidence at the trial); and Southern District of California, Local Rules and Procedures, Civil Rule 16.1(d)(1) (“At the conference, the judicial officer will . . . (2) encourage a cooperative discovery schedule.”).

<sup>84</sup> See FED. R. CIV. P., Rule 26(a); see also George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J.L. & Tech. 10, 26 (2007) (“Lawyers need to re-engineer the process of interacting with opposing counsel to promote efficiency, transparency, and the “just and speedy” resolution of disputes consistent with Rule 1 of the Federal Rules of Civil Procedure. A new, collaborative paradigm for the 21st century is in order. There is a need for the development of case law that makes explicit what, for the past 70 years or so, has been left as a largely unstated goal of “cooperation” within the adversary system.”).

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<sup>85</sup> FED. R. CIV. P. 26(f)(1).

<sup>86</sup> Local Rule 6(a)-(b) (“The Statement will (1) eliminate any issues that appear in the pleadings about which there is no controversy, and (2) include all issues of law as well as ultimate issues of fact from the standpoint of each party.”).

<sup>87</sup> *Id.* See District Court for Southern District of California, Local Rule 16.1(b) (Counsel’s Duty of Diligence. All counsel and parties, if they are proceeding *pro se*, must proceed *with diligence to take all steps necessary* to bring an action to readiness for trial. [Sanctions are available] for failure to prepare for and *participate in good faith* in the pretrial conference process.) (emphasis added). See also Wisconsin Supreme Court, Rule 804.01 (4m) (allowing for a discretionary “meet and confer” requirement where the court may *sua sponte* or on motion by a party order parties “to confer by any appropriate means, including in person, regarding [among other things] (a) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to particular issues . . .”).

<sup>88</sup> See ACUS REPORT at 67-74.

<sup>89</sup> APPLESEED REPORT, *supra* n. 8, at 11.

<sup>90</sup> *Id.* at 68-69.

<sup>91</sup> See 28 U.S.C. § 473(a)(3); FED. R. CIV. P. 12(a) (time for filing an answer); 16(c) (Pretrial conferences); 36 (Requests for admission).

<sup>92</sup> See *supra* n. 33-34 and accompanying text.

<sup>93</sup> FED. R. CIV. P. 16(c)(1) (requiring an attorney with authority to make stipulations or admissions to “all matters that can reasonably be anticipated for discussion”).

<sup>94</sup> See *id.*

<sup>95</sup> See Standing Order Establishing Pretrial Procedure, Northern District of Illinois, para 6(c) (requiring jointly drafted final pretrial order).

<sup>96</sup> See FED. R. APP. P 16(c).

<sup>97</sup> See ACUS, App. 6, at 119. For an example of this in another context, see Standing Order Establishing Pretrial Procedure, Northern District of Illinois, para 10 (appending model pretrial memoranda for personal injury cases and employment discrimination cases).

<sup>98</sup> Since the ICPM serves to “establish uniform procedures nationwide,” it is an appropriate avenue through which EOIR may communicate and facilitate these changes. CHIEF JUDGE BRIAN O’LEARY, OPERATING POLICIES AND PROCEDURES MEMORANDUM 08-03 (AMENDED): APPLICATION OF THE IMMIGRATION COURT PRACTICE MANUAL TO PENDING CASES 1 (June 20 2008), available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-03.pdf>.

<sup>99</sup> A respondent’s A-file is the:

Record of a non-citizen who is currently under investigation by the DHS, has had contact with the DHS or the former INS in the past, or is an informant or witness assisting the DHS. The record contains copies of documents and information for all transactions related to the non-citizen throughout the U.S. immigration and inspection process. This is different than the Record of Proceeding (“ROP”) maintained by the Executive Office for

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Immigration Review for noncitizens placed in removal, deportation, or exclusion proceedings before the immigration courts.

MARIA THERESA BALDINI-POTERMIN, DEFENDING NON-CITIZENS IN ILLINOIS, INDIANA, AND WISCONSIN xviii (May 26, 2009) available at <http://bit.ly/UqJ46U>.

<sup>100</sup> *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).

<sup>101</sup> Form I-213, Record of Deportable Alien, is commonly produced by ICE officers as a result of investigations.

<sup>102</sup> See also ACUS REPORT, *supra* n. 5, at 69-70.

<sup>103</sup> 28 U.S.C. § 473(a)(4); FED. R. CIV. P. 26(a).

<sup>104</sup> Individuals who lack a defense to removal generally have their cases resolved at the preliminary hearing stage.

<sup>105</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, I-2013-001 29-33 (October 2012) (hereinafter Inspector General Report). Other frequent reasons for noncitizens to seek continuances are to seek counsel, to complete background checks, and to await USCIS adjudication of relevant applications. *Id.* at 31. These do not include a rescheduling of a case from a master calendar hearing to a merits hearing; every case at which a relief application is considered will involve at least one such continuance.

<sup>106</sup> See ICPM 4.15(j) Written pleadings.

<sup>107</sup> See ICPM 4.15(m) Waivers of appearance. An Immigration Judge would have authority to reschedule the hearing, and to waive the noncitizen's appearance; but it would require a separate order to do so. This would be unusual, in the authors' experience.

<sup>108</sup> See ICPM 4.8 Attendance. . . . Any delay in the respondent's appearance at a master calendar or individual calendar hearing may result in the hearing being held "in absentia" (in the respondent's absence); 8 U.S.C. § 1229a(b)(5)(C).

<sup>109</sup> The first matter that must be resolved in most immigration cases is the question of removability, an issue that respondents rarely contest. This step is accomplished at the master calendar hearing. In immigration proceedings, a "master calendar hearing," is typically a brief, preliminary hearing, where testimony is unusual. Usually, a dozen or more noncitizens are scheduled for the same time master calendar slot. A "merits hearing" or "individual hearing," by contrast, is an administrative trial on the merits of the case.

<sup>110</sup> The ACUS Report notes that many judges require the filing of asylum applications in court, in order to give required advisals. ACUS REPORT, *supra* n. 5, at 48-49. But nothing in the regulations, 8 C.F.R. § 1208.4(b)(3), requires filing in open court; and there is no principled reason why advisals could not be given at the beginning of a merits hearing, if the noncitizen has not been in court prior to that time. Moreover, nothing in the Settlement Agreement in *B.H., et al. v. USCIS, et al.*, CV11-2108-RAJ (W.D.Wash.), would prevent EOIR from encouraging the "lodging" of asylum applications rather than filing in open court.

<sup>111</sup> 28 U.S.C. §§ 473(a)(2), (a)(3).

<sup>112</sup> Most recently, the immigration court system agreed to prioritize cases involving detained families and families released on alternatives to detention; other cases were rescheduled to make room on crowded dockets. See Juan Osuna, Statement Before the Committee on Appropriations, Hearing "Reviewing the

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President’s Emergency Supplemental Request for Unaccompanied Children and Related Matters,” 3 (July 10, 2014).

<sup>113</sup> See ICPM 5.2(j) Oral argument.

<sup>114</sup> If the judge denies the motion because she does not want to waste the time slot, she may deny the respondent a reasonable opportunity to present her case. If the judge delays ruling on the motion, it may squander a trial slot that could be used for another merits hearing, at a time when other applicants wait years for trial. Moreover, because the parties cannot know whether the motion will be granted, they are forced to expend resources to prepare for hearing on the matter.

<sup>115</sup> To make this change possible, it may be useful to amend ICPM 5.2(j). Below is the suggested new language:

(j) Oral argument. Motions are adjudicated on the pleadings or after an oral argument. The mode of adjudication may differ based on the type of motion filed. Parties should schedule a motion for the motions docket of the appropriate Immigration Judge at the time of filing a motion, pursuant to the local rules and local instructions of each Immigration Court. Each Immigration Court keeps its own motion call schedule. It can be found on EOIR’s website at \_\_\_\_\_.

<sup>116</sup> This models the practice of the U.S. District Court for the Northern District of Illinois. See Local Rule 5.3(b) (PRESENTMENT). Every motion or objection shall be accompanied by a notice of presentment specifying the date and time on which, and judge before whom, the motion or objection is to be presented. The date of presentment shall be not more than 14 days following the date on which the motion or objection is delivered to the court pursuant to LR78.1) available at <http://1.usa.gov/UvFeJG>. See also instructions on how to notice a motion electronically: <http://1.usa.gov/1nY3JGE>.

<sup>117</sup> The immigration judge should have a set time every week (e.g., Friday at 8:30 A.M.) for a motions call during which respondents can plan to argue a motion filed during a specified period one or two weeks prior to the hearing. The intervening week or weeks would permit the immigration court and DHS attorneys to obtain their files before the hearing.

<sup>118</sup> In response to this suggestion, some advocates have noted that currently these preliminary hearings are often the only opportunity for the parties to confer about a given case. While this may be true, the costs on the system (the court, the parties, the noncitizens) far outweigh any incidental benefits, and also believe that required pretrial communications would be a far superior mechanism for such conversations. See also, Reimagining the Immigration Court Assembly Line, *supra* n. 8, at 47.

<sup>119</sup> See 28 U.S.C. § 473(a)(2).

<sup>120</sup> 8 U.S.C. § 1158(d)(5)(A)(iii).

<sup>121</sup> See 8 U.S.C. § 1158(d)(2).

<sup>122</sup> 8 C.F.R. § 274a.12

<sup>123</sup> See also ACUS REPORT, *supra* n. 5, at 54-55.

<sup>124</sup> Id.

<sup>125</sup> Cf. 8 C.F.R. § 208.7(a)(2) with 8 U.S.C. § 1158(d)(2).

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<sup>126</sup> ACUS REPORT, *supra* n. 5, at 54. The Settlement Agreement in *B.H., et al. v. USCIS, et al.*, CV11-2108-RAJ (W.D.Wash.), may limit EOIR’s freedom in some respects; EOIR might wish to seek a modification of that agreement in the course of larger reallocation of responsibility over the EAD clock.

<sup>127</sup> *See, e.g., Niang v. Mukasey*, 511 F.3d 138, 147 (2nd Cir. 2008) (reversing a negative credibility finding in part because the immigration judge “misunderstood or misremembered” part of the respondent’s testimony); *see also Tekle v. Mukasey*, 533 F.3d 1044, 1052 (9th Cir. 2008) (reversing negative credibility finding in part because the immigration judge misunderstood, or misremembered, the context in which the respondent used the word “continuous”); *but see Pilica v. Ashcroft*, 388 F.3d 941, 952 (6th Cir. 2004) (upholding negative credibility finding even though the immigration judge seemed to have misremembered certain parts of respondent’s testimony).

<sup>128</sup> *See* 8 U.S.C. § 1229a(b)(1).

<sup>129</sup> Immigration judges have the power to sanction practitioners practicing in front of them. 8 C.F.R. 1292.3(a). The definition of practitioner does not include DHS attorneys. 8 C.F.R. 1292.3(a)(2); ICPM 10.3(c).

<sup>130</sup> *Matter of Rivens*, 25 I&N Dec. 623, 625 (BIA 2011).

<sup>131</sup> 8 C.F.R. § 1003.47(g).

<sup>132</sup> *See* 8 C.F.R. § 1003.47.

<sup>133</sup> ACUS REPORT, *supra* n. 5, at 72-73.

<sup>134</sup> *See supra* at n. 35-40 and accompanying text.

<sup>135</sup> 28 U.S.C. §§ 473(a)(2), (a)(3).

<sup>136</sup> 28 U.S.C. § 636.

<sup>137</sup> Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U.L. REV. 1503, 1511-13 (1995).

<sup>138</sup> *Id.* at 1527-28. The amendment doubled the number of cases heard by magistrate judges. *Id.* The CJRA’s demands for intensive judicial case management also increased the federal district court’s reliance on magistrate judges. Tim A. Baker, *The Expanding Role of Magistrate Judges in Federal Court*, 39 VAL. U.L. REV. 661, 666 (2005); Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN’S L. REV. 799, 800 (1993).

<sup>139</sup> FED. R. CIV. P. 53(1)(C) allows “special masters” to be employed “to help judges resolve fact-intensive cases . . . [conduct] a master review [of] facts, organize the information, and prepare a comprehensive report to assist the judge or jury.”

<sup>140</sup> Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 493 (2002) (discussing the Eastern District of New York’s appointment of a magistrate judge to hear a big portion of cases filed by *pro se* litigants).

<sup>141</sup> On average, the AO has heard cases 30-40 days after their filing and issued a decision about 10 days afterward. Interview with Ashley Huebner (on file with author). An uptick in asylum-seekers along the border has resulted in some delays in recent months, while the AO hires additional officers.

<sup>142</sup> 8 U.S.C. § 1158(b)(3)(C).



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<sup>143</sup> Compare FY 2013 Statistics Yearbook, *supra* n. 27, at J2, Figure 15 (showing the number of receipts and grants of asylum for FY 2009-2013) with *id.* at N1, Table 16 (listing grants of relief other than asylum).

<sup>144</sup> See Asylum Division Quarterly Stakeholder Meeting, Asylum Office Workload, at 7 available at <http://1.usa.gov/1sZa8cd> (last accessed July 17, 2014).

<sup>145</sup> *Banks. v. Gonzalez*, 453 F.3d 449, 454 (7th Cir. 2006) (“What the immigration bureaucracy needs is . . . someone who knows local conditions at a level of details that would permit him to opine on the question whether a given alien’s assertions are plausible, and what level of risk that alien would face if returned home.”). In addition, Judge Easterbrook suggested a comparison with the “vocational experts” used by the Social Security Administration, who “provide definitive guidance in the adjudication of cases which require consideration of the vocational factors of age, education, training and work experience.” *Id.* See also SOCIAL SECURITY ADMINISTRATION, HISTORY OF SSA DURING THE JOHNSON ADMINISTRATION 1963-1968: OPERATING METHODS: VOCATIONAL TRAINING PROGRAM available at <http://1.usa.gov/1kYFpED>. The authors do not suggest the adoption of that system as such; but we do believe that there is support for the more modest proposition that routing cases through the Asylum Office would facilitate the systematic collection of information by country and claim, which would assist in superior adjudications.

<sup>146</sup> See TRAC, *Judge-by-Judge Asylum Decisions in Immigrations Courts Before and After the Attorney General’s Directive* available at <http://bit.ly/1AcBJNU> (last accessed November 2, 2012). For the most recent by judge and locality, see TRAC, *Immigration Judge Reports – Asylum* available at <http://bit.ly/1nlsjWF> (last accessed November 2, 2012).

<sup>147</sup> See generally Lustig, *supra* n. 57.

<sup>148</sup> Judge Noel Brennan of the New York Immigration Court wrote,

Although I am not a psychologist, I often observe immigrants in need of social support or other professional help that they are likely not receiving. For example, I may see a flat affect that suggests the possibility of deep depression. I have seen a woman from Kosovo break down in terror as she relived a rape. In another instance, a Chinese man sobbed uncontrollably as he recounted being detained by the cadres because he resisted the family planning officials who came to forcibly take his wife, who was six months pregnant, for an abortion.

Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 625 (1990).

<sup>149</sup> This Paper does not have a particular suggestion for how to fund these additional adjudications. Currently, USCIS charges no fee to adjudicate asylum applications.

<sup>150</sup> The ACUS Report drafters suggest that a referral system be considered for Withholding or Removal and Protection under the Conventions Against Torture cases. The authors also considered such a recommendation, but decided against it. We wished to prioritize suggestions that would require no regulatory changes, since they would be easier to implement. We agree that it is wasteful for the Asylum Office to deny asylum based on a collateral bar, while not being able to consider the merits of the protection claim. We would suggest, instead lieu of regulatory changes which would allow for direct Asylum Office adjudication, that similar benefits could be achieved if that office made a positive recommendation to the ICE attorney. For instance, recommending a stipulation to the facts as alleged in the application and/or a stipulation that the conduct would, if true, support a grant of relief. Such an agency finding could support a subsequent decision by ICE counsel to stipulate to a grant of relief.

<sup>151</sup> See JOHN MORTON, GUIDANCE REGARDING THE HANDLING OF REMOVAL PROCEEDINGS OF ALIENS WITH PENDING OR APPROVED APPLICATIONS OR PETITIONS (August 20, 2010) available at <http://1.usa.gov/1rz7xUt> (last accessed November 2, 2012).

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<sup>152</sup> In the context of expedited removals, as ACUS has recently noted, the Asylum Office in fact conducts “credible fear” interviews prior to placing individuals into removal proceedings. 8 C.F.R. § 1235.6. If the Asylum Officer concluded that asylum ought to be granted, there would seem no principled reason why the Asylum Office could not grant asylum without a referral to the Immigration Court system in the first instance.

<sup>153</sup> See 8 U.S.C. § 1229b(b)(2).

<sup>154</sup> The self-petition process permits the victim of an abusive U.S. citizen spouse to file a petition on their own behalf rather than having to rely on that individual to petition for them.

<sup>155</sup> Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L. 95, 139 (2001) (internal citations omitted).

<sup>156</sup> 8 U.S.C. § 1229b(b)(2)(A)(i).

<sup>157</sup> See 8 C.F.R. § 1208.11.

<sup>158</sup> See *supra* n. 161.

<sup>159</sup> 8 U.S.C. § 1356(m).

<sup>160</sup> See USCIS Field Operations Directorate and American Immigration Lawyers Association (AILA) Liaison Meeting (Jan. 7, 2011), available at <http://1.usa.gov/1x7BIY4> (last accessed July 17, 2014); *USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Liaison Meeting 2-3, May 20, 2011*, available at [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/May%202011/AILA%20Q%20%20A%205%2020%202011%20\(FINAL\).pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/May%202011/AILA%20Q%20%20A%205%2020%202011%20(FINAL).pdf)

<sup>161</sup> A 2006 GAO report found that over 111,000 alien files had been lost by USIS. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION BENEFITS: ADDITIONAL EFFORTS NEEDED TO HELP ENSURE ALIEN FILES ARE LOCATED WHEN NEEDED 4 (2006) available at <http://www.gao.gov/assets/260/252947.pdf>.

<sup>162</sup> 8 C.F.R. § 1003.16(b) (“The alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice in accordance with 8 CFR part 1292, at no expense to the government.”).

<sup>163</sup> For overall numbers, see FY 2013 Statistics Yearbook, *supra* n. 27, at F1. The percentage of unrepresented detainees was obtained through a Freedom of Information Act request filed with EOIR by the National Immigrant Justice Center. EOIR responded to that request on September 17, 2014, sending an Excel spreadsheet which forms the basis for these calculations, and is on file with the authors.

<sup>164</sup> See, e.g., Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel (submitted to Department of Justice on June 29, 2009) available at <http://www.aila.org/content/default.aspx?docid=29429>.

<sup>165</sup> KATZMANN REPORT, *supra* n. 8.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See, e.g., DEL. SUPER. CT., DELAWARE COURTS: FAIRNESS FOR ALL TASK FORCE 1, 4 (2009) (hereinafter DEL. SUPER. CT. TASK FORCE REPORT) available at <http://1.usa.gov/1nEJ5kF> (recommending

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that the Supreme Court and bar associations seek ways to increase access to attorneys for unrepresented clients through an increase in funds and the allowance of limited appearances due to continued concern over the inability of *pro se* litigants to represent themselves despite available services and fairness to both parties when one party is unrepresented).

<sup>169</sup> See generally Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105 (2011). The Supreme Court requires representation of children in juvenile delinquency proceedings, which are characterized as civil in nature. See *In re Gault*, 387 U.S. 1 (1966). In *Gault*, the Court emphasized loss of a juvenile's liberty, albeit in a reformatory school rather than a prison, as one of the characteristics necessitating representation by counsel. *Id.* at 28. A similar argument can be made in regard to noncitizens held in detention, especially since despite the civil nature of immigration proceedings, noncitizens in removal proceedings are housed in jails.

<sup>170</sup> The right to counsel in civil commitment proceedings exists by statute in virtually all U.S. States. Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C. R. C. L. L. REV. 397, 411 (1984).

<sup>171</sup> See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973), suggesting that there might be higher due process requirements in cases where a defendant "can fairly be represented only by a trained advocate.").

<sup>172</sup> See, e.g., Brennan, *supra* n. 158, at 627 (discussing the initiatives under way for unrepresented noncitizens in the immigrations court in Manhattan).

<sup>173</sup> See *id.* at 628.

<sup>174</sup> See *id.* at 629. In Baltimore, advocates have set up a similar intake and consultation project located at the University of Maryland Legal Clinic. There, volunteer attorneys conduct an initial assessment of immigrants' cases and agree to take on the case if relief is possible. See Interview with Patricia Chiriboga-Roby, World Relief, Coordinator of Project (on file with author). In Chicago, NIJC performs KYR presentations for detainees and conducts regular intake at detention facilities and in its office. In addition, the Chicago Volunteer Legal Services (CVLS) conducts a once monthly, appointment-only intake clinic staffed with attorney of the American Immigration Lawyers Association (AILA). See CVLS, *What We Do, Legal Clinics*, available at <http://www.cvls.org/clinics>.

<sup>175</sup> See, Brennan, *supra* n. 148, at 630 ("Previously, it had been difficult to recruit pro bono attorneys because immigrants are often moved to another venue before a hearing on the merits. Now, however, even though detainees may be transferred after a consultation with Legal Aid or pro bono counsel after their bond hearing (assuming that bond is denied), this transfer does not impose any impractical burdens on volunteer law firms.").

<sup>176</sup> Brennan, *supra* n. 148, at 623.

<sup>177</sup> *Id.* at 625-626.

<sup>178</sup> KINDREGAN, *supra* n. 11, at (1995). See also Hon. Beverly Snukals & Glen H. Sturtevant Jr., *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 RICHMOND L. REV. 93, 100 (2007); DEL. SUPER. CT. TASK FORCE REPORT, *supra* n. 168, at 4.

<sup>179</sup> ICPM, Section 2.3(d).

<sup>180</sup> For example, the nature of a law school clinic is such that students are only available for several months at a time, limiting a clinic's ability to commit to cases through a merits hearing. Permitting unbundled representation such that clinic members will handle only a discrete portion of an individual's case will provide unrepresented noncitizens with representation while potentially expediting the process and

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lowering overall costs. See Jennifer L. Colyer, et. al., *The Representation and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 486-490 (2009) (arguing for the expanded use of law school clinics in immigration proceedings).

<sup>181</sup> See CHIEF IMMIGRANT JUDGE DAVID. L. NEAL, OPERATING POLICIES AND PROCEDURES MEMORANDUM 08-01: GUIDELINES FOR FACILITATING PRO BONO LEGAL SERVICES 2 (March 10, 2008) available at <http://1.usa.gov/WG512q> (“Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent’s circumstances and interests in relief, if any is available. *Pro bono representation in immigration court thus promotes the effective and efficient administration of justice.*”) (emphasis added).

<sup>182</sup> See 79 Fed. Reg. 55659 (Sept. 17, 2014).

<sup>183</sup> Advocates have already emphasized this point. See Colyer, *supra* n. 180, at 484.

<sup>184</sup> See, e.g., United States District Court for the Northern District of Illinois, *Resources for Persons Who File a Civil Case Without an Attorney* available at <https://www.ilnd.uscourts.gov/ProSe.aspx>; United States District Court for the District of Massachusetts, *General Information, Pro Se Litigants / Representing Yourself* available at <http://www.mad.uscourts.gov/general/prose-litigants.htm>; United States Court of Appeal for the Ninth Circuit, *After Opening a Case – Pro Se* available at [http://www.ca9.uscourts.gov/open\\_case\\_prose/](http://www.ca9.uscourts.gov/open_case_prose/).

<sup>185</sup> See Circuit Court of Cook County, *Help Desks* available at <http://bit.ly/UvG8FR>.

<sup>186</sup> See Snukals, *supra* n. 178, at 102-3.

<sup>187</sup> VERA INSTITUTE REPORT, *supra* n. 8.

<sup>188</sup> Cf. Board of Immigration Appeals Practice Manual, available at <http://www.justice.gov/eoir/vll/qapracmanual/apptmnt4.htm>, with Immigration Court Practice Manual, available at <http://1.usa.gov/1kFVJcJ>.

<sup>189</sup> The Board completed 36,690 matters in FY2013. FY 2013 Statistics Yearbook, *supra* n. 27, at Q1.

<sup>190</sup> See, e.g., *Ai Hua Chen v. Holder*, 742 F.3d 171, 181 (4th Cir. 2014) (finding “boilerplate language used by the BIA ... insufficient to demonstrate that the agency gave [the claim] more than perfunctory consideration”); *Kebe v. Gonzales*, 473 F.3d 855, 857 (7th Cir. 2007) (noting “the absence of any articulated reasons in the BIA’s decision”); *Brucaj v. Ashcroft*, 381 F.3d 602, 609-11 (7th Cir. 2004) (BIA gave only “ cursory” explanation of decision denying asylum that did “little more than paraphrase the language of the applicable regulation”); *Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003) (“The BIA cavalierly dismissed the substantial documentation of conditions in the DRC”); *Mansour v. I.N.S.*, 230 F.3d 902, 908 (BIA 2000) (BIA believed applicant was Syrian rather than Assyrian and considered torture convention claim in a “minimalistic and non-detailed manner”)

<sup>191</sup> See, e.g., *Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011) (appeal untimely because received one day late); *Vasquez Salazar v. Mukasey*, 514 F.3d 643 (6th Cir. 2008) (Federal Express delivered appeal late); *Holder v. Gonzales*, 499 F.3d 825 (8th Cir. 2007) (same, due to ZIP code error); *De Araujo v. Gonzales*, 457 F.3d 146 (1st Cir. 2006) (same); *Khan v. U.S. Dept. of Justice*, 494 F.3d 255 (2d Cir. 2007) (appeal filed one day late due to FedEx error).

<sup>192</sup> See, e.g., *Uriostegui v. Gonzales*, 415 F.3d 660 (7th Cir. 2005) (remanding to BIA where motion to remand filed separately from appeal brief was not addressed); *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007) (failure to address remand motion erroneous, but harmless because noncitizen ineligible for relief);

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*Ahmed v. Mukasey*, 519 F.3d 579 (6th Cir. 2008) (remand for Board failure to consider evidence appended to brief).

<sup>193</sup> See, e.g., *Firmansjah v. Ashcroft*, 347 F.3d 625, 626 (7th Cir. 2003) (decision not received); *Roy v. Ashcroft*, 389 F.3d 132, 135 (5th Cir. 2004) (notice accidentally sent to different attorney); *Dent v. Holder*, 627 F.3d 365, 370 (9th Cir. 2010) (decision sent to wrong address).

<sup>194</sup> See *Firmansjah*, 347 F.3d at 626; *Roy*, 389 at 136; *Dent*, 627 F.3d at 370; cf. *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) (considering minimum standards for reissuance decisions).

<sup>195</sup> See, e.g., 8 C.F.R. §§ 208.8(a), (b), 1208.6 (asylum); 8 U.S.C. § 1367(a) (protecting confidentiality of victims of domestic violence, victims of designated criminal offenses (U Visas) and victims of human trafficking).

<sup>196</sup> The Board's issuance of inconsistent decisions has resulted in numerous published appellate decisions requiring the Board to act consistently. See, e.g., *Zhang v. Gonzales*, 452 F.3d 167, 173-74 (2d Cir. 2006) (Board denied asylum to a Chinese woman who feared forced sterilization; but granted asylum to her husband on precisely the same ground; "the BIA ... failed to address, much less explain, its apparent inconsistent treatment of the couple's seemingly identical future persecution claims.... A rational system of law would seem to require consistent treatment of such identical claims"); *Wang v. Ashcroft*, 341 F.3d 1015, 1019 n. 2 (9th Cir. 2003) (Agency granted asylum to a husband based on abortions suffered by his wife, but denied the wife's claim on credibility grounds). This kind of inconsistency, even in unpublished opinions, is problematic: "[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996); see also, *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) ("the prospect of [the Board] treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises ... concerns about arbitrary agency action.").

<sup>197</sup> See FY2013 Statistics Yearbook, *supra* at n. 27, at R2, W3.

<sup>198</sup> FED. R. APP. P. 32.

<sup>199</sup> Circuits tend to label their programs differently. For instance, the Seventh Circuit has a Settlement Conference Office. See [http://www.ca7.uscourts.gov/conf\\_aty/](http://www.ca7.uscourts.gov/conf_aty/). The Sixth Circuit has an Office of the Circuit Mediators. See <http://www.ca6.uscourts.gov/internet/mediation/index.htm>. The Fourth Circuit has a Circuit Mediator. See <http://www.ca4.uscourts.gov/mediation>. The First Circuit has a Civil Appeals Management Program (CAMP). See <http://www.ca1.uscourts.gov/settlement-program>. For a general discussion of these programs, see Robert J. Niemic, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS*, 2D ED., Federal Judicial Center (2006) (available at <http://1.usa.gov/1x7CZJj>).

<sup>200</sup> See *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980) (once proceedings are initiated, an Immigration Judge must order an alien deported if the evidence supports the charge); *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982) ("neither the immigration judge nor the Board may grant [prosecutorial discretion] or review a decision a decision of the District Director to deny it.").

<sup>201</sup> 8 C.F.R. §1003.1(e)(8).

<sup>202</sup> *In re Immigration Petitions for Review Pending in U.S. Court of Appeals for Second Circuit*, 702 F.3d 160, 160 (2d Cir. 2012).

<sup>203</sup> Cf. 8 C.F.R. § 245.2(a)(1) with 8 C.F.R. § 1245.1(a)(1)(ii); 71 Fed.Reg. 27585 (May 12, 2006); see generally, *Matter of Martinez-Montalvo*, 24 I. & N. Dec. 778 (BIA 2009); *Matter of Silitonga*, 25 I. & N. Dec. 89 (BIA 2009).

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<sup>204</sup> *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

<sup>205</sup> *Id.* at 696.

<sup>206</sup> 8 U.S.C. § 1182(a)(3)(B); 8 U.S.C. § 1158(b)(2)(A)(v).

<sup>207</sup> *F.H.-T. v. Holder*, 723 F.3d 833, 842 (7th Cir. 2013).

<sup>208</sup> *Id.*; *see also, e.g., Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014); *Alturo v. U.S. Atty. Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013) (adjudicating case while noting existence of DHS waiver authority).

<sup>209</sup> *See* <http://1.usa.gov/1nxfCHG> (last accessed Mar. 24, 2014) (including “Cases in which it seems likely that more proceedings are needed before the BIA, such as when the BIA did not consider all claims or issues, or where subsequent case law suggests that the Ninth Circuit will remand the case to the BIA for further consideration; Cases in which there have been developments in petitioner’s life that provide the basis for a motion to reopen proceedings to apply for adjustment of status....; Cases in which a mediation conference call provides a useful forum for clarifying the procedural posture of the case...; In rare cases where the equities are such that the parties agree to leave the removal order in place, but the government agrees not to enforce it so long as petitioner does not violate certain conditions; Cases where petitioners might be eligible for “Dream Act” or other forms of relief involving deferred action, prosecutorial discretion or administrative closure.”).

<sup>210</sup> *See, e.g.,* Settlement Assessment Conference Addressing Immigration Petitions in the Ninth Circuit, found at 3, *available at* <http://1.usa.gov/1ujzdOZ> (last accessed March 24, 2014) (“The most typical means by which an immigration petition is referred to mediation is by the request of counsel or an order by a panel of judges.”).

<sup>211</sup> *See, e.g.,* Office of the Circuit Mediators, *available at* <http://1.usa.gov/1ke9tRJ> (“Most [mediations] are randomly selected by the mediation office and scheduled routinely from the pool of eligible fully counseled civil appeals”).

<sup>212</sup> *See* 9th Cir. R. 15-2 (“the petitioner(s) shall, and the respondent(s) may, complete and submit the Ninth Circuit Mediation Questionnaire.”). Failure to complete the form can result in sanctions, including dismissal of the case. Mediation Questionnaire, at 2 (*available at* [http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Mediation\\_Questionnaire.pdf](http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Mediation_Questionnaire.pdf)) (last accessed Mar. 24, 2014).

<sup>213</sup> *See* <http://www.ca6.uscourts.gov/internet/mediation/index.htm>.

<sup>214</sup> *See supra* n. 68-70 and accompanying text.

<sup>215</sup> *See* BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 4.7(c), at 61 (“It is the Board’s policy to grant one briefing extension per case, if requested in a timely fashion. When a briefing extension is requested, the Board’s policy is to grant an additional 21 days to file a brief regardless of the amount of time requested.”). The Board states that “in rare circumstances” an additional extension may be granted, *id.*, but it appears such requests are rarely made, in part because they would not be adjudicated before the briefing due date would pass.

<sup>216</sup> *See id.* at § 5.9(i), at 80 (“The Board does not normally entertain motions to hold cases in abeyance while other matters are pending (e.g., waiting for a visa petition to become current, waiting for criminal conviction to be overturned).”).

<sup>217</sup> *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

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<sup>218</sup> See, e.g., 7th Cir. I.O.P. 1(a), 1(c)(7) (single judge authorized to grant briefing extensions or abeyance of briefing schedule); see also 7th Cir. R. 32 (authorizing settlement conference to, *inter alia*, “simplify and define issues, consolidate cases, establish the briefing schedule, set limitations on the length of briefs”).

<sup>219</sup> See 8 C.F.R. § 1003.47(h).

<sup>220</sup> 8 C.F.R. § 1003.1(d)(6)(ii)(B) (“The Board may provide notice to both parties that in order to complete adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.”).

<sup>221</sup> A Westlaw search was unable to locate any instance where the Board employed its authority under § 1003.1(d)(6)(ii)(B). By contrast, 179 instances of remand to the Immigration Judge were located. The Westlaw database of unpublished immigration cases does not include asylum cases, where confidentiality issues prevent release of unredacted decisions.

<sup>222</sup> An Appellate Commissioner could also handle cases on hold to permit DHS to exercise its exemption authority at 8 U.S.C. § 1182(d)(3)(B)(i). See *supra* n. 206-208 and accompanying text.

<sup>223</sup> See Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel for Immigrants in Removal Proceedings (June 29, 2009), available at <http://bit.ly/UqSQ9n>.

<sup>224</sup> See BIA Pro Bono Project, available at <http://www.justice.gov/eoir/probono/probono.htm#BIAProBono>.

<sup>225</sup> *Id.*

<sup>226</sup> According to a recent Department of Justice report, a computer program screens from 12-45 cases for potential inclusion, but EOIR staff select only 12 cases due to review limitations. A Ten-Year Review of the BIA Pro Bono Project: 2002-2011, at 5-6, found at [http://www.justice.gov/eoir/reports/BIA\\_PBP\\_Eval\\_2012-2-20-14-FINAL.pdf](http://www.justice.gov/eoir/reports/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf).

<sup>227</sup> <https://cliniclegal.org/programs/advocacy/bia-pro-bono>.

<sup>228</sup> The EOIR states that over 450 individuals have been assisted through the project. <http://www.justice.gov/eoir/probono/probono.htm>.

<sup>229</sup> Since the program’s inception, the Statistics Yearbook indicates that over 110,000 *pro se* individuals have had their cases adjudicated by the Board. To calculate that number, NIJC employed the FY2002 Statistical Yearbook, found at <http://www.justice.gov/eoir/statspub/fy04syb.pdf> (FY02 and FY01); the FY2007 Statistical Yearbook, found at <http://www.justice.gov/eoir/statspub/fy07syb.pdf> (covering FY03, FY04, FY05, FY07, and FY07); and the FY2012 Statistical Yearbook, found at <http://www.justice.gov/eoir/statspub/fy12syb.pdf> (covering FY08, FY09, FY10, FY11, and FY12). According to these publications, there were 115,200 matters completed by the Board involving *pro se* respondents. *Pro se* individuals occupy 20-22 percent of the Board’s docket. See FY2013 Statistics Yearbook, *supra* n. 27, at T1 (figure 31).

<sup>230</sup> See, e.g., Unpublished Order, *Aljabri v. Holder*, 12-1229 (7th Cir.) (Sept. 17, 2012) (*sua sponte* appointing counsel, striking the briefs already filed in the case, and ordering counsel to address two specific issues) (case later decided as *Aljabri v. Holder*, 745 F.3d 816 (7th Cir. 2014)).

<sup>231</sup> See *In re Compean*, 24 I. & N. Dec. 710, 714 (BIA 2009), rev’d, 25 I & N. Dec. 1 (BIA 2009); cf. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975) (finding appointed counsel required by Fifth Amendment in some cases).

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<sup>232</sup> See *infra* n. 242-48 and accompanying text.

<sup>233</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15 (1979); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-508 (1984).

<sup>234</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Cowley v. Pulsifer*, 137 Mass. 392, 394(1884) (Holmes, J.).

<sup>235</sup> Cf., e.g., *Arizona v. U.S.*, 132 S.Ct. 845 (Mem) (2011) (granting certiorari); with *Arizona v. U.S.*, 132 S.Ct. 2492 (2012) (listing 49 amicus briefs filed in case).

<sup>236</sup> See, e.g., Dep't of Homeland Sec., Statement of Regulatory Priorities, 75 Fed. Reg. 79536-01, 2010 WL 5677733 (Dec. 20, 2010).

<sup>237</sup> Cf. Executive Office of Immigration Review, <http://www.justice.gov/eoir> (last visited March 7, 2014).

<sup>238</sup> Cf. Executive Office of Immigration Review, News and Information, <http://www.justice.gov/eoir/press/newsinfo.htm> (last visited Mar. 25, 2014) (public statements by EOIR, including no mention of oral argument in any case).

<sup>239</sup> See <https://www.facebook.com/doj.eoir>.

<sup>240</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 228 n.6 (BIA 2014); *Matter of Peralta*, 26 I. & N. Dec. 171, n.2 (BIA 2013); *Matter of E-A-*, 26 I. & N. Dec. 1, 9 (BIA 2012); *In re Bautista*, 25 I. & N. Dec. 616, n.1 (BIA 2011); *In re Ramon Roberto Huerta-Flores a.k.a. Roberto Huerta*, File: A092 444 014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished); *In re Castillo-Padilla*, 25 I. & N. Dec. 257 (BIA 2010); *In re Marcal Neto*, 25 I. & N. Dec. 169, 171 (BIA 2010) (argument cancelled due to inability of counsel to be present).

<sup>241</sup> This includes all published decisions from *Matter of I-S- & C-S-*, 24 I&N Dec.432 (BIA 2008) through *Matter of Oppedisano*, 26 I&N Dec. 202 (BIA 2013). According to the Statistics Yearbook, from FY09-FY13, the Board decided 192,522 cases. FY 2013 Statistics Yearbook, *supra* n. 27, at Q1.

<sup>242</sup> *Matter of E-S-I-*, 26 I. & N. Dec. 136 (BIA 2013); *Matter of Alyazji*, 25 I. & N. Dec. 397 (BIA 2011); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010); *Matter of Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010); *Matter of Marcal Neto*, 25 I. & N. Dec. 169 (BIA 2010); *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009); *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009); *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009); *Matter of Cardiel-Guerrero*, 25 I. & N. Dec. 12 (BIA 2009); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008); *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432 (BIA 2008).

<sup>243</sup> *Matter of Marcal Neto*, 25 I. & N. Dec. 169 (overruling *Matter of Perez Vargas*, 23 I. & N. Dec. 829 (BIA 2005)); *Matter of Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (overruling *Matter of Saysana*, 24 I. & N. Dec. 602 (BIA 2008)); *Matter of Alyazji*, 25 I. & N. Dec. 397 (BIA 2011) (overruling in part *Matter of Shanu*, 23 I. & N. Dec. 754 (BIA 2005)).

<sup>244</sup> *In re Assaad*, 23 I. & N. Dec. 553 (BIA 2003); *In re Smirko*, 23 I. & N. Dec. 836 (BIA 2005); *In re S-K-*, 23 I. & N. Dec. 936 (BIA 2006).

<sup>245</sup> *In re Y-C-*, 23 I. & N. Dec. 286 (BIA 2003) (asylum application by unaccompanied minor); *In re Gomez-Gomez*, 23 I. & N. Dec. 522 (BIA 2002) (finding removability of 8 year old respondent established by clear and convincing evidence and remanding for in absentia removal order); *In re Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2002) (concerning propriety of service on minor respondent 7 years of age).

<sup>246</sup> Cf. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 741 (1996) (APA notice and comment “designed to assure due deliberation”).



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<sup>247</sup> The Board’s parent agency’s website has a section for the Board, <http://www.justice.gov/eoir/biainfo.htm>; and the agency’s website includes a page dedicated to “News and Information.” <http://www.justice.gov/eoir/press/newsinfo.htm>. The EOIR facebook page is at <https://www.facebook.com/doj.eoir>.

<sup>248</sup> *See, e.g., Matter of Abdelghany*, 26 I. & N. Dec. 254, 255 (BIA 2014). It is unclear why the Board chooses to reach out to those two groups, but the practice seems to go back at least a decade.

<sup>249</sup> The use of initialed pseudonyms would be required for some categories of cases where identity is protected. *See supra* n. 195.

<sup>250</sup> In a way, the actual oral argument would be less important than the public notice of the Board’s consideration. Even if the Board were to strike a case from the argument calendar (perhaps at the request of a party unable to pay for the cost of traveling to Virginia), the act of placing the case on that docket would play the important role of facilitating public involvement in the case and on the issue presented therein.

<sup>251</sup> *See Osuna Testimony, supra* n. 42, at 5 (testifying that AWOs made up 30 percent of BIA decisions in 2004 but with steady decrease were only two percent of BIA decisions in 2011).

<sup>252</sup> 8 C.F.R. §§ 1003.1(e)(5), (e)(6).

<sup>253</sup> *See Reimagining the Immigration Court Assembly Line, supra* n. 8, at 78.

<sup>254</sup> *Cf. Beth Zeitlin Shaw, Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1014, 1030 (2004) (rate of publication in circuits ranged from 8 percent in the Fourth Circuit to 55 percent in the First Circuit); *see also*, Elizabeth Y. McCuskey, Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders, 91 NEB. L. REV. 387, 456-57 (tables 2, 3) (2012). The Board’s publication rate is calculated by dividing the number of precedential Board decisions, *cf. n.* 243, with the total number of cases decided over a five year period. *Id.*

<sup>255</sup> *See Reimagining the Immigration Court Assembly Line, supra* n. 8, at 79.

<sup>256</sup> Compare U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2012 and 2013, *available at* <http://1.usa.gov/1z8OpiQ> (57,272 terminations in 12 month period ending June 30, 2012), with FY2013 Statistics Yearbook, *supra* n. 27, at Q1 (figure 27) (36,690 completions in FY13).

<sup>257</sup> FY2013 Statistics Yearbook, *supra* n. 27, R2 (table 18).

<sup>258</sup> 8 C.F.R. § 1236.1(d).

<sup>259</sup> *Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977).

<sup>260</sup> *See, e.g., Matter of Davey*, 26 I. & N. Dec. 37, n.1 (BIA 2012) (bond memorandum prepared 1 month and 25 days after bond decision); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999) (bond memorandum prepared 1 month and 11 days after bond decision).

<sup>261</sup> *See BIA Practice Manual, supra* n. 188, at 87-88.

<sup>262</sup> *See Inspector General Report supra* n. 105, at 6-7.

<sup>263</sup> *See, e.g., In re: Daniel Eduardo Margolin-Rodriguez*, 2011 WL 585604 (Jan. 31, 2011) (unpublished) (detainee prevailed on his claim to U.S. citizen below and was released).

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<sup>264</sup> 8 C.F.R. § 1236.1(d); *see* BIA Practice Manual, *supra* n. 188, at § 7.4 (setting forth circumstances under which bond appeal becomes moot).

<sup>265</sup> *In re: Cesar Nivardo Ramos-Sanchez*, 2010 WL 5174004 (BIA Nov. 24, 2010) (unpublished).

<sup>266</sup> *Id.*

<sup>267</sup> *In re: Cesar Nivardo Ramos-Sanchez*, 2010 WL 5173939 (BIA Dec. 3, 2010) (unpublished).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* The bond memorandum was produced one month and 11 days after the decision.

<sup>270</sup> *Id.*

<sup>271</sup> FY2013 Statistics Yearbook, *supra* n. 27, A8 (table 3).

<sup>272</sup> 8 C.F.R. § 1003.19(i).

<sup>273</sup> *Cf.* 8 U.S.C. § 1226(c).